Why the Torture Taboo Matters

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Declaration

I declare that this thesis is my own account of my research and contains as its main content work which has not previously been submitted for a degree at any tertiary education institution.

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Date
Abstract

Torture is one of the most prohibited practices in international society and has become a symbol of cruel and unnecessary suffering. Despite this absolute prohibition, torture is widely practiced by states around the world. This disparity between the prohibition of torture and the practice of states raises fundamental questions about the role and power of moral norms in world politics. Does the torture taboo matter? Or are political realists correct in arguing that power politics rules?

This thesis makes the paradoxical argument that despite its widespread violation, not only does the torture taboo matter, but that its strength can be found by studying its violation. The torture taboo constitutes state identities and interests and shapes state actions. Even during times of security crisis, the torture taboo is not forgotten. States hide, deny, and re-define their torture, outsource it to other states, or use techniques that do not leave marks on the body. The fact states go to such great lengths to hide their use of torture demonstrates not the weakness of the taboo, but rather its strength.

In order to demonstrate the power of the torture taboo, and explain why states deny their use of torture, I trace a genealogy of the taboo from the eighteenth century to the twenty first century. I show how international society came to understand torture the way it does today. I show also that the taboo has not developed in a linear fashion, but has become more robust over time due to a series of fortuitous events, and, most surprisingly, in response to widespread inhumanity. By showing that the history of the
torture taboo is also a story about what it means to be human, I seek to show that the
taboo contains normative values immanent in the present that are integral to
experiencing the good life.
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Introduction

Torture is one of the most condemned practices in world politics and is absolutely prohibited in international society. No country would dare openly torture. Nor would a country dare have a policy advocating torture. “No society on earth,” says Hajjar (2008, 235), “advances the claim that torture, as legally defined, is a valued or integral part of its cultural heritage or political culture.” The UN High Commissioner for Human Rights, Navi Pillay, stated in 2009, “[t]orture is a barbaric act. I believe no state whose regime conducts or condones torture can consider itself civilized” (Human Rights Watch 2010, 1). This condemnation stands in stark contrast to the widespread violation of the torture taboo. In an Amnesty International (2000) report released in 2000, it found that 150 countries engaged in torture or ill-treatment.

The above paragraph raises three heavily intertwined issues. The first is the concern to abolish unnecessary harm and violence in world politics. The second concerns the progress that has been made in achieving those goals. And the third concerns how we have come to understand ourselves as “civilized” human beings. All three issues relate to how the torture taboo has shaped our behaviour, the types of obligations we have toward one another, and the limits imposed upon states to hurt individuals. The attempt to ameliorate harm and restrict what Linklater (2011) has called the state’s “power to hurt” has been a prominent theme in international relations theory. Yet for something that is deemed so important, a study of the torture taboo has been heavily neglected in international relations scholarship. What role does the torture
taboo play in world politics? Given its widespread violation, does the torture taboo matter? Have we kept pace with the state’s power to hurt? (Linklater 2011, 258).

To suggest that a cosmopolitan norm such as the torture taboo matters in world politics would be treated with scepticism by some. The realist would respond by telling us to stop being so naïve. Can’t you see that violence has characterised international politics for centuries! To succumb to idealism is dangerous and ignores the fact that one cannot engage in politics without getting their hands “dirty”! States are in intense competition with one another and the primary concern of the state is its security and survival. Concerns about transgressing universal moral principles are overshadowed by the realities of the logic of anarchy and the hegemonic influence of material interests.

Such a position represents a form of pessimism that I seek to challenge in this thesis. I show that despite widespread violations of the taboo in international society, states hide, deny, re-define and outsource their torture. Just because states may at times violate the taboo does not mean the taboo ceases to matter. Humanitarian pressures continue to operate on states even during times of necessity. This can provide hope of escaping the realist logic of power politics by capturing these humanitarian norms to bring about normative change in world politics. Violations do not demonstrate the weakness of the taboo, as realism would suggest, but offer a valuable site in which to examine its strength.

Yet this thesis also explores how torture came to have the meanings it does, and how these historically contingent meanings have influenced identities, interests and actions in world politics. Why is torture taboo? Why does it have the meaning that it has? What factors have resulted in this prohibition? And do our understandings of the torture taboo continue to change over time? Despite an absolute prohibition on torture, other forms of violence and harm do not receive the same level of prohibition. We continue to go to war with one another, leave open the opportunity to use nuclear
weapons in stringent circumstances (see Tannenwald 2007), and allow exceptions to
the taboo against murder. What separates torture apart from these other forms of
violence that can inflict the same, if not more, physical harm on the human body?

Nietzsche (2003, 1) famously declared, “We are unknown, we knowers, ourselves to ourselves: this has its own good reason. We have never searched for ourselves – how should it then come to pass, that we should ever find ourselves?”

Recent studies on torture have focused on the use of torture in the recent “war on terror” (Dunne 2007; Foot 2006; Roberts 2007), whether torture should be used against “ticking-bomb” terrorists (Allhoff 2003; Bagaric and Clarke 2005; Bellamy 2006; Dershowitz 2002; Ignatieff 2005; Levinson 2004; Shue 2006; Walzer 1973), the characteristics that make torture immoral (Scarry 1985, 139-157; Shue 1978; Sussman 2005), and how new forms of torture techniques have emerged (McCoy 2007; Rejali 2007). But a study that examines how we have come to understand torture the way we do, and what influence the torture taboo has in world politics has been sorely neglected. This thesis makes a contribution to the expanding constructivist literature by examining the role morality plays in shaping identities, interests and actions in international society. My goal is to examine the origins and development of the torture taboo from the eighteenth to the twenty-first century to understand how we have come to understand torture and the possibilities immanent in the present that can help abolish torture in world politics. Building upon the work of Asad (1997, 2003), what I seek to show is that a history of the torture taboo is both a story of prohibiting unnecessary harm and understanding what it means to be human.
The Problem of Torture in World Politics

How am I to proceed in showing that the torture taboo matters? The dissonance between the torture prohibition and its violation in practice raises fundamental questions about the nature of international politics and the ability of norms, rules and institutions in international society to prohibit unnecessary harm. The torture prohibition is a *jus cogens* international norm,¹ and is embedded in major humanitarian and international human rights laws.² The apparent disregard for the torture taboo initially lends support to the realist understanding that power and competition dominate the state system. Thucydides (1972, 402) in the Melian Dialogue demonstrated the consequences of the inequality of power amongst states whereby “the strong do what they have the power to do and the weak accept what they have to accept.” While, centuries later, Machiavelli (2003) had little time for the importance of morality, arguing the exercise of cruelty can help hold on to political power.

Although modern realists do not take such positions regarding the use of cruelty for political purposes, they do continue to offer a pessimistic view as to the role moral norms, such as the torture taboo, play in international politics (Gilpin 1984, 290; Mearsheimer 1994-1995, 10). For structural (neo) realists, the international anarchical system conditions states to preference their self-interest and survival ahead of moral principles. Because there is no global leviathan to prevent states hurting one another,

¹ Also known as a peremptory international norm. Article 53 of the Vienna Convention of the Law of Treaties (1969) defines a peremptory norm as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character” (see also Malanczuk [1970] 1997, 57).

² See Article 5 of the Universal Declaration of Human Rights; Article 99 of the Third Geneva Convention and Common Article 3 of the Fourth Geneva Convention of 1949; Article 7 of the 1966 International Covenant on Civil and Political Rights; Article 2(2) of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; Article 5(2) of the American Convention on Human Rights; Article 5 of the Inter-American Convention to Prevent and Punish Torture; Article 5 of the African Charter on Human and People’s Rights; and Article 7, 8 and 55 of the Rome Statute of the International Criminal Court.
the constant possibility of force means states exist “in the brooding shadow of violence” (Waltz 1979, 102). The freedom of states generates insecurity and mistrust as the “self-help” system leads to a constant struggle for power and domination among states (Mearsheimer 1994-1995, 10-12; Waltz 1979, 105,112). The torture taboo has failed to effectively restrain states because the material conditions of anarchy force states to preference material and security interests over moral values (Mearsheimer 1994-1995, 10; Williams 2005, 109). Moral norms, if they are talked about at all, are cheap talk that are acknowledged in public but dismissed in private (Desch 2003, 417).

Classical realists, seen most prominently in the work of Morgenthau, provide more of a role for morality in world politics, but continue to remain doubtful as to the ability of morality to weaken the struggle for power. Differing themselves from structural realism by focusing on the state’s will to power (Mearsheimer 1994-1995, fn20), classical realism sees morality as acting as an exogenous restraint on state action (Morgenthau 1993, 224-249). Both Morgenthau (1993, 225) and Carr (2001, 92) argued that one must focus on both power and morality in world politics to see that states cannot actually do as much as they would like to do. A state, for example, does not use mass extermination to defeat its enemy’s population; not because it is not strategically effective, but because it is wrong (Morgenthau 1993, 226-228).

During peacetime, morality has provided a constraint on the use of force and a realist may argue that the torture taboo has been effective here. However, it is when the taboo clashes with state interests and necessities that the “perennial forces” (Morgenthau 1993, 12) inherent in politics make it difficult to be both politically successful and uphold the torture prohibition. Morgenthau (1945b, 11-12) argued that we face an imperfect world that imposes conflicting moral and ethical demands upon us, both in relation to the self, and to others. This tension means that when we act in the world we cannot help but violate some moral principles in order to adhere to others.
By simply acting in the world, it corrupts our good intentions and destroys our integrity (Morgenthau 1945b, 11).

This tragedy is exacerbated in the political sphere. The human being is an *animus dominandi* that is either being dominated or seeking power to dominate others (Morgenthau 1945b, 5, 13-14). This makes the art of political ethics a practice in doing evil: “To the degree in which the essence and aim of politics is power over man, politics is evil; for it is to this degree that it degrades man to a means for other men” (Morgenthau 1945b, 14). However, acting in an immoral world does not give the statesman free reign to do what one likes. To act morally in the political sphere one must not chase moral abstracts but act according to the political reality of the time and carry out the lesser evil of the acts available (Morgenthau 1945b, 13; Murray 1996, 104-105).

For the statesman, who has obligations and duties to protect the state’s interests, the pursuit of the national interest is the highest moral act. To act morally is to pursue power and conduct one’s affairs according to state interests and necessity. As Kissinger (1994, 61) argued, “states do not receive credit in any world for doing what is right; they are only rewarded for being strong enough to do what is necessary.” States are in constant competition and promoting human rights at the expense of the national interest can harm state interests (Loriaux 1992, 415; Morgenthau 1993, 245-249). One must not be surprised then, argues the realist, when states have to compromise on upholding human rights when security concerns come to the fore (Desch 2003, 417-418; Linklater 2011, 122-127; Loriaux 1992, 415-416; Morgenthau 1993, 245-249; Walt 2001-2002). One can better hope to limit unnecessary harm by practicing prudence through self-restraint, respecting the interests of others, and recognising limits of power (Linklater 2011, 123; Lang 2007; Hulsman and Lievan 2005). For Gilpin (1984, 304), “this moral scepticism joined to a hope that reason may
one day gain greater control over passions constitutes the essence of realism and unites realists of every generation.”

Realism provides a powerful means to understand the current problem of torture in world politics. It helps explain why repeated attempts at prohibiting torture have failed because such efforts do not take into account the weakness of norms and law or the incessant struggle for power among states. Moreover, it makes valuable contributions in showing how morality can act as a constraint on behaviour and how the conflict between different moral obligations and duties can contribute to violations. In addition, the realist argument is strongly supported by the fact that empirically, not many examples have been provided to demonstrate that moral norms have trumped material interests or power (Desch 2003, 418-419).

However, without leaving realism behind, this narrative does not adequately explain the influence humanitarian pressures have on states, especially during norm violations. As Linklater (2011, 127) argues, it is unwise to ignore realist warnings that “necessity” will often trump concerns about moral norms but equally unwise to ignore normative developments that have helped constrain the ability to harm in world politics. States hide, deny, re-define and outsource their use of torture to hide the fact they have violated the torture taboo. Moreover, states have increasingly adopted no-touch torture techniques to further hide evidence torture has taken place (Rejali 2007). This behaviour goes beyond material interests and demonstrates the pressure of a constitutive normative framework in action (Frost 2008, 142-147). States know what they are doing is wrong and seek to hide their torture to avoid the stigma and public outrage that come with the violation of norms. To better understand these humanitarian pressures and how they offer hope of escape from the realist logic of anarchy, I would now like to show how constructivism can offer a more fruitful understanding of the power of the torture taboo.
Torture, International Society and the Study of Violations

States are not just guided by the interests of gaining power and necessity; they are part of a socially constructed international society that shapes states through norms, rules and institutions (Bull 1995; Dunne 1995). Hedley Bull (1995, 8-19) argued there are common interests and values among states that help maintain international order. It is an international society that, “although precarious and imperfect” (Bull 1995, 50), helps to maintain order by seeking (among other things) to limit violence and war (see Bull 1995, 16-19).

Yet, there are also common values and norms among humankind as a whole, which Bull called world international society (Bull 1995, 36-38). World international society concerns the common values and interests reflective of Kantian principles of human solidarity and universalism (Bull 1995, 36-37). For Bull, world order is morally prior to international order because world order is based on “human beings, which are permanent and indestructible” (Bull 1995, 21). It is these values, such as human rights, or the humanitarian laws of war, that are integral to understanding why states torture in secret and why the torture taboo matters in world politics. As will become apparent throughout this thesis, the reason this is so is because these norms help to discipline and constitute actor identities and interests and provide legitimacy for their actions (see Clark 2005, 2007; Hurd 1999; Wheeler 2000).

The torture taboo still matters during violations because conditions of necessity are not void of these humanitarian principles and norms. Important work has been carried out in the last several decades that show that conditions of war do not absolve the environment of moral content (Katzenstein 1996a; Walzer 1978). Walzer (1978) in particular has shown to great effect that war is a moral domain that involves judgements about good and bad, right and wrong, and moral dilemmas of how one
ought to act in particular circumstances. This thesis draws upon this work to show that humanitarian pressures from the taboo continue to operate on states, even when they violate the norm. Although it is generally acknowledged that violations of a norm do not necessarily invalidate it (Kratochwil and Ruggie 1986, 766-769; Kowert and Legro 1996, 484-5; Sandholtz 2008, 108-109), studies have neglected whether one can find the strength of a norm by examining its violation.³ How, then, can studying violations offer a means to study the strength of the torture taboo?

Norm violations are a site of justification for behaviour and such justifications can demonstrate the evidence of a norm. One may interpret the hypocrisy of states regarding the torture taboo as evidence of the weakness of the taboo and evidence that moral norms represent hot air in world politics. In its 1973 global Report on Torture, Amnesty International (1973, 17) wrote, “It is significant that torture is the one form of violence today that a state will always deny and never justify. The state may justify mass murder and glorify those that kill as killers, but it never justifies torture nor glorifies those that torture as torturers.” Yet these “communicative trails” of lying and denying are not just fig leaves but evidence of a norm (Finnemore and Sikkink 1998, 892). As Finnemore (1996a, 159) notes, this discourse is “literally an attempt to connect one’s actions to standards of justice, or, perhaps more generically, to standards of appropriate and acceptable behaviour.”

The normative framework of the taboo places limits upon state behaviour. Although the norm is still violated, states cannot do as much as would be possible if no norm existed at all. It is this counter-factual that helps understand the power of the taboo. The hiding and denying of torture is explained not just by the constraining function of the taboo, but also by its constitutive function (see Frost 2008, 142-147). The taboo constitutes one’s identity as a “civilized” state. Actors who violate the taboo

³ A notable exception is Price (1997, 134-163).
realise torture is inappropriate behaviour and that openly challenging the taboo is to call into question one’s identity as a “civilized” state. Torture is denied and secret because it is not something “we” do. This can impact on some of the most brutal and powerful states. For example, as I show in Chapter 2, the Nazis and the Soviet Union refused to admit to torture or openly challenge the taboo because they feared the impact it would have on their legitimacy and international reputation.

To violate the taboo has serious consequences for both a state’s identity and its policies. The political blowback that can come from violating valued moral principles can harm state strategies and bring about norm conformity. In Chapter 4 I show how France employed torture in French Algeria to defeat the FLN independence movement. This provoked moral outrage in segments of the French population who feared France was facing degeneration into a barbarous state. The domestic pressure in conjunction with international outrage contributed to the decision for France to withdraw from Algeria, despite significant military victories.

The most powerful states are not immune from the consequences of norm violations. Although one may argue that the US violated the torture taboo during the “war on terror” with minimum impunity, this ignores the fact that the US suffered severe damage to its international reputation (Roberts 2007, 200). The Abu Ghraib scandal and revelations of torture in Guantanamo Bay undermined the moral credibility of the US in the Middle East (Guardian 8 May 2004). Military strategists were continuing to claim that even by 2009, five years after Abu Ghraib broke news headlines, the US were still struggling to gain the confidence of the population in Iraq (Haaretz 29 Aug. 2009). International politics is not a situation whereby the strong do what they like while the weak do what they must; even the strongest face limits and negative consequences from violating moral principles in international society.

Finally, widespread violations of the taboo do not necessarily challenge the
norm; in fact, violations can offer an environment in which to strengthen the norm. I do not deny that violations can signify the emergence of new norms whereby the violated norms are no longer deemed in need of protection. But norm violations can also provide environments that facilitate condemnation, disputes and arguments that can assist in normative development (Checkel 2001; Risse 2000a; Sandholtz 2008). The strength of the taboo can be seen by the fact that its most profound reconstructions in the twentieth century have been in response to large-scale inhumanity. The Nazi atrocities of World War II did not weaken the stigma of the torture taboo but strengthened it. Torture was condemned absolutely in the Nuremburg Trials and prohibited under the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions. Moreover, the debates that ensued in the immediate post-war period further strengthened the normative stigma of the taboo by associating torture with “crimes against humanity,” which pose a threat to international peace and security. As I show in Chapter 3, the protection of the taboo was integral not only for international peace, but for individuals to experience the good life.

Similar events occurred when Amnesty International (1973, 1984) exposed the global violation of the torture taboo during the 1970s and 1980s. As a result of Amnesty International’s campaigns, the UN Convention against Torture was adopted in 1984, which established universal jurisdiction and the principle of non-refoulement. Despite widespread violations, the absolute prohibition against torture continued to remain standing. As I show in Chapters 3 and 4, these periods of violations forced a period of self-reflection upon actors in international society that demonstrated more effort needed to be taken to abolish cruel and unnecessary harm in world politics.
Challenging the Realist Logic of Anarchy

How does this argument help escape the realist logic of anarchy? The norm is still being violated, individuals are still being harmed, and one could argue this does not adequately challenge the realist logic that international politics is a struggle for power and security. So far I have argued the strength of the taboo can be seen by studying its violation. But what do I mean by strength? To understand strength as simply the ability of the norm to constrain actors would fall short in understanding the complex workings of the torture taboo. To help understand the taboo’s strength, I make a distinction between the constraining function of a norm and the legitimacy of a norm. Legitimacy helps to determine who a rightful member of international society is, and the appropriate way in which they are to behave (Clark 2005). It is the powerful legitimising role the taboo has in constituting rightful conduct and “civilized” identities that gives the taboo its strength. Despite the fact states have violated the torture taboo, the strength of the taboo’s legitimacy can still be seen by the measures states take to deny and hide norm violations, the public outcry that can be generated when torture is exposed, and the inability of states to openly challenge the taboo.

Although I do not deny that a violation of the taboo harms its constraining function, violations do not necessarily show the weakness of a norm. Simply focusing on the struggle for power ignores the ability for the taboo to moderate violence and act as a moral resource for actors to challenge the most powerful states. Power and material interests are not the only pressures placed on states during times of necessity. Studying violations to demonstrate the power of the taboo takes on the realist logic of anarchy in two ways. First, it highlights the strength of the torture taboo at the very site at which the realist argues it demonstrates its weakness. And second, it takes on the strong realist criticism that international relations scholarship on norms has only been
able to provide a few examples of where norms have constrained states. This is indeed a weakness of the constructivist literature and it is something I wish to ameliorate by showing that the normative framework can still influence and constrain states during norm violations.

Yet, this thesis also takes the position that the realist understanding of international relations is not a reflection of reality, but a socially constructed understanding of reality. Therefore, if we created this world, we can also change it. Constructivists examine the reflexive relationship between the social construction of reality and knowledge and the role power plays in linking the two (Guzzini 2000). The material and social world does not have any intrinsic meaning that human beings have access to; rather we create meaning through the co-constitution between agents and the social structure. The co-constitution of international society breaks away from the realist argument that anarchy is a battleground of violence. As Wendt (1992) argues, “anarchy is what states make of it.” This means that the structure is never out of the control of agents as such, but it does place constraints on the ability for change (Giddens 1984, 1-37).

These ontological and epistemological assumptions are combined with a third element of constructivism that argues identities and interests are constituted by the international normative and legal framework (Adler 1997; Price and Reus-Smit 1998; Reus-Smit 2004). Even though there are different types of constructivism,4 they all share these philosophical assumptions. By showing that norms constitute one’s identity it becomes easier to understand why norm conformity is not just generated by self-interest or coercion. Norm conformity can also be because of the norm’s legitimacy or because it is what an actor ought to do (Checkel 2001; Hurd 1999; March and Olsen

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4 For Habermasian communicative theory, see Risse (2000a); for Bourdieu based theory, see Guzzini (2000); for Giddens structuration theory, see Wendt (1992) and Towns (2010); and for work that draws upon Nietzsche and Foucault, see Bartelson (1995) and Price (1997).
This thesis also builds upon the constructivist literature that has examined the role of prohibition norms in international politics (Nadelmann 1990; Price 1997, 1998; Tannenwald 2007), how norms evolve (Barkin 1998; Finnemore and Sikkink 1998), how they spread and are “taught” as part of a “world culture” (see Boli and Thomas 1997; Boyle, McMorris and Gomez 2002; Finnemore 1993, 1996b; Meyer et al 1997a, 1997b; Ramirez and Boli 1987) and how norms can be used to entrap and constrain states (Florini 2000; Klotz 1995; Lynch 2008). Moreover, I have drawn upon the work of those who have examined the constitutive, constraining and facilitating effects of legitimacy in world politics (Clark 2005, 2007; Hurd 1999; Wheeler 2000). States hide and deny their use of torture because torture violates important international norms and undermines one’s legitimacy in international society.

In addition, I have drawn upon the constructivist literature concerning norm contestation (Krook and True 2012; Sandholtz 2008; Van Kersbergen and Verbeek 2007; Wiener 2004, 2009) to show that internalised norms can become contested in practice. As I show in Chapters 5 and 6, adherence to internalised norms is not automatic, as Finnemore and Sikkink (1998, 904) have suggested. Rather, a new battle occurs as states implement the norm. In this case, I show that as the normative framework of the torture taboo has become more robust over time, the site over its contestation has narrowed. States no longer openly contest whether there are exceptions to the prohibition, but contest what practices constitute torture. As I show in Chapters 5 and 6, this battle actually demonstrates the robustness of the taboo rather than its weakness.

By challenging the idea that international relations is just a repetition of violence, or that qualities of the international system are beyond the reach of agents, it opens up the possibility of change. As Wendt (1995, 80) states, if change “is possible,
then it would be irresponsible to pursue policies that perpetrate destructive old orders, especially if we care about the well-being of future generations.”

The torture taboo represents a symbol of the efforts taken by international society to abolish cruel and unnecessary suffering in world politics. Unlike the realist that would argue the widespread violation of the taboo is evidence of a lack of a society, the continuing strength of the taboo during violations demonstrates the evidence of an international society. Torture is hidden, denied and re-defined because torture cannot be justified in the national interest. The laws and norms of international society recognise that the torture taboo cannot be violated under any circumstance. The fact that the taboo is still taken into account and influences state actions, interests and identities during violations shows how these forces can be harnessed to help bring about change and offer hope of a new, more humane world order.

This thesis offers a novel account of how to see the strength of prohibition norms. Other accounts of norms have shown how the strength of a particular norm can be seen by the fact it was not violated even though it would have been in one’s material interests to do so (Price 1997; Tannenwald 2007). However, the history of the torture taboo has not been a result of a tradition of non-use; rather, it has become more robust in the face of violations. But what makes torture “taboo”? How and why has torture come to be considered so immoral? And how has it developed?

**The Torture Taboo**

What makes torture “taboo”? How does a taboo differ from a norm? I define norms as referring to standards and expectations of appropriate behaviour (Katzenstein 1996b, 5; Makinda 2003, 43). Taboos are norms, but not all norms are taboos. Taboos identify and classify transgressions that are concerned with “the sociology of danger” (Douglas
That is, taboos are concerned with crossing boundaries that result in untold danger (Steiner 1999, 189; Tannenwald 2007, 11). To violate a taboo, according to the anthropological literature, is to bring about a social contagion effect that affects not only the violator but the wider community. Therefore, for Steiner (1999, 147), taboos localise danger “both by the specification of the dangerous and by the protection of society from endangered, and hence dangerous, persons” (Steiner 1999, 147). In localising and protecting individuals and the community from danger, taboos uphold “a vision of the good community” (Douglas 2002, xx).

Seeing the torture taboo in terms of “the sociology of danger” provides a more nuanced understanding of torture and why it is prohibited. Torture is condemned not just because it is immoral but because it is dangerous. Torture is embedded in a network of classifications and categories of pain and suffering that help make the identification of a transgression (and hence danger behaviour) possible. It is not the infliction of pain and suffering per se that is deemed to be dangerous, but whether it is an excess and unnecessary infliction of pain.

It was the excess of pain that led the *philosophes* in the eighteenth century to see torture as dangerous to the social order. Torture undermined justice in the social contract by taking away too much liberty from citizens than was necessary to maintain order. Yet cruel and unnecessary punishments also transformed citizens into callous brutes and generated fears that one’s society would regress to a more barbarous age. By the twentieth century this danger was exacerbated as torture was condemned as a “crime against humanity” that posed a threat to international peace and security. One can see here the localisation of danger. The infliction of pain and suffering during warfare is deemed legitimate if carried out according to the laws of war; however, transgress these principles and one faces unforseen danger.
The danger behaviour from transgressing the taboo is phenomenological: “The people can believe because they collectively want to believe” (Douglas 2002, xiii). The danger from a violation of the taboo is based on historically contingent inter-subjective beliefs and metaphors that help us interact with one another. Taboos tell us what is prohibited, thereby shaping our actions by indirectly telling us what is permitted. But what is so dangerous about torture? Why do we allow exceptions to using nuclear weapons or to the killing of other human beings but continue to condemn torture absolutely?

Since the eighteenth century the torture taboo has become a symbol that represents a set of values deemed in need of absolute protection for individuals to lead a fulfilling life. The taboo represents the Kantian principle that the individual must be treated as an end and never as a means (Kant 2005, 105). The taboo is therefore integral to world justice understood as those ideas linked to “the world common good” (Bull 1995, 81). Torture represents a particularly cruel form of pain and suffering that attacks the defenceless (Shue 1978) and violates the consent of the victim (Scarry 1985). In Chapters 3 and 4, I show that the torture taboo became concerned with protecting the potential and capacity for individuals to enjoy the good life. Torture targets the personality and dignity of the individual, which are intertwined and constitute one another. In doing so, it seeks to destroy that part of the human being which is unique to each and every one of us, yet at the same time, are elements that we all share and which separate us from the rest of the animal kingdom. To torture, then, is not just to destroy a particular human being, but to destroy those elements common to all of us and of which we call humanity.

The torture taboo contains cosmopolitan values and principles that have several effects on states in world politics. As already discussed, the taboo seeks to constrain and discipline states by prohibiting torture absolutely. This is represented in extensive
prohibitions in international human rights law and humanitarian laws.\textsuperscript{5} Secondly, the taboo constitutes identities and interests of states and other actors in international society. To document a case of torture is an accusation against that state in which torture has occurred and poses a risk to that state’s identity. Since torture’s prohibition, torture has become a marker that has helped to distinguish “civilized” states, which have an absence of torture, from “barbarous” ones which do torture.

This leads to the third effect of the taboo. To violate the torture taboo is to breach these normative expectations and open up the opportunity to rank states as “barbaric” or “uncivilized.” I draw upon Dahrendorf (1968, 167-176) and Towns (2010) to show that wherever there exists norms that have attached an evaluative element relating to normative expectations in society, the sanction and reward behaviour used by society to maintain conformity and order has the by-product of ranking. This distinction between civilized and barbaric continues to operate today, and can be seen in the “extraordinary rendition” network whereby civilized states send detainees off to uncivilized countries for torture.

Giddens also draws attention to how social relations position people in relation to “categories and ties” that specify the “rights and obligations relevant to persons having a particular social identity” (Giddens 1984, 89). The torture taboo imposes positive and negative obligations on states. Under the UN Convention against Torture, states have the obligation to refrain from torturing or to send detainees off to countries where they are at risk of torture. But the Convention also imposes duties on states to take measures to prevent torture and punish torturers. The Convention recognises universal jurisdiction over the act of torture, meaning a state must either punish an individual suspected of torture or send them to a state that will. One cannot remain neutral regarding the use of torture.

\textsuperscript{5} See footnote 2.
Norms, then, both constrain and facilitate behaviour. In Chapter 2, I show how the obligations and duties of civilized states to prohibit torture in the non-European world legitimised and facilitated interventions in so-called barbarous societies to civilize backward peoples. To fail to fulfil both negative and positive obligations would have brought the legitimacy of the colonial “civilizing mission” into crisis. Yet it would have also damaged the colonial power’s identity as a civilized and responsible state. To help understand how the torture taboo developed these obligations and its stigma over time, I have employed a genealogical method of inquiry, something to which I now turn.

**Genealogical Method**

I stated above that the torture taboo represents Kant’s principle of always treating individuals as an end and never as a means. But how did the torture taboo come to be understood in this way? What factors led to torture’s stigma and how has its danger behaviour developed over time? I have used a genealogical study to help understand how torture came to appear as “naturally” barbaric. Genealogical studies challenge the idea that norms have a transcendent origin or authority. A genealogy examines how norms develop due to fortuitous events, historical accidents and contingencies we have all but forgotten (Bartelson 1995; Foucault 1991; Nietzsche 2003; Price 1997). This means that the meaning of the torture taboo is not found in its origins, but in particular historical moments that highlight changing epistemologies, metaphors and interpretations (Nietzsche 2003, 77-8).

A genealogy is first and foremost a history of the present. That is, it seeks to show how the present was formed (Bartelson 1995, 73-78). It moves away from presentism, which sees history develop to some sort of ideal, and also moves away
from finalism, which projects an image of the present onto the past (Bartelson 1995, 54-55). A genealogy is an open ended inquiry and is intended to show “we are historical beings all the way down” (Bartelson 1995, 75, 78).

This methodology has important implications for the study of the torture taboo. A genealogy of the torture taboo helps trace the changing meaning of torture over time and destabilise the apparent fixed categories of unnecessary and cruel pain and suffering. My argument in this thesis is that there is no definitive definition of torture; nor is our aversion to torture “natural.” Rather I show that the meaning of torture, and hence the torture taboo, is an on-going social construction. For example, Elaine Scarry (1985) argues that the infliction of pain through torture represents a negation that destroys the human being. However, this has not always been the case. Up until the eighteenth century torture had been deemed a legitimate judicial practice. In fact, as I show in Chapter 1, during the ancien régime torture was deemed a way to gain the truth and offer the sinner salvation and redemption. It has only been recently (over the last two centuries) that torture has been understood as a negation of humanity.

A genealogical method is also useful to help understand how the taboo has become more robust in the face of its widespread violations. It has been fortuitous events and historical accidents that have helped the taboo become more robust over time. These include revolutions in the European criminal justice system and changing epistemologies of pain, developments in international law, European colonial policies and large-scale inhumanity. The torture taboo has also been constructed over centuries by a wide array of actors, including individuals, states, courts and international institutions. Human rights activists have played an important role in putting the torture taboo on the international agenda, documenting rights violations and pressuring states into norm conformity (see Finnemore 2009; Keck and Sikkink 1999; Lynch 2008; Risse 2000b, 203-204).
In order to trace the development of the torture taboo, I have used what Price (1997, 9) has identified as “two of the genealogist’s analytical tools: discourses and power.” By discourses I refer to both language and practices (Foucault 2002; Gee 2001). In terms of power, I draw upon the social constructivist understanding of power as the reflexive link between the social construction of reality and knowledge (Ashley 1984, 259; Guzzini 2000). For Hopf (1998, 179) discourse has the “power to produce inter-subjective meaning within a social structure.” Discourses help to differentiate, classify and categorise meanings; that is, they make the world by organising perception and the social world itself (Bourdieu 1989, 22). Because power is about counter-factuals, the ability to legitimise a particular interpretation of reality is an element of power (Guzzini 2000, 171-172).

By showing that the meaning of norms form part of an inter-subjective framework worked on by many actors, we can break away from the realist understanding that norms and international institutions reflect the interests of the powerful (Mearsheimer 1994-1995, 7). One can see this realist understanding of norms in E.H. Carr’s (2001, 75-81) analysis of the “harmony of interests” or Carl Schmitt’s (2007, 54) notion that those who act in the name of humanity wish to cheat. The realist framework ignores the fact that the production of knowledge often has autonomy from powerful states (Barnett and Finnemore 1999), inhibiting the ability for states to define norms however they like.

How are materially weak actors able to pressure the most powerful states into conforming to the taboo? As Foucault (2002, 55-56) notes, discourses are bound up with “sites” that legitimise discourse. These sites not only provide the speaker with a prestige to speak on a topic (such as a doctor on health), but also provide an assurance to the audience that what this authority is saying is true. For human rights groups such as Amnesty International, their authority relies heavily on their reputation as objective
and accurate (Scarry 1985, 9). This reputation is reinforced when international institutions such as the United Nations or the European Court of Human Rights rely on human rights reports to make their own decisions relating to torture (see Forowicz 2010, 217-228; Kelly 2009). Courts draw upon legal expertise and the appearance of politically neutral discourse for their authority. Courts have the ability to determine whether torture has taken place under the law, how torture is to be distinguished from other practices, and the ability to legitimise an interpretation of the law upon society that can set standards for future conduct (see Bourdieu 1986-1987). Medical physicians gain their authority through knowledge of the body and the ability to recognise and document cases of torture, their ability to engage in differential diagnoses and their ability to associate bodily symptoms and scars with particular methods of torture (Istanbul Protocol 1999, 33-34). It is this authority that provides these actors with the ability to exercise social power, and in doing so, challenge the most powerful states into conforming to the taboo.

The reflexive relationship between the construction of reality and knowledge and the linkage of power is integral in understanding the normative developments of the taboo, how it has become distinguished from other forms of pain and suffering, and how torture has developed its strong stigma over time. However, in engaging in a genealogical analysis that removes transcendent origins of the taboo, does one lose the ability to approve or disapprove of torture in international society? Undertaking a genealogy does not necessarily mean that one has to reject what is being studied (Guess 2002, 212). To suggest there is no such thing as transcendent norms does not mean that “anything goes” or that morality is no longer binding. In fact, Nietzsche (2006, 159) condemned such arguments as “childish follies.” Genealogy is not a neutral endeavour but a value laden one that is directed toward enlightenment and emancipation (Owen 2002). It seeks to show how the taboo has helped constitute who
we are today, and how the taboo shapes and regulates our actions in world politics. The history of the torture taboo is a political struggle between different actors that has vital importance for the recognition of a violation of human dignity.

To show that the torture taboo developed because of fortuitous events is not the same as arguing that it is has no value in international society. Nor is it to suggest that agency plays no role in creating the taboo’s history. The case studies throughout this thesis show how states and non-state actors have played a powerful role in reconstructing and strengthening the taboo. What a genealogy shows is that our actions often have unintended consequences that can shape the international system in profound ways.

I have chosen several case studies to trace the torture taboo. However, I do not pretend that this is a complete history of the taboo. There are many examples of torture around the world and therefore I had to limit the case studies to the one’s most relevant to the task at hand. I have provided three reasons for choosing the case studies in this thesis. First, I have analysed cases that have offered the opportunity for discussion about the meaning of torture and how international society should deal with it. Chapters 1 and 2 focus on absolutist Europe and the expansion of nineteenth century European international society to show how torture came to be prohibited and how its stigma as a barbarous practice was worked on through colonial practices. Chapters 3 and 4 also focus on important moments in the reconstruction of the taboo by focusing on the Nuremberg Trials, the drafting of the Universal Declaration of Human Rights and the 1984 UN Convention against Torture. These case studies helped to strengthen the categorisation of torture as immoral and dangerous behaviour as well as strengthen the taboo under international law.

Second, these case studies offer the opportunity to analyse the different strategies states have used to hide their torture. These strategies include secrecy,
denial, re-defining, outsourcing and using no-touch techniques that do not leave marks on the body. Focusing on these strategies is intended to show how the taboo has become more robust over time. Chapter 2 shows how the Soviet Union and the Nazis had to deny their use of torture to prevent damage to their international standing. Although hiding and denying of torture continues to occur today, there has also been the emergence of re-defining torture under international law so that states no longer have to take measures to hide it. As I show in Chapters 5 and 6, Israel and the United States sought to re-define torture. But in doing so, they legitimised the torture taboo by reaffirming that torture was absolutely prohibited. This has now led to a situation where the torture taboo has become internalised in international society but contested in practice.

Thirdly, I have focused on cases that have resulted in public condemnation of torture to show the negative blowback effects torture has on states that use it. In Chapter 4, I show how the use of torture by France in Algeria generated domestic and international criticism. This undermined France’s legitimacy to rule Algeria and contributed to French withdrawal. In Chapters 5 and 6, the public condemnation from re-defining torture forced both Israel and the United States to drop their controversial interrogation programs. For the US, the Abu Ghraib scandal had profound implications on their military strategy and legitimacy in the Middle East.

To support my argument, I have drawn upon a vast set of primary and secondary materials in this thesis. This includes newspapers, government memorandums, United Nations documents, court trials, human rights reports, government commissioned reports on torture, memoirs, as well as international relations literature, philosophy, and anthropology. I have relied as much as possible on primary sources to help understand how actors understood torture in particular
historical moments and how this understanding has shaped actor’s actions, interests and identities in international society.

Chapter Outline

The outline of this thesis is as follows. Chapter 1 focuses on the abolition of torture. It analyses the use of torture in the ancien régime when it was a legitimate judicial practice and the factors that eventually led to its prohibition. Chapter 2 shows how the torture taboo became more robust in relation to developments under international law and European colonialism during the nineteenth century. I then turn to an analysis of the torture taboo in the Soviet Union and Nazi Germany to show that despite its violation, the torture taboo still mattered. Chapter 3 details how the taboo actually became more robust after Nazi atrocities during World War II through the Nuremburg Trials and the Universal Declaration of Human Rights. The fourth Chapter turns to the use of torture by France in Algeria between 1954 and 1962 to demonstrate how the taboo influenced the outcome of the war. The second half of the chapter focuses on the 1984 UN Convention against Torture, showing again that the taboo managed to strengthen in the face of widespread violations. Chapters 5 and 6 analyse the use of torture by Israel and the United States to show how both states manipulated international law to better define torture to reflect their interests. I also examine the use of “extraordinary renditions” by the US (Chapter 6), which has helped establish a hierarchy in international society between the “civilized” states that send detainees off to “uncivilized” countries for torture.

All these chapters link up to tell a story of how the taboo has developed and the role it plays in world politics. I show how torture has transformed from a legitimate practice to a prohibited one; how the strategies states have used to hide their torture
have become more sophisticated; and the developments under international law that have helped make the taboo. The Conclusion examines what implications this thesis has for theory and practice, the measures that can be taken to further strengthen the taboo into the future and the normative visions immanent in the present that can be harnessed to create a more humane social order.
Chapter 1
Origins of the Torture Taboo

Our story begins with the abolishment of torture in eighteenth century Europe. In order to show how and why the torture taboo matters, one must examine how torture became associated with danger behaviour. It must be remembered that up until the eighteenth century, torture had been deemed a legitimate practice since the times of the Greek city states (see DuBois 2007, 13-15; Peters 1985, 11-18; Ross 2005, 3-6). How, then, did torture come to be taboo?

There is a pervasive understanding that the abolishment of torture was the result of western Enlightenment ideals. This story, what Asad (1997, 290-291) calls the progressivist story, goes something like this: “two centuries ago, critics of torture such as Beccaria and Voltaire recognized how inhuman it [torture] was and how unreliable as a way of ascertaining the truth in a trial. Thus they saw and articulated what others before them had (unaccountably) failed to see. Their powerful case against judicial torture shocked Enlightenment rulers into abolishing it.” This account relies on the presupposition that the *philosophes* discovered the true meaning of torture and exposed it to all, showing how torture’s claim to reveal the truth was based on nothing more than antiquated rituals and myths.

The aim of this chapter is to challenge this account and offer an alternative to the origins of the torture taboo. In genealogical fashion, I question the origins of the
taboo as a “discovery” made by Enlightenment philosophs in the eighteenth century. Although I do not deny the role the philosophs, human rights or Enlightenment ideals played in helping to abolish torture, I argue torture was abolished due to a more complex series of events. The eighteenth century saw the destabilisation of the religious monopoly of the interpretation of truth, pain and suffering and a revolution in the law of proof that had been prevalent throughout absolutist Europe. These factors helped to destabilise the foundations of torture, allowing for the meaning of torture to be reconstructed. Different actors ranging from philosophs, sovereigns, priests and jurists debated as to the value and meaning of torture and the role it should play in eighteenth century society. It was through these fortuitous events that the eighteenth century laid the foundations for transforming torture into a “taboo” and associated torture with “the sociology of danger.”

I have divided this chapter into five sections. The first two sections provide an examination of how torture was understood up until the eighteenth century and the role it played in criminal justice in absolutist Europe. I seek to show that the judiciary and Christian institutions held a monopoly on the interpretations of truth, pain and suffering, and these provided the foundations for not only torture, but for the sovereign’s right and power to punish. The third section provides a brief review of alternative accounts of the abolishment of torture. I focus on Langbein’s (1977) legal account and Silverman’s (2001) analysis of the transformation in the epistemology of pain between the sixteenth and eighteenth centuries, arguing that these two accounts help to explain (better than the progressivist story) how the meaning of torture became unstable and open to challenge. The final two sections look more closely on how torture became associated with danger and classified as a particular form of cruel punishment distinguishable from the appropriate infliction of pain. By the end of the eighteenth century, although some individuals were still willing to defend torture as
something useful in criminal deterrence, the abolitionist movement had gained dominance over the interpretation of torture and had cast it as a practice that was dangerous not only to the individual, but to the broader society.

**Torture in Continental Europe**

It is important to make a separation between torture and public executions in the *ancien régime*. Many modern scholars have associated public executions up until the eighteenth century with torture (Foucault, 1991; Rejali, 2003). However, as I discuss below, torture only became associated with punishment in the seventeenth century, and even then it continued to be distinguished from public forms of punishment. How we see and understand torture today is different from how a seventeenth or eighteenth century mind understood the practice. I refer to torture as a particular judicial practice of procedure, separating it from public executions. No matter how gruesome, public executions were not torture (see Silverman 2001).

Throughout Europe, with the exception of England, which had developed a jury system,\(^6\) judicial torture formed a fundamental part of criminal proceedings. The criminal justice systems were based on Roman-canon law, which spread across Europe after the Inquisitions in the thirteenth century. In the German Empire, the *Constitutio Criminalis Carolina* (1532) regulated criminal procedure. The *Carolina* was a combination of interpretations from Roman-canon law and the procedures of Italian authorities (Bar 1916, 224). In the Spanish Netherlands it was the Ordinance of Philip II (1537) that regulated criminal proceedings. While in France, the criminal law

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\(^6\) The absence of torture in England can be explained by the development of the jury system and not the Roman-canon system that was adopted on the continent. Although torture made a brief appearance in England under Queen Elizabeth in the latter half of the sixteenth century, neither was it an institutionalised legal practice, nor was it a target of the “abolishment” movement of the eighteenth century (Hansen 1991; Langbein 1977, 73-128).
underwent no fundamental change between the 1200s and 1700s. The Villers-Cotterets (1539) provided the foundations for the judicial system, and the Criminal Ordinance (1670) regulated criminal procedure (Bar 1916, 260).

The criminal procedure, including charges against the accused, was secret: the accused was not told of his crime until well into the trial (Foucault 1991, 35; Lowell 1897, 226). Nor was the accused able to have a defence counsel to help prove his/her innocence (Lowell 1897, 226), know his/her accusers, or have access to court documents (Foucault 1991, 35). According to Ayrault, trials were secret because of “the fear of the uproar, shouting and cheering that the people usually indulge in, the fear that there would be disorder, violence, and outbursts against the parties, or even against the judges” (Foucault 1991, 35-6). The Roman-canon system was reliant on certainty to convict. Unlike contemporary judicial systems, courts could not convict on circumstantial evidence. As Langbein (1977, 4) notes, “It does not matter, for example, that the suspect is seen running away from the murdered man’s house and that the bloody dagger and the stolen loot are found in his possession. The court cannot convict him of the crime.” The Roman-canon system could only convict a suspect if there were two eyewitneses to the crime or if the accused confessed to the crime.

The need for certainty to convict was a product of the ordeals. The ordeals represented immanent justice: the idea that divine intervention in the mortal world would not allow crimes to go unpunished (Peters 1985, 42). God was the determiner of truth, the punisher of sin, and the distributor of justice. If a suspect was subject to the hot iron, for example, he had to carry a hot iron and if his hand did not heal in three days, he was deemed guilty (Lowell 1897, 222). These ordeals placed truth separate from human discretion and relied upon God to reveal the truth.

When the Fourth Lateran Council abolished the ordeals in 1215 and many continental states adopted the Roman-canon system, the need for absolute certainty
helped the transition from replacing the judgement of God to human beings being able to judge upon one another (Langbein 1977, 6). Absolute certainty “was based upon the principle that no man ought to be convicted of a grave crime unless the evidence was absolutely conclusive, -clearer than daylight, as the phrase ran” (Lowell 1897, 224-5). By only being able to convict serious crimes through a confession or two eye witnesses, absolute certainty removed the need for judicial discretion and helped to substitute God with an objective truth.

Despite its secrecy, criminal procedure in the ancien régime operated according to a set of regulations. Attaining a guilty verdict operated in semi-proofs, half-proofs, and full-proofs. Unlike the contemporary western system where the defendant is innocent until proven guilty, the system under the ancien régime operated in a way that the defendant was somewhat guilty throughout the whole process; a suspect could be “semi” or “half” guilty, depending on the law of proofs that had been satisfied. A suspect could be tortured if there was a “half-proof:” either one eye-witness or sufficient circumstantial evidence to suggest that the accused could be guilty (Langbein 1977, 5). A court could only convict the accused under full-proof: that is, total certainty of the truth. Circumstantial evidence could not convict, and a confession meant more than simply proclaiming guilt (Bar 1916, 239). The Carolina required that the suspect must provide information that “no innocent person can know” (Langbein 1977, 5). The accused had to reveal information about the crime: where it occurred, what weapon (if any) was used, where the weapon was hidden after the crime, how the victim was killed, etc. This information was then followed up through investigation to prove if the information was sound (Langbein 1977, 5).

Torture played its role in Roman-canon law by helping achieve the “queen of proofs,” the confession. Torture was regulated and limited in its use. Roman-canon law prevented torture from being used as a first resort. To use torture a judge had to first
submit a plea stating the reasons to use torture. This could be appealed by the suspect, and if successful, torture was not allowed to occur. If torture occurred without approval, the confession was void (Welling 1892, 199). The use of torture was restricted to capital cases (Welling 1892, 199) and where there was already sufficient evidence to suggest guilt. Article 20 of the Carolina stated

> When legally insufficient indication of the crime which it is desired to investigate has not been produced and proven beforehand, then no one shall be examined; and should however, the crime be confessed under torture, it shall not be believed nor shall anyone be condemned upon that basis (Ruthven 1978, 61).

Nicolas Eymeric, the papal inquisitor of Aragon, stated in the fourteenth century, “[o]ne must not resort to the question till other means of discovering the truth have been exhausted. Good manners, subtlety, the exhortations of well-intentioned persons, even frequent mediation and the discomforts of prison are often sufficient to induce the guilty ones to confess” (Ruthven 1978, 54). This limit was in place to deal with torture’s unreliability. Torture disadvantaged the weak who could not withstand pain, while allowing the strong to lie through torments to escape punishment (Welling 1892, 198). Ferriere notes, “Judicial torture is a dangerous means of arriving at knowledge of the truth; that is why judges must not resort to it without due consideration. Nothing is more equivocal. There are guilty men who have enough firmness to hide a true crime…and innocent victims who are made to confess crimes of which they were not guilty” (Foucault 1991, 40). Torture was to be used as a last resort, and threats of torture should precede its application to induce the weak to confess (Langbein 1977, 13-15; Peters 1985, 67-68).

Several torture techniques were common throughout Europe. These included
the thumb-screw and leg-screw, which involved placing the respective body parts into metal vices (Langbein 1977, 19, 24). A second technique was the strappado. The victim’s hands were tied behind their back and then hoisted into the air. Sometimes weights would be attached to the victim’s feet to add further strain on shoulder and back muscles. If the victim did not speak, the victim would be lowered and the process repeated (Peters 1985, 68). Other practices included the rack (Langbein 1977, 22), holding feet to fire (Cohen 1998; Peters 1985, 68), tightly tying hands, water torture, and sleep deprivation (Peters 1985, 68). A judge could not use torture himself, but had to rely on “satellites and bailiffs” to torture (Welling 1892, 205). When torture was actually used, the accused had to face the judge without his/her advocate; however, a physician often stood by, especially in cases of severe torture (Peters 1985, 67).

The French Criminal Ordinance (1670) made a distinction between two types of torture. The first, torture préparatoire, was used to gain a confession. The second, torture préalable, or “preliminary torture,” was used against a convicted criminal before they were executed to find out about other crimes he/she may have committed or the names of any accomplices (Langbein 1977, 16-17). The use of torture, then, was not wanton cruelty. It was restricted in use and regulated: torture was only used for capital crimes, threatened and then used as a last resort; a suspect had to have “half-proof” of guilt for torture to be used; and when a confession was provided it had to be investigated by the court to ascertain its validity. Although torture was used against anyone, there were exceptions: torture could not be used against “prepubescents; the mad; the deaf and dumb…the sick and infirm” and pregnant women (Silverman 2001, 43; see also Welling 1892, 204). Torture was embedded in a legal system in such a way that the Roman-canon system could not operate without it. The need for a confession as well as “[t]he two eye-witness rule left the Roman-canon system dependent upon the use of torture” (Langbein 1977, 8).
The Construction of Torture

How was the institution of torture sustained? How can one begin to comprehend how torture could produce “truth” and constitute a principal practice in the pursuit of justice? When the jurists in the ancien régime argued that torture could reveal the truth, one must take these proclamations seriously. Although today we see truth in criminal trials and interrogations being revealed through non-coercive means and free will, for jurists up until the eighteenth century, infliction of pain provided access to the truth. To understand the constitutive elements of this interpretation, one must look at the wider normative and cultural structures that provided the sovereign with the power to punish and religious interpretations of truth, pain and suffering. I will address the latter first.

Christianity, Truth, Pain and Suffering

In the judicial domain, truth was something that existed within the flesh. The body was the site of truth and pain helped reveal the truth. As Silverman (2001, 59) notes, when interrogating the suspect, “Pain rather than fear should induce the accused to speak the truth.” The jurist had to ask questions in a manner that would obtain a “spontaneous” answer. To give the suspect time to prepare an answer would be to allow time for invention (Silverman 2001, 101). Therefore, the questions asked by the judge had to be regulated: suggestive questioning or threats against the accused was not allowed (Peters 1985, 68). A confession had to provide the court with information that only the guilty could know, to paraphrase the requirements of the Carolina.

The judge did not just wait for the truth to come from the mouth, but also
examined how truth was revealed through the defendant’s bodily movements during torture:

The judge must have his eyes fixed upon the accused, during the whole time that he interrogates him, and must observe all his movements with attention. If the accused trembles, if he weeps, or sighs, the judge will ask him the cause of these movements. Also, if he falters, or if he hesitates; if he is slow, and considers his response; the judge will press him with reiterated questions, and will make mention of everything in the interrogation (Silverman 2001, 60).

The judge is not to feel sympathy for the accused as he trembles, sighs, and weeps. Rather, he is to analyse the victim’s bodily movements, inquire as to what they mean, and observe whether the body reveals the truth. Therefore, before torture is carried out, the suspect’s body must be shaven and searched for hidden charms that could prevent the body betraying itself to the court (Silverman 2001, 63; see also Welling 1892, 207). If the suspect confesses under torture, he/she is then to repeat the confession “voluntarily” in front of a court within twenty-four hours of the torture (Silverman 2001, 45). If the suspect refuses or recants on their confession they would be placed again under torture. This was a safeguard to deal with torture’s unreliability (Langbein 1977, 15-16). Up until the sixteenth and seventeenth centuries, when a suspect held out under torture and did not confess to the crime, it purged the suspect of indicia and, unless new evidence was submitted, the suspect could be acquitted (Langbein 1977, 16).

The extraction of the truth was the domain of an authority; not anyone could do it, only the magistrate who knew how to ask the right questions, was familiar with the deceitful moves the body revealed through pain, and with the hierarchies of guilt and innocence. Yet the judiciary was not the only institution that helped constitute the
value and meaning of torture. The theological character of European laws and the
wider hegemony of Christianity had a powerful influence over how to interpret pain
and suffering. As Caton (1985, 493) has argued, “Monasteries were repositories of
books and learning; clergy organized hospitals and distributed benevolences…Priests
officiated at every major event in people’s lives – baptism, confirmation, communion,
marriage, sickness, and death.” The priest welcomed human beings into the material
world and provided the ritual that would send them off to the after-world.

Christianity, as both a religion and institution, possessed a monopoly over the
interpretation of pain and suffering in society. Pain and suffering was punishment from
God for violating divine law. The Holy Bible (2007) offers guidance as to how the
individual was to interpret their suffering:

In Book of Job: “Think now, who that was innocent ever perished?” (4:7, 486).

“Or where were the upright cut off? As I have seen, those who plough iniquity
and sow trouble reap the same” (4:8, 486).

“By the breath of God they perish, and by the blast of his anger they are
consumed” (4:9, 486).

In Isaiah: “Tell the innocent how fortunate they are, for they shall eat the fruit
of their labours” (3:10, 660)

“Woe to the guilty! How unfortunate they are, for what their hands have done
shall be done to them” (3:11, 660).

In Proverbs: “No harm happens to the righteous, but the wicked are filled with
trouble” (12:21, 623).

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7 For an analysis of the interpretation of pain and suffering of the Bible in absolutist Europe, see Caton
Medical historians have documented religious interpretations of suffering in relation to understanding disease and illness during the ancien régime. Clergymen also served as physicians who interpreted suffering as punishment or a test of faith, choosing to treat illnesses with amulets and magical rituals (Ramsey 1992, 101; Wear 1995, 240). Yet, for some, even ameliorating pain and illness was avoided in fear of further provoking God’s wrath. This was particularly predominant among the peasants, who continued to hold this view well into the eighteenth century. In 1785, a French physician stated in relation to treating illness among the peasantry: “the peasants do not appeal to anyone. They believe there is nothing to be done. Moreover the priests tell them that their hour is decided and that it is useless to spend money for remedies that will not help” (Risse 1992, 153).

The judicial interpretation of pain was further constituted and provided with additional meaning through the Christian meaning of the grotesque flesh. Porter (2001, 37) has shown that Christian theology defamed the body: it was a site of lust. Flesh was fallen, guilty, and deserving of contempt (Porter 2001, 38-39). This contempt for the body helped to justify judicial torture and public executions. Yet beating the flesh was also necessary to reveal the truth. In the Fourth Gospel, Jesus’ beaten body becomes a beacon of truth (Glancy 2005). Judicial torture transcended the mortal world by forging a connection between the material and metaphysical realms of experience.

Yet suffering also had positive consequences. In establishing a connection with God, suffering offered the opportunity for redemption for the sufferer. “How happy is the one whom God reproves; therefore do not despise the discipline of the Almighty. For he wounds but he binds up; he strikes, but his hands heal. He will deliver you from six troubles; in seven no harm shall touch you” (Holy Bible 2007, Book of Job 5: 17-19, 496-498; see also Caton 1985, 494). The Book of Job tells us that suffering can
still come to the righteous, but humility will end it. This is perhaps the reason behind the prestige of the confession. A person could be convicted of a crime without a confession if two eye witnesses were present, yet the confession held a privileged status as a “queen” of proofs. This status was constituted by its ability to offer redemption for the criminal (Foucault 1991, 38). For Ayrault, “It is not enough that wrongdoers be justly punished. They must if possible judge and condemn themselves” (Foucault 1991, 38; Pearce 2003, 58).

Christian notions of pain and suffering had a profound influence over jurists, and provided a prominent role in constituting torture as an institution. Silverman (2001, 111) found that in Toulouse, France, judges were often members of penitential confraternities. The major source for criminal law was the Bible and judges often cited from the Old Testament (Sanford 1988 [1854], 9). Torture was not carried out on Sundays or holy days (Langbein 1977, 13; Welling 1892, 204), and the duration of torture would be the “length of time it takes the judge to say a prayer, or creed” (Peters 1985, 68-69).

This interpretation of torture remained influential because of the dominant role of the *parlementaries* in the broader society. *Parlementaries* and judges were the elite in France; they were wealthier and outnumbered the merchants, and often dominated cultural organisations and activities, taking part in important holidays and festivals such as the Assumption of the Virgin (Silverman 2001, 51-52). The opening sessions of the *parlements* brought with it festivities that filled the streets in parts of France (Silverman 2001, 51-52). Moreover, the events of the court became popularised in legal texts for the non-legal specialists, providing both legal instruction and entertainment (Silverman 2001, 57-58). In France, the large amount of discretion of the

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8 In an analysis of the law of torture, Sebastian Guazzini, a well respected Italian jurisconsult, wrote in 1612 that there were exceptions to not torturing on Holy days: “an accused party shall not be tortured on a Feast Day celebrated in honor of God, except in grave cases. Judges who fear God observe this rule, says Julius Clarus, but judges otherwise minded do not pay much respect to it” (Welling 1892, 204).
judges in specifying penalties further provided them with power and high status in society. The magistrates saw themselves as the State, and saw it as their right to determine crimes and punishments (Bar 1916, 262-263). “It was this situation more than anything else which in the preceding period had brought about the ascendency of the royal judicial officers – which has enabled them to make themselves both respected and feared, throughout the kingdom, as the relentless pursuers of crime and criminals, irrespective of kind or degree” (Bar 1916, 262). Judicial theories played a role of legitimising judicial notions of truth outside the legal system, and the dominance of the jurists in European society helped provide legitimacy to the social order.

The judiciary and the Church were the primary authorities that provided the theoretical and practical foundations for criminal justice in absolutist Europe. The Church had a moral authority that was recognised by the state, judiciary and the European populations. Christianity’s ability to differentiate the grotesque body from the soul, to determine and provide moral guidance for suffering individuals helped European society make sense of the relationship between their pain and God, as well as provide a rationale for inflicting pain in judicial torture and punishment. The judiciary claimed their authority as not only representatives of the state, and therefore reflective of the will of God, but through evidentiary proceedings and practices. The judiciary had its rules of semi-proofs and half-proofs that provided its search for truth with a type of objective legitimacy, its rules and regulations of interrogation, and its thresholds that must be met before pain could be inflicted. The judges possessed the power to determine criminal from appropriate behaviour as well as determine the appropriate punishment. The judiciary and the Church had the power to impose boundaries and identify deviation that helped to regulate and control the body politic. Torture was made possible by the relations between these two authorities and the absolutist state. It is to the third authority, the state, to which I now turn.
Torture and the Absolutist State

The development and concentration of the power to punish into a centralised state became a primary domain of sovereign power (see Bar 1916, 259-268). Legal theory helped lay the theoretical foundations of absolutist power (Church 1967, 3). One of the most influential legal writers during absolutist Europe was Jean Bodin. Bodin was concerned with identifying “markers” that could only be held by someone called a sovereign; that is, someone who “must not be subject in any way to the commands of someone else and must be able to give the law to subjects, and to suppress or repeal disadvantageous laws and replace them with others” (Bodin 1992, 11). The sovereign made and repealed law, declared war and peace, appointed officers of state, and had the power over life and death (see Bodin 1992, 46-88).

Bodin’s theory on sovereignty constructed a hierarchy between state and society. These markers could not be divided between the ruler and his/her subjects. Since a sovereign could only be subject to natural or divine laws (Bodin 1992, 13) the sovereign could not be both a subject and sovereign (Keene 2002, 43). This meant that until the eighteenth and nineteenth century when the state came to exist for the population, the sovereign ruled over society (Towns 2010, 59). Marx (1992, 232) wrote, “the unity of the state, together with the consciousness, the will and the activity of the unity of the state, the universal political power, likewise inevitably appears as the special concern of a ruler and his servants, separated from the people.” The sovereign’s interests, reflective of God’s, were taken as state interests. Many laws reflected this relationship. For example, in the German Empire, stealing deer was punished with heavy penalties because it “was prejudicial to the exercise by the prince of his noble passion for the chase” (Bar 1916, 230). Sovereignty was granted from above, legitimised in metaphysical, timeless laws.
Upholding justice was integral to constituting the power of the sovereign. As Domat argued, “The rule of justice…was both the supreme duty of the kind and the basis of his absolute power” (Church 1967, 20). Justice derived from the sovereign (Parker 1989, 43), which, in turn, derived from “God himself who is justice” (Church 1967, 20). Torture and public executions were integral to achieving justice in the ancien régime. Both practices operated in a system of punishment that focused on the body as the site of punishment and the symbol for the reconstitution of state power. Foucault (1991, 47-57) drew attention to the role inflicting pain upon the body in the public execution had in reconstituting the sovereign’s power and right to punish. Since laws were also divine laws, and the sovereign a representative of God, violations of the laws were a direct attack on the sovereign himself. The public execution was a public display of power. A sovereign could pardon a victim, thereby either taking life or letting it live (Foucault 2008, 136). Yet in the capacity to tear the flesh, it further constituted the privileged status that “in criminal matters the establishment of truth was the absolute right and exclusive power of the sovereign” (Foucault 1991, 35).

The body was still targeted after its execution and used as a spectacle. In serious crimes, the corpse of the criminal may be dragged on a hurdle in public while the judiciary condemned the descendant’s memory (Bar 1916, 270). Torture formed one practice in a broader discourse of justice in the ancien régime. Torture helped to establish guilt. But torture was also distinguished from public executions and other forms of punishment. It is important to keep in mind that even when the Ordinance of 1670 placed torture as a punishment just behind the death penalty (Bar 1916, 269 fn. 3) torture remained somewhat separate from other punishments. Torture was the procedure that could either relieve or reveal the infamy of the offender by revealing guilt or innocence (Beccaria 1963, 35-36).

It was the public execution where truth and the infamy of the offender were
confirmed to all. The penal system saw the public execution as a way to deal with “unruly” flesh (Porter 2001, 47). Title XXV, Article 13, of the 1670 Criminal Ordinance outlined a hierarchy of punishments (Bar 1916, 268). The first class penalties concerned death penalties such as burning on the stake, broken on the wheel, quartering, hanging, beheading (Bar 1916, 270). Second class punishments included maiming such as cutting off the lips, nose or hand and flogging (Bar 1916, 273-4). Other punishments were more “symbolic” of the crime (Foucault 1991, 44-45). In France, the Declaration of 30 July 1666 stated that the eighth offence of blasphemy would result in the criminal losing their tongue (Bar 1916, 281). Attacks against the sovereign’s life or his family were met with severe punishment. The punishment for lese majeste proper (attempt to take the sovereign’s life) was listed in the Ordinance of 1539: “The offender is to be plucked with red-hot pincers and, after boiling lead has been poured into his wounds, is to be torn asunder by horses; his house is to be razed to the ground and his estate confiscated” (Bar 1916, 282). The criminal’s suffering in the public execution restores the harmony and wholeness of the social order (Hunt 2004, 49) and reconstitutes the power of the sovereign.

Torture and punishment were two practices that helped to achieve truth and justice in the ancien régime. However, these foundations were soon challenged, undermining the legitimacy of torture as an appropriate and just mechanism to gather the truth. By the eighteenth century European states began to abolish torture. Torture was abolished in Saxony (1700), Prussia (1754), Poland and Austria-Bohemia (1776), France (1780), Tuscany (1786), Austrian Netherlands (1787), and Sicily (1789) (Langbein 1977, 10). In the United States, the Eighth Amendment to the US Constitution prohibited cruel and unusual punishment in 1791 (Dayan 2007, 6-7).9 Torture had become “tyrannical,” “barbaric,” and “cruel.” Here we have, then, a

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centuries-long practice abolished in the space of several decades. How can this be explained? How did torture come to be taboo?

The Abolishment of Torture

In examining the abolishment of judicial torture, I will not engage in examining the removal of public executions, which has been explored by others, Elias (2000) and Foucault (1991) in particular. Judicial torture was never public; it was always hidden from sight. I am more interested in the particular practice of judicial torture and its demise.

The work of Henry Charles Lea, W.E.H. Lecky, and Andrew Dickson White offer the conventional “progressivist” account for the abolishment of torture (Peters 1985, 75-77). It is assumed that Beccaria and Voltaire shocked European sovereigns by demonstrating the true nature of torture as an affront to human rights and hindering the advance of reason (Langbein 1977, 10-11; Peters 1985, 74-78). Although I do not deny that the human rights movement or Enlightenment thought contributed to the abolition of torture (see Peters 1985, 76), I suggest that the torture’s abolition, and the origins of the stigma against torture, have a more complex history.

I build upon the conventional story by drawing upon two alternative accounts of the abolishment of torture. Legal historian John Langbein (1977) argues the Roman–canon system, which relied on the use of torture to gain confessions, lost its monopoly in continental Europe in the seventeenth century to a new system of proof that relied on the free judicial evaluation of evidence. This new system emerged in the sixteenth century and became integrated into law in the seventeenth and eighteenth centuries. The revolution in the law of proof existed alongside the Roman –canon system, allowing the Roman –canon system to continue to be used for “easy cases” that did not
need a confession or two eyewitnesses to convict.

How did the revolution in the law of proof take place? In the sixteenth and seventeenth centuries, new forms of punishment emerged that replaced the blood sanctions of the Middle Ages. These included the galleys, workhouse, imprisonment, and transportation of convicts to overseas colonies for labour (Langbein 1977, 27-44). The term used to describe the use of the alternative forms of punishment was called “poena extraordinaria:” “an extraordinary or discretionary punishment” (Langbein 1977, 45). This discretion was only used at the time on cases of full proof. The legal system continued to rely on torture, and it was only after guilt had been established that discretion was exercised.

In the seventeenth century, poena extraordinaria began to serve another function. Poena extraordinaria was used in two types of cases when full proof was lacking: when the suspect withstood torture, and when persuasive circumstantial evidence did not meet the threshold of half-proof and therefore did not allow torture. Poena extraordinaria was used “subject to the important limitation that the punishment had to be less severe than that prescribed for full proof of the crime” (Langbein 1977, 47). It therefore became possible to punish for serious crimes without the need for full-proof and without resorting to torture (Langbein 1977, 59-60).

Langbein offers a powerful alternative to the progressivist story by examining how an alternative law of proof destabilised, and eventually replaced, the Roman-canon system. Torture was abolished because it was no longer necessary to use it. However, Langbein does not address why torture continued to be used well into the eighteenth century despite the fact it was no longer necessary to do so. Nor does he examine how torture came to have such a powerful stigma. Lisa Silverman (2001) has addressed these important issues, arguing torture continued to be used because it had cultural value and meaning until the eighteenth century based in the religious
interpretation of pain, suffering, and the judicial interpretation of truth. Therefore, to understand the abolishment of torture and how torture became stigmatised as “barbaric,” one must look at the epistemological shift in these interpretations, in particular, the meaning of pain.

Examining the use of judicial torture in France, Silverman argues that although the religious interpretation of pain continued to be used in the courts, pain was understood differently in other contexts of French society. In the medical context, pain was a negative phenomenon that had to be ameliorated. Examining the interpretation of pain between patients and surgeons, Silverman (2001, 136) shows the sick went to surgeons for relief of pain. Pain was seen by patients not as ennobling, but something to be feared because it could negatively alter their quality of life (Silverman 2001, 135-137).

In early medical works from the 1500s, surgeons showed little sympathy for those who suffered pain (Silverman 2001, 148). Pain was something that could help in diagnoses and surgeons “were therefore reluctant to treat it” (Silverman 2001, 137-140, 148). However, by the end of the sixteenth century, pain came to be seen as a problem for both the patient and witnesses of the pain (Silverman 2001, 148). Surgeons took measures to minimise and avoid unnecessary pain (Silverman 2001, 143). Drugs were provided to relieve pain such as the use of “mandrake, henbane, solanum, wild lettuce, and opium” (Silverman 2001, 145) and alcohol was used during surgery as an anaesthetic (Silverman 2001, 146).

By the eighteenth century Silverman shows how surgeons showed empathy and pity, but also horror and distress, for patients in pain (Silverman 2001, 149). Pain posed a danger to both the patient and onlookers. Pain was considered dangerous because of “the fear that repeated exposure to the sight of suffering was itself damaging” (Silverman 2001, 150). It is here that we see the seeds for the abolishment
of torture. As the meaning of pain became more contested and became associated with danger behaviour, “painful practices like torture that relied on narrowly constructed definitions of pain became more difficult to support” (Silverman 2001, 108).

The shift in the epistemology of pain in the seventeenth and eighteenth centuries has been noted by others. Caton (1985, 495) points to the “secularisation” of pain in the seventeenth and eighteenth centuries and how this provided an “intellectual bond” between the philosophes and the medical practitioners. The philosophes saw medicine as an important way to help people out of the life of self-incurred tutelage. Science and technology was seen as a means for humans to gain better control over their environment, to tackle the stronghold of superstition and to advocate the advance of human reason (Porter 1995, 374). Peter Gay argues that the advance in medicine gave the philosophes and the enlightenment a morale booster: “for observant men in the eighteenth century, philosophes as well as others, the most tangible cause for confidence lay in medicine” (Porter 1995, 384).

Langbein and Silverman’s contribution provide the necessary background in which to examine how torture came to be “taboo.” Langbein demonstrates how torture no longer became necessary in the law of proof. However, Langbein’s thesis does not tell us how torture came to be described in terms of danger for it to become taboo. Silverman’s thesis, while offering the origins of torture’s danger in the shift in the epistemology of pain, cannot tell us why torture was dangerous while other forms of infliction of pain, such as corporal punishment, were still advocated by the philosophes. What I would like to do is examine Beccaria’s famous text, On Crimes and Punishment, to demonstrate how torture became categorised as dangerous and different from other inflictions of pain, and how it shifted from a valued and meaningful practice to a dangerous one by the end of the eighteenth century.
**Beccaria and the Localisation of Danger**

The latter half of the eighteenth century witnessed a struggle to legitimate a monopoly on the interpretation of torture. Two opposing discourses emerged: one pointed to the danger of using torture, the second deemed torture important for criminal deterrence. This struggle represented a contest for the power and authority to legitimise moral limits on the political community. What I am interested in is how Beccaria localised the danger that can come from pain and stigmatise and classify torture as inappropriate behaviour. The answer to this problem lies in the principles that formed his notion of the social contract.

Drawing upon the work of Hobbes, Locke and Rousseau (Beccaria 1963, 6 fn. 8), Beccaria sought to discover natural laws based in reason that could form the foundations of a criminal justice system. Describing the criminal laws in Europe as antiquated and based on “obscure and unauthorised interpretations” (Beccaria 1963, 3-4), Beccaria wanted to remove laws that reflected particular interests and replace them with laws that reflected the “general will” of the people (Beccaria 1963, 8). The general will was not the interest of one individual or group in society (although at times it may be consistent with a particular set of interests), but reflected interests transcendent of any group or individual and encompassed the interests of all. It was laws based on the general will that produced “the greatest happiness shared by the greatest number” (Beccaria 1963, 8). The general will served to turn independent human beings in the state of nature into moral and communal ones by strengthening social bonds (Rousseau 1968, 85). Yet the general will also acted on the sovereign to persuade him to act in the common good (Rousseau 1968, 69). The general will, then, sought not only to transform individuals into rational, human beings, but to create a sustainable political order.
In order to ensure a sustainable social order and prevent society regressing into a state of nature of all against all, the social contract asked individuals to sacrifice part of their liberty to live in peace and security (Beccaria 1963, 11). The sacrifices of liberty were deposited into the sovereign, which at the same time, also constituted the sovereignty of the nation and “the right to punish” (Beccaria 1963, 11-13). However, there were limits as to how much liberty should be sacrificed. Beccaria argued individuals should only be obligated to sacrifice the minimally necessary amount of liberty needed to maintain order. No man (or woman) had ever freely sacrificed his (or her) liberty for the common good. As Beccaria (1963, 12-13) argued, “It was, thus, necessity that forced men to give up part of their personal liberty, and it is certain, therefore, that each is willing to place in the public fund only the least possible portion, no more than suffices to induce others to defend it.” This minimum level of liberty sacrificed by all “constitutes the right to punish; all that exceeds this is abuse and not justice; it is fact but by no means right” (Beccaria 1963, 12-13). By “right” Beccaria referred to that which was “most advantageous to the greater number,” and by “justice,” “nothing more than the bond required to maintain the unity of particular interests which would otherwise dissolve into the original state of insociability” (Beccaria 1963, 13).

When assessing torture, Beccaria asked whether torture worked in whatever purpose it was intended to serve and whether torture was “just” (i.e., the bond required to maintain unity in the body politic) (Beccaria 1963, 10). Beccaria concluded that torture is cruel and should be abolished, having no justification for existence. Several reasons were given. First, torture inhibited the truth. One can notice here the role the shift in the epistemology of pain had in Beccaria’s argument. Torture operated on the principle that truth “lay in the muscles and sinews of a miserable wretch” (Beccaria 1963, 31). This was the result of the “ancient and barbarous legislation” of the
judgements of God (Beccaria 1963, 32). Reason and a clear head produced the truth, not pain. Nor could pain purge one of infamy. Pain is a sensation that had no relationship with metaphysics or morality. This “confusion” between the two was a product of religious dogma and was something that “should not be tolerated in the eighteenth century” (Beccaria 1963, 35).

Torture was also condemned because it was not just. Although Beccaria utilised utilitarian arguments to help prohibit torture, Beccaria’s argument also went beyond utilitarianism. Beccaria saw torture as both punishment and procedure and condemned torture as a practice that punishes someone not yet proven guilty (Beccaria 1963, 30). Punishing the innocent was not only based on the principle that “might is right,” but was condemned by Beccaria as a residue of the roman-canon system that operated on semi-proofs and half-proofs (Beccaria 1963, 39). It was in this system that “torture exercises its cruel power” (Beccaria 1963, 39).

Other arguments were also given to abolish torture: torture favoured the strong who could withstand pain, while punishing the weak that could not (Beccaria 1963, 31-33); torture was secret and therefore could not act as a deterrent to others (Beccaria 1963, 30-31); and there were alternatives to torture that could be used to find accomplices. Accomplices often fled into exile after committing crimes and alternatives such as examination of witnesses and the accused, as well as the material facts of the crime, could be used instead of torture (Beccaria 1963, 35).

Beccaria classified, limited, and stigmatized forms of pain according to the principles outlined in the social contract. Consistent with Montesquieu’s (1949, 1: 299) writings on punishment, anything useless and unnecessary was tyrannical. It is important to note that this principle did not just apply to pain; it applied to any kind of law. In a discussion on severe punishments, Beccaria argued even if severity itself was not against the common good, but that if severity could be proven to be useless, it was
against justice and the social contract (Beccaria 1963, 14).

The individual should only give away that little amount of liberty that was necessary to maintain order. Uselessness asks for too much liberty for no good reason and people will then not be willing to defend the social order if it becomes threatened. But this principle also served as a classifying theme in which to separate different acts and provide them with meaning. Here one can see Beccaria localising and narrowing danger to the political community, identifying ways in which to judge the danger a practice has according to its utility and necessity. Corporal punishment could still serve a positive purpose if used in the correct manner (Beccaria 1963, 68). It was the unnecessary or ineffective use of pain that posed a threat to the social order.

This could be seen not only in torture but in the cruelty of punishments. Cruelty could be dangerous by causing “contagion” in the broader political community. Cruel punishments turned the human spirit callous and embolden citizens to commit crimes. Moreover, those countries with more severe punishments were condemned by Beccaria because those societies often produced “the bloodiest and most inhumane of deeds” (Beccaria 1963, 43-44). This was because the cruelties that guide legislators reproduce that cruelty in the minds of the citizens, in turn making new tyrants (Beccaria 1963, 43-44).

Thomas Paine made similar observations regarding the use of cruel punishments, arguing the people “learn it [punishments] from the governments they live under, and retaliate the punishments they have been accustomed to behold” (Paine 1985, 57). Invoking the execution of Damien, Paine (1985, 58) argued “[t]he effect of those cruel spectacles exhibited to the populace, is to destroy tenderness, or excite revenge; and by the base and false idea of governing men by terror, instead of reason, they become precedents. It is over the lowest class of mankind that government by terror is intended to operate, and it is on them that it operates to the worst effect.” It is
therefore necessary to “Lay then the axe to the root, and teach governments humanity. It is in their sanguinary punishments which corrupt mankind” (Paine 1985, 58).

The *philosophes* had cast any unnecessary practices as tyrannical. This combined with the medical discourses that demonstrated that pain endangered patients and onlookers to associate torture with danger behaviour. Torture, which was argued to be useless in every supposed function, was also associated with the cruel infliction of pain that threatened to turn the people into callous “mobs” and damage social bonds. It was this stigma that associated judicial torture with despotism. In his *Discours sur les moeurs* in 1769, Joseph-Michel-Antoine Servan linked torture to oppressive rule:

Doubt it no longer; when you deliver a citizen to the torture, be it at the other end of the universe, despotism will be heard to cry and to speak with derision to the men whom it oppresses: ‘There then is Switzerland, there is that free government, which employs the *question* in the name of the laws,’ and it will add, ‘Happy slaves! You dare to complain now that I scorn both laws and liberty. You can still hope to bend your despot; but who will bend the law when the very virtue of the magistrates renders it inflexible?’ (Silverman 2001, 171).

It is also in the eighteenth century that one can see the comparison of torture with “barbaric” countries, such as those in the Orient, which, apparently, is where humanity is most debased (Silverman 2001, 171). Torture existed in the realm of barbarity that lurked beyond community boundaries. The use of torture had become a marker to distinguish identities, but also form social hierarchies of superiority and inferiority. Those who tortured were inhumane and inferior, and those who had abolished torture had become humane and superior. Beccaria brought to light the hierarchical function that torture has among states. England, Sweden and Fredrick II of Prussia were praised as “examples of virtue” and with wisdom for not having torture (Beccaria 1963, 36).
Those who continued to use torture were deemed irrational for employing a practice not even used to regulate armies (Beccaria 1963, 36). However, one could lose the title of tyrant by using reason as a foundation for criminal laws and engage in the heroic quest for truth without fearing it (Beccaria 1963, 97).

What is interesting to note is that few of Beccaria’s critiques of torture were original in any sense of the word. Beccaria invoked many criticisms against torture that had been voiced since the Greek city states. Torture was cast as tyrannical in hagiography from the Middle Ages (Tracy 2012), and the caution concerning torture’s unreliability had been expressed as far back as Aristotle, and throughout the Roman Empire. However, it should be kept in mind that Beccaria and Servan’s condemnation of torture as tyrannical was proclaimed in a different context than in the Middle Ages or in the Greek City States. For example, the criticisms made by Aristotle and in the Roman Digest concerning torture’s unreliability were prudential critiques, and did not suggest torture should be abolished. The eighteenth century critics had invoked older critiques of torture, but because of the shift in the epistemology of pain, as well as the association of uselessness with tyranny, these critiques took on a new meaning and associated torture with “the sociology of danger” that threatened the wellbeing of the political community.

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10 Aristotle wrote in his Rhetoric, “Torture is a kind of evidence, which appears trustworthy, because a sort of compulsion is attached to it,” however, “those under compulsion are as likely to give false evidence as true, some being ready to endure everything rather than tell the truth, while others are really ready to make false charges against others, in the hope of being sooner released from torture” (Ross 2005, 5).

11 The Roman law text, Digest, stated

It was declared by the Imperial Constitutions that while confidence should not always be reposed of torture, it ought not to be rejected as absolutely unworthy of it, as the evidence obtained is weak and dangerous, and inimical to the truth; for most persons, either through their power of endurance, or through the severity of the torment, so despise suffering that the truth can in no way be exhorted from them. Others are so little able to suffer that they prefer to lie rather than to endure the question, and hence it happens that they make confessions of different kinds, and they not only implicate themselves, but others as well. (Peters 1985, 34)
Contesting Views on Torture

The condemnation of torture was not unanimous. Even within the abolishment movement, opinions differed as to the value torture could continue to provide to criminal justice. For example, Voltaire had different views to Beccaria on torture. Voltaire was one of the leading advocates in the abolishment movement. However, he argued that torture *préalable* could still be useful in limited cases and Voltaire advocated its use in the case of the assassination of Henry IV to find accomplices and punish the assassin (Langbein 1977, 68; Silverman 2011, 167).

Pierre Francois Muyart de Vouglands, the *Conseillier au Grand-Council* of France, argued in 1780 that not only is legalised torture successful, but taking it away poses a danger to “the fields of government, morals and religion” (Peters 1985, 72-73). Muyart de Vouglands had a companion in the criminalist Jousse. In his *Traite de la justice criminelle*, Jousse wrote the abolishment movement sought to undermine “civilized” laws and “injure religion, morals, and the sacred maxims of the government” (Bar 1916, 318 fn. 12). And Ferdinando Facchieni, a Venetian monk from Vallombroso, published a scathing critique of Beccaria’s treatise in 1765 as part of his wider defence of the system of absolutism (Young 1984, 159).

Other critics focused on the functionality of torture and the possible contribution it could continue to make to the criminal justice system. In a set of unpublished manuscripts written in the 1770s, Jeremy Bentham argued the then debate over torture had become too emotive and plagued with prejudices that had inhibited the ability to debate torture rationally (Twining and Twining 1973). Although Bentham praised Beccaria’s critique, and advocated the abolishment of torture as it was then used in Europe, he argued torture could still be used. Relative to other forms of pain

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12 Voltaire played a leading role in the famous Calas case in the 1760s (see Silverman 2001, 157-159). For Voltaire’s views on torture, see Voltaire (2007).
and suffering (such as enduring imprisonment), torture appeared to be no different to warrant such an absolute prohibition or place it beyond a debate about its possible utility for the creation of a just society. The advantages torture had over imprisonment was that torture relied on intensity of punishment, rather than duration, and this could make the prisoner conform more quickly: “A man may have been lingering in prison for a month or two before he would make answer to a question which at the worst with one stroke of the rack and therefore almost always with only knowing that he might be made to suffer the rack, he would have answered in a moment” (Twining and Twining 1973, 311). Bentham did not associate torture with cruel or excessive punishment if used in a regulated manner, and therefore detached it from the sociology of danger.

Still others saw torture having utility in relation to criminal deterrence. The Belgian de Fierlant wrote in 1771 that there is a fear that the removal of torture would make it difficult to deter and convict hardened criminals (Langbein 1977, 66). In the Netherlands, Voorda defended the rack as late as 1798, saying it was indispensible “unless the common welfare was to be sacrificed to rogues and villains” (Bar 1916, 310). Many sovereigns feared the effect abolishing torture would have on deterring crimes, and many of the abolishment decrees were issued in secret. These included Fredrick the Great’s orders in 1740 and 1754; Maria Theresa’s order in 1773; and Joseph II’s order for abolishment in 1784 (Langbein 1977, 66-67). In some cases, the decrees came with reservations. On May 8 1788, Louis XVI issued an edict that abolished torture préalable. Although this edict was not implemented, it came with a clause that demonstrated the concerns of sovereigns: “reserving however regretfully [the option] of re-establishing torture préalable if, after some years of experience, we gather from the reports of our judges that it is an indispensible necessity” (Bar 1916, 319; Langbein 1977, 66).

Although there were still defenders of torture, these critics were in the
minority. The abolishment movement had won the battle over torture and condemned it as prohibited behaviour for a civilized state. What is interesting is that of the minority that defended torture, few invoked torture’s truth revealing qualities as a reason why torture could still be used in a civilized society. The fact that defenders invoked the deterrent value of torture demonstrates the influence the shift in the epistemology of pain had on understandings of torture. Torture hurt; it had no redemptive or truth revealing qualities. The epistemology of pain traced by Silverman and the association of useless with tyranny had helped to change torture in two ways: 1) by transforming torture’s role in society by questioning the relationship between pain and truth; and 2) by condemning torture as useless, cruel, and in need of abolishment.

**Conclusion**

The torture taboo is only a recent phenomenon. Up until the eighteenth century torture was a legitimate judicial practice that helped reveal the truth and bring about salvation for the victim. The eighteenth century represented a “fight” or struggle over the meaning of torture. What was at stake was the struggle over the interpretation of social reality, to define prohibitions, limits, and the constitutive elements of a “humane” social order. It is important to note that Beccaria, Voltaire and other abolitionists did not “reveal” the true meaning of torture. The destabilisation of the absolutist’s monopoly on the interpretation and value of torture by the middle of the eighteenth century was the result of a dispersed set of relations: the abolitionist movement, the rise of medical surgeons and the shifting epistemology of pain, the replacement of the Roman-canon law of proof with a poena extraordinaria, and the association of useless and unnecessary policies with tyranny.
The combination of the shift in the epistemology of pain and the connotation of uselessness with tyranny helped form the classifications and stigmatisations necessary to distinguish torture from other forms of pain (such as corporal punishment). The localisation of danger helped to understand transgressions of appropriate behaviour by identifying the endangered as dangerous. The eighteenth century transformed torture from a meaningful practice into one associated with the sociology of danger. Engaging in torture endangered the social order, created brutes within society and threatened a regression to the state of nature by undermining humane social bonds that the social contract was intended to create. The overwhelming opinion was that torture was a category of unnecessary, and hence cruel, infliction of pain and was dangerous to the victim and social order. Torture also became a signifying marker to help rank and distinguish between civilized Europe and the barbaric Orient.

The purpose of this chapter was to show how torture came to be prohibited and find the seeds to torture’s association with danger, a vital element of what makes something taboo. As I show in the following chapters, these stigmatisations and categorisations strengthened over time to a point where no state wanted to be associated with torture. It is these categories that have given the taboo its strength, even during norm violations. In the next chapter and Chapter 3, I show that despite the torture’s stigma strengthening during the nineteenth century, by the twentieth century European totalitarian regimes violated the torture taboo on an unprecedented scale. However, despite these violations, not only did torture maintain its absolute prohibition, but the torture taboo actually strengthened as a result.
Chapter 2
The Taboo and the Fear of Regression

Chapter 1 examined how torture became prohibited due to a series of fortuitous events. Despite the fact torture had existed since the time of the Greek city states, eighteenth century Europe managed to prohibit torture within the space of half a century. Torture was deemed useless, a relic of older ages, and a danger to society. However, during the nineteenth and early twentieth century, the prohibition against torture was violated in both Europe and in colonial territories. Although torture in Europe during the nineteenth century was minimal, by the first half of the twentieth century, the emergence of European dictatorships led to untold violence, as these states systematically used torture against those deemed “enemies” of the state. What is one to make of these violations? Does it demonstrate that the prohibition of torture in the eighteenth century made only a surface difference in human affairs? Are these violations proof the taboo masks the deeper tensions of an historical repetition of violence in international society?

This chapter examines the period 1800 – 1945 to show how the taboo was reconstructed and how it has been made more robust over time. As we will see, the evolution of the torture prohibition happened in unexpected ways. I argue norm violations played a fundamental role in the development of the torture taboo, and that
studying these violations can show the strength, rather than the weakness, of the taboo. I show in this chapter, and throughout the rest of this thesis, that the taboo has not strengthened in a linear progressive fashion, but in response to instances of widespread inhumanity.

The first section examines how the taboo became more robust in the nineteenth century as it became integrated in the laws of war as prohibited unnecessary suffering. I argue that despite torture occurring during the nineteenth century, it was in no way emerging as appropriate behaviour, as states hid and denied their torture, and torturers faced public condemnation. The second section shows how the torture taboo expanded into the non-European world as part of the colonial duty to “civilize” “backward” peoples. The third section examines an 1855 investigation into allegations of torture in the Madras Presidency, British colonial India. I show that even though the taboo was violated by native officers to gain revenue and confessions, the Madras investigation demonstrated the strength of the taboo. Studying this case of norm violations showed the duties European colonial powers had in prohibiting torture and the fear that failing to fulfil these duties would pose a risk to British “civilized” identity. As we will see, colonial practices had a powerful effect in (re)constructing torture as a “barbaric” act.

The fourth and fifth sections of this chapter examine the use of torture by the Soviet Union and Nazi Germany up to 1945. I make two arguments. First, studying the widespread violations of the taboo by these two regimes does not highlight the weakness of the taboo (although I do not deny it harmed the norm’s constraining function), but demonstrates its strength. Despite the fact these regimes sought to fulfil the goals of the Laws of History and Nature, neither regime could openly challenge the torture prohibition. Torture continued to maintain its strong stigma as a “medieval barbarity” that no civilized state would dare openly use. As a result, both regimes had to hide, deny and lie about their use of torture to maintain their legitimacy in the eyes
of their domestic populations and other members of international society. This has important implications for escaping the realist notion of the “brooding shadow of violence.” Although the taboo was violated in favour of protecting state interests, the prohibition against torture continued to influence state behaviour during these violations.

Second, the Nazi and Soviet crimes offered an environment for political leaders and war pamphleteers to condemn totalitarian crimes, helping to reconstruct both the torture taboo and the broader normative order of international society. In a series of lectures by the British Organisation Association for Education and Citizenship, held in Ashridge, England, and published in 1938, Sir Ernest Simon (1938, 21) declared “The most revolting aspect of the new dictatorships has been the sudden reappearance of torture in a world from which it was believed to have disappeared for ever- probably the greatest set-back of civilisation, understood by democrats, that has occurred in the history of mankind.” Torture represented a “breakdown” of civilization (Woolf 1933, 7-8) that threatened to untie and break humane social bonds, invoking fears that progressive efforts at ameliorating harm in world politics would be lost.

This fear of regression further stigmatised torture as a particularly dangerous and cruel form of pain and suffering. Yet Nazi crimes in particular offered the opportunity to challenge the nationalist and minorities’ rights system that was established after World War I. Critics argued that the nationalist system had failed to protect vulnerable individuals and groups from unnecessary harm and suffering and that a “new” civilization had to be created out of the ashes and mistakes of the “old” (Kingdon 1942, 143). These actors campaigned for an international system of human rights that would seek to ameliorate divisions between one another and promote a more tolerant international society. As I show in the next chapter, the rise of international human rights buttressed the torture taboo by giving preference to the rights of the
individual to be free from unnecessary harm over the rights and interests of sovereign states to hurt.

Torture in “Civilized” States

Allegations of the use of torture emerged in several European and “civilized” states in the nineteenth century. However, despite its use, torture was in no way emerging as appropriate behaviour. Torture was a scandal and allegations of torture had to be staunchly denied. When Japan was accused of torture in 1880, the Secretary of the Japanese Legation in London dismissed the charges, writing in The Times, these “mendacious assertions…do injury to my country” (Tetsnoske 22 Oct. 1880, 10). The Secretary stated that like other civilized countries, Japan had stopped using torture (Tetsnoske 22 Oct. 1880, 10).

Torture was also feared to lead the people to revolt. In Poland between November and December of 1888, torture was employed on dozens of prisoners to force them to confess to attempting to “alter” the existing government. However, when the guards became concerned that the “modern revival of the old and barbaric custom of questioning under torture might, if known, cause the outbreak of serious disturbances in the town,” the guards took efforts to prevent these facts from leaving the prison (The Times 4 Feb. 1891, 13). However, this vein attempt backfired for when the prisoners were released from Warsaw, news spread of the tortures, and the incident was reported in newspapers as far away as London (The Times 4 Feb. 1891, 13).

Torture had become a practice associated with “old,” “barbaric” customs that

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13 For torture in Poland, see The Times 4 Feb. 1891, 13; The Times 5 Jan. 1846, 6. For torture in Spain, see Perry 1897, 6; Tallack 1897, 10; The Times 23 Aug. 1897, 9. For torture in Switzerland, see The Times, 3 Jan. 1870, 10. For torture by the United States in the Philippines circa 1900, see Kramer (2008).
had no place in a modern civilized society. In fact, invoking torture was used as a stigma to help prohibit other forms of cruel punishment. During the 1870s, there was a debate in England concerning the prohibition of the “cat,” a whip used in corporal punishment. England was condemned by the Prison Congress, which held a conference in London in July 1871, for being alone in the civilized world for continuing the practice (Pears 1872, 961-962). The cat was condemned for being useless and having an injurious effect on society. Pears (1872, 963), a barrister, wrote, “before long, society will demand that the cat shall take its place in the Tower, side by side with the thumb-screw, the pincers, the rack, and the other instruments of legal or illegal punishment and torture in ages gone by.”

Several human rights and penal reform groups took advantage of torture’s stigmatising and ranking effects to pressure states to conform to “civilized” norms. The revelations Spain had tortured anarchists and suspects in Cuba and the Philippines in the late 1890s provoked condemnation from different groups. In 1897 the International Prison Congress applauded Spain for its progress in adopting “enlightened methods of criminal treatment” but condemned it for “barbarous tortures, such as burning the flesh with hot irons, tearing out finger-nails with pincers, bodily mutations, compression of the skull by metal instruments, and other modes of treatment, both indecent and savage” (Tallack 1897, 10). William Tallack (1897, 10) of the Howard Association in London, a group that promoted penal reform, argued Spain must abolish torture as it was representative of those “relics of savage and uncivilized ages.” But apart for reasons of humanity, Spain should stop torture for political reasons as the tortured anarchists were gaining sympathy among the population rather than the outrage they deserved for bombing populated areas (Tallack 1897, 10).

The Spanish torture issue was taken up again, this time by the Spanish Atrocities Committee. On 3 August, 1897, Joseph Perry, the Secretary of the
Committee, wrote in *The Times*, “The Spanish Government must speak and disprove [the allegations of torture] if it wishes to keep its honour…Unless she speak, and speak truly, the black cloud that now overhangs her will surely burst with terrible havoc” (Perry 1897, 6). On the 22 August 1897, the Spanish Atrocities Committee organised a protest in Trafalgar Square, London, with the objective “to obtain public sympathy” for the anarchist prisoners in the Spanish Montjuich Prison (*The Times* 23 Aug. 1897, 9). Organisations and groups that attended included the Gas Workers’ Union, the Social Democratic Foundation, the Independent Labour party, refugees and anarchists. Literature concerning the tortures was distributed, including a victim’s account of their torture, as well as two doctors’ certificates that confirmed the tortures. G.W. Foote of the National Secularists’ Society moved the only resolution proposed at the protest:

> Seeing that it has been proved by incontestable evidence and acknowledged by the British and Continental Press that the most barbarous tortures, recalling those of the Middle Ages, have been inflicted by the Spanish Government on prisoners arrested wholesale on mere suspicion, and some of whom so tortured were never even brought to trial; seeing also that the Spanish Government treats with callous disdain all representations addressed to it on this subject; seeing, further, that the Spanish Government has deported 28 of these prisoners to England, this meeting of English men and women feels that it has a right on every ground to record its public protest against these detestable outrages on the common humanity of the civilized world (*The Times* 23 Aug. 1897, 9).

Foote warned that “if the Spanish Government would treat their citizens like wild beasts they must not be surprised if some citizen now and then bettered their example and acted himself like a wild beast towards the Government” (*The Times* 23 Aug. 1897, 9). Foote invoked the torture critiques of the eighteenth century that warned that
cruel punishments and tortures pose a danger because they spread to the population, transforming them into violent animals. Foote’s critique was a concern for the common humanity of the “civilized” world, making an important distinction between “civilized” and “barbarous” societies, a division I discuss in more detail below.

By the nineteenth century torture had taken on a self evident meaning, or “doxa” (Bourdieu 2010, 473), as naturally barbaric. Although some of the eighteenth century critiques concerning the danger of cruel punishments remained, many of the utilitarian criticisms listed by Beccaria were no longer necessary to condemn torture. I suggest this reconstruction came about through the developments under international law during the nineteenth century concerning the regulation and humanisation of warfare. This included the General Order No. 100 of 1863 (the “Lieber Code”), which regulated warfare during the American civil war, the 1864 Geneva Convention that concerned the treatment of the wounded and sick, and the 1899 and 1907 Hague Conventions that sought to prohibit unnecessary or superfluous suffering during wartime (Linklater 2011, 62). The prohibition of unnecessary suffering was seen by Carr (2001, 141) as one of the most important elements in what he called the “international moral code.” These legal developments associated torture with an “unfair fight” and an attack on the defenceless (Shue 1978, 127-130). The Lieber Code (1863) listed five articles concerning the prohibition of cruel treatment of soldiers and prisoners of war:

Art. 16. – Military necessity does not admit of cruelty – that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions;

Art. 44. – All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer,
all robbery, all pillage or sacking, even after taking a place by main force, all rape, wounding, maiming, or killing of such inhabitants are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense.

A soldier, officer or private, in the act of committing such violence, and disobeying a superior ordering him to abstain from it, may be lawfully killed on the spot by such superior;

Art. 56. – A prisoner of war is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional infliction of any suffering, or disgrace, by cruel imprisonment, want of food, by mutilation, death, or any other barbarity;

Art. 75. – Prisoners of war are subject to confinement or imprisonment such as may be deemed necessary on account of safety, but they are to be subjected to no other intentional suffering or indignity; and

Art. 80. – Honorable men, when captured, will abstain from giving the enemy information concerning their own army, and the modern law of war permits no longer the use of any violence against prisoners in order to extort the desired information or to punish them for having given false information.

Torture was deemed an excess of pain. It was inflicted for reasons not related to the war effort but for soldiers’ desire for revenge. Torture was used against prisoners stripped of their weapons and unable to defend themselves; it was pain inflicted after the battle, as Shue (1978, 130) points out. The torture taboo identified transgressions in “civilized” society as well as offering protection from danger and unnecessary harm to individuals. As a relic of an “old” order, torture provided an object to rank states in a
hierarchy between “barbarous” and “enlightened.” It is to this hierarchy in international society to which we now turn.

Torture in the “Uncivilized” World

The understanding of torture as an “uncivilized” practice was reconstructed alongside the expansion of European society in the non-European world. English school scholars have been at the fore in examining how universal (i.e. western) norms and morals expanded to non-European communities (Bull 1995; Bull and Watson 1984; Gong 1984; Keene 2002). An integral part of the development of international society was through the standard of civilization, which ranked societies as inferior or superior in relation to one another by identifying what legal, moral and political norms were required to become a “civilized” state (Donnelly 1998; Gong 1984).

Although the standard of civilization was not explicitly stated in international law until late nineteenth century (Donnelly 1998, 3-4), it existed in the form of customary norms and morality in the broader international normative framework. One of the most important normative principles of European international society, as Hedley Bull (1995, 18) noted, was the “limitation of violence resulting in death or bodily harm.” To violate what were deemed to be “civilized” and “universal” moral principles, such as the torture taboo, was to bring into question the violator’s identity as a “civilized” state. As Gong (1984, xi) wrote, “no country wants to be ostracized as ‘uncivilized.’ Even those countries most intent on pursuing their individual interests recognize the need for, and thereby usually acquiesce to some degree in, certain collective standards of international conduct.”

However, as Suzuki (2005, 142) argues, within much English school literature “there is an assumption that a single set of norms within this Society applied equally to
all its members, and that non-European states were socialized into this Society.” Keene (2002) has shown that during the eighteenth and nineteenth centuries, two patterns of legal and political norms operated: tolerance, which constituted and regulated behaviour between European states, and “civilizing” processes, which shaped relations between European and “uncivilized” non-European states. These two normative structures created a hierarchy of superior and inferior between European and “uncivilized” non-European states, with Europeans ranked on top. How, then, did notions of “civilization” structure the actions and identities of states in world politics?

Scholars have recently shown the different classifications of “civilized” and “barbarous” allowed for different standards of treatment (Bowden 2007; Keene 2007; Pitts 2005; Shepard 2006; Suzuki 2005). Keene (2007, 319) has shown how the emergence of the concept of “civilization” in the 1700s and its comparison with “barbarism” stripped the latter of agency, in this case, to make law. Yet different moral standards also applied in European relations with non-Europeans, in particular, with regard to the use of force. This can be seen in J.S. Mill’s 1859 essay, “A Few Words on Non-Intervention.” Mill argued the same moral and normative standards of behaviour did not apply between “civilized” and “barbarous” societies (Mill 2006 [1859], 259). Mill provided two reasons for making such distinctions. First, “barbarous” societies could not reciprocate. If international law and morality relies on reciprocity, barbarians “cannot be depended on for observing any rules. Their minds are not capable of so great an effort, nor their will sufficiently under the influence of distant motives” (Mill 2006 [1859], 259). The association of a lack of economic development with cognitive and cultural development led to the second justification: the barbarian’s lack of mental maturity meant they were not ready for independence. In fact, nationality and independence were harmful to such societies. “Barbarous” societies were not yet nations and therefore imposed rule, such as despotism, could be
justified for the natives own benefit until they advanced to a “civilized” stage of development (Mill 2006 [1859], 259).

The association of the “barbarous” societies with a lower mental capacity and backward development helps explain how liberals such as Mill and Tocqueville could advocate despotism and the infliction of violence that would not have been tolerated if inflicted on a fellow “civilized” state. Tocqueville wrote in 1841 in reference to Algeria, “For myself, I think that all means of devastating the tribes must be employed…” (Pitts 2005, 231). Although it was expected that “civilized” states abide by the laws of war when battling one another, no such obligation was expected in a war between “civilized” and “uncivilized” societies (Bowden 2007). Because “barbarous” societies could not reciprocate, and therefore, would not abide by the laws of war, the duties of restraint imposed upon “civilized” actors no longer applied. For example, although the use of dum-dum bullets were prohibited in “civilized” wars, it was deemed appropriate to use them “against Asians and Africans” (Headrick 1979, 256).

This violence was necessary to undertake the heroic “civilizing” mission that would bring the enlightenment to the wretched (see Bowden 2007; Lewis 1962; Pitts 2005; Schalk 1998; Shepard 2006). That is, the transgression of the laws of war was necessary24 because it achieved a greater ideal: the creation of a new human bring (Asad 1997, 293-295). Like most classificatory schemes, the distinction between “civilized” and “barbarous” nations represented a form of power that fixed the attribute of each, and justified different standards of behaviour (Bourdieu 2010, 479).

Did these different standards of behaviour apply to the torture taboo? How did

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24 This was not universal, with some Europeans such as Fredrich Engels (1968, 158) condemning French actions in Algeria as a “barbarous system of warfare” and Karl Marx (1968a) condemning British military actions in China.
“civilized” states see their moral obligations towards the “barbarous” societies in relation to the practice of torture? The torture taboo represented a prohibition, akin to slavery, in what Mill (2006 [1859], 259) called “universal rules of morality between man and man.” Although the torture taboo formed part of the laws of war as I showed above, it existed above these rules as a universal moral law. Colonial powers had a duty to prohibit, prevent and punish taboo-violators as part of their “civilizing” duties (The Times 24 Nov. 1840, 3; The Times 8 June 1844, 8). In 1844 a Pasha in the Ottoman Empire tortured several suspects during an investigation relating to an assassination at Scala Nueva in Anatolia. The British ambassador, Sir Stratford Canning and the French Ambassador, M. Bouqueney, condemned the Pasha for “such barbarous practices” (The Times 8 June 1844, 8). A circular was then issued by the Ottoman authorities “to all governors, civil and military, of the empire” prohibiting torture and promising punishment for those who tortured in this particular instance (The Times 8 June 1844, 8).

A failure to stop the tortures, or the difficulty in persuading colonial subjects that torture was not necessary, often led to calls for colonial intervention to directly stop the practice (see The Times 21 Aug. 1837, 7; The Times 9 Sep. 1882, 6). On 9 September 1882, the British Foreign Office announced that Consul-General Malet had taken measures to prevent further torture occurring in Alexandria, Egypt. Malet stated “there is great difficulty in persuading the Arabs that thumbscrews are not necessary for the conducting of examinations, but, at any rate, the Khedive and his officers now know that the English refuse to tolerate barbarity” (The Times 9 Sep. 1882, 6).

The inability to realise torture was not necessary was reflective of the “barbarous” nature of the native. M. Hilaire Gay, a Genevan and former captain in the foreign police force wrote of a scene he witnessed in 1882 while in Egypt of “the punishment of the bastinado inflicted on three unfortunate Arabs” (The Times 29 July
1884, 8). He watched how several Arabs were punished by being whipped on the soles of their feet. Condemning it as a Medieval torture, Gay wrote, “I could not help shivering with horror at the sight of so much suffering” while his Arab companions “look[ed] unmoved on so cruel a sight” and “seemed for a moment rather the creations of a discarded imagination than being of flesh and blood” (The Times 29 July 1884, 8). According to this narrative, “Arabs” did not have the same sensibility to pain as “civilized” beings and had not yet “progressed” to seeing such pain as repugnant.

How do we explain why some forms of suffering such as torture were prohibited, but other forms of violence were not? As Asad (1997, 293-295) notes, it was not simply pain and suffering that was prohibited but the infliction of pain that violated what it meant to be a “civilized” human being. Asad (1997, 294-295) and Dirks (1997) have noted how the British prohibited hookswinging in colonial India, claiming it to be cruel. Hookswinging was a religious practice in India in honour of the god Mhatoba. To be “hook-swung” was a great honour. Metal hooks were inserted just above the swinger’s hips on their back. They were then hoisted and left to swing while being suspended by the two hooks (Kosambi 1967, 109-110). Despite the importance this practice had for the people, the colonial authorities prohibited it because it was “repugnant to the dictates of humanity” (Dirks 1997, 193). It was the role of the colonial power to prohibit uncivilized violence for the Arab because they could not do it themselves. Unlike in nineteenth century Europe where it was implied that states had the capacity and agency to prohibit torture themselves, no such agency was granted to barbarous societies. Colonial states had a duty to impose the taboo upon uncivilized societies.

I now turn to an investigation by the British authorities into allegations of torture in the Madras Presidency, colonial India (see Bhuwania 2009). The

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15 Rao (2001) has examined similar issues in his examination of torture in Bombay.
investigation exposed taboo violations by native Indian officers in revenue raising and policing duties. As we will see, not only did this Report selectively use evidence to deny European complicity in the tortures, but in doing so, it helped to (re)construct torture as a barbaric practice found in backward societies in need of European rule.

The Madras Report

The emergence of allegations of torture by the East India Company in the Madras Presidency, India, sparked an intense debate in British Parliament in 1854 (see UK Hansard 1854, 135: cc43-90). In response, on 9 September 1854 the British government commissioned the Report of the Commissioners for the Investigation of Alleged Cases of Torture in the Madras Presidency (Madras), which was submitted to the British House of Commons on 16 April 1855. At first, the Committee was to examine alleged cases of the use of torture to raise government revenue, but the investigation was then broadened on the 19 September to also examine torture by police to extract confessions (Madras 1855, 3). In a letter from H.C. Montgomery to the Commissioners of the investigation, it states the allegations of torture are “injurious to the character of the British Government” and should be denied if untrue, and if found to be true, efforts made to stop their practice (Madras 1855, 49).  

The Commission issued notifications in the Presidency asking individuals who had complaints of torture to report by 1 February 1855. The Commission registered 519 complainants and received 1,440 letters of complaints (Madras 1855, 4). The Commission reported that between 1806 and 1852 “no fewer than 10 circular orders”

16 Departments of the government, such as the Military Department and Collectors and Sub-Collectors, as well as the Court of Sudder Udawlut and the Board of Revenue were called upon to provide information about the tortures. Moreover, protection was to be afforded to torture victims to demonstrate that “the British Government does not in any shape or degree tolerate such atrocities, and will spare no effort to prevent them” (Madras 1855, 50).
had been issued by colonial authorities “on the subject of the practice of extorting confessions” (Madras 1855, 8). However, despite these Circulars, the Commission showed that torture by native officers was widespread within the Presidency. The Report cites witnesses to torture, ranging from missionaries, merchants, proprietors and “old” judicial authorities to show the tortures were not new (Madras 1855, 5-15). The Commission found that although the use of torture had declined in recent years, it was still prevalent, with some districts experiencing more torture than others (Madras 1855, 31). The extraction of revenue for the native officers’ own interests was most common and torturing for revenge was exceptional (Madras 1855, 34). Moreover, torture used in police cases was often more severe than the torture used for extracting revenue (Madras 1855, 32-33). The police employed the following techniques to gain confessions:

- twisting a rope tightly round the entire arm or leg so as to impede circulation;
- lifting up by the moustache; suspending by the arms while tied behind the back; searing with hot irons; placing scratching insects, such as the carpenter beetle, on the navel, scrotum, and other sensitive parts; dipping in wells and rivers, till the party is half suffocated; squeezing the testicles; beating with sticks; prevention of sleep; nipping the flesh with pincers; putting pepper or red chillies in the eyes, or introducing them into the private parts of men and women; these cruelties occasionally persevered in until death sooner or later ensues (Madras 1844, 34).

The investigations found that the judges were lenient in punishing penalties and that it was difficult for victims to obtain redress. Barriers to receiving justice included the long distances victims had to travel to make a complaint and the costs involved in such a travel; “the fear that their applications by letter, if permitted to reach head-quarters
unadultered by misinterpretation, will be returned with the ordinary endorsement of a reference to the tahsildars” (who are often involved in the torturers, see Madras 1855, 17-24); little or no action would be taken if complaints were made anyway; witnesses were often bribed; and victims feared if they reported their abuse they would be subjected to reprisals by native officers (Madras 1855, 37).

The Madras Report cast the problem of torture as a product of the so-called “habits of the people.” Ill-treatment in revenue collection had “in the course of centuries come to be looked upon as ‘mamool,’ customary, a thing of course, to be submitted to as an every day unavoidable necessity” (Madras 1855, 34-36). The tradition of violence meant that even if individuals had money to pay the revenue collector, they often did not do so unless force was applied:

‘I brought 14 rupees from my house,’ says a ryot, in a deposition referred to by Mr. Lushington, ‘but only paid six. I brought the said money to pay, but as no violence was used towards me, I did not do so. Had I been compelled, I would have paid them’ (Madras 1855, 36).

European officials were believed to have no knowledge of the torture. This was for several reasons. Firstly, because European officials had extensive duties and the difference in the “immense size of our collectorates, and the small number of Europeans employed” to administer the province made it hard to supervise lower level officials (Madras 1855, 37). This allowed the Commission to conclude that this explained why European officers knew so little about the widespread torture (Madras 1855, 11). And secondly, native officers tortured so as to leave no marks on the body. In addition, they would often delay the transfer of detainees so that any marks that were left were “obliterated” by the time the victim reached “European supervision” (Madras 1855, 11, 35). This was because the native officers knew what they were
doing was wrong and would not be tolerated by European officials (Madras 1855, 28-29). Therefore, the Commission stated there is “the certainty that no native would knowingly venture to have recourse to any such practice in the presence of a European, sets at rest any surprise at the very few cases in which any of our countrymen have personally witnessed the operation” (Madras 1855, 11).

In offering a solution to the prevalence of torture, the Commissioners suggested several technical adjustments to colonial regulations, including, among others, separating revenue and police duties, improving pay, and better organising the police force under the supervision of European officers (Madras 1855, 42). The Commission claimed that although they found common usage of torture, it was declining in severity and frequency (Madras 1855, 31). It was therefore the role of the European “to guard the natives against themselves, such as they are now” (Madras 1855, 47). The Report stated “the people at large” know that European officers detest these practices and that the people often turn to European officials for protection: “the whole cry of the people which has come up before us, is to save them from the cruelties of their fellow natives, not from the effects of unkindness or indifference on the part of the European officers of Government” (Madras 1855, 35). The Commission concluded by warning that the recommendations in the report must be acted upon or “the native population may be worse off than before” (Madras 1855, 47).

The response to the Report in the British Parliament was that action needed to be taken to prevent any further torture, and the Report’s recommendations implemented to protect the British character. The tortures were condemned as cruel to the victim and “degrading to [the] human nature” of those who engaged in torture (UK Hansard 1856, 141: c996). The Duke of Argyll brought attention to the fact the torture allegations in British India had received attention in Europe, and that Britain had been perceived as showing an indifference to the allegations. The Duke stated any
resolutions passed must deny this indifference and should not “convey the impression of complicity or silence on the part of the Government to foreign countries or to the people of this country” (UK Hansard 1856, 141: c976).

The overwhelming opinion within the British Parliament agreed with the Report in stating that the Madras government were not complicit in the tortures. The Madras government were irresponsible for its ignorance, but were not deemed to have encouraged or condoned the tortures (UK Hansard 1856, 140: cc1563-1573; UK Hansard 1856, 141: cc975-998). Lord Monteagle blamed the habits of the natives and the previous regime in India, stating Britain had “inherited these barbarous practices from barbarous times” (UK Hansard 1856, 141: c996). Members of Parliament invoked the recommendations of the report, suggesting a separation of police and revenue collecting powers and a revision of the taxation system was needed to stop the tortures (see UK Hansard 1856, 140: cc1563-1573; UK Hansard 1856, 141: cc377-384; UK Hansard 1856, 141: cc964-999).

This Report allowed the British to deny complicity in the torture allegations and uphold “British character.” The tension between exposure of torture and the presumed progressive and “civilizing” character of colonial rule was ameliorated by blaming the traditional practices of “barbarous” societies. Yet the investigation ignored European complicity of European officials in the use of torture. Alternative accounts suggest that even if some in the British Parliament were not aware of the tortures, the officials embedded in the colonial territory tolerated them. In an article published on 17 September 1857 in the New-York Daily Tribune, Karl Marx condemned the Madras Report. Marx (1968b, 164) argued “The universal existence of torture as a financial institution of British India is thus officially admitted, but the admission is made in such a manner as to shield the British government itself.” The British government blamed the “native” while the British “had always, however unsuccessfully, done their best to
prevent it” (Marx 1968b, 164). Marx cites the Madras Native Association (MNA) which had presented a petition to British parliament in January 1856 condemning the investigation for not investigating the broader revenue system responsible for the tortures or investigating what superior officers in the Presidency knew of the tortures. Marx also cited a petition from the Malabar Coast recalling the abuse indigenous populations received from East India Company officials (Marx 1968b, 166-167). This challenged the view that the natives saw the Europeans as their saviours. Marx concluded that the torture demonstrated the “real” conditions of British rule and such cruelty constituted grounds to expel the British from India (Marx 1968b, 167).

Moreover, there was evidence within the Report itself that contradicted its conclusions. The Report cited one statement by the Court of Directors, made on the 11 April 1826, arguing that torture was so prevalent that “I see no other mode of accounting for, than in the leniency with which such aberrations of public duty are noticed by their immediate superiors” (Madras 1855, 8). However, the Commission did not elaborate on, or acknowledge, the significance of this statement. In addition, the Earl of Albemarle, an exception in the British Parliament, questioned the notion that the European officers knew nothing about the tortures when witness accounts provided in the appendix of the Madras Report proved otherwise (UK Hansard 1856, 141: cc964-975). Captain A Boileau, a Civil Engineer of Nellore, stated “The idea of its [torture] being tacitly tolerated by the Government or its European officers is so far prevalent, that a belief is expressed that any complaint made of torture inflicted for the non-payment of kist would not be attended to” (Madras 1855, 89). While T.W Goodwyn, a Civil and Session Judge of Salem, told the Commission, “As far as I could ascertain or judge, the idea was prevalent among the people that such acts [of torture] were tacitly tolerated by Government or its European officers. If directed so to do, I can furnish some details which appear to me to support the above opinion” (Madras
The Madras Report does not show the weakness of the taboo but rather its strength. Although there was a difference between the rhetoric of colonial officers and practice, the flat-out denial of complicity in the tortures by the European colonial officers demonstrates that torture was not deemed acceptable behaviour for a “civilized” state. The European officers sought to reap the benefits of revenue raising from torture, yet at the same time, avoid any association with the practice. The Madras investigation helps us understand how torture was treated as a moral problem in colonial territories and the types of duties and obligations European states had to their subjects. Moreover, the denial of European complicity allowed the Report to reaffirm the belief that torture occurred in “barbarous” societies in need of European rule. The taboo was not just cheap talk; it defined identities and shaped and regulated relations between European and “barbarous” non-European societies.

The “Barbarians” within “Civilization”

The distinction between “civilized” Europeans and “uncivilized” non-Europeans came under challenge in the first half of the twentieth century with the rise of the fascist and communist dictatorships in Germany, Italy, Japan and the Soviet Union. Civilization could no longer be used to distinguish Europeans from non-Europeans as many “civilized” states entered the “uncivilized” world (Donnelly 1998, 14; Keene 2002, 123). European civilization, according to Arendt (1994, 302), had produced barbarians that were forcing people into conditions of savagery. The belief that torture existed as an aberration in Europe and as an ingrained practice in the non-European world was challenged as torture became a widespread practice used by these regimes to gain information, confessions, and to hold on to power. I now turn to the widespread use of
torture by the Soviet Union and Nazi Germany to show how the re-emergence of torture in Europe challenged assumptions about the international political and legal order and led to a fundamental rethinking of the normative foundations of international society.

As political theorists and historians have shown, the regimes in Nazi Germany and the Soviet Union were not so dissimilar (Arendt 1994; Gray 2007; Overy 2004). Both based their legitimacy on appealing to supranational laws of Nature or History to create new human beings. As Gray (2007) notes, this attempt to create a new human being was a completely modern project without historical precedent. The Soviet Union sought to liberate the laws of History through encouraging the development of a social environment to restrain unhealthy impulses (Overy 2004, 254). The Nazi movement, on the other hand, sought to ground politics in a form of social Darwinism that attempted to create a new kind of superior race (Overy 2004, 242). Drawing upon the Aryan myths found in the work of Gobineau (see Huxley 1939), the biological purity of the race became the key ingredient that determined the quality of the population, military strength, freedom and honour of a nation (Wagner 1936, 78). It was the role of the state to provide biological protection for the continuance of a healthy body politic (Wagner 1936, 73).

As Arendt (1994, 465) has argued, terror was employed to “stabilise” men by destroying human spontaneity and the desire for freedom, thereby liberating the forces of Nature or History. By treating individuals as merely means to a higher end, it made all forms of violence possible (Arendt 1994). Although the crimes of these regimes have been well explored by historians, what has received less attention is how despite everything being possible, not everything was permissible. There were some types of behaviour that could not be openly justified in international society, even in the name of national security or survival. As I show, the Soviet Union and Nazi Germany hid,
denied and lied about their use of torture. I argue that this went beyond material or strategic interests, and included moral concerns. What these examples show is that although the taboo was violated for state interests, it was not forgotten, and it continued to have an influence on state behaviour, even during times of crisis.

**The Soviet Union**

The Soviet Union employed torture in many periods since the revolution. Thurston (2000, 36) notes this included “the Civil War of 1918-1920, collectivization of the peasantry in the late 1920s, a campaign to collect gold in the early 1930s, and the Terror of the late 1930s.” The most widespread use of torture, and the example I would like to focus on, occurred during the 1937-1938 “Great Terror” (Overy 2004, 182). From autumn 1936 until June the following year, Stalin made preparations for a “final battle” against “class enemies” that had allegedly threatened Soviet rule since the 1920s (Overy 2004, 183-4). The targets included priests, Kulaks, former White Army soldiers, and criminals (Thurston 2000, 37). By July 1937, Stalin and the head of the NKVD, Nikolai Ezhov, began issuing mass arrests (Thurston 2000, 37).

Torture was regularly used to gain information and confessions from suspects. On 29 July 1936 the first official (and secret) order was given that authorised torture of “any method” (Conquest 1990, 121-122). In the subsequent year, although the exact date is unknown, Stalin drafted a further decree that authorised physical torture to gain confessions, and ordered members of the Politburo to sign it (Overy 2004, 184). A further memorandum authorising torture, which surfaced during the Kretinsky trial, was written by Frinovsky, the NKVD’s Deputy People’s Commissioner, which authorised beatings (Conquest 1990, 121).

Torture was used on a daily basis on arrested “enemies” during the Great
Terror (Thurston 2000, 37). The “swallow,” according to Conquest (1990, 121), “involved tying the hands and feet behind the back and hoisting the victim into the air.” Wet towels were wrapped around prisoners’ heads and then left to dry, causing immense pain (Conquest 1990, 125; Rejali 2007, 81). Positional tortures were also used. The stoika consisted of forced standing on tip-toe while leaning against a wall for hours (Conquest 1990, 121), while the vystoika involved prolonged standing. The vystoika caused the ankles to swell forming blisters, increasing the heart rate to the point where fainting became a possibility and the kidneys began to shut-down (Rejali 2007, 80).

Few prisoners could withstand torture (Overy 2004, 182). A Bolshevik recalls how only four out of 400 of his cell mates he met in prison did not confess under torture (Conquest 1990, 121). When prisoners did not confess hostages were used. Kossior, a prisoner, “was only broken when his sixteen-year-old daughter was brought to the interrogation room and raped in front of him” (Conquest 1990, 127).

However, by 1938, many Soviet officials within the Central Committee started to question these “excesses” of the Terror (Thurston 2000, 41; Overy 2004, 184). Of concern was that Soviet officers had fabricated cases and tortured innocent individuals (Thurston 2000, 41). By 1938, the doubts over the mass arrests led to a shift in policy that reduced arrests and strengthened “investigative and judicial practices” (Thurston 2000, 42). The head of the NKVD, Ezhov, was sacked and replaced with Lavrenti Beria in November 1938. However, torture continued to occur (Overy 2004, 184-185; Thurston 2000, 42). In 1939 Stalin signed a telegram addressed “to the committee secretaries of oblasts and krais, to the central committees of republic communist parties, to the people’s commissars for internal affairs and to the heads of NKVD organizations” (Khrushchev 1956, 50-51) authorising torture:
The Central Committee of the All-Union Communist Party (Bolsheviks) explains that the application of methods of physical pressure in NKVD practice has been permissible from 1937 on in accordance with permission of the Central Committee of the All-Union Communist Party (Bolsheviks).

…it is known that all bourgeois intelligence services use methods of physical coercion against the representatives of the socialist proletariat and that they use them in their most scandalous form. The question arises as to why the socialist intelligence service should be more humanitarian against the mad agents of the bourgeoisie, against the deadly enemies of the working class and the kolkhoz workers. The Central Committee of the All-Union Communist Party (Bolsheviks) considers that physical pressure should still be used obligatorily, as an exception applicable to known and obstinate enemies of the people, as a method both justifiable and appropriate (Khrushchev 1956, 51).

There are several things to note about this telegram. First, Stalin did not authorise a blanket approval of torture. Torture was to be used only in those instances where there was believed to be evidence of a crime (Thurston 2000, 42). Second, Stalin did not challenge the stigma that torture was prohibited or inhumane behaviour. And third, Stalin created a distance between himself and torture by arguing he did not initiate the violence, but was responding in kind. This removed notions that Stalin was authorising torture for personal pleasure or for terroristic violence, and placed the telegram in the realm of necessity, where he apparently had to authorise these practices in order to survive. Torture was deemed appropriate because it put Soviet forces on a level playing field in the class war against the bourgeoisie enemy. Authorising torture, then, was to allow for a “fair fight.”

In suggesting because Stalin did not authorise torture in all circumstances or that he was responding to the “bourgeoisie enemy,” I do not claim that Stalin’s actions
were humane or justified. Rather, my aim is to show that this telegram contains the workings of morality that shaped how Stalin authorised and justified torture. This is particularly important because Stalin was not seeking to legitimise his actions to Soviet citizens or an international audience, with this telegram only coming to light in Khrushchev’s 1956 speech at the 20th Congress of the CPSU (Khrushchev 1956).

Although torture was widely used in the Soviet Union, it was not deemed “civilized” or appropriate behaviour in wider Soviet society. As part of the end of the Terror, public trials took place in 1939-1940 that sought to prosecute Soviet security agents who had abused and tortured suspects (Overy 2004, 185; Thurston 2000, 42). In Moldovia, five NKVD agents were shot after confessing to using “illegal methods” (Thurston 2000, 42). The public trials demonstrated that it was now understood among the police that “‘he who tortures or has tortured the innocent’ is an enemy” (Thurston 2000, 42).

Moreover, Soviet officials were careful not to leave any marks of torture on victims who had to face “show trials.” This was so as to make it appear individuals voluntarily confessed to crimes (Rejali 2007, 79-80). Beatings were clean. They included kicks to the shins, slaps to the face, blows to the kidneys, and chokeholds (Rejali 2007, 80).17 Rejali (2007,79) argues, “Even some of those who were eventually subjected to torture had themselves previously dismissed rumors of torture as ‘highly unlikely,’ naively believing that torture was ‘incompatible with the principles of democracy so solemnly proclaimed a short while before, as well as with the ‘Stalinist solicitude for the human being’.”

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17 Other techniques used for show trials included relay interrogation, sleep deprivation, use of blinding lights, positional torture (such as forced standing) and positional devices (such as straitjackets). Victims were placed in cold or hot rooms, freezing baths, given salty food, and alcohol was withheld from alcoholics (Rejali 2007, 80-81).
Torture occurred in Nazi Germany from the beginning of the regime in 1933 until its collapse in 1945. Torture during the 1930s included whipping (often with wet whips that cut deeper into the skin, or with lead-filled whips), finger screws and calf clamps, exhaustion exercises, stress positions (such as forced standing outside “while wearing full work equipment and staring into the sun” (Rejali 2007, 97)), and beatings with the use of truncheons, rifle butts, and “sticks with rusty nails” (Rejali 2007, 96-97).

During World War II a decree was issued on the 12 June 1942 by Muller, the Gestapo Chief, authorising “third degree” methods, a euphemism for torture. It states if preliminary investigation indicates that a person holds information on “important matters, such as subversive activities,” third degree methods may be used (“though not for the purpose of extorting confessions of the prisoner’s own crimes”) (Nuremberg 1947, 1: 233). The order states

…Third degree may, under this supposition, only be employed against Communists, Marxists, Jehovah’s Witnesses, saboteurs, terrorists, members of resistance movements, parachute agents, anti-social elements, Polish or Soviet Russian loafers or tramps; in all other cases my permission must first be obtained…Third degree can, according to circumstances, consist amongst other methods of very simple diet (bread and water), hard bunk, dark cell, deprivation of sleep, exhaustive drilling, also in flogging (for more than twenty strokes a doctor must be consulted) (Nuremberg 1947, 1: 233).

However, as the Nuremberg Trials showed, many more torture methods were used during the war. M. Labussiere, captain of the French resistance Army, was tortured by the Nazis for information concerning meeting places and fellow resistance fighters (Nuremberg 1947, 6: 172). Labussiere provided a list of torture techniques used by the
Nazis in France: the lash, which involved whipping; “the bath,” whereby the victim’s head was submerged in water until s/he became asphyxiated. The victim was then revived and the process repeated; electric torture; crushing testicles; suspension by the arms which often resulted in dislocation; and burning with a soldering lamp or matches (Nuremberg 1947, 6: 173).

On the 12 March 1942, the Swedish newspaper *Västmanlands Länstidning* devoted two pages to accounts of Gestapo torture in Norwegian prisons (*The Times* 18 Mar. 1942, 3). Although the paper was “seized by the Swedish Minister of Justice for fear of giving offence to Germany,” a copy reached *The Times*. The article provides seven witness accounts of torture in prisons, including beatings with steel batons covered in rubber. In April 1944, more accounts had emerged of torture in Norway. “The most cruel of the instruments, however, is a ring fitted round the head, with a rubber tube inside, which can be inflated and which stops the flow of blood to the head. The effect is reported to be terrible” (*The Times* 11 Apr. 1944, 3).

Similar to torture in the Soviet Union, the Nazis tortured in secret. Gestapo-files on interrogation sessions contained no mention of torture methods, or that torture was used at all (Gellately 1991, 130). There was an absolute prohibition on talking about the torture, genocide, and non-consensual medical experiments occurring in the concentration camps during the war (Nuremberg 1947, 6: 288). The Nazi’s also went to lengths to demonstrate the concentration camps were not terroristic. On the “Day of the German Police” in 1940, German forces were lauded for bringing a “clear legal order” to Poland and introducing humane confinement practices in prisons (Gellately 2001, 44-45). Torture allegations were denied (Gellately 2001, 44). Propaganda was used to promote the camps as “civilized” institutions that embodied discipline,

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18 Other accounts of Nazi torture during the war and the techniques used can be found in Rejali (2007, 97-104). For *The Times* reports of torture by Nazi Germany during the war, see *The Times* 22 Jan. 1940, 8; *The Times*, 3 Nov. 1941, 4; *The Times*, 7 Feb. 1942, 3; *The Times*, 11 Apr. 1944, 3; *The Times* 6 Sep. 1944, 3; *The Times*, 14 Oct.1944, 3.
education and hard work (Gellately 2001, 55-57). In a visit to Oranienburg, a journalist from a Nazi newspaper praised the regime for the virtuous treatment of detainees. He quotes a prisoner who said the prison guards “were upstanding guys. We thought you would deal mercilessly with us. But you treated us, your enemies, as human beings. And we thank you!” (Gellately 2001, 55).

In addition to denying torture and carrying it out in secret, the Nazis condemned others for torturing. A German citizen, Bruno Weigel, was arrested on 9 November 1936 and held in a Prague prison by Czechoslovakian authorities. It was alleged that on 11-12 November Weigel had “been beaten with rubber truncheons, struck in the face with fists, forced to hold heavy weights in unnatural postures, and beaten on the soles of his feet, to which electric shocks were administered” (The Times 19 June 1937, 16). The Czech authorities promised his release if Weigel would undertake political work for the interrogators, which Weigel refused to do. He was later released on 20 May 1937. The Times reported

An official German protest, it is stated here, was made some time ago in Prague, and the matter is still pending. The Deutsche Allgemeine Zeitung says that immediate satisfaction must be given, and that ‘in Prague it will be realized that such an infamous deed cannot be cleared up by a mere diplomatic apology.’ Other newspapers express in similar terms their astonished indignation that such things should be possible in Europe to-day and hint, like the D.A.Z., that Germany will want more than an expression of regret (The Times 19 June 1937, 16).
At the same time that the Nazi’s were passing laws permitting sterilisation\(^{19}\) and calling for the exclusion and elimination of Jews from the “German body,”\(^ {20}\) torture continued to remain absolutely prohibited. This German condemnation of the torture of Weigel would not have had weight if the Nazi’s had been open about their torture, or had attempted to publicly challenge the absolute prohibition.

The reason for the secrecy was astutely observed by The Howard League for Penal Reform in a 1937 report dealing with treatment of prisoners during the trial process in Europe. It stated there is “widespread and increasing danger of our times, the use of torture to extort confessions or evidence” (*The Times* 22 Sep. 1937, 5). The Report argued,

The international standing of a country inevitably suffers when its justice is known to be tainted. Where methods of torture are applied in connexion with political offences a new element of extreme bitterness is added to the struggle of parties, which tends to poison international relations also. If, indeed, any proof were needed that the use of torture, physical or mental, to secure evidence, is an incontrovertible evil, it could be found in the fact that no

\(^{19}\) The Nazi’s passed the “Sterilisation law” on 14 July 1933. This law permitted “forcible sterilisation of anyone suffering from ‘genetically determined’ illnesses” (Proctor 1992, 20-21). These included “feeblemindedness, schizophrenia, manic depression, epilepsy, Huntington’s chorea, genetic blindness, deafness, and ‘severe alcholism’” (Proctor 1992, 20-21). In October 1939, Hitler declared that doctors could “grant a ‘mercy death’ (*Gnadentod*) to patients judged ‘incurably sick by medical examination’” (Proctor 1992, 23). Two years later in August 1941, in excess of 70,000 patients had been killed (Proctor 1992, 23-24).

\(^{20}\) On 14 July 1933, the “for the Annulment of Naturalization and the Stripping of German Citizenship” law was published. Jews that were naturalised in Germany were stripped of this status, and German enemies living abroad were “denaturalized” (Overy 2004, 574). On 15 September 1935, two more laws were passed: “for the Protection of German Blood and German Honour” and the “Reich Citizenship Law.” These laws sought to prohibit marriage between Jews and Germans and restricted German citizenship to individuals with “German or related blood” (Overy 2004, 575).
The Howard League expressed its desire for the League of Nations to openly call for an end to torture. It further stated, “By a polite fiction it is customary to speak as though its [torture] use were a stain upon the honour of past ages from which our own was free. Yet no one who examines the evidence can doubt that, actually, the use of torture is more widespread to-day that it was half a century ago; the evil is not extinct but is growing” (The Times 22 Sep. 1937, 5). Although the violations of the taboo harmed its constraining function, the secrecy and denial by states does not challenge the torture prohibition but reaffirms it. Regardless of what threatened state security, the refusal of states to admit to torture demonstrates the potent stigma attached to torture. The behaviour of the Nazi and Soviet regimes reveals that even during violations, the taboo continued to influence state behaviour.

Reconstructing the Normative Fabric of International Society

What impact did these violations have on the normative framework of international society? How did other actors respond to these violations? We have seen the secrecy and hiding of torture by the totalitarian regimes demonstrated that torture continued to be condemned (and that these denials actually reaffirmed the taboo). However, the widespread violations also created an environment in which to challenge existing norms and values and make the taboo more robust. That is, these violations helped in the reconstruction and development of the torture taboo. It did so in two ways.

First, torture was linked to fascist aggression and inhumanity in Allied war propaganda. During World War II, Stalin condemned Nazi Germany for torturing
Soviet prisoners. Calling German army actions a form of “medieval brutality” (Stalin 1942, 43), Stalin claimed in a speech at the celebration meeting of Moscow Soviet of Working People’s Deputies and Moscow Party Organisations on 6 November, 1942, “Let these butchers know that they will not escape responsibility for their crimes or elude the avenging hand of the tormented nations” (Stalin 1942, 45). In other war speeches, Stalin condemned Hitler for violating “democratic liberties” and praised the Red Army for its respect for human rights (Stalin 1942, 27). Although this statement is hypocritical in that the Soviet Union tortured as well, the fact Stalin used the example of torture to condemn the Nazi forces further demonstrates the powerful stigma the taboo had to undermine state legitimacy.

The widespread use of torture by the Nazis was also used in US war propaganda. Although Roosevelt saw Nazism as a “localised menace” after the Nazis came to power in 1933 (Adler 1957, 230), by 1937 Roosevelt began to see Nazism as a threat to American security. However, Roosevelt came up against an isolationist Congress that did not want to get involved in European conflicts. In 1935, Senator Gerald Nye published a report which blamed America’s involvement in World War I on the private interests of armament manufacturers (Donovan 1951, 301). Between 1935 and 1937, Congress reached “The depth of ‘isolationism’” (Klingberg 1952, 248) by passing three Neutrality Acts that imposed arms embargos and prohibited loans and financial assistance to all parties in war (Donovan 1951, 301-2; Kissinger 1994, 378). The isolationist movement sought to concentrate on strengthening democracy at home, rather than engage in European “power politics” which, apparently, inevitably ended in war (Donovan 1951, 300). It was argued that the Atlantic and Pacific oceans protected the US from the fascist threat, and that although the human rights violations were horrible, it was not the role of the US to act as the world’s policeman (Adler 1957, 253; Kissinger 1994, 379-385).
Roosevelt used human rights discourse to help break the hold of isolationism in the US Congress and gain domestic support for war (Kissinger 1994, 390). The first major public address Roosevelt used to challenge isolationism was the “Quarantine Speech” delivered in Chicago on 5 October, 1937. Roosevelt (1937) warned that America was not immune from fascism, which threatened “a breakdown of all international order and law.” Roosevelt (1937) declared the international lawlessness had become an “epidemic” that needed to be stopped: “When an epidemic of physical disease starts to spread, the community approves and joins in a quarantine of the patients in order to protect the health of the community against the spread of the disease.” A solution to the fascist threat was to strengthen human rights. Roosevelt (1937) argued that one of the “causes” of the epidemic was “Nations claiming freedom for themselves [and] deny[ing] it to others.” The interdependence of the modern world meant that upholding moral principles and human rights was the solution to long-term international peace and security: “There can be no stability or peace either within nations or between nations except under laws and moral standards adhered to by all” (Roosevelt 1937). The world consisted of a common humanity, and security was linked to the freedom of all, not just to the freedom of a few.

In January 1941, Roosevelt (1941) declared his four freedoms (freedom of speech, freedom of religion, freedom from want, and freedom from fear) in the State of the Union address and the importance upholding human rights has for international peace and order. On 27 May 1941, Roosevelt again appealed to the fascist threat in a radio address (Kissinger 1994, 390), and in August of that year, Roosevelt and Churchill signed the Atlantic Charter on a cruiser “off the Newfoundland coast of Placentia Bay” (Lauren 1998, 142). This document drew upon Roosevelt’s Four Freedoms to declare “common principles in the national policies of their respective countries on which they base their hopes for a better future for the world” (Atlantic
The Atlantic Charter made clear that human rights violations were no longer just of concern to the violating state, but to all states in international society.

Although torture had been deemed an affront to a “common humanity” throughout the nineteenth century, never before had torture, and other human rights violations, been seen as a threat to international peace and security. Even during the war, administration officials continued to promote the link between human rights and a just world order (see Welles 1943). Despite the fact Roosevelt’s interests and condemnation of human rights violations was instrumental and selective (Stalin’s atrocities were not deemed a threat to international peace), Allied war propaganda generated an important discursive reconstruction of torture’s danger behaviour. In the nineteenth century, violating the taboo hurt the violating state only. The association of fascist expansionism with human rights violations during World War II gave the torture taboo a powerful contagion effect. Torture not only undermined efforts by international society to create more humane social bonds by prohibiting unnecessary suffering, but torture had become associated with “barbaric,” aggressive states that threaten the wellbeing and security of others.

The second major effect Nazi taboo violations had on the normative structure of international society was that it provided an environment to challenge and replace the existing normative order. Many state leaders and war pamphleteers saw the continued dominance of nationalism as the primary hurdle to creating a more just world order. The 1919 Peace Settlement and the minorities’ rights system had sought to base the source of freedom and justice in international society on the self-determination of the nation (see Buell 1926; Eisenmann 1926; Harris 1926; Kunz 1954; Rappard 1926). However, nationalism now had to be removed to destroy Nazism (Angell 1940, 61). Nationalism encouraged fear and insecurity among nation-states (Laski 1942, 151) and it was this fear and insecurity that had brought about
untold harm and suffering, such as torture (Russell 1942, 235-236).

In a powerful critique of world order and nationalism in 1945, E.H. Carr argued the 1919 European settlement that justified international order and justice upon the rights of nations and not individuals had ascribed a historical product (the state) with natural rights, something only the individual possesses (Carr 1945, 39). This became difficult to sustain, especially when the state was seen as a threat to individual well-being (Carr 1945, 46). A new world order must be based on the individual, not on national allegiances (Carr 1945, 44). The world was seen to have become increasingly interdependent and the world needed a unifying moral foundation (Acland 1940; Angell 1940; Morgenthau 1948; Zimmern 1939) not the divisive one encouraged by nationalism. Old forms of protection of the individual from harm had failed, and an international human rights system was seen as an alternative that could offer that protection (Benes 1942, 239; see also Benes 1944; Laski 1940; Mazower 2004, 387-88; Schechtman 1951, 5).

Human rights did not just concern attempts to better regulate states: it was an opportunity to allow individuals to achieve their full potential and generate more humane social bonds between one another. Maritain (1943, 2, 65, 73) argued that civilization should be founded in respect for human dignity that treats individuals as ends in themselves, thereby placing the individual above and beyond the rights of sovereign states. Invoking arguments of the eighteenth century, scholars such as Bernstein and Dewey argued the notion that in every human being is innate goodness, freedom and the “potentiality for progress” (Bernstein 1942, 49; Dewey 1942, 76). This universalism and the attempt to remove superficial boundaries between human beings also provided an opportunity for these pamphleteers to challenge colonial rule. Like nationalism, divisions between people and races was not only unsustainable, but they fixed hierarchical relations and limited human possibilities (Du Bois 1943, 732;
Yet human rights were also intended to transform individuals into rational and more tolerant beings. Invoking arguments from Voltaire and J.S. Mill, Norman Angell argued that human rights could help “cultivate” individuals into becoming more tolerant of one another and contribute to “the intellectual and moral health of a community” (Angell 1940, 72-73). Angell argued that human beings are capable of being rational, but often succumb to “folly” and vicious interests that “thrust man back into barbarism” and threaten civilization (Angell 1940, 72, 78, 124). Angell argued that through freedom of discussion, people can become tolerant of one another by hearing opposing opinions and viewpoints. In addition, human rights could also better protect one’s interests by preventing the encroachment of tyranny (Angell 1940, 72-74).

This shift from the rights of the nation to the individual in international society represented an important development in the reconstruction of the torture taboo. As I will explain in more detail in the next chapter, the Nazi violations provided an opportunity to challenge the idea that the interests and rights of the nation override the rights of the individual to be protected from unnecessary harm. By constructing human rights as transcendent and timeless, it invoked the sense of a global community by focusing on what all human beings have in common; human dignity, innate goodness and the potential for progress. Yet it also demonstrated common vulnerabilities. To violate human rights, such as the torture taboo, was to harm that part of the human being (dignity and innate goodness) that we all share. This was to lay the groundwork for a shift (explored in Chapters 3 and 4) in the meaning of torture. Torture did not just threaten a regression of society to a previous age; it became destructive by destroying what it meant to be human. Torture destroys our innate potential and capacity to experience and enjoy the good life.
Conclusion

By the first half of the twentieth century, torture continued to be seen as a particularly cruel form of pain and suffering representative of an “uncivilized” form of violence. The advancement of the international laws of war and the expansion of European international society into the non-European world in the nineteenth century strengthened the taboo. Torture became associated with an attack on the defenceless during wartime by targeting prisoners after the fighting had ended. In addition, the expansion of European colonialism reinforced torture as a backward and savage practice. “Inferior” and “uncivilized” societies had not yet (apparently) developed the sensibilities to unnecessary and superfluous suffering; it was therefore the role of the European to intervene in these societies to civilize the wretched and prohibit cruel punishments.

One notices a shift in the potency of the discourse concerning torture as compared to Beccaria’s treatise. For Beccaria, torture was cruel because it was useless, irrational and backward. Although some of these stigmas continued into the nineteenth and twentieth century, the taboo became more robust as torture was increasingly condemned as cruel behaviour in and of itself. It was no longer necessary to prove torture was unnecessary and useless; this much was taken for granted. Torture became closed off and the justification for its prohibition circular: torture was cruel because it was torture. Moreover, the danger from violations had become more threatening. To transgress the prohibition was to bring a fear of regression and a return to more savage forms of human relations and forms of punishment.

This chapter has also shown that the most profound reconstruction of the taboo since torture was abolished in the eighteenth century was in response to twentieth century’s most widespread and systematic examples of inhumanity. There were
concerns in Europe and among Allied countries that the widespread use of torture and commission of other crimes by the Nazis during World War II threatened a regression of civilization. Torture untied social bonds, broke them down, and threatened to setback progress that had been made to abolish unnecessary harm in world politics. For the first time, torture was deemed to threaten the security of others as it became grafted onto fascist aggression. As I show in more detail in the next chapter, the Nazi violations provided an opportunity to strengthen the taboo by embedding it in an international system of human rights.

Moreover, I have argued that taboo violations can offer a site to study the strength of the taboo rather than its weakness. This is not to deny that violations harmed the constraining function of the taboo; rather, it has intended to show that the prohibition against torture continues to influence states during violations by forcing them to hide, deny and lie about their use of torture. States engage in this behaviour, even during times of security crises, in order to avoid (to paraphrase the Howard League) damage to their standing in international society. What this demonstrates is that when states violate the taboo, they know what they are doing is wrong, and know the wider community will not accept their actions. Despite the fact security interests of totalitarian regimes took precedence over the prohibition to torture, the taboo was not forgotten; it continued to influence state behaviour.

It may be useful to heed E.H. Carr’s advice: “It is noteworthy that the attempt to deny the relevance of ethical standards to international relations has been made almost exclusively by the philosopher, not by the statesman or the man [or woman] in the street” (Carr 2001, 141). The argument has been that taboo violations offer a site in which to examine the strength of the taboo. The realist may scoff at such an argument, as it demonstrates that violence is constant in world politics, and the hypocrisy shown by torturing states is further proof of the meaninglessness of morality during times of
crisis. Yet to stop analysis at transgressions is to miss important and complex workings of norms. State behaviour is not just driven by material and strategic interests. I do not disagree with the realist argument that states will often inflict great harm on others if they see it as necessary to protect their security. However, this is not the whole story. States face pressure to conform to morally acceptable behaviour. It was the taboo that shaped the duties and behaviour between European and “uncivilized” non-European societies. And it was the taboo that not only helped the Allied forces undermine the Nazi efforts through its promotion of human rights, but forced the Nazis into denying, hiding and lying about their use of torture. The taboo was not forgotten during violations, but continued to matter.
Thus far in this thesis I have sought to explain how torture came to be taboo and how even during norm violations, the taboo continues to have a powerful influence over states. Even in the face of violations, Nazi Germany and the Soviet Union denied their use of torture and carried it out in secret. This went beyond material or strategic explanations alone, with both leaders publicly acknowledging the cruelty of torture and its moral prohibition in international society.

This chapter builds upon the previous chapters by showing that not only did the taboo’s stigma continue to have strength during World War II, but the widespread Nazi atrocities subsequently helped to reaffirm and strengthen the taboo in international society. I do not seek to deny that the widespread violations during World War II undermined the constraining function of the taboo. Rather, I want to show that despite these violations, torture continued to be condemned absolutely and actions were taken to further strengthen its prohibition in both humanitarian law and international human rights law. This paradoxical argument fits in well with a genealogical analysis that emphasises the role of historical contingency and fortuitous events. But what normative shifts occurred that resulted in the taboo being strengthened? This chapter
examines two key events to demonstrate my argument: The Nuremburg Trials and the drafting of the Universal Declaration of Human Rights.

The victory of the Allied forces in World War II resulted in a series of trials that sought to prosecute Nazi and Japanese war criminals. The International Military Tribunal of the Far East was carried out under the Special Proclamation of the Supreme Commander of the Allied Powers, General Douglas McArthur, which was issued on 19 January 1946. Although this was essentially an American trial of Japanese war leaders, the Nuremburg Trials, carried out between 14 November 1945 and 1 October 1946, were based on the international agreement known as the London Agreement of 8 August 1945. Because the Tribunal in the Far East was based on the Nuremburg principles, this chapter will focus on the Nuremburg Tribunals.

The prosecution team at Nuremburg consisted of the United States, France, the United Kingdom and the Soviet Union. The Nuremburg trials served to punish past wrongs (Finch 1947, 20; Nuremburg 1947, 2: 155) and act as a “guide-post for the further development of the law of nations” (Ehard 1949, 244). I focus on two sets of Nuremburg trials in this chapter. The first set of trials, between 1945 and 1946, prosecuted Nazi war officials. The second set of trials took place between October 1946 and April 1949 and is commonly known as the “Medical Cases.” The Medical Cases prosecuted Nazi physicians that experimented on concentration camp detainees without their consent during the war. In the first section of this chapter, I examine how the prosecution of the medical experiments helped to consolidate the absolute prohibition against torture by showing how state necessity and survival does not override the right of the individual to be free from torture. This reaffirmation of the primacy of the individual means that states have no justification for torture, even in the face of threats to state survival.

The Nuremburg Trials also established the legal concept of “crimes against
humanity,” which prohibited absolutely the use of torture (among other crimes) during wartime. As I discuss below, although this was not the first time the international community had condemned another state for crimes against humanity, I argue the legalisation of this term in international law contributed to the genealogical development of the torture taboo in two ways. First, in making crimes against humanity an “accessory” to war crimes and crimes against the peace (the two other major crimes tried at Nuremburg), it further associated torture with contagion behaviour and reinforced the idea that torture posed a danger to international peace and security. And second, crimes against humanity associated certain crimes such as torture with acts that destroy the human being and what it means to be human.

Furthermore, the Nuremburg Trials contributed to strengthening the torture taboo by prosecuting the individual offender and not the state (Wright 1947, 46). As Lauterpacht noted in 1944, “twenty-five or thirty years ago every respectable writer on international law had little hesitation in stressing emphatically the view that States only, and no one else, were subjects of international law” (Idelson et al 1944, 66). Soldiers and officials found guilty of committing crimes against humanity could not escape punishment. Article 7 of the Nuremburg Charter stated that superior positions would not free soldiers from punishment or mitigation from crimes, while Article 8 stated that superior orders would not free the offender from responsibility, but mitigation may be considered (Nuremburg 1947, 1: 12). These articles helped to work on the absolute prohibition of torture and provide it with a sacredness that needed protecting.

The second half of this chapter examines the drafting of the Universal Declaration of Human Rights. An examination of the drafting process represents an important genealogical shift in not only the torture taboo, but how we understand the foundations of human dignity. By fortuitous events, the drafters came to agreement
that human rights were no longer to be justified by God or natural law, but that human
rights were innate within every human being. As I show in later chapters, this in
integral in understanding the concept of “modern” torture. Yet the Universal
Declaration was also a statement that individual human rights were above and beyond
the rights of territorial sovereignty. The Declaration was not just a response to Nazi
atrocities but an attempt to replace the nationalist system that had dominated European
politics and was blamed for much of the violence and rise of totalitarian movements. In
doing so, the Universal Declaration reaffirmed, alongside the Nuremburg Trials, the
prohibition of torture as absolute. It could be argued that without the Nazi atrocities
and untold violence of World War II, the revulsion from Nazi torture would not have
given the international community the opportunity to strengthen the torture taboo.

The Medical Cases

Between October 1946 and April 1949 twelve Nuremburg Trials took place concerning
the medical experiments carried out by Nazi physicians during World War II. Held
under Allied Control Council Law No. 10, 23 defendants were tried. These defendants
were either physicians or officials concerned with the administration and authorisation
of the medical experiments. Fifteen different types of experiments were carried out on
concentration camp detainees without their consent at various camps, including at
Dachau, Sachsenhausen, Natzweiler, Ravensbrueck, Buchenwald, and Auschwitz. The
experiments were concerned with solving German battlefield problems. They
comprised of discovering medical cures to save German soldiers’ lives and developing
better means to kill the enemy (Nuernberg 1946-1949, 1: 37-38).

In the spring and summer of 1942, high-altitude experiments were carried out
at Dachau to determine the effects high-altitudes had on German fighter pilots.
Detainees were subjected to simulated heights of 12,000 to 20,000 meters. The Nuremburg prosecution quote a passage from a series of experimental notes taken by a Nazi physician, documenting how the detainee subjected to this experiment struggled to breathe, eventually lost consciousness, and died as a result (Nuernberg 1946-1949, 1: 40-41, 92-93). In other experiments, physicians sought to develop ways in which to rewarm German pilots who had parachuted into the North Sea. As part of the experiment, inmates were made to stand in “freezing weather from 9 to 14 hours” or were placed in an iced water tank “for 3 hours at a time” (Nuernberg 1946-1949 1: 42).

In typhus and malaria experiments, detainees were injected with these diseases in an attempt to find cures for both diseases which were, at the time, harming German soldiers in Russia (Nuernberg 1946-1949, 1: 43-44, 51). In a series of mustard gas experiments, the Nuremburg prosecution recalls the findings from a 1939 report that described how during the experiments, “wounds were inflicted on both arms of the human guinea pigs and then infected, and the report states: ‘The arms in most of the cases are badly swollen and pains are enormous’” (Nuernberg 1946-1949, 1: 44). As part of other experiments, Gypsies were forced to drink sea water to find a means to make sea water drinkable for shipwrecked Navy personnel (Nuernberg 1946-1949, 1: 47); new methods of sterilisation were sought after as surgical sterilisation had become too expensive; and Russian prisoners of war were used as guinea pigs for poisons the Germans wanted to use against the Allied forces in the war (Nuernberg 1946-1949, 1: 48, 52).

The sulfanilamide experiments were condemned by the prosecution as perhaps the most gruesome experiments carried out throughout the war. The experiments were to test the therapeutic efficacy of sulfanilamide on German war wounds and gas gangrene. The experiments were brought about by the losses of German troops on the Moscow Front during the winter of 1941-1942. The large distances, poor traffic
conditions and climate posed problems for treatment of wound infections and the experiments were intended to determine whether soldiers should be treated surgically on the front lines, or treated with sulfanilamide and then transferred back to the hospital base for proper treatment (Nuernberg 1946-1949, 1: 356). To re-create battle injuries of German soldiers, incisions were made on inmates’ legs, and then a bacterial culture, wood fragments or glass pieces were inserted into the wound to create infection. When the wounds became infected, the victims were treated with sulfanilamide. Grawitz, the head of the SS Medical Service, visited Ravensbrueck and ordered the experiments be more severe to better simulate battle conditions (Nuernberg 1946-1949, 1: 45). Physicians created bullet wounds on victims and tied off the blood circulation at either end of the wound to catalyse infection. After the gangrene culture was placed in the wounds and infection resulted, some of the victims were treated with sulfanilamide, while others were not treated at all to compare the results of non-treatment (Nuernberg 1946-1949, 1: 45).

At the heart of the prosecution’s case was that the Nazi medical experiments did not have the consent of the subject and therefore constituted a crime against humanity. The prosecution stated, “It is the most fundamental tenet of medical ethics and human decency that the subjects volunteer for the experiment after being informed of its nature and hazards. This is a clear dividing line between the criminal and what may be noncriminal” (Nuernberg 1946-1949, 1: 980). Telford Taylor, the US prosecutor, outlined the purpose of prosecuting these crimes. Taylor argued in his opening statement, “it is far more important that these incredible events be established by clear and public proof, so that no one can ever doubt that they were fact and not fable; and that this Court, as the agent of the United States and as the voice of humanity, stamp these acts, and the ideas which engendered them, as barbarous and criminal” (Nuernberg 1946-1949, 1: 27).
Yet the Medical Cases were not merely retributive; the trials sought to punish these crimes to prevent them from occurring again in the future. Taylor warned that the ideas that led to these atrocities had not yet died. Invoking Justice Jackson’s opening statement at the Nuremberg war crimes Tribunal, Taylor reiterated that these crimes must be exposed and condemned because these “wrongs…have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored because it cannot survive their being repeated” (Nuernberg 1946-1949, 1: 28).

Undermining the dignity of individuals by subjecting them to medical experiments without their consent was not only inhumane, but dangerous. The experiments degraded the physicians and posed a threat to others (Nuernberg 1946-1949, 1: 39). Human dignity and consent must be upheld, even at the expense of protecting society from danger. In the cross examination of Dr. Andrew C. Ivy, the prosecution’s expert witness, Dr. Servatius, the Defence Council for Karl Brandt, posed a moral problem to Ivy:

Witness, take the following case. You are in a city in which the plague is raging. You, as a doctor, have a drug that you could use to combat the plague. However, you must test it on somebody. The commander, or let us say the major of the city, comes to you and says, ‘Here is a criminal condemned to death. Save us by carrying out the experiment on this man.’ Would you refuse to do so, or would you do it? (Nuernberg 1946-1949, 2: 42).

This moral problem was in the context of one of the defence arguments that because many of the concentration camp detainees were sentenced to death anyway, their bodies may as well be put to good use for the benefit of society. Ivy responded that he would not carry out the experiment because he did not believe these actions were morally justified (Nuernberg 1946-1949, 2: 42). Medical ethics should be based on
long-term considerations of “doing good” for society because if these principles are undermined for short-term considerations, then it undermines public faith in the medical profession and causes public outrage (Nuernberg 1946-1949, 2: 42). This means, then, that for the physician, one cannot kill a few in order to save the many (Nuernberg 1946-1949, 2: 43). However, Ivy made a distinction between the doctor and the politician, stating that although he as a doctor would not follow the order to subject the prisoner to experimentation, it is permissible for the politician to give the order, even if the doctor does not abide by the order and martyrs him/ herself as a result (Nuernberg 1946-1949, 2: 43-44).

In its final ruling, the Tribunal found “human experiments under such conditions are contrary to ‘the principles of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity, and from the dictates of public conscience’” (Nuernberg 1946-1949, 2: 183). The Tribunal continued, stating, “In every one of the experiments the subjects experienced extreme pain or torture, and in most of them they suffered permanent injury, mutilation, or death, either as a direct result of the experiments or because of lack of adequate follow-up care” (Nuernberg 1946-1949, 2: 183). 16 physicians were found guilty of war crimes and crimes against humanity, and 7 physicians were sentenced to death (Grodin 1992, 137). The Tribunal established what became known as the Nuremberg Code, a set of principles to regulate future human medical experiments. This Code is intended to help identify transgressions and protect the individual from dangerous experiments and it continues to have a powerful influence on medical ethics today (see Annas and Grodin 1992). The Code contains ten principles:

1. The voluntary consent of the human subject is absolutely essential.

2. The experiment should be such as to yield fruitful results for the good of society, unprocurable by other methods or means of study, and not random
and unnecessary in nature.

3. The experiment should be so designed and based on the results of animal experimentation and a knowledge of the natural history of the disease or other problem under study that the anticipated results will justify the performance of the experiment.

4. The experiment should be so conducted as to avoid all unnecessary physical and mental suffering and injury.

5. No experiment should be conducted where there is an a priori reason to believe that death or disabling injury will occur; except, perhaps, in those experiments where the experimental physicians also serve as subjects.

6. The degree of risk to be taken should never exceed that determined by the humanitarian importance of the problem to be solved by the experiment.

7. Proper preparations should be made and adequate facilities provided to protect the experimental subject against even remote possibilities of injury, disability, or death.

8. The experiment should be conducted only by scientifically qualified persons. The highest degree of skill and care should be required through all stages of the experiment of those who conduct or engage in the experiment.

9. During the course of the experiment the human subject should be at liberty to bring the experiment to an end if he has reached the physical or mental state where continuation of the experiment seems to him to be impossible.

10. During the course of the experiment the scientist in charge must be prepared to terminate the experiment at any stage, if he has probably cause to believe, in the exercise of the good faith, superior skill and careful judgement required of him that a continuation of the experiment is likely to result in
injury, disability, or death to the experimental subject (Nuernberg 1946-1949, 2: 181-182).

The Code establishes a set of patient rights and physician obligations regarding human experimentation. The first Article establishes that voluntary consent is “absolutely essential” for medical experiments. The Tribunal pays attention to the quality of voluntary consent:

This means that the person involved should have legal capacity to give consent; should be so situated as to be able to exercise free power of choice, without the intervention of any element of force, fraud, deceit, duress, over-reaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him to make an understanding and enlightened decision. This latter element requires that before the acceptance of an affirmative decision by the experimental subject there should be made known to him the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonably to be expected; and the effects upon his health or person which may possibly come from his participation in the experiment (Nuernberg 1946-1949, 2: 181-182).

Articles 2 and 6 state medical experiments must be “good” for society (however, the Tribunal does not define what constitutes “good”). Article 6 also outlines the level of

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21 The Nuremburg Code was not the first set of regulations on medical ethics that outlined the importance of informed consent. In 1900, a directive was issued by the Prussian minister for religious, educational and medical affairs to hospitals and clinics stating that the “unambiguous consent” of patients was needed for “all medical interventions other than for diagnosis, healing, and immunisation” (Vollmann and Winau 1996, 1446). In addition, in 1931 the German Reich Minister of the Interior issued regulations for human experimentation that included the need for informed consent of the experimental subject. As Grodin (1992, 129) notes, these guidelines were “important because they were recognized and cited during the Nuremberg tribunal as a standard of ethics for the practice of human experimentation during the Nazi period” (see also Vollmann and Wineau 1996, 1446).
risk the experiments cannot exceed. Article 3 reflects a hierarchy between human and animal rights, with the former taking precedence. Article 4 draws upon the “civilized” norm that unnecessary infliction of pain is cruel. This is reinforced by Articles 7 and 8 that state proper facilities and expertise should accompany the experiments to minimise risk of harm to the subject. Article 5 prohibits dangerous medical experiments, unless carried out by the physician on him or herself. This last article in fact reinforces the preceding articles on the importance of human dignity and autonomy by respecting the right of the physician to do to his or her body as they so wish. Articles 9 and 10 concern the rights of the subject and the obligations of the experimenter respectively. Article 9 concerns the right of the subject to end the experiment, while Article 10 imposes the obligation on the experimenter to end the experiment if it poses a threat of harm to the subject if continued (see Grodin 1992, 136).

What the Nuremberg Code shows is that consent removes danger from the social order. Although the subjects may physically risk danger to themselves through medical experimentation, this danger to others and to the broader social order is ameliorated when the infliction of pain is consented too. Ivy’s response to Servatius’ moral problem is important as it highlights the sociology of danger that comes about from violating the taboo. As I showed in Chapter 1, torture was condemned by the *philosophes* because it posed a danger to the moral fabric of society. Respecting the victim’s consent to experimentation, then, is not just upholding the subject’s rights, but it is also in society’s interest. As Hans Jonas (1969, 222) has argued, “it may well be the case that the individual’s interest in his own inviolability is itself a public interest such that its publicly condoned violation, irrespective of numbers, violates the interest of all. In that case, its protection in *each* instance would be a paramount interest, and the comparison of numbers will not avail.”
As Steven Lukes (2006, 14-16) reminds us, this phenomenon was brought to light by Emile Durkheim during the Dreyfus Affair. Durkheim (1973, 53-54) argued that industrial society had become permeated by what he called the cult of the individual. Individual rights constituted the common feelings of a nation and helped provide society with social cohesion. However, when individual rights are violated, these social bonds break, bringing about “social dissolution.” Therefore, Durkheim argued that upholding the individual’s rights was not just important for that individual, but it was also in society’s interests as well. The Nuremburg Trials showed that upholding voluntary consent in medical experiments was also in society’s interest, even in the face of threats to state survival.

**Attacking the Defenceless**

Despite the absolute condemnation by the Tribunal of medical experiments without the consent of the subject, it is questionable whether these practices were labelled and classified as “crimes against humanity” because they inflicted pain and suffering per se. Rather, it was a particular category of pain and suffering that posed a danger to the victim and others. If one is willing to take the German defence council’s arguments seriously, they show that the prosecutors had unstable foundations as to what practices constitute morally dangerous forms of pain and suffering.

The defence too acknowledged the importance of consent in medical experiments. Non-consensual medical experiments place a mental burden on the physician because the life of the experimental subject is placed at risk (Nuernberg 1946-1949, 1: 983). The defence argued patient consent should also be abided by for instrumental reasons because it provides cooperation by the subject during the experiment and protects the physician from legal claims of damages (Nuernberg 1946-
However, the defence argued there were circumstances in which involuntary medical experiments could be carried out. The defence sought to either relieve their defendants of responsibility for the medical experiments or to justify them as acceptable under the exceptional conditions, and therefore, absolve them from any illegality. These defences included questioning the applicability of Control Council Law No. 10 (the Law that gave authority to the Tribunal) to Germans during the war, a lack of responsibility by subordinate (and superior) officers for the medical experiments, the status of Poland under International law where some experiments took place, and subjection of medical experiments in replacement of the death sentence (see Nuernberg 1946-1949, 1 and 2).

Perhaps the most important argument made by the defence was that the interests and rights of society could in some instances take precedence over the individual’s right to be free from harm. This argument was justified in two ways. The first was that compulsory medical experiments helped in the progress of society by conducting experiments that advanced medical science. In the case of the Nazi physicians, medical progress helped to alleviate the “evident state of distress” the German army were facing from diseases and war injuries on the battle fronts (Nuernberg 1946-1949, 1: 988).

The second argument relating to when society could take precedence over the individual was in instances where the infliction of pain and suffering could save society from imminent danger. In the final plea for the defendant Gebhardt, the defence concentrated on the sulfanilamide experiments, arguing that these experiments were needed to help care for individual soldiers and uphold the “fighting power” of the

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22 According to the Nuremberg transcripts, the German defence team argued that because Poland had lost its sovereignty to German occupation in 1939, German law applied to Polish nationals, not international law (Nuernberg 1946-1949, 1: 974).
German nation and army (Nuremburg 1946-1949, 2: 5). The defence argued that in the fighting on the Moscow front and in Rostov in the south between 1941 and 1942, wound infections on German soldiers became hard to treat, for the reasons outlined above. This demonstrated, argued the defence, that the German Wehrmacht was in a fight for its survival (Nuernberg 1946-1949, 2: 6).

If the German Wehrmacht did not do everything to prevent bacterial infection and gas gangrene they would have neglected in their duty to protect the German nation. The medical experiments were resorted to after clinical observations had failed to resolve the question and were only used “to avert an imminent danger and to throw light on a question which was important to the individual wounded soldier as well as to the striking power of the whole army” (Nuernberg 1946-1949, 2: 6). The German defence did not suggest that these experiments were appropriate behaviour under normal circumstances, but that they represented a “lesser evil” in an extraordinary situation (Nuernberg 1946-1949, 2: 9). If the wounds were not treated, there was a possibility of thousands of deaths (Nuernberg 1946-1949, 2: 9). Other methods of solving the wound infections had failed, and therefore, no alternative was left available (Nuernberg 1946-1949, 2: 9).

By arguing that the compulsory medical experiments were in the interests of society and necessary to save the state in an extraordinary situation, the Nazis argued this justified their actions and ameliorated guilt (Nuernberg 1946-1949, 2: 7-8). In an emergency, interests of state override individual rights if all other alternatives in dealing with the danger have been exhausted (Nuernberg 1946-1949, 2: 7-8). The defence pointed to how this legal argument had been incorporated into the laws of war and into German domestic law (Nuremburg 1946-1949, 2: 10). When this criminal law is applied to the state, this legal principle absolves the offender of guilt and justifies state actions (Nuernberg 1946-1949, 2: 7-8).
As mentioned above, the Tribunal dismissed these defences, placing the importance of voluntary consent of the detainee as the first principle in the Nuremburg Code. How, then, can we understand why medical experiments carried out without the consent of subjects and in terms of necessity were condemned as a crime against humanity, but Allied violence, such as dropping the atomic bomb on Japan, was not? In fact, the defence team invoked this example to discredit the prosecution’s argument. In the final defence plea of Karl Brant, Brandt’s defence council, Dr. Servatius, raises the moral dilemma as to what kinds of sacrifices the state can make for the benefit of the political community (Nuernberg 1946-1949, 2: 126). Servatius asks,

What did the airman think who dropped the first atomic bomb on Hiroshima? Did he consider himself a criminal? What did the statesmen think who ordered this atomic bomb to be used. We know from the history of this event that the motive was patriotism, based on the harsh necessity of sacrificing hundreds of thousands to save their own soldiers’ lives. This motive was stronger than the prohibition of the Hague Convention, under which belligerents have no unlimited right in the choice of methods for inflicting damage on the enemy (Nuernberg 1946-1947, 2: 127).

Dr. Servatius’ comments raise a very interesting problem. The nuclear bombs resulted in 70,000-80,000 deaths in Hiroshima and 35,000-40,000 deaths in Nagasaki. Moreover, the firebombing carried out by Allied forces in Tokyo killed 80,000 – 100,000 people (Tannenwald 2007, 80). How was a distinction made between the two acts? Nina Tannenwald (2007) has examined the origins of the nuclear taboo and argued that when it was used during World War II nuclear weapons were seen as a legitimate weapon of war that represented a continuation of the wartime bombing strategy (Tannenwald 2007, 79). Although there were some military critics of the
nuclear bomb (Tannenwald 2007, 82), many politicians and generals saw the bomb as a quick way to end the war and save American lives (Tannenwald 2007, 73, 75). Moreover, the “barbarities” of the war and the Dresden bombings set the precedent for bombing civilians and removing distinctions between civilian and military targets (Tannenwald 2007, 81).

The non-consensual medical experiments, on the other hand, invoked normative traditions of excessive cruelty prohibited under the laws of war. The victims were held under the power of the Nazis in concentration camps and therefore were associated with the protections accustomed to prisoners of war. As discussed in Chapter 2, no punishment or violence is to be inflicted on prisoners outside of a battle fight or for information. The experiments violated these principles because they sought to use violence to extract “information” from prisoners, in this case, information concerning how to treat battlefield diseases and war injuries. They represented an attack on the defenceless. The experiments did not allow for a “fair fight” (Shue 1978, 129-130), for the victim’s fight with the Nazi’s had finished when they were locked up and sentenced to death. Whereas the nuclear bombs were used on the battlefield, and had not yet deemed to be “taboo,” the medical experiments not only invoked the tradition of prohibition against unnecessary suffering under the laws of war, but went outside battlefield conflicts and represented the beginning of a “fresh assault” against a victim who had ceased to be a threat (Shue 1978, 130).

**Creating Categories: Crimes against Humanity**

The Nuremburg Trials further strengthened the taboo by creating a new classification of war crimes labelled “crimes against humanity.” Crimes against humanity were also prosecuted at the International Military Tribunal of the Far East and under Control
Order Law No. 10 in the Medical Cases discussed above. Before and during the Trials, crimes against humanity also became part of much municipal law in “civilized” society (Schwelb 1946, 222-224). Although there were legal differences as well as similarities amongst the different interpretations of crimes against humanity, I would like to continue to focus on the term used in the International Military Tribunal.

Article 6 of the Nuremburg Charter identifies three crimes within the jurisdiction of the Tribunal: crimes against peace, war crimes, and crimes against humanity. Crimes against humanity concerned the prohibition against torture and is defined under Article 6 (c) as

murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated (Nuremburg 1947, 1: 11).

Crimes against humanity overlap with war crimes, with many war crimes (such as torture) also constituting crimes against humanity. Torture is not specifically mentioned in the Nuremburg Charter, constituting what the Tribunal labelled “inhumane acts” (however, torture was mentioned in the definition in the Medical Cases).23 Neither “inhumane acts” nor “torture” was defined in the trial. Crimes against humanity contain a quantitative element in that crimes such as torture could only be a crime against humanity if carried out on a population and in conjunction or

23 Article II, 1(c) of Control Council Law No. 10 states:

*Crimes against Humanity. Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated* (Nuernberg 1946-1949, 1: XVII)
association with the other crimes of the Tribunal. Moreover, crimes against humanity did not have to be a crime within the domestic jurisdiction of the offending country for prosecution to take place, giving the term an international and cosmopolitan scope.

The origins of crimes against humanity are dispersed. Crimes against humanity reflected the serious crimes in the domestic legal system of “civilized” states (Radin 1946, 372). Yet it is also found in the relationship between natural law or the “laws of humanity” and the laws of war. The 1899 Hague Convention’s “Martens clause,” which has its roots in natural law, provided humanitarian protection for civilian populations. The clause acted as a form of customary law by providing a principle that could help judge actions not codified in law and ensure war was not left up to the whim of military commanders (Meron 2000, 79-80).

Although the Nuremberg Trials placed crimes against humanity into international law, this was not the first time the term had been used. On 28 May 1915, Russia, France and Great Britain condemned Turkey for its genocide of the Armenian population as “crimes against humanity and civilization for which all the members of the Turkish Government will be held responsible together with its agents implicated in the massacres” (Matas 1989-1990, 87; Schwelb 1946, 181). However, when the term was used in 1915 it did not have a legal basis but was reflective of customary law related to the laws of war (Schnelb 1946, 180). Despite this difference, in both cases crimes against humanity referred to a quality of behaviour that identified the boundary of “civilized” life (see Schwelb 1946, 195; Tietel 2004, 229). Finch (1947, 22) stated in 1947, “There could be no more sacred trust than that of upholding the law against

24 The Martens Clause states:

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience (Convention (II) with Respect to the Laws and Customs of War on Land (“Hague Conventions”) 1899).
primitive and barbarous acts of inhumanity which shock the conscience of all civilized peoples and are forbidden by divine as well as human command.” This classification sought to protect the individual body, as well as the social body – what we call “humanity” – from unnecessary harm in warfare (Tietal 2004, 231).

Crimes against humanity and the other crimes within the jurisdiction of the Tribunal helped classify forms of behaviour and identify transgressions that had consequences that spilled over sovereign borders (Schwelb 1946, 195). One can see here the continuation of the Allied countries discourse in the warning that such practices that breach the threshold of “civilized” behaviour threaten a regression of civilization. Justice Jackson stated Nazi crimes had “bathed the world in blood and set civilization back a century” (Nuremburg 1947, 2: 154). Yet another discourse operated alongside the discourse of regression, namely, a discourse of destruction. Justice Jackson’s opening statement cited above that civilization cannot survive a repeat of these war crimes in the future demonstrates that crimes against humanity destroy the social body of humanity and the moral fabric of civilization: that is, the moral and social bonds as well as the reciprocity and obligations each has to one another to refrain from inflicting unnecessary harm.

The Nuremburg crimes also stigmatised the identity of the perpetrator and helped to identify dangerous individuals. The pain and suffering that became prohibited under the crimes of the Tribunal were condemned because they represented the revival of ancient “barbarities.” The Nazis were likened to the despots of the “ancient East” (Nuremburg 1947, 2: 99-100) and carried out practices such as torture that had not been seen for centuries (Nuremburg 1947, 2: 130). This is similar to the nineteenth century discourse that condemned torture as a barbaric relic of older ages and which constituted a threat to a state’s security. However, what distinguishes the nineteenth century discourse from the twentieth century is the fact that this “medieval
“barbarity” constitutes a threat to the security of other states. The threat these crimes posed to international peace and security were reiterated in the 1946 United Nations General Assembly resolution that reaffirmed the Nuremburg Charter principles (UN General Assembly Resolution 1946, Doc. No.: A/RES/95(I)). Someone who carried out a crime against humanity was doubly condemned: first because they crossed a boundary and destroyed what it meant to be human and second because they posed a danger to others.

It has been a common assumption that crimes against humanity helped to undermine state sovereignty. The Chief British prosecutor in the Nuremberg Trial, Sir Hartley Shawcross, argued in his closing statement that crimes against humanity presented a warning to tyrants who think they can hide behind state sovereignty by arguing that this legal precedent of the Tribunals recognised the right for the international community to intervene in states to stop human rights abuses (Schwelb 1946, 198-199). The Nuremberg Tribunal removed notions that unconditional sovereignty prevented legal accountability outside of the state, or that leaders were immune from prosecution for acts carried out within the state (Falk 2009, 92). The categorisation therefore contributed to world order by bringing about social solidarity in a cosmopolitan sense by giving the protection of the individual a sacred importance that transcends territorial sovereignty. To engage in crimes against humanity is not only to destroy a human being, but the social and moral bonds that provide the framework of a common, global, humanity.

However, simultaneously, the ruling of the Tribunal placed a limit that, in fact, upheld sovereignty in relation to crimes against humanity. The Tribunal argued that practices such as torture can only be considered a crime against humanity if carried out on a civilian population and in association with other crimes within the jurisdiction of the Tribunal. The Tribunal did not deny that “circumstances of great horror and
cruelty” occurred in Nazi Germany before the war (Nuremburg 1947, 1: 254-55). But the Tribunal argued it could not convict defendants for cases of torture in Germany before the war because these practices were not carried out in association with war crimes or crimes against the peace. Schwelb (1946, 207) argued “it is doubly significant that the Charter and the Tribunal respected German sovereignty to the extent of subjecting to the Court’s jurisdiction only such criminal activities as were connected with either crimes against peace or with violations of the laws and customs of war, i.e. only such acts as directly affected the interests of other states.”

What impact did this limitation have on the robustness and reconstruction of the torture taboo? It could be argued that such a limitation harmed the taboo by refusing to label the practices carried out in Nazi Germany before the war as a crime against humanity. Although this limitation was seen as deplorable by the French IMT Judge Donnedieu de Vabres (Nuremburg 1946-1949, 1: 917), the limitation established by the Tribunal actually contributed to reconstructing torture as a particularly dangerous behaviour with contagious effects. By associating crimes against humanity, and hence torture, with crimes against peace and war crimes, the Tribunal linked torture with practices that sought to challenge and overthrow the social and political order. Torture became an “accessory” to aggressive war. The applied limitations of crimes against humanity gave torture a seriousness of danger that perhaps it would not have attained if it were not associated, or executed alongside, the other crimes within the Tribunal’s jurisdiction.

Victors’ Justice? Or Setting New Standards?

Despite the contribution the Nuremburg Tribunals made to strengthening the stigma of the taboo in the face of unprecedented violations, one notices that elements of Victors’
justice were present in the Trials. Allied crimes were not prosecuted or punished and there were charges the Allied forces retroactively applied international law.\textsuperscript{25} Carl Schmitt’s (2007, 54) argument that those who act in the name of humanity want to cheat has some substance. Even the lead prosecutor for the Allied forces, Justice Robert Jackson, acknowledged these concerns (see Falk 2009, 92).

Alongside the Dresden bombings carried out by Allied forces, which violated the combatant/non-combatant distinction during wartime, the Soviet Union engaged in widespread killings and rapes in Germany near the end of the war, which, as Overy (2004, 524-525) argues, were “driven by the simple but vicious lusts of victory and revenge.” The UK also engaged in war crimes. The British tortured detainees in London between 1940 and 1948 (in torture chambers known as the London “cage”) and in a secret prison (“Bad Nenndorf”) in British-occupied North-West Germany between 1945 and July 1947 (Cobain 2005a, 2005b, 2005c, 2006). However, despite these violations, Allied crimes did not represent a challenge to the absolute prohibition of torture. The norm violations by the Nazis set a precedent that no other state wanted to be associated with. The British were keen to keep their torture hidden and secret for fear of undermining their legitimacy in international society. During the Attlee government, a memorandum was written to UK Foreign Secretary Ernest Bevin, by the foreign minister Hector McNeill, stating “I doubt if I can put too strongly the parliamentary consequences of publicity [regarding British use of torture]. Whenever we have any allegations to make about political police methods in Eastern European states it will be enough to call out in the House ‘Bad Nenndorf’, and no reply is left to us” (Cobain 2005c). One can see here the operation of a moral framework in action. The British knew what they were doing constituted inappropriate behaviour, and it was

\textsuperscript{25} The charge of retroactive lawmaking during the Nuremberg Trials caused controversy in the drafting of the Universal Declaration of Human Rights. Many drafters were concerned that a prohibition on retroactive law in the Declaration would have conflicted with the Nuremberg judgement, something they wanted to avoid (see Morsink 1999, 52-58).
this moral framework that forced Britain to hide and deny the existence of its torture centres, both during and after the war.

Without ignoring the hypocrisy of the Allied forces, to suggest that Nuremburg represented merely Victors’ justice is to ignore not only the customary norms that existed in international society before the war concerning the prohibition against torture, but this argument also detracts attention away from the powerful effects these Trials had on strengthening and reconstructing the torture taboo. First, the Trials highlighted the importance of voluntary consent and autonomy over one’s body in relation to other values in society, such as acting in the interests of society or the state’s right to protect itself. Second, the Trials condemned torture absolutely by ensuring officers associated with torture (either superior or inferior in rank) were prosecuted for their crimes and no excuse could justify torture. And finally, the Nuremburg Tribunals linked society’s interests with the individual’s right to be free from torture by exposing the untold danger that torture has on the victim and society’s norms and institutions.

The Nuremburg Trials helped to establish human dignity as one of the keystones of an international moral community, and it did so in the face of widespread violations of the taboo. However, what I have not explored yet is what this human dignity “looks like.” How was the protection of human dignity, and its precedence above so many other values, justified? The answer to this question lay in the drafting of the Universal Declaration of Human Rights.

**The Universal Declaration of Human Rights**

The second major post-war development that arose out of the Nazi atrocities was the Universal Declaration of Human Rights. After the United Nations was established in
1945, the United Nations Economic and Social Council set up the Human Rights Commission to draft an international bill of human rights. The Nuclear Commission (preparatory commission) met in April and May 1946 to make recommendations as to the duties of the Human Rights Commission. These meetings also discussed the purpose of an international bill of human rights. Henri Laugier, Assistant Secretary-General in charge of social affairs, stressed in the first meeting that international legal machinery was necessary to bind states and prevent further human rights violations. Arguing that a violation of rights within a nation constitute a threat to peace and security of international society as a whole, Laugier stated “Let us remember that if this [legal] machinery had existed a few years ago, if it had been powerful and if the universal support of public opinion had given it authority, international action would have been mobilized immediately against the first authors and supporters of fascism and Nazism” (E/HR/6, 3).26

The international human rights system was in response to Nazi atrocities. Arnold J. Lien stated, “bills of rights are always monumental indictments of regimes of the past, as well as promised safeguards against the same abuses by regimes of the future” (Lien 1949, 24). This discourse of “progress” sought to separate the “old” order from the “new-to-be” order, and human rights were fundamental in the reconstruction of the moral foundations of civilization. Laugier (E/HR/6, 2) stated, “In the reconstruction of the world, the material tasks are more important, but the effort of all town planners, of architects, or doctors, will only assume its real significance if humanity starts again to have confidence in its destiny, if the human community gets together around a minimum of common principles.” These common principles were to be founded in and guided by human dignity (E/HR/6, 1; see also Lien 1949, 24).

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26 In order to prevent disruption to the flow of the argument, I have referenced the document number of the drafting meetings of the UN Declaration of Human Rights. The full reference for these documents can be found in the References list.
International human rights established a new standard of civilization with Laugier arguing that acceptance of international human rights was essential for “admission in the international community” (E/HR/6, 2-3).

The purpose of the Declaration and what kinds of rights were to be included was a topic of debate amongst philosophers at the time (see in particular UNESCO 1949). What I would like to do in this section is look at how the torture taboo was further strengthened in response to Nazi violations. I then turn to how international human rights clashed with post-war power politics. This clash inhibited international legal enforcement of human rights and reinforced the normative preference of territorial sovereignty in international society.

The Article on the Prohibition against Torture

On the 11 June 1947 the First Session of the Commission of Human Rights Drafting Committee met to discuss, among other things, the Secretariat draft outline of Article 4, which then concerned torture. Compared to the drafting process of some of the other human rights articles in the Declaration, this provision that prohibited torture had universal support within the Committee. Cassin, the French representative, and Chang, the Chinese representative, agreed that the Article should “stress the goodness of life itself” (E/CN.4/AC.1/SR.3, 12-13). Drawing upon the Nuremberg Medical Cases, Cassin stated the Committee should take into account questions such as “Do some humans have the right to expose others to medical experiments and do any have the right to inflict suffering upon other human beings without their consent, even for ends that may appear good?” (E/CN.4/AC.1/SR.3, 13). The representative for Australia also suggested that both physical and mental torture should be covered by the Article as well as “torture resulting from involuntary experimentation” (E/CN.4/AC.1/SR.3, 13).
The main debate concerning the article prohibiting torture surrounded the wording of the Article. The Draft Declaration (E/800) of article 4 read:

1. No one shall be held in slavery or involuntary servitude.

2. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment (A/C.3/271).

Since my primary focus is torture, I will concentrate on the comments and amendments to the second sentence in the article. Uruguay and Cuba wanted to amend the second sentence so as to read without the word “torture” or “inhuman.” Cuba’s amendment stated “No one shall be subject to cruel, degrading and non-customary punishment” (A/C.3/SR.109, 213). Cuba argued that there is no need to say “inhuman” in the article as the term “cruelty” suffices to cover inhuman punishment. Cuba argued non-customary punishment was more appropriate and also felt that the term “non-customary” could strengthen the article (A/C.3/SR.109, 213; A/C.3/SR.110, 216).

Cuba’s amendment and the use of the word “non-customary” were not acceptable to the Philippines (A/C.3/SR.110, 215). Aquino, the Philippines representative, stated because customs vary in different countries, the Nazis could have justified their torture because it was customary to use it in Germany (A/C.3/SR.110, 215). Venezuela also disagreed with Cuba, stating “inhuman” should be kept in the declaration wording because it has a wider meaning than “cruel” (A/C.3/SR.110, 217). Chile agreed with Venezuela and Cuba withdrew the amendment (A/C.3/SR.110: 218, 222).

The final Declaration was to place the prohibition on torture on its own in Article 5, and retain the words “inhuman” and “cruel.” Article 5 of the Universal

27 For the Cuban amendment, see (A/C.3/271); for the Uruguay amendment, see (A/C.3/224).
Declaration of Human Rights states *No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment*. The Universal Declaration does not define torture; nor does it define “cruel,” “inhuman,” or “degrading” treatment or punishment. As I show in Chapters 5 and 6, this vagueness has been exploited by states to justify gruesome forms of violence. Yet despite this, Article 5 reaffirmed in international law an absolute prohibition on torture, something that was not even given to war. The torture taboo was linked to the good life and set boundaries as to the limits of the state’s power to hurt. But if the torture taboo protects the good life, what does this good life look like? How are we to understand how protecting one from torture was deemed a universal good? What is it that connects us all in a common humanity? The answers to these questions lay in the negotiations concerning the philosophical foundations of the Declaration, outlined in the Preamble.

**The Preamble**

At the seventh meeting of the Commission on Human Rights the Preamble for the Declaration was discussed. At the beginning of the meeting, Chang suggested that the Preamble should contain the philosophy that will form the foundation of the Bill (E/CN.4/SR.7, 4). The philosophy should elevate human dignity and emphasise human respect (E/CN.4/SR.7, 4). But the Preamble should also be anthropocentric; a distinction should be made between man and animal to demonstrate what separates human beings from other animals. It is in this separateness, Chang argued, that human dignity and the foundations of human rights are found (E/CN.4/SR.7, 4). For Cassin and Chang, this meant highlighting permanent human qualities that were “common to mankind” such as human equality (E/CN.4/SR.7, 4). This was deemed an important element in the foundations of universal rights because Hitler had asserted human
inequality before carrying out Nazi atrocities (E/CN.4/SR.13, 3-4).

What philosophical foundations were notions of human equality and dignity to be grounded in? Discussions surrounded whether human rights should gain its justification from a single authoritative framework, such as from God or Nature, or whether the Declaration was to be a secular document (Morsink 1999, 284-289). In the Third Committee, Brazil proposed that the Declaration should declare that God is the origin of rights, proposing the Preamble state that “human beings were ‘created in the image and likeness of God’” (A/C.3/SR.96, 96). Both Argentina and Bolivia agreed that a reference to God would enhance the Declaration by giving human rights a transcendental quality that rises above politics (A/C.3/SR.98, 109). The Netherlands also wanted an inclusion of God because of the importance of religion to many around the world, and because of the dangers of the recent “materialistic conception of man as a mere tool in the service of the State” (A/C.3/SR.164, 755; A/C.3/SR.166, 776).

However, there were several dissenters to this idea. The UK and French delegates argued that because “not all peoples were religious,” invoking God as a foundation for rights would harm “universal acceptability of the Declaration” (Morsink 1999, 286). The Soviets dissented as well, arguing that a mention of God would conflict with the separation between Church and State. In addition, both the Soviets and China considered it inconceivable the Committee should seek to solve the metaphysical issue of the existence of God with a vote (A/C.3/SR.98, 114; A/C.3/SR.165, 760-761). Chang on the other hand argued a Declaration of universal scope should not contain theological references because to include metaphysical origins of human rights within the Declaration would be to impose it upon others (A/C.3/SR.96, 98). Chang argued that the Chinese have a history of their own cultural values, but that China would not include these in the Declaration. Chang asked other countries to “show equal consideration” and remove amendments that “raised
metaphysical problems” (A/C.3/SR.96, 98).

In order to remove metaphysical references from the Declaration Chang engaged in what Morsink (1999, 284-290) has called a “bargain.” Chang hoped that if metaphysical notions of Nature (which played a minor role in the drafting discussions) were removed from the Declaration, those who wanted to mention God would also withdraw their amendments. Deleting Nature from the text would also mean “those who believed in God could still find in the strong opening assertion of the article the idea of God, and at the same time others with different concepts would be able to accept the text” (A/C.3/SR.98, 114). Chang hoped this trade-off would convince Brazil to withdraw its amendment and spare the Committee a vote on the existence of God (A/C.3/SR.98, 114). As Morsink (1999, 287-289) explains, due to a lack of support, Brazil withdrew its amendment concerning God, and the Committee subsequently removed mention of Nature as well.

It was because of fortuitous events that the Commission came to an agreement that the foundations for human rights lay neither in God or Nature, but are inherent and inalienable within every human being because they are human beings. As Morsink (1999, 282-290) rightly notes, this secular understanding of human rights moves away from the eighteenth century ideas on human rights. Locke argued that the authority and meaning of human rights came from God, and therefore existed external and independent of history (See Dunn 2003, 271; Locke 2003). However, the shift away from a central authority did not leave eighteenth century thought behind completely. To replace God and Nature in the Declaration, Chang suggested the Committee could learn from eighteenth century philosophy that emphasised the “innate goodness of man” (A/C.3/SR.98, 113-114). As Chang notes, the eighteenth century *philosophes* “had realized that although man was largely animal, there was a part of him which distinguished him from animals. That part was the real man and was good, and that
part should therefore be given greater importance” (A/C.3/SR.98, 113-114). This “goodness” was something emphasised in the drafting of the article that prohibits torture and it is here we find one of the constitutive elements behind the potency of the torture taboo. Torture strikes at the innate goodness of man and what it means to be human.

To emphasise “inherent” rights, the delegates placed “born” in Article 1 so that it read “All human beings are born free and equal in dignity and rights.” The term “born” is used in two ways: a physical birth and a moral birth, with the latter referring to a “birth into the human family of rights and duties” (Morsink 1999, 291). The inclusion of “born” in Article 1 raised several issues. Venezuela argued for the omission of “born” because human rights begin from conception, not from exiting the womb (see A/C.3/SR.98, 111; A/C.3/SR.99, 122), while the Soviet representative argued it was inadequate to merely claim that all are born equal when in reality this is hard to sustain as human equality was created through laws (A/C.3/SR.98, 110).

In the 99th meeting, the French representative stated that although inequality did exist, the meaning of “born” implied “the right to freedom and equality was inherent from the moment of birth. The men who had drafted the Bill of Rights of Man of 1789 had fully realized the existence of inequality and social injustice, but they had felt it essential to affirm their belief in man’s inherent right to equality and freedom” (A/C.3/SR.99, 116). The word “born” was left in the final version of Article 1. As Morsink (1999, 293) argues, “The word ‘born’ was left standing by itself as an intentional reminder of the eighteenth-century approach to human rights as rights inherent in human nature, however that being or nature is construed.”

The Universal Declaration was accepted by all states in the United Nations, with eight abstentions.28 Human rights came to reflect the notions that progress and

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28 The eight abstentions were “from the USSR, the Ukranian Soviet Socialist Republic (UKSSR), the
freedom were innate within all individuals and that this provided not only the justification for a Universal Declaration of Human Rights, but a way to understand what it means to be human. Human rights helped to make judgement upon past actions, such as those carried out by the Nazis, but also offered a guide for the appropriate behaviour of future conduct. Human rights were the moral measurement of appropriate behaviour for “civilized” states.

However, despite the argument that the torture taboo, and human rights more broadly, were key to the good life, what this “good life” is was never defined. This openness within the Declaration represents an emphasis on founding a new international order not on what is good, but prohibiting what is bad. Linklater (2007, 23) draws attention to Adorno’s argument that we are more likely to be able to agree on what is bad, but not what is good, and these shared human frailties can provide a cosmopolitan ethic that is inclusive by breaking down the inside/outside barriers created by bounded human communities. We can recognise different moral interpretations of the good life, while at the same time setting thresholds in which no community may cross (such as the prohibition against torture) for individuals to experience the good life. This allows for plurality but also allows us to pass judgement on those who breach certain prohibitions that are seen to be universal (see also Lukes 2008). However, as I now show, the human solidarity to prohibit unnecessary and prohibited forms of harm was inhibited by the power politics of states that sought to reaffirm principles of sovereign non-intervention.

BSSR, Yugoslavia, Poland, South Africa, and Saudi Arabia” (Morsink 1999, 21). The six communist countries abstained because they argued the abstraction of rights ignored the fact that it was the state that granted rights; Saudi Arabia because of equal marriage rights and right to change religious belief; and South Africa because it believed the Universal Declaration was a means by which others could criticise its Apartheid regime (Morsink 1999, 21-28).
**Reinforcing Sovereign Boundaries**

Despite the strong support for human rights, enforcement mechanisms were absent. Both during and immediately after the war, many of the arguments made by states and public figures in favour of human rights argued international society must have international legal machinery to enforce human rights (Angell 1940; Laski 1942; Morsink 1999, 12-13; Russell 1942). The Nazi atrocities showed that violations of human rights in a country can spill over territorial borders and result in a threat to international peace and security. This argument was shared by many in the drafting Committee. Laugier’s statement cited above in the Nuclear Commission shows that human rights were a concern for international society as a whole, and sovereignty should no longer allow governments to treat their subjects as they wish. This challenged traditional understandings about sovereignty. Laugier’s statement suggests the right of states to have control over their domestic affairs is only valid when that state upholds the human rights of its citizens. If such violations are interpreted as threatening international peace and security international collective action by other states to stop torture may be justified.

Other members of the Commission were also in favour of weakening absolute sovereignty in international society. Cassin stated in the First Drafting Session the Nuremburg and Tokyo trials had set a precedent that those who violate human rights will be put on trial. The Nuremburg principles should therefore be “studied by the Commission” (E/HR/13, 4). In the First Session of the Commission on Human Rights several states advocated the need to ensure effective implementation and machinery to protect human rights. India, Australia and Lebanon all advocated the need for international machinery (E/CN.4/SR.2, 3-5). These countries wanted both a declaration and a convention. The difference between a declaration and a convention is that the
latter is legally binding while the former is not. To have both a convention and declaration would ensure that international law would become binding on states, helping to enforce human rights.

At the start of the Second Session real divisions emerged between those who wanted a declaration and convention and those who wanted just the former. The French delegation argued that both a declaration and convention were necessary and that it was in the Commission’s terms of reference (E/CN.4/SR.25, 4). The UK took a strong stand in favour of both a declaration and convention. The UK stated “If the Commission confined itself to producing such a declaration without any means of enforcement it would produce a text too vague to be of real value” (E/CN.4/SR.25, 5). The UK then made a position they were to hold until the Third Session of the Commission. The UK “Delegation was prepared to accept a Draft Declaration if that were to precede a Convention, but if the Draft Declaration were to take the place of the Draft Convention his Delegation would be unable to support it” (E/CN.4/SR.25, 6; Morsink 1999, 17, 19).

However, other states were leaning more toward the position of adopting a declaration only. Although the US had at times taken a position in favour of a declaration and convention, by the Second Session, the US had joined the Soviet Union in preferring giving priority to the declaration. The US argued the declaration “should not be drawn up in such a way as to give the impression that Governments would have a contractual obligation to guarantee human rights” (E/CN.4/SR.25, 10). The UK condemned this position, stating “A Declaration was nothing more than a document of propaganda” (E/CN.4/SR.25, 11). Panama condemned the decision as well, arguing that to have just a declaration would avoid responsibilities and “be a legal monstrosity” (E/CN.4/SR.28, 9). As Malik, Lebanon’s representative, rightly noted, “the issue of a ‘Declaration’ or a ‘Convention’ was a challenge between small
and great Powers.” This is in tune with Morsink’s argument that the small powers saw a legally binding convention as a way to bind and constrain the Great Powers (Morsink 1999, 15).

The Soviet position was based on upholding absolute sovereignty. In the Report of the Working Group on Implementation of the Convention, the Report proposed establishing an international committee that would investigate human rights violations, examine complaints and mediate between individuals and governments, just to name a few (E/CN.4/SR.38, 8-9). Yugoslavia and the Soviet Union condemned the Working Group Report, with the Yugoslavia representative invoking fears that its findings were trying to impose a world government and set up an international system that would favour the powerful (E/CN.4/SR.38, 10). The Soviet stated that the Report represented an “attempt to interfere in the domestic affairs of a State” and that it violated Article 2(7) of the United Nations Charter (E/CN.4/SR.38, 8-9). Yugoslavia saw no reason to “surrender national sovereignty in order to implement human rights” (E/CN.4/SR.38, 11) and likened the measures proposed for implementation in the Working Group report as akin to “dictatorship and oppression” (E/CN.4/SR.38, 10).

This position received several criticisms by other representatives. The United Kingdom argued if no international implementation measures were put in place, “the entire work of the Commission would have been useless” (E/CN.4/SR.38, 13). Lebanon and Belgium also raised questions over the Soviet and Yugoslavian position on sovereignty (E/CN.4/SR.39, 7-11). The Belgium representative stated that an argument in favour of absolute sovereignty was last argued 15 years ago and “any support of such a concept was reactionary” (E/CN.4/SR.39, 9). Belgium stressed that

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29 Article 2(7) of the United Nations Charter (1945) states: “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.”
complete confidence cannot be placed in governments to respect human rights, and legal machinery was therefore necessary to ensure the protection of human rights (E/CN.4/SR.39, 10).

The debate between a declaration and convention was resolved in the Third Session of the Human Rights Commission. Morsink argues the British dropped its all-or-nothing position and voted in favour of a French amendment to separate the declaration from the convention and implementation measures.\(^{30}\) The Commission was to produce a declaration of human rights only to international society in 1948. No implementation measures or convention was to accompany it. Although the Commission had a mandate that asked them to produce both a declaration and convention, Roosevelt argued a convention was to follow a declaration when “circumstances should permit” (E/CN.4/SR.48, 6). The result was that the Declaration was adopted by the General Assembly as having an educative purpose by setting human rights “as a common standard of achievement for all peoples and all nations” (see Morsink 1999, 320-328).

Although the Nazi atrocities provided the impetus to draft the Universal Declaration of Human Rights, the preference for upholding state sovereignty at the expense of strong legal enforcement of human rights continued to be strong (a preference that had existed since the Dumbarton Oaks talks) (see Lauren 1998, 168-169; Falk 2009, 87-91). These political interests left the Declaration as a set of norms and moral standards that lacked international enforcement. As Donnelly (1999, 86) notes, it also created a situation where “the modern state has emerged as both the principal threat to the enjoyment of human rights and the essential institution for their

\(^{30}\) Morsink argues that it was Cassin that persuaded the British to change their position. Morsink writes Cassin “correctly notes that if the delegates had insisted on the achievement of a convention, they would have run the risk of letting a politically favorable period slip by.” Cassin warned how the Cold War had begun threatening the drafting process. Morsink argues that Harold Laski, Cassin’s friend, put pressure on the Attlee government (UK) to adopt the declaration (see Morsink 1999, 19).
effective implementation and enforcement.” As I show in subsequent chapters, this paradox has been a major factor which has made it more difficult to uphold the taboo by being unable to intervene in other states to stop torture (Donnelly 1999, 85-86).

However, the lack of legal enforcement also helped in the normative development of the Declaration. Morsink (1999, 20) argues, “The fact that the Declaration itself is not intertwined with any piece of this machinery of implementation gave it from the start an independent moral status in world affairs and law.” The Declaration provided a set of moral rights that helped inspire the emergence of human rights legislation around the world (Morsink 1999, 19-20). As I explore in later chapters, it is this moral standard that has provided a moral resource to weaker actors in international society, allowing them to condemn and shame states that violate international standards, and help bring about norm conformity. Yet it also provides the philosophical foundations that constitute the torture prohibition, and which help us understand what it means to be human.

**Conclusion**

I have argued in this chapter that the torture taboo was strengthened under international law in response widespread inhumanity. The Nazi atrocities demonstrated the difficulty of constraining states from inflicting unnecessary harm upon others. The post-war period offered a unique environment to punish norm violators and take measures to ensure such atrocities did not happen again. The Nuremburg Trials reaffirmed the absolute prohibition on torture with Article’s 7 and 8 of the Nuremburg Charter ensuring that one cannot escape punishment when they have ordered torture or carried it out themselves. Moreover, the Nuremburg judgements reaffirmed that some moral principles cannot be violated during wartime, even if state survival is at stake.
The Nazi medical experiments were deemed an attack on the defenceless and a violation of individual consent, something that proved vital in distinguishing torture from the legitimate infliction of pain during wartime (see also Scarry 1985, 139-157).

The Universal Declaration of Human Rights further strengthened the taboo by prohibiting torture absolutely and linking the protection of human dignity with the potential and capacity to live the good life. Although the Universal Declaration did not define the good life, it listed a set of prohibitions (such as the torture taboo) that set benchmarks that different ways of life must meet if they are deemed acceptable (Lukes 2008, 143-144). These precedents were followed in 1949 with the Geneva Conventions, which prohibited torture under Common Article 3 of the Fourth Geneva Conventions, and Article 99 of the Third Geneva Conventions. In 1966, the International Covenant on Civil and Political Rights was adopted, which prohibited torture under Article 7. The Nazi medical experiments were still in the minds of the Covenant drafters, with the second sentence of Article 7 reading “In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”

In addition to strengthening the torture prohibition under international human rights and humanitarian law, both the Nuremberg Trials and the Universal Declaration reaffirmed that a violation of human rights represents a threat to international peace and security. Torturing an individual not only harms the victim and the torturer, but it also undermines the broader moral framework of international society. Torture destroys civilization and threatens a regression to “barbarous” times. In this way, both the Nuremberg Trials and the Universal Declaration linked the protection of the rights of the individual to be free from unnecessary harm to the interests of society more broadly.

The Nazi atrocities constructed torture as a particularly dangerous form of pain and suffering. However, despite this widespread condemnation of torture in the
immediate post-war period, as I show throughout the rest of this thesis, since 1945 the taboo has been violated on a global scale. Torture was employed by colonial powers in an attempt to brutally crush decolonisation movements, and many states around the world employed torture to gain information, confessions or to punish and terrorise. How are we to understand this simultaneous condemnation and violation? I have so far argued that the taboo still matters even during violations, and can actually strengthen because of them. Yet in the face of global violations, does this argument still hold?
Chapter 4

The French-Algerian War and the UN Convention against Torture

I have argued so far in this thesis that the torture taboo has become more robust over time in the face of its widespread violation, and in some instances, because of its violation. The Nazi atrocities led to the Nuremburg Trials and the Universal Declaration of Human rights, which I argued, reaffirmed the absolute torture prohibition and made torture an increasing danger to order and justice in international society. Yet the Nazi atrocities also placed torture back in the spotlight by demonstrating both the difficulties of upholding the absolute prohibition and of dealing with the problem of eliminating unnecessary harm in world politics.

Despite the strengthening of international human rights law and humanitarian law, post-war decolonisation saw the revival of torture by many European countries as they sought to crush unrest in their colonial territories (many of these countries were not only part of the Nuremburg prosecution, but were victims of Nazi torture themselves). Torture was used by the British against the Mau Mau in Kenya between 1952 and 1956 (Elkins 2005; Rejali 2007, 157-158) and the Eoka in Cyprus between 1955 and 1959 (Creighton and Connett 2012), in Hong Kong in 1967 and in Aden, Yemen, between 1963 and 1967 (Rejali 2007, 331). The Portuguese also used torture in Portuguese Guinea, Cape Verde Islands, Angola and Mozambique (Amnesty
One of the most publicised uses of torture during de-colonisation was by the French in Algeria between 1954 and 1962. The French employed electric shocks, water torture and beatings, among other techniques, in an attempt to destroy the National Liberation Front (FLN). The French use of torture provides an interesting test case for the torture taboo because the important strategic, political and economic interests at stake for the French in winning the war would imply that material interests should have overridden any concerns about adhering to moral norms. After World War II, de Gaulle saw the revival of the French colonial empire as integral to ensuring France maintained a leading role in world affairs (Beigbeder 2006, 57; Shepard 2006). Algeria in particular was considered the “crown jewel” in the Empire and was historically linked to French identity and prestige (Merom 2003, 88; Shepard 2006, 20). In addition, the military did not want to face another humiliating loss after it was defeated by the Germans in World War II, and in the colonial territories of Vietnam, Tunisia and Morocco (Domenach 1958, 39; Kelly 1961, 384-385; Merom 2003, 88-89).

Toward the end of the war economic and geopolitical interests also came into consideration. Significant reserves of coal, gas and oil had been found in the Sahara during the 1950s (Soustelle 1959). After oil production had begun in 1958, it was believed that by 1980, the reserves in the Sahara could provide all of France’s oil needs (Horne 1977, 241; see also). As Horne (1977, 241) argued, “here was a glowing prospect of securing the nation’s need for the future, as well as solving her acute balance of payments problem.” Moreover, holding on to Algeria was seen to be integral to preventing communist expansion in the Middle East

31 Scholars have argued the communist threat was over exaggerated or abused by the French (Beigbeder 2006, 57). As Merom notes, the Soviets had a limited power capacity and could, at best, offer diplomatic and material support to the revolutionary movements (Merom 2003, 93). Moreover, since the FLN was
threat the West would be blocked from Middle Eastern oil (Soustelle 1956, 124-126).

However, despite the political and strategic interests at play, the torture taboo continued to have a profound influence on French decision making during the war. The war reflected a clash of discourses between the security and political interests of the French Republic on the one hand, and on the other, how a humane country is to conduct itself during wartime. The belief that the French had to torture to save innocent lives from FLN bombings and to gain information clashed with global standards of humanitarian warfare to prevent unnecessary suffering and prohibit torture absolutely. When revelations emerged that the French army were employing torture against the FLN, the French political leadership sought to deny and lie about the prevalence of torture to prevent a public backlash. However, such attempts were in vein, for the torture revelations provoked moral outrage in France and invoked fears torture posed a danger to the French Republic. In 1957, Robert Delavignette, a member of the Mollet government’s Safeguard Commission, stated, “The most serious problem is not the atrocities themselves, but that as a result of them the state is engaged in a process of self-destruction. What we are witnessing in Algeria is nothing short of disintegration of the state; it is a gangrene which threatens France herself…” (Horne 1977, 234). Despite sidelining the torture prohibition for political and strategic interests, the violation of important moral and humanitarian principles profoundly shaped how France saw the war.

This chapter focuses on two cases studies that seek to demonstrate the power of the taboo by focusing on its violation. The first case study shows the power of the taboo by studying its violation during the French Algerian war. I analyse the use of

not communist, the Soviets had no strong reason to justify supporting them (Merom 2003, 93). The Soviets often supported decolonisation movements by virtue of the fact of its opposition to the West and the possibility they could entice the newly formed nations to the Communist side (Beigbeder 2006, 47).
torture by the French army, the subsequent domestic and international backlash, and how the impending danger torture posed to the French Republic contributed to French withdrawal.

The second major case study moves away from the French-Algerian war to focus on a series of human rights campaigns that placed the torture prohibition back on the international agenda in the 1970s and 1980s. Amnesty International released two reports on torture during this period that demonstrated that torture was used on a worldwide scale. Not only does this campaign provide an opportunity to study the discourses that provide torture with meaning, but it also allows one to examine how international society responded to these reports. Was the evidence of the torture taboo’s global violation passed over in silence or condemned? What impact did it have on the robustness of the taboo? Did torture become more acceptable because of its constant use?

In a similar vein to the last chapter, what one finds was that the exposure of global torture reinforced the absolute prohibition and actually strengthened the taboo under international law. The United Nations (UN) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted in 1984, providing the taboo with universal jurisdiction and the principle of non-refoulement. A UN Special Rapporteur on Torture was established soon after to monitor states and document violations. Not only is this a testament to the strength of torture’s stigma, but these measures demonstrate that even after such widespread violations, torture continues to be seen as a moral problem that concerns international society as a whole.
The Battle of Algiers

The outbreak of revolutionary violence in Algeria on 1 November 1954 was met by metropolitan France with a proclamation that Algeria would remain French. M. Mendes-France stated “It is inconceivable that Algeria should secede from Metropolitan France. This should be clear and forever to all, in Algeria, in Metropolitan France, and abroad. France will never, no Parliament, no Government will ever, yield on this basic principle. Algeria is France, and not a foreign country under our protection [such as Tunisia and Morocco]” (Galula 2006 [1963], 8). Francois Mitterrand, the interior minister, stated that there would not be negotiations with the revolutionary FLN, as “the only negotiation [is] war” (Merom 2003, 90).

On 1 April 1955, Parliament declared the situation in Algeria an “emergency.” The French authorised laws to restrict movement such as confinement to residence, curfews, press censorship, the ability to search homes at night, house arrests, and closure of public places of entertainment such as theatres and cafes (Beigbeder 2006, 96). However, these emergency laws were soon seen to be insufficient. By the end of 1955, the European colonizers in Algeria were disappointed with French efforts to quell the violence. The FLN had carried out a massacre at the El-Halia mine near Philippeville, killing “Thirty-seven French civilians, including ten children” (Galula 2006 [1963], 12). In late 1955 the dissolution of Parliament saw socialist Guy Mollet come to power with the intent of negotiating with the FLN. Mollet proclaimed the war was “stupid and leading nowhere” (Merom 2003, 90). Mollet elected General Catroux to Governor General in Algiers. This was condemned by colonists as Catroux was “suspected of ‘decolonizing’ tendencies” (Galula 2006 [1963], 12). When Mollet went to Algiers in February 1956, he was met “with ripe tomatoes, rotten eggs, and riots” (Galula 2006 [1963], 13). Mollet altered his policy immediately. Governor General
Lacoste, an advocate of a French-Algeria, was given cabinet rank and France increased its military presence in Algeria. Mollet sent 160,000 army reservists to Algiers in April, and this number reached 400,000 by August (Galula 2006 [1963], 13).

Mollet also pushed through several laws that granted powers to the military. On 12 March 1956, with support from the Communists, the French Parliament passed the “special powers” law which replaced the emergency law and authorised “exceptional measures” to reinforce order in Algeria (Beigbeder 2006, 97; Wall 1977). In January 1957, Lacoste granted General Massu, who was the Commander of the 10th paratroops division, total police powers for Algiers with the intent to eliminate “terrorism from the greater city of Algiers” (Aussaresses 2002, 64; Beigbeder 2006, 101; Merom 2003, 94). To attain these goals, General Massu received an order that torture could be used to collect information (Paret 1964, 71). Also known as “Operation Champagne,” the Battle of Algiers required the acquisition of information “by all possible means” with the goal being to preserve French-Algeria (Giniger 1962, 3).

Torture was carried out by the secretive Detachement Operationnel de Protection (DOP) established by Massu in 1957, and co-ordinated by General Paul Aussaresses (Aussaresses 2002). The DOP were “specialists in the interrogation of suspects who wanted to say nothing” (Rejali 2007, 485). The DOP engaged in both arrests and interrogations (Lazreg 2008, 45). Torture was carried out in internment camps, transit centres and “unofficial” centres in Algiers (Aussaresses 2002; Alleg 2006; Lazreg 2008, 46). Aussaresses recalls how once a suspect was taken to the Villa des Tourelles (unofficial torture centre in Algiers), suspects would be immediately questioned. If they refused to talk, they would be tortured. If information was obtained, further arrests would be made (Aussaresses 2002, 113). Suspects would then be shot and buried, often in “remote locations” outside of Algiers (Aussaresses 2002, 114).

Torture techniques included beatings (including on the feet with a stick) and
burning with cigarettes (Fanon 2001, 226). Generators used to power field radio transmitters were modified to give electric shocks, known as “gegene” (Aussaresses 2002, 20). Recalled in great detail in Alleg’s (2006) own account of torture, electrodes were often placed on the penis, testicles, or other sensitive parts of the body to intensify shock (see also Aussaresses 2002, 20). Water torture was also used whereby water was injected into the victim’s stomach at high pressure, sometimes with an enema of soapy water (Fanon 2001, 226). This often caused lesions and perforations of the intestine, as well as “[g]aseous embolisms” and peritonitis (Fanon 2001, 226). Other tortures included inserting a bottle into the victim’s anus, brainwashing, and “motionless” tortures. Motionless torture forced victims to stand in uncomfortable positions for periods of time, with soldiers issuing blows with truncheons if the victim moved (Fanon 2001, 226).

The amount of people subjected to torture is unclear given the large amount of arrests during the Battle of Algiers. Massu had arrested 24,000 people out of a population of 80,000 (Rejali 2007, 482). As a French soldier stated, “My duty was to arrest the maximum number of people to avoid attacks” (Rejali 2007, 489). The mass arrests reflected the notion that Algerians were guilty unless proven otherwise, and this mentality among French soldiers resulted in the torture and deaths of many innocent people (Rejali 2007, 482).

How did the French military justify their actions? There were two justifications. First, torture was deemed necessary in this new form of “modern” warfare. Modern warfare differed from “traditional” warfare in that the latter occurred between state actors while the former occurred between a state and non-state actor.

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32 This mentality was not just confined to the Battle of Algiers but was evident in broader conflicts in the Algerian countryside. Lt. Colonel David Galula stated during the Algerian war, “If we distinguish between people and rebels, then we have a chance. One cannot catch a fly with vinegar. My rules are this: outwardly treat every civilian as a friend; inwardly you must consider him as a rebel ally until you have positive proof to the contrary” (Galula 2006 [1963], v).
(Paret 1964). This structural change, according to the theorists of pacification (see Galula 2006 [1963]; Paret 1964; Trinquier 1964), implied different methods of warfare needed to be utilised to win the war.

“Traditional” warfare had prohibited torture under the laws of war because it constituted “unnecessary” pain and suffering. But the demands of “modern” warfare were not foreseen by the drafters of the laws of war and therefore the limitations on pain and suffering had to be renegotiated. The structure of modern warfare, the limited usefulness of heavy weapons, and the emersion of the “enemy” in the population meant that intelligence gathering and police work were key to winning the war (Trinquier 1964, 43). As Paret (1964, 35-36) notes, a saying developed in Algeria that “the discovery of an FLN messenger or middleman was as important a victory as the capture of a fort had been in more conventional conflicts.” A refusal to use torture would result in a lost war and untold consequences for the French Republic. Colonel Trinquier (1964, 115) wrote, “If, like the knights of old, our army refused to employ all the weapons of modern warfare, it could no longer fulfil its mission. We would no longer be defended. Our national independence, the civilization we hold dear, our very freedom would probably perish.”

The French argued torture was needed to quickly gain information in order to prevent further attacks. The next FLN attack was uncertain and it had to be prevented before it spread. The fast-paced nature of modern warfare placed an emphasis on utility and absolved any moral questions concerning the methods (see Aussaresses 2002, 114). General Aussaresses (2002, 17, 21) proclaimed “torture was legitimate in cases when it was urgent to obtain information… I must avoid thinking in moral terms and only do what is most useful. As of now the rebellion is located for the most part in the countryside. Tomorrow it can hit the house next door.” The information needed was specific: it was not about attacks the suspects may have carried out, but about the
suspect’s organisation, and the names and addresses of his superiors (Trinquier 1964, 21). If the information was given, the interrogation was ended. However, if the suspect refused to talk, “specialists must force his secret from him. Then, as a soldier, he must face the suffering, and perhaps the death, he has heretofore managed to avoid” (Trinquier 1964, 21-22).

The second justification for torture was that it “saved lives” from further terrorist attacks (see Aussaresses 2002; Brady 1957, 3). The FLN were exploding bombs in cities and targeting innocent civilians as a means to gain international attention to their cause (Galula 2006 [1963], 15). The French military and civil servants argued if a bomber had planted a bomb and refused to release its location, torture was justified if no other way could make the bomber talk. To not torture, and not do everything possible to find the bomb, would let the bomb explode killing countless innocent lives. One would then have to explain to the victim’s family why everything was not done to find the location of the bomb (Aussaresses 2002, 18; see also Brady 1957, 3). For General Aussaresses (2002, 18), this morally justified the use of torture in that it “swept away any doubts I may have harbour[ed] about torture. I reached the conclusion that no one would ever have the right to pass judgement on our actions and that, should I have to do extremely unpleasant things in the course of my mission, I would never have any regrets.” On 19 March 1957, General Massu expressed similar feelings in relation to torture, writing in a Note, “The sine qua non condition of our action in Algeria is that these methods be admitted, in our souls and consciences, as necessary and morally valid” (Beigbeder 2006, 101).

There was some contestation regarding torture among soldiers, with some arguing that torture does not work as the victims do not tell anything under torture (Fanon 2002, 213; Rejali 2007, 481), or that the purpose of torture was not information but to terrorise the Algerian population into submission (Rejali 2007, 487). Yet even
among those army officials who supported the use of torture, torture continued to retain its tainted character. General Aussaresses (2002, 17-18) condemned torture as “disgusting” and “unacceptable under normal circumstances.” Moreover, efforts were made to hide the torture to prevent a public backlash. Many in the French military knew that employing torture would not be accepted in the wider French community. A young French soldier recalls how when it came to executions, “They used to ask for volunteers to finish off the guys who had been tortured (there are no marks left that way and so no danger of a witch-hunt later)” (Horne 1977, 233). The French-Algerian conflict was not just about strategic or material concerns, but was heavily intertwined with moral justifications. Torture continued to be an evil that could only be justified under extreme circumstances and in order to save the lives of others. In addition, the French use of torture generated a public backlash within France and in international society, eventually contributing to French withdrawal from Algeria.

**The Anti-Torture Protests**

Throughout the entire war, torture critiques came from a minority within French society. This anti-torture movement had no organised leadership or organisation, but consisted of groups from different segments of French society ranging from defecting French soldiers, Church groups, human rights activists, and academics. Yet despite the fact the majority of French society did not actively protest against the instances of torture, the minority critics played a profound role in shifting public opinion away from French colonial rule in Algeria to an acknowledgment for the need for Algerian independence.

Even before the war began in 1954, there had been instances and condemnation of French torture in Algeria. Governor-General Naegelen issued a circular in 1949
reinforcing the absolute prohibition of torture and vowing to punish with severity those responsible for torture (Horne 1977, 196-197). Several years later, on 6 December 1951, Claude Bourdet published an article in *L’Observateur* condemning French torture and likening the tortures to the tactics of the Gestapo (Beigbeder 2006, 110). The first critiques against torture that occurred after the war began were two articles (one again written by Bourdet) that appeared in January 1955 in the *France-Observateur* and *L’Express* (Beigbeder 2006, 110). In June of that year, France faced its first resignation over torture in Monteil, Soustelle’s *chef du cabinet militaire* (Merom 2003, 114).

By 1957 there was increasing dissent to torture as the Battle of Algiers gained attention back home in France (Horne 1977, 234). On 25 March 1957, Rene Capitant, who had formally served under De Gaulle, suspended his law classes at the University of Paris in response to the “suicide” of Ali Boumendjal, an Algerian lawyer who had been arrested by the French army (Giniger 1957, 3). Jean Bruler, an author who wrote resistance novels during the Nazi occupation of France, returned his Legion of Honour as protest against French tortures (Doty 1957a, 3). Moreover, in March 357 public figures, including writers, religious figures and political leaders signed a petition of protest to President Coty and provided testimony of French brutality (Doty 1957a, 3).

March 1957 also saw the high level defection of General Jacques Marie Roch Paris de Bollardiere. *Le Monde* stated Bollardiere, who had served under Massu, resigned because of a “categorical refusal to submit himself to orders and to apply methods that he deems to be inadmissible” (Doty 1957a, 3). Bollardiere warned of the “frightful danger” that awaited France if the Army continued to yield “on the absolute principle of respect for human beings” (Horne 1977, 203) which had “been the grandeur of our civilization and of our Army” (see Doty 1957a, 3). Bollardiere’s resignation was followed by Paul Tietgan, the police commissioner in Algiers, in
September, and, a month later, the further resignation of General Pierre Billotte (Horne 1977, 203-204; Merom 2003, 115; Paret 1964, 73-74).

Human rights groups were also active in condemning torture. The League of Human Rights published a report in conjunction with the Maurice Audin Committee, a group named after the French torture victim, mathematician at Algiers University and Communist party member. Entitled *Dossier sur la torture et la repression*, it was published in September 1958 and provided evidence of torture and advocated punishment of torturers (Beigbeder 2006, 109; see also *New York Times* 6 Jan. 1960, 10).

In February 1959, the Association for the Safeguard of Judicial Institutions and Individual Liberties adopted a resolution that condemned the use of torture, “extrapenal repression,” disappearances and “their progressive extension to the metropole” (*New York Times* 18 Feb. 1959, 6). Similar condemnations could be heard from Roman Catholic priests, the General Assembly of the French Protestantism, and religious publications such as the Catholic *Temoignage Chretien*, which published the recordings of tortures by a boy scout who had witnessed torture at an army camp (Beigbeder 2006, 111). Until the end of the war, these religious groups condemned torture as an “unchristian” practice that had to be stopped because it was damaging the nation and the consciences of the French soldiers (Beigbeder 2006, 113; Blair 1959, 3; Callender 1957a, 1; Doty 1960, 1; *New York Times* 25 Apr. 1959, 8; Paret 1964, 74-75).

Many of these torture critics were in fact in favour of the war up until 1959-1960. Their criticisms were not against the war per se, but against the “excesses” and illegal conduct of the war. This in fact reflected the wider French public opinion regarding the Algerian war. When asked in July 1957 if Algeria should remain French, only 18% supported Algerian independence (Talbott 1975, 357). However, there were
more radical critiques of torture that directly linked torture to the French colonial system. Seen in the works of Jean Paul Sartre, Simone de Beauvoir and Franz Fanon, these critics argued that to pay attention to “excesses” was to condemn one form of harm (torture) but justify another (colonialism). In 1962, de Beauvoir argued “To protest [against torture] in the name of morality against excesses or abuses is an error which hints at active complicity” (Shepard 2006, 68). This criticism of “liberal” opinion often resulted in conflict in the different anti-torture camps, with the most public dispute occurring between Sartre and Camus (Horne 1977, 234-235).

One of the most powerful impacts on the campaign against torture was Henri Alleg’s personal account of torture. In The Question, which was released on 12 February 1958, Alleg retells how French troops used water torture, electric shock and beatings to make him confess where he had been hiding from officials. In the preface to Alleg’s book, Jean Paul Sartre wrote torture was not civilian, military or French in nature but constituted “a plague infecting our whole era” (Sartre 2006, xxxvi). In the modern era torture had become a “semi-clandestine institution” that had been practiced by the Nazis, Stalin and others (Sartre 2006, xxxvi). Sartre argued that the cause of French torture was in colonialism; the unjust power relationships that defined colonial rule produced violence and harm as a means to constitute its very existence. Unlike the “excesses” discourse that placed the blame on military leadership and strategy, Sartre argued torture represented a means to consolidate and reinforce the superiority of the colonised over the inferior native. Having its roots in racial hatred (Sartre 2006, xliiv), torture seeks to reinforce the “manhood” of the powerful, while denigrating the native to a sub-human status (Sartre 2006, xxxix). By making the wretched speak, torture acts to humiliate and enforce a sense of betrayal that not only destroys the victim’s dignity and kills his/her spirit, but consolidates them as “a lower animal” (Sartre 2006, xl-xlili).

The second major radical critique (that Sartre also wrote a preface to) was
Franz Fanon’s *The Wretched of the Earth*. Fanon’s text too saw torture as a product of colonialism and saw colonialism as a system that harmed all those encompassed within it. Toward the latter end of the text, Fanon documents the effects torture had on both the victims and torturers during the Algerian war. Fanon recalled that victims of “motionless” torture were often depressed and easily agitated (Fanon 2001, 227). Victims of electric torture suffered from aboulia and feared electricity such as turning on a switch or radio. “These patients felt ‘pins and needles’ throughout their bodies; their hands seemed to be torn off, their heads seemed to be bursting, and their tongues felt as if they were being swallowed” (Fanon 2001, 228). Victims of “truthserum” suffered from verbal stereotypy, a clouding of intellectual or sensory perception, fear of private conversations, and inhibition marked by a “psychical slowing down” (Fanon 2001, 230).

Fanon also documents cases of soldiers who had developed anxiety attacks and trouble sleeping from the torturing. One patient heard screams during the night and could not stop them, despite placing cotton wool in his ears or putting on the radio or music to stifle the screams (Fanon 2001, 213-214). Others found it difficult to restrain from using violence. In one instance of domestic violence, Fanon recalls how one patient who had tortured “wants to hit everybody all the time. In fact, he does hit his children, even the baby of twenty months, with unaccustomed savagery” (Fanon 2001, 215).

Sartre and Fanon’s discourse takes on the official policy discourse of colonialism by arguing that the colonial system does not “make men” but destroys them (Lapie 1944; Fanon 2001, 201). Yet colonialism represented a reflexive relationship whereby the means by which colonisers treated their subjects in turn reflected their own identity (Sartre 2001, 13). Therefore, for France to save itself from “this disgrace” and end torture, the colonial system had to end (Sartre 2006, xliv). Both
Fanon and Sartre argued this had to come through the use of violence. Unlike the pain and suffering of torture which was oppressive, revolutionary violence was a form of human creation in that it helped bring about emancipation through the act of killing (Sartre 2001, 21). Sartre (2001, 21) wrote, “to shoot down a European is to kill two birds with one stone, to destroy an oppressor and the man he oppresses at the same time: there remain a dead man, and a free man; the survivor, for the first time, feels a national soil under his foot” (Sartre 2001, 22). For the first time the native was able to create his or her own history, rather than being the creation of history (Sartre 2001, 27).

Although these more radical critics represented a minority within the anti-torture movement, by the end of the 1950s, many in French society (although not agreeing with everything Sartre or Fanon argued) came to see that France could no longer stay in Algeria. By February 1959, 51% believed that Algerian independence would be necessary, and this increased to 58% by August 1961 (Talbott 1975, 357). The exposure of torture had demonstrated the harmful impact it was having on the French Republic, the victims, and French soldiers, and this helped shift public opinion away from supporting a French-Algeria (Horne 1977, 207). The use of torture invoked a “moral crisis” within France and the result was that the French won the Battle of Algiers but at the expense of losing the war (Horne 1977, 206-207; McCoy 2007, 18-20; Rejali 2007, 493).

**Government Denial**

How did the government respond to the allegations of torture? Despite Army officials arguing torture was necessary to win the war, the French government refused to publicly endorse the use of torture. The emerging allegations of torture prompted the
government to commission the Wuillaume Report, which was delivered in March 1955. The Report found that torture was widespread, and that because it was widespread as well as effective in saving lives, it should be officially authorised and institutionalised. The criticisms of torture had affected police morale and this could be ameliorated by authorising the practice (Horne 1977, 197). The Report justified the use of torture by arguing the electricity and water techniques did not reach a pain threshold high enough to constitute torture:

The water and electricity methods, provided they are carefully used, are said to produce a shock which is more psychological than physical and therefore do not constitute excessive cruelty….According to certain medical opinion which I was given, the water-pipe method, if used as outlined above, involves no risk to the health of the victim. This is not the case with the electrical method which does involve some danger to anyone whose heart is in any way affected….I am inclined to think that these procedures can be accepted and that, if used in the controlled manner described to me, they are no more brutal than deprivation of food, drink, and tobacco, which has always been accepted… (Horne 1977, 197).

Wuillaume narrowly categorised torture as something that constitutes physical pain resulting in “excessive cruelty.” Torture is only torture if it poses a risk to the health of the victim; and even if the water and electricity methods do result in a health risk, it is the victim’s fault.

Despite the recommendation that torture was effective and should be legalised, Soustelle “categorically refused” to endorse the Report’s conclusions (Horne 1977, 197). This refusal represented a wider trend in the French government regarding the use of torture. In response to Bourdet’s 1955 article, the Minister of Interior, Maurice
Bourges Maunoury, denied the torture allegations (Beigbeder 2006, 110). By 1957 torture critics had become more prominent and began to influence French strategy. In February 1957 Lacoste, the French minister in Algeria dismissed army abuses as “lies and calumnies” promoted by the rebels and the “pan-Arabic demagogy” (Durdin 1957, 7). Lacoste described the “pacification” program as “wise and balanced,” that critics should stay out of French affairs, and that French policy “will be able, within the framework of a French peace, to construct the liberty of each inhabitant of Algeria and a new French-Moslem fraternity” (Durdin 1957, 7).

However, by March government discourse had shifted. As French actions were being compared to Nazi atrocities, the government acknowledged that torture had taken place, but that critics’ allegations were either “non-existent or considerably exaggerated and distorted” (Callender 1957a, 1 and 1957b, 5). The government began targeting the moral integrity of its critics by suggesting they were ignoring the sacrifices made by the army. The government declared it had a duty to defend the army against the “odious slanders that can only disgust all those who know the spirit and courage and sacrifice shown by officers, non-commissioned officers and troops in Algeria” (Callender 1957a, 1).

By late March, the pressure from the anti-torture campaign had become so great that Premier Guy Mollet addressed the torture issue in Parliament. The New York Times reported “Mollet acknowledged that there had been isolated instances of indiscriminate brutality by security forces” but that those people have been punished (Doty 1957a, 3). In April, a Cabinet meeting was called to respond to the situation in Algeria. As a result the government established a commission to investigate allegations of human rights abuses in Algeria (Doty 1957b, 1). The Cabinet communiqué stated the government shared “the sincere emotion of those who hope that any individual lapses from the policy desired by France, attached to the safeguard of the rights of
man, should be uncovered and punished” (Doty 1957b, 1). Yet at the same time, it condemned “a campaign organized by the enemies of France” that depicted French administration and army officials as torturers (Doty 1957b, 1).

On 18 April 1957 a meeting was held that sought to prohibit torture “villas” as well as prohibit and punish torture. The meeting consisted of French generals, the Minister Resident in Algeria, and the Prosecutor general in Algeria. However, the “proposals [were] met with active or passive opposition from all sides” (Biegbeder 2006, 101). On 13 December 1957, a report by the government Commission for the Safeguard of Rights and Individual Liberties was released. Although first leaked to *Le Monde*, it was later released by the Government (Doty 1957c, 1). The report stated that the instances of torture, disappearances, and arbitrary internment were in retaliation to terrorist attacks by the Algerian rebels. The rebels were constructed as engaging in wanton violence: the commission stated the rebels “kill for killing’s sake, pillage, burn, slit throats, rape, crush infants’ heads against walls, disembowel women, emasculate men” (Doty 1957c, 1). The Commission claimed that torture had saved lives by foiling terrorist plans (Doty 1957c, 1). However, it also argued that “neither the provocation of rebel excesses nor the argument of efficacy could justify use of illegal methods,” such as torture. What the Commission’s report shows is that even if torture was interpreted as being effective, it should still be prohibited.

On 24 June 1958, after de Gaulle had earlier come to power in France, Andre Malraux, the Minister of Culture, stated to journalists “No act of torture has occurred, to my knowledge nor to yours, since De Gaulle came to Algiers [on 4th June]. There must not be any more from now on” (Beigbeder 2006, 102). However, this statement was never acted upon. Although de Gaulle never publicly condemned torture, torture continued to be used until the end of the war in July 1962 (Beigbeder 2006, 103). On the 27 August 1959, de Gaulle visited the army in Saida in Algeria and ordered
Colonel Bigeard to stop the torture. However, on the 29 October, Colonel Bigeard told officers that de Gaulle’s orders should be followed if reasonable, and gave the order of “No more torture, but still torture” (Beigbeder 2006, 103).

In an attempt to quell the anti-torture critics, the French government engaged in censorship tactics (see Harrison 1964). On 27 March 1958, the police seized Alleg’s *The Question* at Editions de Minuit, which was involved in clandestine activities during the Nazi occupation (*New York Times* Mar. 28 1958, 6). On the 3 December 1958 an edition of *L’Express* was seized because of an “attack on the morale and honor of the army.” The comment was made by the Minister-Delegate in de Gaulle’s cabinet that charged the army with “excesses” against the rebels (*New York Times* 5 Dec. 1958, 13). On 19 June 1959, the book “La Gangrene,” which accused the French army of torture, was seized (*New York Times* 20 June 1959, 4). The government proceeded to seize four newspapers that published elements of a leaked Red Cross report (discussed below) which included *Liberation, Le Patriote de Nice et du Sud-Est, Le Petit Varois* and *Le Monde* (*New York Times* 6 Jan. 1960, 10). Moreover, a cousin of the Premier Michel Debre, was dismissed as a mathematics professor for signing a manifesto against French-Algerian policy (Doty 1960, 1).

By the late 1950s, France was beginning to be internationally condemned and ostracised for its policies in Algeria. In February 1958, London saw a three-day protest in front of the French embassy against the trial of Djmaila Bouhired, a victim of French torture. In addition, British Labour MP, Barbara Castle, blamed nationalist terrorism on French repression (Horne 1977, 243-244). In the United States, FLN delegates, in particular Abdelkader Chanderli and M’hamed Yazid, lobbied for Algerian independence to universities, the media and politicians, among others (Horne 1977, 245). They gave publicity to French torture and torture critics such as army defectors (Horne 1977, 245-46). Even when FLN terrorist violence was voiced, Horne
(1977, 246) argues, it “would indeed produce a momentary revulsion in the United States, but the eventual reaction would, perversely, somehow end up as one of irritation against France as being responsible for the war in which such horrors could take place.”

Criticisms were also voiced in the United Nations. In 1959 a group of North African and Middle Eastern countries submitted a letter to the United Nations Security Council claiming French actions were a threat to international peace (Parrott 1959, 1). On the 25 September of the same year, France walked out of the General Assembly as the Saudi Arabian minister to the UN proclaimed in a speech that France “tortures with a ‘thirst for blood’” (Teltsch 1959, 3). By 1960, France became further isolated in its claim to Algeria as the General Assembly announced the Algerian war a threat to international peace and security and proclaimed Algeria had the right to independence (UN General Assembly Resolution 1573 (XV)).

France also received criticism from international humanitarian organisations. On 5 January 1960, a Red Cross report was leaked to the press which examined French POW conditions in Algeria (Beigbeder 2006, 103-105; Blair 1960, 5). The Red Cross noted improvements in POW conditions since its 1958 visit but also stated that 60 per cent of transit and interrogation camps were not satisfactory. “Primitive conditions, brutal treatment and frequency of the notation ‘killed while attempting to escape’ were criticised by the committee.” It was also reported that the Red Cross “said some of the Algerian prisoners had begged the committee members not to reveal their declarations for fear of reprisals. The team saw marks of torture on at least one prisoner” (Blair

33 Representatives who signed the letter were from the countries of “Afghanistan, Burma, Ceylon, Malaya, Ghana, Guinea, Indonesia, Iran, Iraq, Jordan, Lebanon, Liberia, Libya, Morocco, Nepal, Pakistan, Saudi Arabia, Sudan, Tunisia, the United Arab Republic and Yemen” (Parrott 1959, 1).
34 From the outset of the conflict, France argued that the 1949 Geneva Conventions did not apply to the conflict in Algeria because it was not an international conflict. However, France soon changed its position and recognised the applicability of the Conventions in Algeria on 23 June 1956. The ICRC visited camps and detention centres in Algeria seven times, with the first visit occurring between 12 May and 28 June, 1956 (Beigbeder 2006, 103-104).
The French-Algerian war also harmed French relations with its British and American allies. Neither state wanted to become too closely associated with French policy in Algeria for fear it would harm their relations with the Arab states (Cogan 2002, 144; Goldsmith 2002, 160). As US Ambassador to the UN Henry Cabot Lodge stated, Algeria “had become a symbol in Arab countries and in the Muslim world as a whole” (Cogan 2002, 144). Both states had to play a balancing act that attempted to maintain allied relations with France, yet at the same time, not declare open support for France’s war (Cogan 2002; Goldsmith 2002). By the end of the 1950s, not only were the French government losing legitimacy in the eyes of the French public because of the torture scandal, but they became increasingly isolated in international society.

French Withdrawal and Why the Taboo Matters

Although reasons for the French withdrawal were complicated, ranging from the failed Putsch by rebels within the French Army in April 1961, to the attitudes of the pied noirs and the violence of the FLN (Horne 1977, 505), the decision to withdraw went beyond material concerns. By the end of the war, the French were defeating the FLN militarily. The French defeated the FLN in Algiers in 1957 and by 1958 were achieving successes in the country side (Merom 2003, 84-85). David Galula (2006 [1963], 243), a captain and commander of counter-insurgency operations in Great Kabylia, Algeria, argued that by 1959, “our strength was such that the war had been won for all practical purposes.” By 1960, the French had reduced rebel numbers to 8-9000, with rebel forces having only 6,500 weapons left (Galula 2006 [1963], 244). The French had recruited over 100,000 “Moslems” to the French side and the territorial borders were closed off (Galula 2006 [1963], 244). Moreover, FLN control over the
population was minimal. The FLN could not organise a general strike, and in 1961 when the FLN called for a boycott over the independence referendum, Algerians defied FLN calls and voted (Merom 2003, 87-88).

One of the major factors which contributed to French withdrawal was the condemnation France received both domestically and in international society regarding its conduct of the war. Shepard (2006, 73) argues “The international context that the Algerian Revolution helped create forced the French to change.” De Gaulle stated, “there is an international situation almost entirely and openly against us. This will not change if we seem to have to keep Algeria in the position where it is vis-à-vis ourselves” (Horne 1977, 343). Galula (2006 [1963], 6) stated, “On the international front, the situation was favorable to the insurgents from the beginning. While France had no ally, the rebels benefited from the material, financial, diplomatic, propaganda, and moral support of communist bloc and Arab countries.”

The negative impact torture had on French soldiers also contributed to the decision to withdrawal. General Allard, Massu’s superior, complained to the Ministry of Defence that the press’s “incessant repetition…place at risk the morale of the army” (Horne 1977, 234). Efforts were made to improve Army morale. Colonel Trinquier asked Father Louis Delarue to sanction torture, which he did, by arguing torture was the lesser of two evils and therefore morally justified under the circumstances (Merom 2003, 126-127). Yet despite these efforts, Army morale was heavily damaged not only by the repeated use of torture, but by the sense of betrayal by the government. As Horne (1977, 234) notes, “there was an increasingly savage feeling that they [the army] had been called in to carry out the dirty work of the civil authorities and were now being carted for it.” The impact of the tortures on the Army was acknowledged by Louis Joxe, who was involved in the Algerian peace settlement:
I shall never forget the young officers and soldiers whom I met who were absolutely appalled by what they had to do. One should never forget the significance of this experience in considering a settlement for Algeria; for practically every French soldier went through it. This is something that the supporters of *Algerie Française* never properly understood” (Horne 1977, 206).

Studying the widespread violation of the torture prohibition throughout the Algerian war does not demonstrate its weakness, but highlights its strength. Throughout this whole thesis, I have not sought to downplay or deny the fact that violations harm the constraining function of the taboo. But I have sought to show that this is only half the story. The torture taboo matters because it continues to influence and shape state actions during its violation. The French-Algerian war was no exception. The French were militarily winning the war up until 1962. Oil reserves were found in the Sahara which would have provided much needed revenue for the French government. And historically, Algeria constituted an important element of French identity and prestige. And yet by 1962, the French withdrew from Algeria. The exposure of torture not only generated a fear of moral degeneration within France itself, but it also led to a crisis and demoralisation within the Army. Although I do not argue that the exposure of torture was the only or primary reason for French withdrawal, it did play a potent role in contributing to the French decision to grant Algeria independence.

**Global Violations and the UN Convention against Torture**

In 1973 the human rights organisation Amnesty International (1973) released a *Report on Torture* as part of its 1972-1973 international campaign against torture. This report highlighted for the first time how torture had become a global phenomenon and how it
posed a danger to international society. In the Declaration from the Amnesty International Conference for the Abolition of Torture, held in Paris on 10-11 December 1973, the Declaration warned how torture “creates an escalation of violence in the internal affairs of states. It spreads like a contagious disease from country to country” (Forrest 1996, viii). Former colonies that had condemned their colonial oppressors for using torture were now employing it themselves to gain information, confessions, to punish and to intimidate. Superpowers and other western countries were also sponsoring and training torturers in Third World countries as part of their Cold War strategies, and ignoring the plights of the suffering of torture victims to protect their material and strategic interests (Amnesty International 1973; see also Chomsky and Herman 1979; McCoy 2007).

Similar to other violations I have examined throughout this thesis, the Amnesty Report and campaign provided an opportunity to strengthen the torture taboo. Amnesty International (1973, 18-20) argued the taboo was being undermined by both public indifference to torture and its constant violation. The anti-torture campaign was intended to break this indifference and declare a program to abolish torture based on the themes of “document, denounce, mobilize” 35 (Amnesty International 1973, 7; Prokosch 1996, 26). In 1974, Amnesty set up an International Secretariat with the task to “organize actions against torture in specific countries” (Prokosch 1996, 29). In the same year it set up the Urgent Action network that connected Amnesty members and coordinated appeals on behalf of those at risk of torture (Prokosch 1996, 29). Amnesty International also presented the United Nations with a petition with over a million signatures that called for the UN General Assembly “to outlaw immediately the torture

35 Alongside Amnesty International’s campaign, other NGOs emerged that dedicated themselves to investigate, document, and expose torture. This includes (but certainly not limited to) the Action of Christians for the Abolition of Torture (France), the Swiss Committee against Torture (today known as the Association for the Prevention of Torture), the Vicaria de la Solidaridad (Chile), the Free Legal Assistance Group of the Civil Liberties Union of the Philippines (Prokosch 1996, 29), and The Argentine Permanent Assembly for Human Rights (see Pion-Berlin and Lopez 1991, 75).
of prisoners throughout the world” (Prokosch 1996, 27).

In response to Amnesty International’s anti-torture campaign, Austria, Costa Rica, the Netherlands and Trinidad and Tobago drafted a United Nations resolution that condemned the use of torture and called on states to become Parties to international instruments that have prohibited torture and cruel and inhuman treatment (Burgers and Danelius 1988, 13). With amendments, this resolution was adopted by the General Assembly on 2 November 1973 (UN General Assembly Resolution 3059 (XXVIII)). In 1974, the UN affirmed that further efforts needed to be taken to eradicate torture (see UN General Assembly Resolution 3218 (XXIX)). The Fifth UN Congress on the Prevention of Crime and the Treatment of Offenders acted on this concern and drafted a Declaration on the Protection of All Persons from being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which was adopted without vote on 9 December 1975 (Burgers and Danelius 1988, 13-17).

Soon after the Declaration was adopted, the UN General Assembly passed Resolution 3453 (XXX) that called for further efforts to be made to ensure protection against torture and cruel, inhuman and degrading treatment (CIDT). On 8 December 1977, the General Assembly adopted Resolution 32/62 which requested the Commission on Human Rights to draft a convention against torture and cruel and degrading treatment. The drafting process occurred between 1977 and 1984. In an effort to not only see the convention adopted by the UN, but also to respond to the continued use of torture around the world, Amnesty International engaged in a second campaign against torture in 1984-1985 which focused on measures of prevention (Amnesty International 1984). By 4 February 1985 the Convention against Torture (CAT) was open for signatures. The CAT entered into force two years later, on 26 June 1987 (Burgers and Danelius 1988, 107-110). By January 1988, the Convention had
been ratified or acceded to by 28 states and signed by 59 states out of 159 members of the United Nations (see Burgers and Danelius 1988, 107-109). Today, there are 78 signatories and 151 Parties to the Convention.\textsuperscript{36}

Both the Declaration and Convention set out expectations and obligations of states in addressing the danger from torture. There is a heavy reliance on the sovereign state to initiate efforts (a problematic issue as we become reliant on the very actors that are the chief violators of the taboo in the first place (Donnelly 1999)). The Declaration has 12 Articles. The first Article defines torture, something that I examine in detail in the next chapter and will not elaborate on here. The Declaration announced that torture was a violation of the purposes of the United Nations Charter (Article 2) and no justification whatever could justify torture (Article 3). Each state shall take measures to prevent torture (Article 4), ensure that torture is a criminal offence under domestic law (Article 7) as well as train and establish rules and regulations for officials involved in custody of offenders, with these rules being reviewed over time (Article 5, 6). A victim of torture has the right to complain to “competent authorities” (Article 8) and the state is under obligation to investigate allegations of torture (Article 9) and prosecute offenders (Article 10). The victim has a right to compensation (Article 11) and any statement the victim made under torture cannot be used against the victim as evidence in “any proceedings” (Article 12).

The Convention incorporated the principles of the 1975 Declaration against Torture as well as build upon the Declaration in important respects. Under Article 3 (1) a state cannot “return (‘refoulmer’) or extradite a person to another State where there are substantial grounds for believing that he [or she] would be in danger of being subjected

to torture.” The Convention also establishes universal jurisdiction for the prosecution of torture offenders whereby a state has to either extradite a suspected torturer for prosecution or to prosecute the suspect under domestic law (Article 5, 6, 7, 8, 9). The choice of which option a state must do is left to the discretion of the state that has the suspect in custody. These articles not only reflect the customary nature of the torture taboo as a *jus cogens* international norm but are an attempt to eliminate the practice of using state sovereignty as protection from prosecution for human rights violations (Burgers and Danelius 1988, 131). Both the articles for non-refoulement and universal jurisdiction reaffirm the notion that violations of the taboo are not a matter of individual states but of the international society as a whole. The Torture Convention seeks to develop positive and negative responsibilities to prohibit unnecessary harm and break inside-outside dualisms between those across sovereign boundaries to generate “stronger attachments to a universal moral community” (Linklater 2011, 221).

**The Committee against Torture**

The Convention established a Committee against Torture to help enforce adherence to the Convention. The Committee consists “of ten experts of high moral standing and recognized competence in the field of human rights, who shall serve in their personal capacity” (Article 17 (1)). Human rights groups also work alongside the Committee in helping the Committee establish facts on the ground in particular countries (Kelly 2009, 786-788). A state must submit a report within one year of when the Convention comes into force for that State Party, and the report should outline

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37 This article is based on European case law on non-refoulement and Article 33 of the 1951 Geneva Convention Relating to the Status of Refugees (Burgers and Danelius 1988, 125).
38 See the “Participation of non-governmental organizations (NGOs) and National Human Rights Institutions (NHRIs) to the reporting process to the Committee against Torture,” available at http://www2.ohchr.org/english/bodies/cat/follow_up Ngo.htm
measures that the State has taken to achieve the aspirations and goals of the Convention. A State Party then submits a report every four years of new measures it has taken to prohibit and prevent torture (Article 19 (1)). The Committee is then able to publish “at its discretion” comments made on a State Party report in its annual report (Article 19 (4)). The Committee can accept petitions from those who allege to have been victims of torture, and carry out investigations if it receives “reliable” and “well-founded” information that a State Party is “systematically” using torture (Article 20, 21).

The Committee against Torture see the problem of torture as one of too much liberty of officials over persons deprived of their liberty. Although in the nineteenth century torture was deemed to be the product of the traditions of barbarous societies, torture is now deemed to occur in environmental contexts “in which human beings find themselves in the absolute power of other human beings” (UN Economic and Social Council 1986, 2; Amnesty International 1973, 23). The global use of torture by so many regimes demonstrated that torture is a “danger which threatens the citizens of every country, however long its tradition of civilized conduct” (Amnesty International 1973, 7).

Transgressions from the taboo can be ameliorated, then, through establishing institutions that place limits on the exercise of power (see Kelly 2009). This includes abolishing incommunicado detention and excessive pre-trial detention, ensuring an independent judiciary, establishing independent institutions to receive and follow up

39 This is on condition that the State Party from which the allegations are coming from recognises the competence of the Committee (see Article 22).
40 To prevent disruption of the text, I have cited the references of the different measures taken by the UN Committee in the following footnotes 41-46. Although I have relied primarily on the Eighteenth and Nineteenth Sessions of the UN Committee against Torture, one will find similar recommendations in other meetings.
on complaints, improving police culture through training and education, and improving monitoring and surveillance in prisons. This approach by the Committee is consistent with measures taken by other institutions such as the Inter-American Commission on Human Rights (IACHR 2011) as well human rights groups which seek to eliminate the “preconditions” of torture (see Amnesty International 1984, 11).

The Committee recommendations of monitoring and surveillance are complemented by the work of the UN Special Rapporteur on Torture. Under UN Resolution 1985/33, the UN Human Rights Commission decided to appoint a Special Rapporteur on Torture for one year to promote the implementation of the prohibition against torture. In subsequent resolutions, the mandate was developed by the Commission and today the methods of work on the UN Special Rapporteur contain several functions. The Special Rapporteur receives allegations of torture, makes appeals to governments concerning individuals at risk of torture, conducts on-site investigations, makes recommendations to states to prevent torture and identifies reasons or obstacles for why the torture prohibition has not been fulfilled (Rodley 2005, 107; UN Economic and Social Council 1997, Annex, Doc. No.: E/CN.4/1997/7).

Regional measures have also been taken to prevent and prohibit torture. The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment was signed on 26 November 1987. The European model establishes a committee on torture and carries out on-site visits to places where persons are deprived of their liberty (see Burgers and Danelius 1988, 26; Ginther 1991). A second major convention is the Inter-American Convention to Prevent and Punish Torture adopted at Cartagena de Indias, Colombia, on 9 December 1985, at the fifteenth session of the General Assembly of the Inter-American Commission on

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44 See Committee against Torture 1997, Doc. No.: A/53/44, par. 94.
45 See Committee against Torture 1997, Doc. No.: A/52/44, par. 167(b).
Human Rights. The IACHR model also authorises on-site visits and produces reports on human rights situations in member states.

The UN Committee and other regional institutions help in disciplining states into norm conformity by targeting and shaming a state’s identity. Through its ability to document and report on instances of torture, the Committee has a power over knowledge that helps it define who constitutes a good international citizen, and who is to be condemned (see also Price 1997, 154-155). In a similar vein to the publication of reports by human rights groups, the documentation of torture is at the same time a denouncement of that state (Prokosch 1996). When the UN Committee publishes its annual report, it has the discretion to include or exclude information it has received on certain states throughout the year. The Committee uses this discretion to pressure states to conform by rewarding states by keeping the matter confidential, or punishing states by going public (Burgers and Danelius 1988, 162).

The Special Rapporteur also contributes to disciplining states. A state can refuse a visit from the Special Rapporteur; however, doing so can stigmatise a state as a pariah state that has something to hide (Rodley 2005, 115). The United Nations also has country-specific Rapporteurs that focus on the human rights violations of a particular country. According to Rodley (2005, 108), “a country-specific rapporteur is often seen as the UN nuclear weapon, so much so that sometimes countries can end up agreeing to something even more intrusive to avoid that fate.” Rodley (2005, 108), a former Special Rapporteur on Torture, recalls a conversation with the Colombian army

47 These measures are similar to the shaming methods used by the UN Human Rights Commission (see Lebovic and Voeten 2006). This mechanism operates along the “1235” and “1503” procedure in the UN Commission on Human Rights, which has often examined torture cases. The 1235 procedure is the unofficial naming of Resolution 1235 adopted by ECOSOC in 1967. Initially adopted to allow the Commission to examine gross human rights violations in South Africa, it has since been broadened to allow the UN Commission to examine torture allegations in public sessions. This includes the establishment of country-specific working groups to examine human rights in particular countries. This procedure also allows for public discussion on torture (see Amnesty International 1984, 41-42). The second procedure is based on Resolution 1503 adopted by ECOSOC in 1970. This allows the UN Commission to examine communications relating to gross human rights violations. As Amnesty International (1984, 42) reported, “These procedures offer a form of sanction, for no government wishes to stand accused of torture before other governments, even in closed session.”
high command, who stated “The one thing we don’t want is a [country-specific] special Rapporteur on us.”

The Special Rapporteur follow-up reports are intended to be an on-going form of discipline that checks the progress of a norm violating state. The follow-ups occur once a year whereby the UN Special Rapporteur asks countries to report on what they have done to meet the recommendations. The state’s response is then published in the annual report (Rodley 2005, 115). The recommendations at the end of human rights reports are intended to identify failings of states and the follow-up reports reconstruct the ranking of states by evaluating its progress in achieving previously made recommendations. This allows for the continued exclusion and sanctioning of states or a revision of this status according to attempts made at progress.

The UN Convention against Torture, the Special Rapporteur on Torture, and other regional institutions reflect a technical, almost administrative approach, to dealing with torture. However, as Kelly (2009) points out, the Committee takes a very political position by associating the absence of torture, and therefore the presence of civilization, with the institutionalisation of liberal values. It is assumed by the Committee “that liberal institutions produce liberal practices all the way down,” and that removing torture means implementing liberal reforms (Kelly 2009, 798-799). The Committee has implicitly associated civilization (and an absence of torture) with liberal values, thereby allowing the Committee to use these measurements as a ranking device to identify “civilized” and “uncivilized” states. By taking the focus away from the causes of violence toward concern on monitoring mechanisms, it ignores how “liberal politics can produce its own forms of violence” (Kelly 2009, 798), an issue I turn to in Chapters 5 and 6.

Despite the strength of Kelly’s argument, the administrative approach of the Committee can also be demonstrative of the robustness of the taboo. The absolute
prohibition is taken for granted, and issues are not even raised as to whether torture in a particular instance is justifiable, or whether states should be able to create exceptions to the prohibition. It is a testament to the strength of the torture prohibition that after such widespread violation in international society, it still remains beyond the pale of negotiation, and has now become a technical problem of state building.

Caring for Victims of Torture

Although much of the UN Committee’s work has focused on institutional building to ameliorate the danger of torture, in the latter half of the twentieth century there emerged institutions that helped in the rehabilitation of torture victims. On 16 December 1981, the UN General Assembly passed resolution 36/151 to establish a Victim’s Fund that provides assistance for torture victims and their families. The Fund is based on voluntary donations of states, individuals and NGOs and these donations are used to help NGOs provide needed assistance to victims.

There has also been a rise in the number of medical NGOs concerned with torture documentation and treatment. In 1982 the Rehabilitation and Research Centre for Torture Victims was formed, and by 1985, the International Rehabilitation Council for Torture Victims emerged, which now acts as an umbrella organisation for 140 organisations in 70 countries (see http://www.irct.org). In 1985, The Medical Foundation for the Care of Victims of Torture was founded, which continued the work of volunteer physicians that had worked with Amnesty International (Denford 1996, 153).

The increasing attention given to treatment and rehabilitation of torture victims represents a consolidation in the understanding that torture represents a destructive practice. The Preamble of the 1984 UN Convention against Torture reaffirms the
foundations of human dignity negotiated during the drafting of the Universal Declaration of Human Rights, stating “the equal and inalienable rights...derive from the inherent dignity of the human person.” Torture is condemned because it targets these innate rights. In the first report by the UN Special Rapporteur on Torture in 1985, the Rapporteur Peter Kooijmans stated torture destroys the “individual personality that constitutes man’s inherent dignity” (UN Economic and Social Council 1986, 1). Torture is no longer condemned because it violates natural law. Torture’s destructive power is relegated to violating an internal quality of the human being. The personality is something both unique to the individual, and at the same time, something which all of humanity share. This destructive quality of torture represents a reaffirmation of its linkage with the category of “crimes against humanity.” The discursive shift to a destructive quality reinforces the robustness of the taboo as torture comes to be seen as a practice that destroys the qualities (personality and dignity) that make all of us human.

The intertwining of human dignity and the personality is what provides the possibility and capacity for human beings to experience the good life. The recordings of medical and psychiatric treatments of torture victims demonstrate the negative impact torture has on the ability of victims to live fulfilling lives. Mary R. Fabri (2005), the director of the Marjorie Kovler Center for the Treatment of Survivors of Torture, recalls the experience of one of her patients, a Central American indigenous woman who had been abducted and tortured. Because of the torture she received, she was diagnosed with post-traumatic stress syndrome. One day, after several sessions of therapy, the victim woke up and had difficulty recalling details of her personal history, she was asking friends questions about herself, and was unable to remember the torture, or Dr. Fabri and the sessions they had had together (Fabri 2005, 134-135).

48 Peter Kooijmans was UN Special Rapporteur on Torture from 1985 to 1993.
Another patient could not fail to forget her torture. Elena, a physician, was tortured in Latin America and then received asylum in the United States. She was on “prescribed medication to alleviate the insomnia, nightmares, uncontrollable weeping, depression, loss of appetite, weight loss, and intrusive thoughts and memories of being raped” (Fabri 2005, 132).

The consequences of torture also harm family members. In an important ruling in the Inter-American Court of Human Rights known as the Tubi Case, Daniel Tubi, a Frenchman accused on drug trafficking, was subjected to unlawful detention and torture. The Court found both Tubi and his next of kin had suffered a violation of “personal integrity” under Article 5 (1) of the Inter-American Convention on Human Rights. The Court ruled this was “a consequence of the unlawful and arbitrary detention, lack of due process, and torture suffered by the alleged victim [and] consisted, among other things, of the anguish caused by not knowing the whereabouts of the alleged victim immediately after his detention, and the feeling of powerlessness and insecurity due to negligence of the State authorities to make Mr. Tubi’s unlawful and arbitrary detention cease” (Burgorgue-Larsen and De Torres 2011, 381-383, 386-387).

The impact of torture to affect social relationships has been incorporated into rehabilitation processes (Denford 1996, 155). Denford discusses how in therapy sessions one victim of torture had difficulty remembering the images of friends and family before they were tortured. Denford (1996, 160) recalls how his patient “was ‘stuck’ with images of their grotesque deaths, unable to remember beyond those images to reach the whole people they had once been, as though he was still in bondage to the torturers who had caused such revolting distortions of living beings
whom he knew.” The therapy concentrated on reconstructing those people before the tortures, so as to allow mourning and recovery (Denford 1996, 160).

Conclusion

This chapter has made two arguments. First, the torture taboo continued to matter during the French-Algerian war despite is constant violation. The blowback and moral outrage France received both at home and abroad demonstrates there are normative limitations to the legitimate exercise of material power. The French refused to openly advocate torture in Algeria, even though they were receiving reports on the ground that it was effective in winning the Battle of Algiers. In an attempt to continue using torture, but avoid the stigma of being likened to torturing Nazis, the government sought to hide and deny its torture to get the best of both worlds. The French government were not just concerned with material strategic interests, but were heavily shaped by moral obligations to eliminate unnecessary harm and prohibit torture absolutely.

A realist may suggest that this hiding and denying does not matter much. Underneath one still finds the repetition of violence which plagues international politics and a further example of where security interests prevailed over moral restraint. But to play down the importance of moral principles during times of necessity is to miss the impact torture had on the war. The taboo violations negatively impacted on the attitudes of French society to a point where they feared a moral degeneration of the French Republic. And torture critics and government denial of torture harmed army morale. The Algerian war was an example of how a modern state

49 The use of therapy may not be appropriate in all situations. In Uganda, family and community bonds, as well as the work of local healers, are often used to reaffirm human relationships (Denford 1996, 162-165).
dealt with the clash of security interests and moral obligations, and it was both of these that shaped the conduct and outcome of the war.

The second argument made was that the global violation of the taboo provided an environment in which to strengthen the torture prohibition under international law. This builds upon previous arguments in this thesis that the torture prohibition has not developed in a linear fashion, but has become more robust over time in the face of violations, or because of its violations. Amnesty International’s anti-torture campaign provided an opportunity to consolidate torture as an international danger that has destructive qualities. In the previous two chapters, I showed how torture acquired the stigma of being a danger to international norms and institutions by being linked to fascist expansionist policies. However, by the 1970s this link had been forgotten, and torture had become an international danger in and of itself.

In addition, Amnesty International’s campaign helped strengthen the torture prohibition under international law. The principle of universal jurisdiction, non-refoulement and the establishment of the UN Committee against Torture and Special Rapporteur were all measures taken by international society to uphold the torture prohibition. In recent years, this international framework has been further strengthened with the Optional Protocol of the Convention against Torture, adopted on 18 December 2002 (UN General Assembly Resolution A/RES/57/199). The Optional Protocol establishes a Subcommittee on the Prevention of Torture that carries out inspections in States Parties and provides assistance and advice in establishing “National Preventative Mechanisms” (Article 11).

Although a welcome move to help prevent and prohibit torture, the UN Convention against Torture has not been able to stop torture from occurring around the world. Although I acknowledge that these are weaknesses of the Convention, this does not mean that the Convention does not matter. As Hathaway (2004) has argued, those
who have ratified the Convention, but continue to torture, do so in secret. States are concerned with damages to their reputation if they are exposed as norm violators. Therefore, Hathaway (2004) argues, if states are concerned about their reputation, this can be used against them to shame states into conforming to the torture prohibition. The UN Convention strengthens this ability to expose violations and shame states through the UN Special Rapporteur on Torture and the UN Committee against Torture.

Yet as I show in Chapters 5 and 6, the UN Committee against Torture has also played a crucial part in determining what practices constitute “torture” under international law. As increased public exposure of torture in international society has meant it has become harder for some states to hide and deny their use of torture, states are often resorting to re-defining torture under international law so that the torture prohibition better reflects their interests. Although these tactics show that the torture taboo is still being violated, consistent with what I have argued throughout this thesis, this does not mean the taboo has ceased to matter. As I show in the cases of Israel and the United States, both states received widespread condemnation for their definitions of torture, forcing them to abandon their controversial interrogation programs. Moreover, even though these states sought to limit the types of practices that could come within the torture prohibition, the torture taboo continued to limit and moderate state violence in often unexpected ways.
I have sought to challenge the realist position that during times of necessity there is *silent leges*, or a silence of law, that excludes moral norms from state calculations (Walzer 1978, 4). According to this argument, when human beings come under pressure, it exposes our inhumanity, and any reference to moral language when survival is at stake is cheap talk (Walzer 1978, 4). Although I have not moved away from the realist position entirely, I have shown that although strategic or material interests help explain taboo violations, this is not the whole story. Throughout this thesis I have argued the torture taboo matters, and I have done so by studying the very thing realists point to in order to demonstrate its weakness: norm violations. I have shown that not only do widespread violations offer an opportunity to strengthen the taboo but that times of war and necessity are permeated with moral language: one makes justifications for their behaviour, excuses, judgements about cruelty and virtue, right and wrong, good and evil, and agonise over what norm violations will mean for their identity.

What I seek to do in this chapter is to further build upon the study of violations by focusing on how since the 1970s and 1980s a battle has emerged in international society over how to define torture under international law. In the late 1960s, the
European Commission on Human Rights became the first international institution to define torture under international law. Since that time, there has been a debate between the European Commission and European Court of Human Rights, the UN, States, and human rights groups over how to distinguish torture from other forms of pain and suffering and how to identify torture’s constitutive elements. Although by the end of the 1990s the fluidity of the definition converged in a particular direction, as I show, legal uncertainties continue to remain, and this has left the definition of torture open to abuse.

This chapter examines how states have exploited these definitional ambiguities to re-define torture to better reflect their interests. The result has been to show that despite the taboo being internalised in international society, it has become contested in practice. In order to demonstrate how this re-defining demonstrates the strength rather than the weakness of the taboo, I have focused on the case of Israel and its use of “moderate physical pressure.” Between 1987 and 1999, Israel carried out what it called “moderate physical pressure,” a set of physical interrogation techniques that it argued were necessary to gain confessions from terrorism suspects and avert terrorist attacks in Israel. Israel provides a strong test case for the torture taboo because Israel became the first state to openly legalise torture as understood under international law. Israel did not declare that the prohibition against torture did not apply to them; rather, they argued what they were doing was not in fact torture, and therefore, legitimate and in line with international standards.

Realists may argue that this is further proof that the powerful define and capture moral norms to better serve their interests. Moreover, it is further proof, realists may argue, that Israel was pulled by the forces of necessity and did what was necessary in order to protect society from attack. However, a closer inspection shows something more complex. Not everything was permissible. The “moderate physical
pressure” techniques could only be used on certain subjects, in certain circumstances, and had to be kept within certain prohibitions deemed morally acceptable for a civilized, democratic state. Despite Israel being in a state of necessity, the Israeli Security Services were prohibited from using particular forms of coercive interrogation techniques because they violated international moral principles.

What does this mean for the taboo? One can find within this example a society agonising about appropriate moral behaviour, about what behaviour is fit for a humane state, and the dangers one faces if they transgress “basic moral principles” (Landau Commission 1989, 182). Yet the narrowing of the debate over torture to a definitional problem has shown how the torture taboo has become more robust over time. This very practice is evidence that not only does Israel recognise that a taboo exists, but that they also acknowledge that one cannot violate it under any circumstances.

As I show below, Israel’s moderate physical pressure program sparked outrage in the international community, with the United Nations and human rights groups condemning the program as constituting torture under international law. Even though Israel attempted to re-define torture to better reflect its interests, its interpretation was challenged by materially weaker actors. This further demonstrates that norms do not just reflect the interests of the powerful; rather, they are the creation of a dispersed set of authorities in international society that are constantly in a battle with one another to define behaviour and social reality.

This chapter proceeds as follows. The first section focuses on cases within the European Commission and European Court of Human Rights that have highlighted the difficulty in defining torture and how definitions differ amongst different European institutions, the United Nations, the Inter-American Court of Human Rights and human rights organisations. Although I show that there has been a convergence in recent years where these institutions have adopted similar means to understand what
practices constitute torture, this chapter and the next shows that states have exploited legal ambiguities to re-define torture to better reflect their interests. The ability of these authorities to define and classify practices and distinguish one practice from another is integral to understanding whether a person has been tortured and whether that individual’s humanity has been destroyed. As I will show, this contestation in practice has powerful implications for the kinds of practices associated with unnecessary and cruel harm, and the increasing difficulty to accurately identify taboo violations.

The second section examines Israel’s use of “moderate physical pressure” and how this attempt at re-definition shows the strength of the taboo rather than its weakness. The final section looks at how we can understand the rise of what is often called “modern” torture which does not leave any marks on the body. I build upon the work of Rejali (2007) to show that the rise of no-touch torture techniques is due to the strengthening of the human rights framework, as states have adopted measures to better hide their torture.

**The Greek Case**

The Greek Case in the European Commission on Human Rights (1967-1969) marked the first attempt by an international human rights institution to define torture and find that a state had tortured (Bates 2010, 266). After the Greek military coup in April 1967, Denmark, Norway, Sweden and the Netherlands submitted applications to the European Commission claiming the Greek military rulers had violated numerous articles of the European Convention on Human Rights. The submissions were then updated in March 1968 to include violations of Article 3 concerning torture and inhuman and degrading treatment after serious allegations of torture by the Greek military rulers had been made. These included Articles 5, 6, 8, 9, 10, 11, 13, 14 and 15 (see Bates 2010, 264-265).
military regime had emerged (Bates 2010, 265).51

The Commission adopted its final report on 5 November 1969, and several days later, on the 18 November, it was sent to member states foreign ministers’ departments (Amnesty International 1973, 93). The Commission found that the Athens Security Police had employed torture (in particular the technique falanga52) for information and confessions (Bates 2010, 266). When the Commission defined what practices constituted torture, it divided the definition in Article 3 into its constitutive elements. Article 3 reads “No one shall be subjected to torture or to inhuman or degrading treatment or punishment” (European Convention on Human Rights 2010 (amended according to Protocol No.14)). The Commission argued “all torture must be inhuman and degrading treatment, and inhuman treatment also degrading.” Inhuman treatment is “treatment as deliberately causes severe suffering, mental or physical, which in a particular situation is unjustifiable.” Torture is distinguished from inhuman and degrading treatment because it is an aggravated form and has a purpose (such as gaining confessions). And finally, treatment is “degrading if is grossly humiliates him [or her] before others or drives him [or her] to act against his [or her] will or conscience” (European Commission on Human Rights 1976, 245).

Not all infliction of pain is prohibited under Article 3, only that which in a particular context is “unjustifiable.”53 Although the Commission recognised that severity of pain can help distinguish torture from other painful practices, it also acknowledged that the purpose of the act plays a role in distinguishing prohibited forms of pain and suffering from one another (De Vos 2007, 4; Forowicz 2010, 197).

51 A violation of Article 7 was also included in the March 1968 submission (Bates 2010, 265).
52 This technique refers to the beatings, often of the souls of the feet.
53 Manfred Nowak (2006, 821), the former UN Special Rapporteur on Torture, stated “there may be some purposes for which deliberately causing severe suffering is justified and, therefore, is not inhuman treatment. Examples of such treatment include the use of force by police in the exercise of law enforcement, such as lawful arrest of a person suspected of having committed a crime, preventing a person lawfully detained from escaping, quelling a riot or insurrection, dissolution of a violent demonstration, defending a person against crime and unlawful violence, and the use of force by the military in case of armed conflict.”
The *Greek Case* subsequently influenced the definition of torture in the 1975 UN Declaration against Torture, with Article 1(2) stating torture constitutes “an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment” (UN General Assembly Resolution 3452(XXX)). As I now show, since the *Greek Case* there has been a contestation under international law as to how to define torture, and whether its distinguishing feature (relative to other forms of pain and suffering) should be defined by the severity of pain inflicted, or the purpose of the act. This contestation is more than just about definitions, but concerns what types of behaviour are permitted within civilized life.

**Commission Ruling in the *Ireland Case***

The definition in the *Greek Case* was drawn upon in another prominent case of torture in the European Commission known as the *Ireland Case*. Ireland submitted an application to the European Commission of Human Rights against the British government on 16 December 1971. Ireland claimed, amongst other things, that the UK violated Article 3 of the European Convention regarding the prohibition of torture and degrading and inhuman treatment. This occurred in the context of the emergency powers exercised by Northern Ireland authorities in August 1971, which were used to deal with the surge in violence between Catholic and Protestant communities (European Court of Human Rights 1978a, par. 11). Known as “Operation Demetrius,” it consisted of a joint police and army operation to arrest 452 people and combat IRA violence (European Court of Human Rights 1978a, par. 38-39). Suspects were then taken to regional holding centres and interrogated by the Royal Ulster Constabulary (RUC).

The Commission case concerned the interrogation of 14 individuals who were
taken to unidentified detention centres for “interrogation in depth.” These interrogations were concerned with gaining information about the IRA, not for information that could be used for court convictions. The Commission reviewed the cases of two case witnesses who were arrested in the morning of 9 August 1971 and taken to the Magilligan Camp, which was a Regional Holding Centre. They were “selected for special interrogation” and taken to an unknown interrogation centre on 11 August. They were then medically examined, taken to another place to be served with a detention order, and then taken back to the unknown interrogation centre where they were subjected to what became known as the “five techniques:” wall standing, hooding, loud noise, sleep deprivation, and reduced diet of food and drink (European Commission on Human Rights 1976, 396-397).

The five techniques were orally taught to the Royal Ulster Constabulary in a seminar at the English Intelligence Centre in April 1971 (European Court of Human Rights 1978a, par. 97). The techniques were given authorisation at a “high level” but were never written down in an official document (European Court of Human Rights 1978a, par. 97). When allegations began to emerge of the use of these techniques in Northern Ireland, the British government set up two commissions of inquiry to investigate the allegations. The Compton Commission was the first and was launched on 9 August 1971 and its findings were adopted on 3 November 1971 (Brownlie 1972, 501). The Compton Commission looked at interrogation in depth on 11 detainees and found these constituted “physical ill-treatment” but not brutality:

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54 The British government defined interrogation in depth as “asking extensive and searching questions on subjects specifically selected as likely to be able to provide useful information and its object is to obtain reliable information concerning the disposition of the enemy and of his intentions rather than to obtain evidence to achieve a conviction in court” (European Commission on Human Rights 1976, 391).
We consider that brutality is an inhuman and savage form of cruelty, and that cruelty implies a disposition to inflict suffering, coupled with indifference to, or pleasure in, the victim’s pain. We do not think that happened here (Brownlie 1972, 502).

The Compton Report came under criticism and as a result the Parker Committee was then established to examine whether authorised interrogation practices needed amendment. The Parker Report was adopted on 31 January 1972 (European Commission on Human Rights 1976, 389). Although the Report found the techniques to be illegal, the majority opinion argued they could be morally justified on the basis of “reasonable necessity” (Brownlie 1972, 505-507). The Report argued the techniques had been used in colonial contexts since World War II to save lives and gain information, and could continue to be used “in a manner consistent with the highest standards of our society” (Brownlie 1972, 505; European Commission on Human Rights 1976, 393).

On the same day as the Parker Report was published on 2 March 1972, despite the Report morally justifying the techniques, British Prime Minister Heath stated in Parliament that these five techniques would not be used in the future for interrogation purposes but reserved the right to use them with parliamentary approval (European Commission on Human Rights 1976, 390). When the five techniques came to the European Commission, the British government argued there was no need to express opinion on the five techniques because they had already been abandoned by the government and examined in the Compton and Parker Commissions (European Commission on Human Rights 1976, 375). However, the European Commission argued that because the British government Commissions made no reference as to whether the five techniques breached the European Convention, the status of the techniques continued to remain unresolved (European Commission on Human Rights
In determining whether these techniques breached Article 3 of the Convention, the Commission took a similar approach it adopted in the Greek Case, distinguishing “torture” from “inhuman treatment” and “degrading treatment.” It also distinguished prohibited pain from “a certain roughness of treatment” which “may take the form of slaps or blows of the hand on the head or face” (European Commission on Human Rights 1976, 377). In acknowledging that not all pain inflicted breaches the Convention, the Commission was acknowledging the different interpretations of what constitutes cruelty in different societies. The Commission stated, “This underlines the fact that the point up to which prisoners and the public may accept physical violence as being neither cruel nor excessive varies between different societies and even between different sections of them” (European Commission on Human Rights 1976, 377). The Commission found the detainees experienced pain while being subjected to the five techniques and suffered psychological effects such as “anxiety and fear, as well as disorientation and isolation” (European Commission on Human Rights 1976, 398). Psychiatrists differed as to whether the after effects of these techniques would be minor or result in “depression, insomnia and a generally neurotic condition resembling that found in victims of Nazi persecution” (European Commission on Human Rights 1976, 398).

In its ruling, the Commission found the five techniques to be an administrative practice characterised by repetition and official tolerance (European Commission on Human Rights 1976, 391). If the five techniques were carried out separately, they may not have violated Article 3 of the Convention, and assessing such “would rather depend on the circumstances and the purpose and would largely be a question of degree” (European Commission on Human Rights 1976, 401). However, carried out together, the Commission ruled by a unanimous vote that the five techniques
constituted inhuman treatment and torture (European Commission on Human Rights 1976, 402).

It is important to note the Commission ruled on a practice, not an individual act (European Court of Human Rights 1978a, par. 157). Moreover, the Commission ruled primarily on the purpose of the act (such as gaining information), rather than the severity of pain inflicted. The five techniques were distinguished from other interrogation techniques that may “bring some pressure on the person concerned, but they cannot, by that very fact, be called inhuman” (European Commission on Human Rights 1976, 402). The Commission found the five techniques used in combination negatively “affects the personality physically and mentally” and are intended to “break or even eliminate the will” (European Commission on Human Rights 1976, 402). As a result, “the systematic application of the techniques for the purpose of inducing a person to give information show a clear resemblance to those methods of systematic torture which have been known over the ages” (European Commission on Human Rights 1976, 402).

The Commission’s findings embarrassed the UK government (Bates 2010, 272). It must be remembered that not only had the UN General Assembly passed the Declaration prohibiting torture a year before in 1975, but that this Resolution was in part a response to the tortures of the Pinochet regime in Chile (see UN General Assembly Resolution 3219 (XXIX)). Moreover, the military dictatorship in Greece had also just been found guilty of torture by the European Commission (Bates 2010, 272), placing the UK in awkward company.

Ireland subsequently took the case against Britain to the European Court of Human Rights on 10 March 1976 with the purpose to confirm the Commission ruling that Convention violations had occurred in Northern Ireland (European Court of Human Rights 1978a, par. 2). The UK attempted to persuade the Court not to examine
the five techniques because the UK did not dispute the Commission’s interpretation that they constituted torture; the UK had given assurances the techniques will not be used again; and the wide publicity of the acts meant that it did not give rise to interpretation issues (European Court of Human Rights 1978a, par. 152, 153). The Court, however, unanimously ruled that it had an obligation under the Convention to examine the five techniques (Bates 2010, 273-276; European Court of Human Rights 1978a, par. 154).

Similar to the Commission, the Court argued that “ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3” (European Court of Human Rights 1978a, par. 162). The Court argued that “The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc” (European Court of Human Rights 1978a, par. 162). Pain is not a purely objective phenomenon; pain relates to the individual's background, medical history, and duration of treatment.

However, unlike the Commission which placed greater emphasis on the purpose of the act rather than the severity of pain inflicted to distinguish torture from inhuman and degrading treatment, the Court relied on the severity of pain to make a distinction between torture and inhuman and degrading treatment. The Court therefore ruled that the five techniques constituted inhuman and degrading treatment but did not constitute torture (European Court of Human Rights 1978a, par. 167). The Court argued that because the Convention makes a distinction between torture and inhuman and degrading treatment, it was the intention of the Convention that torture has attached “a special stigma to deliberate inhuman treatment causing very serious and cruel suffering” (European Court of Human Rights 1978a, par. 167). The Court invoked Article 1 of the UN Declaration against Torture, which labels torture an
aggravated form of cruel, inhuman and degrading treatment (CIDT) and concluded that although the practices constituted inhuman and degrading treatment, “they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood” (European Court of Human Rights 1978a, par. 167).

This ruling received dissenting opinion from several Judges in the European Court. One dissenting opinion by Judge Sir Gerald Fitzmaurice argued that the five techniques did not even pass the threshold of inhuman treatment. Alone in his opinion by sixteen votes to one, Judge Fitzmaurice argued that these techniques constituted “mere aches, pains, strains, stresses and discomforts” (European Court of Human Rights 1978, 118). However, most of the dissenting opinion was in relation to using the severity of pain as the distinguishing feature to differentiate torture from other painful practices (see dissenting opinion of Judge Zekia, Judge Evrigenis and Judge Matscher). As Judge Evrigenis argued, this judgement had the potential to exclude “modern techniques of oppression” which were not necessarily about violence and physical pain but were concerned with causing “even if only temporarily, the disintegration of an individual’s personality, the shattering of his mental and psychological equilibrium and the crushing of his will” (European Court of Human Rights 1978, 124).

The European Court received criticism from other authorities on human rights and international law. These criticisms reiterated the dissenting judges’ opinions in labelling the Court’s ruling too restrictive by relying on “old” concepts of pain that do not adequately take into account “modern” forms of psychological torture (Amnesty International 1984, 15; Bates 2010, 273-274; Bonner 1978; Spjut 1979, 271-272). Despite this condemnation, the Court continued to uphold its interpretation of torture.

For the dissenting opinion of Judge Zekia, see European Court of Human Rights (1978, 96-98). For dissenting opinion of Judge Matscher, see European Court of Human Rights (1978, 126-127). I have provided the dissenting opinion of Judge Evrigenis above.
in subsequent trials, using the severity of pain, and not the purpose of the act, to help identity torture (see European Court of Human Rights 1978b, 1996, 1997).56

The UN Convention against Torture

The European Court’s ruling in the Ireland Case had a profound impact on the drafting of the definition of torture in the UN Convention against Torture (see Burgers and Danelius 1988, 41; Forowicz 2010, 198-199; Rodley 2002, 474-475). During the drafting of the UN Convention there was a debate as to whether the Convention should define torture in relation to other prohibited acts in terms of severity of pain inflicted or by the purpose of the act. The US and UK wanted to define torture in relation to the severity of pain (Forowicz 2010, 199). A draft submission by the US defined torture as constituting “extremely severe pain or suffering, whether physical or mental” and which “is deliberately and maliciously inflicted on a person” (Burgers and Danelius 1988, 41). The UK also wanted a more restrictive definition of torture, arguing torture constitutes “systematic and intentional infliction of extreme pain or suffering rather than intentional infliction of severe pain or suffering” (Burgers and Danelius 1988, 45).

Other parties, such as Amnesty International and the International Commission of Jurists wanted the purpose of the act to be the distinguishing feature of torture (Rodley 2002, 475) in order to take into account modern forms of oppression that did not rely on physical pain inflicted. As Forowicz (2010, 199) argues, the final definition in the Convention “represented a compromise between non-governmental organizations that wanted the total elimination of the idea of the intensity of pain or suffering and those parties, including the United Kingdom, that wanted to preserve

56 For a discussion on each of these cases, see Forowicz (2010, 197-202).
what they saw as the benefits of the *Ireland* judgement.” The final definition of torture found in Article 1(1) reads

> For the purposes of this Convention, the term ‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

The UN Convention moves away from the previous definition in the UN Declaration by removing the notion that torture is an “aggravated” form of inhuman treatment (Rodley 2002, 474). Rather, Article 16 (1) defines cruel, inhuman or degrading treatment or punishment as acts

> which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

The UN removed the hierarchy of pain that the European Court used to distinguish between torture and CIDT. This has been interpreted by legal scholars as an indication that the UN wanted to move away from the European Court’s decision in the *Ireland* judgement and follow the approach of the European Commission (Forowicz 2010, 199).

Other courts and committees have also moved away from specifically
distinguishing torture from other forms of prohibited pain and suffering by severity. The Inter-American Convention to Prevent and Punish Torture (1985) does not make reference to the severity of pain in its definition of torture, and rulings by the Inter-American Commission on Human Rights have reiterated this view in case rulings (Rodley 2002, 478-480). Moreover the UN Human Rights Committee in its rulings on torture has also argued that severity of pain is not required for torture to have taken place. However, they have not moved away from it altogether, having taken into account aggravation of suffering in some of its rulings (Rodley 2002, 478).

It was in 1999 that the European Court began to move away from its ruling in the Ireland Case (Forowicz 2010, 203). The European Court began to adopt a dual approach to understanding torture by taking into account both the purpose and severity of the act. One can see here the reflexive nature of international law, as the European Court began to incorporate elements of the definition of torture outlined in the UN Convention and other international bodies. In an important ruling in 1999, the Court argued the Convention was a “living instrument” and “certain acts which were classified in the past as ‘inhuman and degrading treatment’ as opposed to ‘torture’ could be classified differently in the future” (De Vos 2007, 7; European Court of Human Rights 1999; Forowicz 2010, 204). This ruling was followed up by others (European Court of Human Rights 2001) and has been interpreted as suggesting that the Court would now rule the five techniques used by the UK as cruel and inhuman

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57 Article 2 of the Inter-American Convention to Prevent and Punish Torture (1985) reads:

For the purposes of this Convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.

The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article.
treatment and torture (DeVos 2007, 7; Rodley 2002, 477).

How are we to understand the evolution of the definition of torture under international law? First, both torture and cruel and inhuman treatment are prohibited absolutely. Second, with the exception of the Inter-American Court of Human Rights, torture and CIDT is distinguished from the lawful infliction of pain because it constitutes severe pain and suffering (Rodley 2002, 498). And third, by the end of the 1990s, the purpose of the act had been adopted as a key element of torture (Rodley 2002, 491).

The definition of torture has narrowed in a particular direction over time to a point where important similarities exist between different international institutions regarding their interpretation of torture. However, there remain legal ambiguities that have left the torture taboo vulnerable to manipulation. The exact role severity of pain plays in distinguishing torture from CIDT is still not unanimous, with the European Court adopting a dual approach and the UN Human Rights Committee assuming an unclear position as to what role severity plays in its rulings (Rodley 2002, 489). In addition, whether the five techniques, individually, would constitute torture, was not made clear by the European Commission. What I would like to do now is to show how some of the ambiguities surrounding the definition of torture under international law have been exploited by states and produced a situation where the torture taboo remains stable in international society but contested in practice. I turn to the case of Israel to show how it manipulated international law to distinguish its interrogation practices of “moderate physical pressure” from torture. I argue that although these practices were condemned as torture and CIDT by human rights groups and the United Nations, the attempt by Israel to redefine its acts as not torture during times of necessity shows the moral framework of the taboo in action.
Israel and “Moderate Physical Pressure”

On 31 May 1987, the Israeli government established a Commission to investigate allegations that the Israeli General Security Service (GSS) had employed violent interrogation techniques on suspects of “Hostile Terrorist Activities” (HTA) and lied about the use of these techniques in court. The revelations, exposed in the 1987 Nafsu Case, had “severely undermined the public’s confidence in the GSS, and in parallel, caused immense confusion, to the point of a danger of a loss of direction, within the GSS itself” (Landau Commission 1989, 148). The Commission was launched to address these issues and make recommendations as to GSS investigation procedures in relation to combating terrorism activities (Landau Commission 1989, 146).

The Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity, or the Landau Commission as it became called, was headed by former Israeli High Court Justice, Moshe Landau. The Commission confirmed the allegations that GSS interrogators had used violent and illegal techniques on “terrorism” suspects and then lied about these practices in court. However, instead of prohibiting absolutely physical interrogation techniques, the Landau Commission recommended they be legalised. The Landau Commission marked an important diversion from the UN interpretation of torture and launched a twelve year struggle between Israel, the UN and human rights groups over a monopoly of the interpretation of torture.

The Commission made a distinction between police work, which consists of collecting evidence to prosecute the offender, and the work of the GSS, which aims to prevent terrorist attacks and protect society (Landau Commission 1989, 157). The Commission stated that since 1967, Israeli GSS have used some form of physical pressure to force terrorist suspects to confess, and that this physical force had been
seen within the GSS as “unavoidable” (Landau Commission 1989, 158-159). The confession had been fundamental to prosecuting terrorism suspects; however, suspects have often been trained to resist interrogation strategies (Landau Commission 1989, 158). Because of limitations under Israeli law prohibiting the use of violence to gain confessions, the GSS dealt with this problem by committing perjury to prevent confessions being thrown out of court, and by keeping GSS interrogation techniques secret to prevent resistance training by state enemies (Landau Commission 1989, 161-165).

The Landau Commission sided with the GSS rationale and recommended that some physical pressure or what it called “moderate physical pressure” was necessary to prevent terrorist attacks. The Commission relied on the “ticking-bomb” scenario to argue that harm could be inflicted upon detainees to save lives. However, because engaging in physical interrogations is illegal in Israel, the Commission justified its recommendations under section 22 of Israel’s Penal Law, which can justify a transgression of legal prohibitions if it protects a greater value (Landau Commission 1989, 170). This provision is based on three premises: that the offender acted in self-defence or prevented harm to others the offender had a duty to protect; the harm could not have been avoided in another manner; and that the harm inflicted was not disproportionate to the harm prevented (Landau Commission 1989, 169-170). As the Commission argued,

To put it bluntly, the alternative is: are we to accept the offence of assault entailed in...slapping a suspect’s face, or threatening him, in order to induce him to talk and reveal a cache of explosive materials meant for use in carrying out an act of mass terror against a civilian population, and thereby prevent the greater evil which is about to occur? The answer is self-evident (Landau Commission 1989, 174).
However, the recommendation to use physical force was not unrestricted. The Landau Commission was attuned to the dangers of a transgression of “basic moral principles” in interrogations (Landau Commission 1989, 182). The Commission stated “methods of police interrogation which are employed in any given regime are a faithful mirror of the character of the entire regime” and there is the “danger of sliding towards methods practiced in regimes which we abhor” and which brings about “internal moral corruption” (Landau Commission 1989, 182-184). In order to prevent police despotism in Israel, the Landau Commission argued the GSS must “preserve humanitarian behaviour and human dignity in their treatment of terrorists, in order to uphold the credo of the State itself as a law-abiding State grounded in fundamental concepts of morality,” even if terrorism suspects had no right to such treatment (Landau Commission 1989, 183-184).

The Landau Commission did not condone the infliction of “severe” pain or suffering: in fact, Israel sought to maintain the absolute prohibition on torture and cruel, inhuman and degrading treatment. Instead, the Commission drew upon the Ireland Case discussed above to argue that the Court condemned the “five techniques” as violating Article 3 of the European Convention because they were applied in combination. The Landau Commission argued “it remains to be…considered whether each of these acts separately constituted a deviation from what is permissible” (Landau Commission 1989, 181). The Landau Commission also drew upon the European Commission’s ruling in the Ireland judgement whereby the European Commission “held that a moderate measure of physical violence” was tolerated by detainees, and would not violate Article 3 of the European Convention (Landau Commission 1989, 181).

By adopting the European Court’s emphasis on the severity of pain inflicted as a guide to understand what practices constitute torture, and examine techniques
individually rather than in combination, the Landau Commission argued it could advocate physical interrogation techniques and maintain they did not constitute torture. Although the Commission never released its recommended techniques to the public, it stated that psychological techniques should be used first, and if these failed, one could then resort to “moderate physical pressure” (Landau Commission 1989, 184-5). The Landau Commission set limitations and safeguards for the use of these techniques. These limitations were: (1) “disproportionate” pressure was prohibited; (2) the use of techniques must be weighed against “anticipated danger,” meaning that these interrogation techniques could only be used in limited and “necessary” situations and were not standard behaviour; (3) the techniques must be defined in advance; (4) there must be supervision of the interrogation; and (5) any transgressions must be punished (Landau Commission, 1989, 175). If followed correctly, argued the Commission, these techniques would not constitute torture, maltreatment, or a violation of human dignity and would set “the boundaries of what is permitted to the interrogator and mainly what is prohibited to him” (Landau Commission 1989, 185). To breach these boundaries was to question the existence of Israel as a “civilized” state (Landau Commission 1989, 182).

This creative legal rationalisation for inflicting harm sought to bring physical infliction of pain in interrogations within “civilized” conduct by removing it from notions of “unnecessary” suffering. This allowed Israel to proclaim that it was still upholding the torture taboo and the suspect’s dignity while inflicting a “moderate” amount of pain on suspects to save the state and society from terrorism. The important element of this argument that one must keep in mind is that even though the Landau Commission was sympathetic to Israel’s security situation, it did not openly advocate torture. The torture taboo was given a sacredness that could not be balanced against the interests of society. Torture was to be prohibited, not because it was strategically
useless, but because it was bad, in and of itself. Torture undermines the social and moral bonds in society and threatens one’s identity as a humane member of international society.

Even though Israel redefined torture in a way that allowed for a wider range of interrogation practices to be exempt from the torture prohibition, the Landau Commission continued to set limitations on what interrogation practices Israel could use based on moral principles. By focusing on limits, rather than the actual practices used, one can find that even during times of necessity, certain sacred moral norms could not be violated. These limitations are even more surprising given that the GSS had argued physical interrogations used in the past, i.e., torture, had proven successful and were deemed necessary (Landau Commission 1989, 158-159). Amnesty International (1973, 211-214 and 1984, 233-236) has reported on torture in Israel and the occupied territories since the 1970s. In 1973, Amnesty International (1973, 212) argued torture methods used by Israel included “electric shocks applied to the genitals and other parts of the body, suspension by handcuffs, beating, kicking, and punching of all parts of the body, and the burning of the body with cigarette stubs. It has also been alleged that dogs have been set on prisoners.” In 1977, both the National Lawyers Guild and the London’s The Sunday Times carried out investigations into allegations of torture in Israel and found torture to be systematic and linked to high ranking officials in Israel (Bishara 1979, 7, 9; Hajjar 2008, 245-246).

The United Nations has also been critical of Israeli torture in the occupied territories. The UN General Assembly approved resolution 2443 in December 1968 which authorised a three-person committee to investigate human rights violations in the occupied territories (Bishara 1979, 8; UN General Assembly Resolution 2443 (XXIII)). Although Israel refused the Committee access to the occupied territories, and denied the use of torture, the Committee examined previous allegations of torture and
concluded there was strong evidence to suggest the use of torture (see Amnesty International 1973, 212; Bishara 1979, 9, 29).

If torture had been used because it was necessary to do so, it seems strange for the Landau Commission to argue that one must do what is necessary, but within limits, to save society from harm. What this demonstrates is that the use of “moderate physical pressure” cannot be explained by the realist emphasis on rational strategic or material interests alone. Israel was appealing to domestic and international audiences in re-defining torture to legitimise its interrogation practices and uphold its image as a civilized state. As I now show, even in the face of international and domestic outrage, Israel continued to maintain its position that “moderate physical pressure” did not constitute torture. This refusal to admit to torture shows not the weakness of the taboo, but rather its strength.

**The Battle over Torture**

The use of “moderate physical pressure” sparked controversy soon after the Landau Report was released, with human rights groups and the United Nations calling these practices torture. Although Israel, to this day, has never released the physical interrogation techniques recommended in the Landau Report, it becomes possible to see what these practices consisted of through the documentation by human rights organisations. The Israeli human rights organisation B’Tselem (1991) published a report in 1991 documenting the use of physical violence on thousands of Palestinian detainees dating back from the beginning of the intifada in 1987. Techniques included verbal insults and abuse; threats to harm the detainee or detainee’s family (including death threats); sleep and food deprivation; holding detainees in “closet” cells of 1x1 meters, with some cells being refrigerated; different forms of tying-up such as the “al-
Shabah\textsuperscript{58} and “banana tie”\textsuperscript{59} forced physical exercise; beatings; the use of water (cold showers, wetting the detainee’s hood); and covering the head with a sack or blindfolding the detainee (B’Tselem 1991, 54-75).

Although orders were given that detainees were not to be killed (Ron 2000, 459), some of these techniques resulted in death. This occurred with the technique known as “shaking.” Shaking is carried out with a detainee in the sitting position and their “legs shackled below a low chair and the hands handcuffed behind and between the back bars of the chair” (Amnesty International 1995, 10). This helps inhibit the detainee from resisting as the interrogator shakes the detainee (Amnesty International 1995, 10). One detainee recalls

An interrogator called ‘Captain Benny’ stepped on the chain linking my legs, while my hands were tied behind my back. He grabbed my shirt collar, bent me backward at a 45 [degree] angle and began to shake me very hard. When he did this I felt as if I was choking. I couldn’t feel my neck, as if it was not even there. The first time he did this I fell to the ground and fainted (Amnesty International 1995, 11).

On the 25 April 1995, it was publicly announced that a detainee, Abd al-Samad Harizat, had died while in Israeli custody. The autopsy, which was carried out on the 27 April, concluded Harizat died of a right parietal sub-dural haematoma caused by violent shaking (Amnesty International 1995, 6):

\textsuperscript{58} B’Tselem (1991, 62), described the al-Shabah position as involving the following: “Soldiers, police or prison staff tie the detainees’ hands behind and over the head. In most centres, the bound hands are also tied to pipes or bars embedded in the wall. The hands are usually fixed so high that the individual finds it very difficult to stand on his legs, which are also bound. In addition, the detainee is usually blindfolded or hooded. ‘Al-Shabah’ lasts for 5-6 hours between interrogation sessions, or for 12 hours during the night.”

\textsuperscript{59} According to B’Tselem (1991, 55), the banana tie involves tying the victim to “a stool, with head and legs bent over on either side.” Beatings can accompany the banana tie.
A haemorrhage of this type is produced as a result of sudden jarring movements of the head, as a consequence of which shearing forces sever small blood vessels bridging the space between the brain and the inner surface of the skull. Such a haemorrhage may be produced as a result of an impact to the head or face but in the case of Mr Harizat there was no injury to the head or face to account for it. Such a haemorrhage may also be produced by violent shaking of the person and this is well described in young children (‘the shaken baby syndrome’)… (Amnesty International 1995, 5).

Human rights organisations such as Amnesty International (1991b, 1994, 1995, 1997), B’Tselem (1991, 1992, 1997) and Human Rights Watch (1994) released several reports between 1991 and 2000 condemning Israeli practices and highlighting the dangers Israeli practices posed to Israel. For example, in a 1994 report, Amnesty International warned that “moderate” pressure often becomes “immoderate” as it becomes difficult to control the escalation of violence once violence had been condoned by the government (Amnesty International 1994, 12). B’Tselem argued that the justification of these techniques for short-term interests undermines democratic values and blurs the distinction “between terrorism and those who combat it” (B’Tselem 2000, 9-10).

The International Committee of the Red Cross issued a rare public statement on 16 July 1991 and again in May 1992, calling on Israel “to put an immediate end to the ill-treatment inflicted during interrogation on detainees” (Amnesty International 1994, 1; B’Tselem 1992, 27). The Public Committee against Torture in Israel petitioned the High Court in Israel in 1991 and 1994 to declare the physical interrogation tactics illegal and to force the Israeli government to publish the recommended interrogation techniques in full. The first petition was rejected in 1993, while the second petition
resulted in an *order nisi*\(^{60}\) with the Court leaving “the case pending” (B’Tselem 1992, 25-27; Hajjar 2008, 248-9).

The UN Committee against Torture also disagreed with the Israeli interpretation of torture. In a 1994 Israeli report submitted to the UN Committee, Israel outlines the measures and safeguards it has taken to implement the UN Convention against Torture. The Report makes a distinction between torture and “moderate physical pressure” arguing the latter techniques do not reach the level of torture or maltreatment, they uphold the suspect’s dignity, and that they are unavoidable in order to prevent terrorist attacks (UN Committee against Torture 1994, Doc. No.: CAT/C/16/Add.4, 9). However, in the UN Committee’s 1997 concluding observations and recommendations to a report submitted by Israel in the same year, the Committee condemns the Landau interrogation practices as violating Article 1 and 16 of the Convention against torture (torture and CIDT respectively). The Committee acknowledged Israel’s security concerns but stated this did not allow for a violation of the prohibition against torture. Amongst some of the Committee’s recommendations was for Israel to cease applying internationally prohibited interrogation techniques \(^{61}\) and any other provisions that violated the Convention, and for Israel to publish the “landau rules…in full” (UN Committee against Torture 1997, Doc No.: A/52/44). Israel refused and both parties stuck to their positions in the subsequent report and conclusions in 1998.\(^{62}\)

Despite international condemnation, many elements within Israeli society, including the courts and some medical professionals, agreed that not only did GSS

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\(^{60}\) This refers to when a Respondent has to provide evidence of why a detainee was being subjected to particular interrogation techniques (B’Tselem 1997, 8).

\(^{61}\) The techniques the UN Committee condemned specifically included: “(1) restraining in very painful conditions, (2) hooding under special circumstances, (3) sounding of loud music for prolonged periods, (4) sleep deprivation for prolonged periods, (5) threats, including death threats, (6) violent shaking, and (7) using cold air to chill” (see Committee against Torture 1997, Doc No.: A/52/44).

\(^{62}\) For the Israeli report to the Commission, see UN Committee against Torture 1998, Doc. No.: CAT/C/33/Add. 3, 6 March. For the Committee’s response, see Committee against Torture 1998, Doc. No.: A/53/44, par. 232-242.
interrogation techniques not constitute torture, but that they were necessary to protect society. There were several legal cases in Israel that helped to legitimise Israel’s definition of torture and cruel and inhuman treatment. In the *Bilbeisi Case* and the *Hamdan Case*, both in 1996, the applicants petitioned for interim injunctions on physical interrogation methods they were both subjected to. For Bilbeisi, this included being tied up in painful positions, hooding, subjected to loud music, sleep deprivation, squatting and violent shaking (B’Tselem 1997, 7-13). Hamdan was subjected to the same techniques, with the addition of death threats (B’Tselem 1997, 14-19). While the courts granted the interim injunctions, the courts then revoked them on appeals by the GSS who claimed they had obtained recent knowledge concerning future terrorist attacks and needed to use the techniques on the applicants to gain information (B’Tselem 1997, 7-19).

The *Hamdan Case* sparked international outrage. On 18 November 1996, Yuval Ginbar, a senior researcher for B’Tselem, wrote to Allessio Brunni, Secretary of the UN Committee against Torture, stating he was concerned about the Israeli court’s ruling in the *Hamdan Case*: “We are concerned that this could have extremely dangerous implications beyond Israel and the Occupied Territories. If Israel’s policy is allowed to continue unhindered, other democratic states facing security problems may follow suit” (B’Tselem 1997, 30). He then asked the Committee to request Israel for a special report explaining the interrogation methods under Article 19 (1) of the UN Convention against Torture (B’Tselem 1997, 30). The next day, the Chairman of the Committee against Torture issued a press release stating “moderate physical pressure” was “completely unacceptable” and requested Israel to submit a report to the Committee under Article 19 (1) to explain its practices, the first time in the Committee’s history it had done so (B’Tselem 1997, 19, 31). Moreover, the Committee stated it was concerned that the Supreme Court decision in the *Hamdan*
Case was intended to legitimise “moderate physical pressure” “for domestic purposes” (UN Committee against Torture 1997, Doc No.: A/52/44: par. 259). On 17 December 1996, the High Court of Justice issued another interim injunction which prohibited “the use of physical force” on Hamdan by GSS interrogators (B’Tselem 1997, 19).

A third legal case in November 1996 concerned Khader Mubarak, who was subjected to painful positions, hooding, loud music and sleep deprivation by Israeli authorities (B’Tselem 1997, 26). Mubarak’s injunction was rejected by the court. Although the court prohibited the “painful shackling” of the detainee, it argued that hooding, sleep deprivation and loud music were legitimate techniques. The court made its judgement by examining the use of each technique individually, rather than in combination which had been done by the European Commission and European Court (B’Tselem 1997, 28). B’Tselem condemned the ruling, arguing it ignored the suffering caused by the combination of methods used on the detainee (B’Tselem 1997, 28).

The Israeli Medical Association (IMA) also came under fire from physicians and human rights organisations for being complicit in Israel’s interrogation program. Some doctors that worked alongside interrogators in army and detention facilities did not document torture or helped interrogators determine whether detainees were fit to withstand “moderate physical pressure” techniques (Bamber, Gordon, Heilbronn and Forrest 2002, 271; Summerfield 1995b, 755). It emerged in 1993 that “a ‘medical fitness for interrogation’ form” was given to physicians by Israeli interrogators to fill out to confirm that suspects were fit for interrogation (Summerfield 1995a, 1413). As Derek Summerfield (1995a, 1413), the Principal psychiatrist for the Medical Foundation for the Care of Victims of Torture, stated, “doctors who completed such forms could not credibly claim to have no idea that they were certifying detainees to undergo some degree of abuse amounting to torture.”

When the role of Israeli medical physicians in interrogations became public
knowledge, the IMA remained silent on the issue (Mamode 1996, 57; Summerfield 1995b, 755). The Chairman of the Centre Committee of the IMA justified this stance by arguing the organisation is “careful not to get involved in the political aspects of the issue” of interrogations (Summerfield 1995b, 755). However, this apparently “neutral” position was also because elements within the IMA were sympathetic to the GSS rationale for physical interrogation. In 1999, the Chairman of the IMA Ethics Committee, Professor Dolev, stated “a couple of broken fingers” in interrogations could be justified if it elicited information to prevent “ticking bombs” (Bamber, Gordon, Heilbronn and Forrest 2002, 271). Moreover, Dolov did not agree that Israeli techniques constituted torture (Bamber, Gordon, Heilbronn and Forrest 2002, 271). As a result of these positions, there were calls for the international medical community to boycott medical conferences held in Israel (Burns-Cox 1996, 57).

This struggle between different actors regarding the legality and morality of “moderate physical pressure” resulted in an important landmark decision in the Israeli High Court in 1999 in the case of Public Committee Against Torture in Israel [PCATI] v The State of Israel. The Court had convened a nine-justice panel in January 1998 to consider seven separate petitions regarding GSS interrogation techniques (see UN Committee against Torture 2001, Doc. No.: CAT/C/54/Add.1, 3). The panel reconvened again on 20 May 1998 and a third time on 13 January 1999 (see Hajjar 2008, 250). Finally, on 6 September 1999, the High Court ruled “moderate physical pressure” was illegal. The Court examined several Israeli interrogation techniques, including shaking, the “frog crouch,”63 hooding and loud music while being subjected to the “Shabach,”64 “excessive tightening of handcuffs,” and sleep deprivation. The

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63 According to the Israel Supreme Court (1999, par. 11), the Frog Crouch “refers to consecutive, periodical crouches on the tips of one’s toes, each lasting for five minute intervals.”

64 According to the Israel Supreme Court (1999, par. 10), “a suspect investigated under the ‘Shabach’ position has his hands tied behind his back. He is seated on a small and low chair, whose seat is tilted forward, towards the ground. One hand is tied behind the suspect, and placed inside the gap between the
Court noted that in all “progressive” societies, interrogations cause discomfort, but that there are limits to interrogations. The Court found these techniques were unnecessary and violated the subject’s dignity. The Court argued, “An illegal investigation harms the suspect’s human dignity. It equally harms society’s fabric” (Israel Supreme Court 1999, par. 22). The Court reaffirmed that the prohibition against torture is absolute and argued “there is no room for balancing” between the torture taboo and other values (Israel Supreme Court 1999, par. 23).

However, the Court did not make a judgement as to whether these practices constituted torture. The Court concluded these techniques were illegal by arguing that the necessity defence did not authorise the techniques, and therefore the GSS were not authorised to use them. The Court expressed a tinge of regret regarding its decision. The Court’s judgement warned of the potential negative repercussions of its decision, stating, “The possibility that this decision will hamper the ability to properly deal with terrorists and terrorism disturbs us” (Israel Supreme Court 1999, par. 40).

However, the Court left the door open for the GSS to continue to use the techniques, stating that these practices could be justified in certain exceptional circumstances but that the legislature would have to authorise them (Israel Supreme Court 1999, par. 39). By arguing that these interrogation practices could be authorised, it suggests that the Court did not believe these practices constituted torture. Yet, by acknowledging these techniques resulted in a violation of human dignity, the Court was implying that at a minimum, these practices constituted cruel and inhuman treatment. To then suggest these techniques could be authorised is a decision that goes against the absolute prohibition of CIDT under international law.

Although there were criticisms of this ruling (see Imseis 2001; UN Committee chair’s seat and back support. His second hand is tied behind the chair, against its back support. The suspect’s head is covered by a sack that falls down to his shoulders. Loud music is played in the room. According to the briefs submitted, suspects are detained in this position for a long period of time, awaiting interrogation.”
against Torture 2001, Doc. No.: A/57/44), the Israeli government used the judgement to defend the claims that “moderate physical pressure” did not violate international law (UN Committee against Torture 2001, Doc. No.: CAT/C/54/Add.1, 12). Yet Israel did not continue these interrogations after the Court ruling. On the same day of the judgement, 6 September, a directive was issued by the Israel Security Agency ordering personnel to adhere to the Court’s ruling (UN Committee against Torture 2001, Doc. No.: CAT/C/54/Add.1, 8). Moreover, the government did not legislate for the authorisation of “moderate physical pressure,” instead opting for improving the manpower and technological resources of the security agencies (UN Committee against Torture 2001, Doc. No.: CAT/C/54/Add.1, 11). Even when a private member’s bill was brought before the Knesset (by Likud member Reuvin Rivlin) to authorise “moderate physical pressure” interrogation practices in exceptional circumstances (UN Committee against Torture 2001, Doc. No.: CAT/C/54/Add.1, 11; Hajjar 2008, 251), the bill faced opposition from the Prime Minister, the Minister of Justice and from human rights groups, eventually leading to the bill’s defeat (Bamber, Gordon, Heilbronn and Forrest 2002, 271; UN Committee against Torture 2001, Doc. No.: CAT/C/54/Add.1, 11). To this day, Israel has not published the Landau Rules, telling the UN Committee against Torture that because the Israeli Supreme Court ruled them illegal, publishing them “is no longer relevant” (UN Committee against Torture 2001, Doc. No.: CAT/C/54/Add.1, 13).

So What?

What does this case of “moderate physical pressure” in Israel tell us about the workings of the torture taboo during times of necessity? A realist analysis would possibility argue that the forces of necessity led Israel to breach fundamental norms
because, like all states, security and survival take precedence over morality. The term “moderate physical pressure” represented evidence of the hypocrisy among states and support of the fact that morality is little more than a fig-leaf in world politics.

Although not denying that Israel violated the torture taboo, and that brutal violence was inflicted on defenceless individuals, the situation is more complex than a realist would suggest. I have argued that by studying Israel’s taboo violation, one finds the strength of the norm rather than its weakness. This is for two reasons. First, Israel re-defined torture to localise the danger from pain by narrowing what constitutes torture, allowing for practices such as shaking to be brought within acceptable conduct. Yet in doing so, Israel continued to impose moral limits upon itself in which it could not cross. Not everything was permissible. Orders were given that detainees could not be killed (Ron 2000, 459). Moreover, the Landau Commission set standards as to what was permitted and prohibited and the conditions under which these interrogation practices could be used. If one must do what is necessary to survive, why impose limits upon oneself at the very time when you are arguing that no limits should apply?

And second, these limits were justified in moral terms. The Landau Commission made a clear separation between “moderate physical pressure” and torture. The Commission argued it was not advocating torture, but a form of civilized violence that could uphold the detainee’s human dignity as well as the integrity of Israel. By calling brutal forms of harm “moderate physical pressure,” it removes connotations of excess and cruelty and gives the practices a civilized character of restraint. This is a testament to the constitutive effect of the taboo in defining a “civilized” identity. But this re-definition also demonstrates avoidance behaviour, a potent taboo characteristic, and re-defining torture was an attempt to legitimise the interrogation techniques in the eyes of domestic and international audiences. The key point to keep in mind here is that torture, as defined by Israel, was not prohibited
because it was unnecessary or strategically useless, but because it was something that Israel does not do because it is wrong. This is a powerful demonstration of moral language shaping the identity, interests and actions of a state during times of necessity. All is not fair in love in war, it seems.

The Construction of “Modern” Torture

What the Israeli case study show us is that the boundaries between permissible and prohibited conduct are unstable. This is in part due to the fact that these “modern” forms of torture techniques, such as wall-standing, hooding, tying, and loud music, among others, do not seem at first sight to be associated with the cruelty of practices such as ripping out finger nails that we commonly associate with torture. However, as victim’s testaments, human rights groups, and the dissenting judges on the European Court of Human Rights tell us, these practices are akin to the old types of torture in that they destroy the will and the personality of the victim. These torture techniques that leave few, if any, marks on the body are becoming more common. How did these new forms of torture emerge?

One explanation is that these techniques represent part of a broader shift to “psychological” torture developed in North American science laboratories. McCoy (2006, 7) argues that since the beginning of the Cold War psychological torture became the central “clandestine facet of American foreign policy.” CIA sponsored research programs concerned with psychological warfare experimented with drugs, electricity and sensory deprivation that resulted in the psychological “no-touch torture” practiced by the US and other states today (McCoy 2006, 7). The new “psychological paradigm” fused together “sensory disorientation” and “self-inflicted pain” which forces the victim to look in upon themselves and make them “feel responsible for their
suffering and thus capitulate more readily to their torturers;” that is, it targets and destroys the victim’s identity (McCoy 2006, 8).

The CIA disseminated “no-touch” torture worldwide first in Asia and Latin America through the US AID’s Office of Public Safety, then in Central America through Army training teams (McCoy 2006, 10-11). McCoy (2006, 11) argues “Much of the abuse synonymous with the era of authoritarian rule in Asia and Latin America seems to have originated in the United States. While dictatorships in those regions would no doubt have tortured on their own, U.S. training programs provided sophisticated techniques, up-to-date equipment, and moral legitimacy for the practice, producing a clear correspondence between U.S. Cold War policy and the extreme state violence of the authoritarian age.” McCoy (2006, 21-60) argues the US funded psychological research that sought to battle Soviet interrogation methods and help its overall security policies during the Cold War. By the 1960s, the CIA concluded “that ‘esoteric’ methods simply did not work and more basic psychological techniques were, by contrast, devastatingly effective” (McCoy 2006, 49). By 1963 the CIA’s findings had been implemented into the KUBARK manual which, McCoy argues, defined US interrogation practices in the “Third World” (McCoy 2006, 50).

However, although McCoy offers a powerful account of the role of the US in spreading torture techniques, Rejali (2007) has shown that many of these techniques existed before the CIA-funded experiments, and the origins of many torture techniques lay outside North America. Rejali (2007) offers an alternative account to modern torture, arguing that no-touch or “stealth” torture has increased around the world because of the strength of the human rights regime. Since the 1970s, states have increasingly adopted torture techniques that leave no (or few) marks on the body to prevent criticism from human rights organisations and institutions, as well as from states. These techniques include electric torture, water torture, choking, use of cooling
devices (such as refrigerated cells), sensory and sleep deprivation, positional torture and devices (such as straitjackets), forced exercises, loud noise, use of drugs and cooking spices (the latter are inserted in the eyes or in cuts on the body to exacerbate pain), use of restraints, and beatings with instruments (such as telephone books) or with hands (such as slapping) (Rejali 2007, 554-556).

Rejali argues these techniques were first used in democracies such as the United States and the United Kingdom, as democracies had better checks and balances than authoritarian regimes and so police needed to take extra measures to hide torture. Moreover, the torture taboo was an integral part of democratic identity. Rejali (2007) documents the increase in clean beatings, stress positions, and electric torture, among others, to show how states have been careful to leave few marks of torture to avoid condemnation by human rights groups and actors. These practices have “clustered” around democracies because of their high level of accountability, but have since spread to authoritarian regimes around the world.

Rejali’s argument fits nicely alongside my own in that it helps explain how states hide, deny and re-define their use of torture, and provides further support that the strength of the taboo can be found by studying its violation. Even some of the most violent regimes have taken measures to ensure they were not labelled as torturers and to protect their identity. In the former Mubarak regime in Egypt, efforts were taken to maintain a positive public image of the regime in the face of allegations of torture. Allegations of torture made against Egypt by Amnesty International in 1991 were denied and condemned by the Egyptian government. The government formed a committee in January 1991 in response to the allegations, however, instead of investigating violations and prosecuting offenders, it used the committee to develop “media strategies to counter-reports of torture” (Human Rights Watch 1992, 120-124).

Hiding and denying forms of torture shows that even though the taboo is
violated, the violators know what they are doing is wrong, and they seek to hide that behaviour to prevent persecution, condemnation or maintain legitimacy in the eyes of a domestic or international community. Rejali (2007, 14) cites an example where an officer under the Mobutu regime in Zaire told his soldiers to stop beating one of their prisoners because “It will leave scars and we will get complaints from Amnesty International.” In post-Pinochet Chile, detainees were told after torture sessions to go “wash and make [themselves] look better for the press” before they could video-record their “confessions” (Amnesty International 1991a, 8-9). In Turkey a victim was suspended naked and electrocuted on the testicles. He was then hosed down on the concrete floor. The victim recalls, “The torturers take good care not to leave marks, but underneath my arms there is still bruising” (Amnesty International 1992b, 12).

UN Rapporteurs have shown that during inspection visits at police facilities and detention centres, countries have often hidden abused detainees from inspectors, hid torture weapons, or even transferred large amounts of prisoners to other prisons to prevent them from being seen by the Rapporteur (see Rodley 2005, 106-116; UN General Assembly 2008, Doc. No.: A/HRC/7/3/Add.6). By exposing this hypocrisy through the dissemination of human rights reports, human rights groups and international organisations can challenge the identity, reputation and legitimacy of a state (See Finnemore 2009, 66, 74). Scholars have shown that public pressure by NGOs have brought about change in the use of torture in some countries, such as in Algeria (although only temporarily) (Amnesty International 1992a, 8), in countries in Latin America (Amnesty International 1984, 73-76; Lutz and Sikkink 2000, 644-645), and Turkey (Worden 2005, 99-105). Public pressure was also placed on European states to expel Greece from the Council of Europe in 1970 when Greece was employing widespread torture (Amnesty International 1973, 75-100).

However, the effectiveness of such a strategy depends on how sensitive a state
is about their public perception and what strategic interests are at stake. For example, despite widespread condemnation of Greece for torture during the late 1960s and early 1970s, Greece continued to torture. Amnesty International argued this was because the US continued to support Greece because the US needed military bases and facilities for strategic reasons, something Greece supplied (Amnesty International 1973, 77). Amnesty noted, “The torturers [in Greece] from the start had said that the United States supported them and that was what counted” (Amnesty International 1973, 96).

The construction of this thing we call “modern” torture can be explained not only by psychological laboratories creating new techniques, but as a result of the human rights framework that has pushed torture further underground. However, just because states have increasingly adopted techniques that leave few marks on the body does not mean that they are any less harmful to the individual. The Cartesian distinction between mind and body that is often used to describe “modern” torture is a false one; torture targets the person as a whole, both the physical body and the mind.

**Conclusion**

This chapter has shown the powerful constitutive effects of the torture taboo’s role in defining a civilized state. Israel made a separation between “moderate physical pressure” and torture not because torture was useless, but because it was bad in and of itself. It was morality that restricted the use of torture and morality that shaped moderate physical pressure. This re-definition sought to remove notions of excessive and cruel pain and suffering, and provide the impression that although pain is being inflicted, it is regulated, restrained, and necessary. Israel, and as I show in the next

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65 On the relationship between pain, the mind and the body, see Bendelow and Williams (1995), Melzack (1961), and Sullivan (2001).
chapter, the United States, were able to exploit the legal uncertainties over the definition of torture in international law. These ambiguities left the definition of torture vulnerable to manipulation and it allowed states such as Israel to exploit it to further their own interests.

My argument in this thesis is that terms such as “torture,” “unnecessary” and “necessary” pain and suffering have no essentialist meaning but are ongoing and contested forms of social construction. Pain is dangerous, but pain can be inflicted for the greater good to prevent a greater harm. What we are currently seeing in international society is a “legal struggle” (Asad 1997, 304-305) between different actors concerning what constitutes torture and how best to localise dangerous forms of pain and suffering. The debate seems polarised between those, on the one hand, that interpret torture to better protect the security interests of the state, and on the other hand, those that want to see protecting individual dignity as being of primary importance.

The case of Israel and its “moderate physical pressure” shows that the ability to “taboo” a practice, and define torture, has no relationship to material power. The realist assumption that norms reflect the interests of the most powerful states in world politics has some basis in fact, but it is unable to account for the fact that human rights organisations and the UN Committee against Torture were able to defeat and de-legitimise Israel’s definition of torture. In fact, as I show in the next chapter, the US interpretation of torture was heavily criticised, opening the US up to social condemnation. These materially “weaker” institutions and actors exercise their power in their ability to produce knowledge.

The main purpose of this chapter, as with previous chapters, was to show that even though Israel violated the prohibition against torture, the attempt on Israel’s part to re-define torture shows not the weakness of the taboo but its strength. It shows that
Israel did not want to be associated with torture, and that it was morality, rather than strategic interests, that imposed moral limits upon Israel during times of necessity. The narrowing of the battle over torture to its definition shows how the torture taboo has become more robust over time. Yet Israel’s actions also set a dangerous precedent. Members of the human rights group B’Tselem argued that Israel’s example of legalising torture could spread to other liberal democracies as they face threats from terrorist violence. As we turn to the final chapter we see this is exactly what happened as the Bush administration embarked on its global “war on terror.”
Chapter 6
Torture, Renditions and the “War on Terror”

The 11 September 2001 terrorist attacks against the United States (US) demonstrated the threat transnational terrorist organisations posed to all members of international society. The US responded by re-declaring a “war on terror” and proclaimed itself responsible for leading the “civilized” world in this international war against transnational terrorism (White House 2002, vi). Bush stated in the Joint Session of Congress on 20 September, 2001, “This is not, however, just America’s fight. And what is at stake is not just America’s freedom. This is the world’s fight. This is civilization’s fight” (Bush 2001). In defending “civilization,” the Bush administration vowed to uphold and fight for human rights (White House 2002; 2003, 23; 2006a, 9; 2006b). President Bush stated in the 2002 State of the Union address,

America will lead by defending liberty and justice because they are right and true and unchanging for all people everywhere. No nation owns these aspirations, and no nation is exempt from them. We have no intention of

66 The Reagan administration first declared a “war on terror” during the 1980s and had support from the United Nations (see Chomsky 2002, 128-137; UN General Assembly Resolutions A/RES/40/61 and A/RES/42/159).
67 The US had international support in its efforts to deal with terrorism. The United Nations Security Council and General Assembly resolutions condemned international terrorism and placed obligations on states to take efforts to combat it (see UN Security Council Resolutions 1368, 1373, 1377 and UN General Assembly Resolutions A/RES/51/1, A/RES/56/160 and A/RES/56/88).
imposing our culture -- but America will always stand firm for the non-negotiable demands of human dignity (Bush 2002).

However, despite its proclamations that the US would uphold human dignity when fighting this war, in 2004, photographs were leaked that showed US military personnel abusing Iraqi detainees in Abu Ghraib prison, Iraq. Moreover, a series of memorandums were leaked soon after that showed the administration had been employing torture under the guise of what it called “enhanced interrogation” to gain information and intelligence from terrorism suspects. These practices included, among others, waterboarding, stress positions, use of loud music and isolation.

This is a perfect example for realists to demonstrate the weakness of the torture taboo. The Bush administration employed torture in Guantanamo Bay, Afghanistan and Iraq, as well as use “extraordinary renditions” to send terrorist suspects to foreign countries for torture. Both morality and international law were swept aside as the Bush administration sought to do what was necessary in order to prevent further terrorist attacks against the United States.

Yet as I have shown throughout this entire thesis, violations of the torture taboo are not as simple as they first appear. This chapter examines the violation of the torture taboo by the Bush administration and shows that the moral framework of the taboo had a powerful role in shaping the administration’s “enhanced interrogation” techniques as well as the use of extraordinary renditions. The Bush administration never argued that the prohibition of torture never applied to them during the “war on terror.” In fact, on 26 June, 2004, President Bush declared his support for the absolute prohibition against torture in respect for the United Nations International Day in Support of Victims of Torture (UN Committee against Torture 2005, Doc. No.: CAT/C/48/Add.3). Other top level officials, such as Alberto Gonzales, also reaffirmed the administration’s position that no circumstances justify torture (US Senate Judiciary Committee 2005, 14, 54).
Rather, similar to the example of Israel I analysed in Chapter 5, the Bush administration sought to manipulate the definition of torture under international law to better reflect their interests. In doing so, the US separated “torture” from “enhanced interrogation,” thereby making the argument that it could use more coercive forms of interrogation while still upholding the torture taboo.

Moreover, although I do not deny that the rationale behind extraordinary renditions was strategic and political to help facilitate interrogations, morality also played a powerful role in shaping these practices. The US saw itself as having limits in terms of the kinds of interrogation practices it could use, and therefore sent detainees off to foreign countries to subject them to torture practices it could not do. It is this outsourcing, re-definition and denial which show the strength of the taboo. The “war on terror” was permeated with moral language, and it was morality that both shaped and constrained US actions.

To show the strength of the torture taboo, I begin by showing how the US administration began re-defining “enemy combatants” as being outside of international law. This made it possible to remove Geneva Protections and allow for more coercive interrogations. I then move on to the negotiations and battles within the administration as to how they defined torture, and how the Bush administration placed moral limits upon themselves, limiting the types of practices it could use. And finally, I examine the use of extraordinary renditions and the public backlash to the enhanced interrogation program. Despite the attempt by the US to exploit some of the legal uncertainties surrounding the definition of torture, the US failed to legitimise its definition of torture to its domestic audience or to international society. The administration became increasingly isolated in its interpretation of torture, and suffered social sanctions and condemnation as a result of its interrogation policies. These social sanctions not only demonstrate the robustness of the taboo, but they also challenged
the authority and legitimacy of the US to “taboo” practices, undermining its political authority to help determine normative standards of behaviour in international society.

**Unlawful Combatants**

The Bush administration’s declaration that the fight against terrorism represented a new form of warfare marked the creation of a new legal category: the “unlawful” combatant. This new legal category sought to exempt detainees captured in Afghanistan from Geneva Convention protections and proved fundamental in justifying and legitimising the administration’s “enhanced interrogation” program. On 19 January 2002, the Secretary of Defense Donald Rumsfeld released a memorandum determining the status of Taliban and al-Qaeda individuals under international law. The memorandum states that Taliban and al-Qaeda detainees under the control of the Department of Defense will not be provided with Prisoner of War (PoW) status under the 1949 Geneva Conventions. However, US Commanders were nonetheless to treat these detainees “humanely” and “consistent with the principles of the Geneva Conventions of 1949” (Rumsfeld 2002, 80).

The justification for these classifications was elaborated upon in a 22 January 2002 memorandum written by Jay S. Bybee, Assistant Attorney General in the Department of Justice (DoJ). Bybee’s (2002a, 81) memorandum looks at the application of domestic and international laws on the detainment and treatment of al-Qaeda and Taliban detainees in the Afghanistan conflict. Three arguments were made as to why the laws of war should not be applied to al-Qaeda detainees. First, al-Qaeda is a non-state actor and therefore cannot be party to the Conventions. Second, the
group does not meet the “eligibility” criteria to be treated as a PoW under Geneva III. And third, the nature of the conflict does not fit within the Conventions because the “war on terror” is not a traditional war between states or a civil war (Bybee 2002a, 90).

In relation to the Taliban, Bybee’s memorandum makes two arguments. First, he states the administration could argue that Afghanistan is a failed state, and therefore cannot fulfil its obligations under the Geneva Conventions, allowing the US to suspend its obligations toward the Taliban. And second, because the Taliban had become heavily intertwined and dependent upon al-Qaeda, they could be treated as a terrorist organisation and this would enable the administration to suspend Convention obligations that way (Bybee 2002a, 91).

The attempt to remove al-Qaeda and Taliban detainees from Geneva protections caused debate within the administration. Although Alberto Gonzales (2002), Council to the President, agreed with the thrust of Bybee’s opinion, arguing it provided the US with “flexibility” to pursue various policy options, Secretary of State Colin Powell warned of the negative political repercussions of going down this path. Powell (2002, 123) warned excluding Geneva Conventions goes against the history of US support of the Geneva Conventions; it would result in international condemnation; harm military and legal cooperation with allies; and make US officials and troops vulnerable to prosecution and legal challenges. Adhering to the Geneva Conventions, Powell continued, “provides the strongest legal foundation for what we actually intend to do” and “presents a positive international posture, preserves U.S. credibility and moral authority by taking the high ground, and puts us in a better position to demand and receive international support” (Powell 2002, 123).

However, in a 7 February 2002 memorandum by President Bush, the President

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68 Bybee argued al-Qaeda are excluded from Article 4(A)(2) because they did not constitute a “volunteer force, militia, or organized resistance force.” Bybee also excluded al-Qaeda from Article 4(A)(3) because they do not constitute “a ‘regular armed force’ that professes allegiance to a government or authority not recognized by the detaining power” (Bybee 2002a, 90).
leaned toward the opinion expressed by Bybee and Gonzales. Bush stated the Geneva Conventions would not apply to al-Qaeda, and that Articles 3 and 4 would not apply to the Taliban. Because the Taliban are “enemy combatants,” they would not have PoW protections under international law (Bush 2002, 134-135). However, Bush then entered a caveat, stating “our values as a Nation, values that we share with many nations in the world, call for us to treat detainees humanely, including those who are not entitled to such treatment” and that this treatment must be “in a manner consistent with the principles of Geneva” (Bush 2002, 135).

This argument has been challenged by some, with Roberts (2002, 20-26) arguing that even if some detainees do not have PoW status under the Geneva Conventions, they are still entitled to certain minimum standards of protection under international law. However, a broader question arises when one reads these memorandums: why did the US want to exempt certain prisoners captured in Afghanistan from PoW status? Adam Roberts (2002, 24-25) argues there were two major reasons why prisoners captured in Afghanistan were not given PoW status. First, under the 1949 Geneva Conventions III, “PoWs are only obliged to give name, rank, date of birth and personal or serial number” (Roberts 2002, 24). This posed significant problems as the US sought to interrogate detainees regarding information relating to al-Qaeda. And second, the US were concerned with judicial proceedings under the Geneva Conventions that state PoWs must be sentenced “by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power” (Roberts 2002, 24). This raised concerns within the US that sentencing al-Qaeda in the courts would lead to publicity for al-Qaeda and fears defence lawyers would “prolong legal processes;” that courts would not be able to meet the standard of proof for punishment; and an open court might provide the opportunity for al-Qaeda to gain US intelligence information “about its vulnerability” (Roberts 2002, 24-25).
In light of these interests, one could claim that treating detainees “humanely” is “cheap talk” and nothing more than the insertion of a legal nicety to allow the Bush administration to get what they want. Although not denying this is in part the case, this statement is also important because it demonstrates the Bush administration recognised that not everything was permissible. There were limits as to how one could treat another human being, and these limits were based upon customary international norms and law. Bybee had provided an argument whereby the executive authority could abandon customary law, yet Bush decided not to adopt that position because they would violate the values of the US. As we will now see, international morality, and in particular the torture taboo, played a fundamental part in the debate within the administration concerning the creation of the “enhanced interrogation” program.

Military Interrogations at Guantanamo Bay

On 11 January 2002, the first 20 enemy combatants from Afghanistan arrived at Guantanamo Bay Naval base, Cuba (Department of Justice (DoJ) 2008, 27). The US holds Guantanamo Bay under a lease it signed with Cuba in 1903. The agreement recognises US jurisdiction over the area, but holds that Cuba has sovereignty over the lands and waters in the lease (Philibin and Yoo 2001, 31-33). For much of this time, Guantanamo Bay has been used as a refuelling post for the US, as well as a place for processing Haitian and Cuban refugees (Fletcher and Stover 2008, 9). However, when the “war on terror” and Afghanistan war began, the US needed a facility to hold and interrogate indefinitely prisoners captured in Afghanistan (Fletcher and Stover 2008,

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69 Bybee examined the potential argument that even if Geneva Conventions do not technically apply to detainees, the norms and principles within the Conventions have become so universally accepted that they have become customary international law. However, Bybee dismissed this argument claiming that even if this was the case, customary international law is not a “source of jurisdiction” and that the executive has the power to override it (Bybee 2002a, 111-116).
An inter-agency task force was established in October – November 2001 to decide on such a facility, and the task force agreed on Guantanamo Bay. This was because it was out of the jurisdiction of US courts\(^70\) and therefore ensured the facility could be run by wartime and not peacetime standards (Fletcher and Stover 2008, 9).

Interrogations began soon after the arrival of the detainees at the beginning of 2001. Interrogations were carried out by the Criminal Intelligence Task Force (CITF), military intelligence, and the Federal Bureau of Investigation (FBI).\(^71\) When interrogations began, interrogators relied on the Army Field Manual 34-52 (FM 34-52), *Intelligence Interrogation*, which is based on rapport-based interrogation techniques (US Senate Committee on the Judiciary 2009). Although interrogation tactics were relatively unorganised in the first few months, by May 2002, “Tiger Teams” were adopted which “consisted of an FBI agent, an analyst, a contract linguist, two CITF investigators, and a military intelligence interrogator” (DoJ 2008, 34). The FBI was the lead interrogator on the Tiger Teams as they had the most experience interrogating terrorism suspects (DoJ 2008, 34). These Teams continued for four to five months and “[e]ach Tiger Team conducted two detainee debriefings a day” with each agency producing its own report (DoJ 2008, 34). Although the Tiger Teams produced some successes, the Department of Justice Review (DoJ) into FBI involvement in interrogations stated “the FBI withdrew from participation in the Tiger Teams in the fall of 2002 after disagreements arose between the FBI and military intelligence over interrogation tactics” (DoJ 2008, 34). This can be seen in the interrogation of Guantanamo Bay detainee, Al-Qahtani.

\(^70\) This was challenged in an important ruling in 2008 in the case of *Boumediene v. Bush*. The US Supreme Court ruled that US courts had jurisdiction to hear habeas corpus petitions from Guantanamo Bay detainees. However, the recent practice of US courts has raised doubt over the ruling, with the Court rejecting seven habeas corpus claims from Guantanamo detainees in June 2012 (*New York Times* June 13, 2012).

\(^71\) According to the Department of Justice Review into FBI interrogations, the FBI began interrogating detainees at Guantanamo Bay on 4 February 2002 (DoJ 2008, 27).
By mid-July 2002, the US found out that Al-Qahtani was connected to the September 11 terrorist attacks. The lead interrogator, FBI Special Agent Thomas, moved Al-Qahtani on 8 August to isolation at the Navy Brig. Thomas interrogated Al-Qahtani for 30 days before the military told the FBI to “step aside” and allow the military to take over and pursue more aggressive interrogations (DoJ 2008, 82). The DoJ Review (2008, 82) stated, “According to Demeter [the case agent for Guantanamo Bay between February 2002 – April 2003], the military’s decision to pursue a more aggressive approach was the ‘beginning of a real schism’ between the FBI and the military regarding detainee interrogation techniques.” On 3 October, Al-Qahtani was taken to a “plywood hut in Camp X-Ray” where he was interrogated until the early hours of 4 October. An FBI agent recalled how “Al-Qahtani was ‘aggressively’ interrogated and that the military interrogators yelled and screamed at him” (DoJ 2008, 83). A military interrogator squatted over a Koran that had been provided to Al-Qahtani which “incensed” him (DoJ 2008, 83). Military interrogators also incorporated dogs into interrogations whereby “the guard handling the dog first agitated the dog outside the interrogation room, and then brought the dog into the room close to Al-Qahtani…the dog barked, growled, and snarled at Al-Qahtani in very close proximity to him, but was never allowed to have contact with him” (DoJ 2008, 84). FBI SSA Foy emailed the On-Scene GTMO Commander on 8 October to describe how military interrogators were using “sleep deprivation, loud music, bright lights, and ‘body placement discomfort’” on Al-Qahtani and that Al-Qahtani was “down to 100 pounds.” Foy stated the interrogations were having “negative” effects, and more interrogations had been planned for the weekend (DoJ 2008, 84).
Torture and “Enhanced Interrogation”

In order to understand how these military interrogations and practices on Al-Qahtani became possible, despite orders by Bush to treat detainees “humanely,” it is necessary to examine how the administration defined torture. On 1 August, 2002, Assistant Attorney General Jay Bybee wrote a memorandum to Gonzales, replying to Gonzales’s request on clarification for standards of conduct in interrogations under the Convention Against Torture, implemented under Section 2340-2340A, title 18 of the United States Code. Under the Code, torture is defined as an “act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control” (Bybee 2002b, 173). Bybee splits this definition into three constitutive elements to understand torture. First, an act constitutes torture if a person specifically intends to inflict “severe pain and suffering on a person within his custody or physical control” (Bybee 2002b, 175). This means that if a person knows his or her actions will result in severe pain, but that this is not his or her specific objective, or that the person acted in “good faith” while inflicting severe pain, the act does not constitute torture (Bybee 2002b, 174-175).

The second element of torture under Section 2340 is the act must cause “severe pain and suffering.” Bybee draws on both “common” understandings and medical understandings of “severe pain” to demonstrate that the pain must be of a “high level of intensity” and “difficult to endure.” Relying heavily on medical discourses, Bybee (2002b, 176) concludes that if an act is to constitute “torture” it must similarly “be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body functions.”

And thirdly, Bybee examines what constitutes “severe mental pain or
suffering.” The statute defines that the pain must be “prolonged.” Bybee (2002b, 177-178) draws upon psychological literature to argue that post-traumatic stress syndrome and chronic depression is often found in torture victims, therefore, “severe mental pain or suffering” must rise to this level. In relation to the application of drugs on detainees during interrogation, the drugs must produce an “extreme effect” that profoundly disrupts the personality of the victim to constitute torture (Bybee 2002b, 180-181). Examples may include drug-induced dementia, pushing someone toward suicide, and obsessive compulsive disorders (Bybee 2002b, 181-182). Moreover, if a death threat is to constitute torture, the threat must indicate “imminent” death. A death threat alone is not sufficient to rise to the level of torture (Bybee 2002b, 182).

One immediately notices that this definition of torture draws upon the European Court of Human Rights by defining torture in relation to the severity of pain inflicted. In fact, Bybee invokes both the Ireland Case and the Israeli Supreme Court decision discussed in Chapter 5 to provide further evidence that torture constitutes only extreme acts and that the severity of pain distinguishes torture from other cruel acts (Bybee 2002b, 196-200). To support this argument, Bybee invokes the negotiating and ratification history of the CAT during the Reagan and Bush I administrations showing how both administrations saw torture at the extreme end of cruel and inhuman treatment (Bybee 2002b, 185-190).

Bybee then turns to cruel, inhuman and degrading treatment (CIDT), arguing that international case law determining what behaviour constitutes CIDT does not apply to the US. This is because during the ratification of the Torture Convention both the Reagan and Bush I administrations were concerned that the Convention against Torture may prohibit behaviour not prohibited under the Eighth Amendment of the US Constitution concerning cruel and usual punishment. The US therefore made a reservation in the ratification process whereby the US Constitution would be the
founding document to interpret a violation of CIDT under Article 16 of the Convention against Torture (Bybee 2002b, 185-190). The US, therefore, did not argue that the prohibition against CIDT did not apply at all, but that only the US interpretation of CIDT applied, and that torture represented an extreme form of this interpretation.

After defining torture, Bybee turns to the legality of applying Section 2340A to interrogations carried out during the “war on terror.” Bybee argues that because the prevention of terrorist attacks and interrogation of “terrorists” is imperative to the national security and defence of the United States, inhibiting interrogation techniques would interfere with the Commander in Chief authority in “conducting operations against hostile forces” (Bybee 2002b, 202). This non-statutory discussion argues that even if interrogators engage in torture as defined in this memorandum it could potentially be justified and therefore eliminate criminal liability. This would be justified, according to Bybee, under the defence of necessity, which carries out harm to prevent a greater harm, and self-defence of the nation from a terrorist attack (Bybee 2002b, 207-213).

Although the US definition of torture is similar to the Landau Commission’s definition and understanding of torture, it contains some important differences. The Bybee memorandum went further than the Israeli government in its legal arguments by arguing that torture and cruel and inhuman treatment could be justified to prevent a terrorist attack, something the Landau Commission never suggested. However, as we see below, despite the fact Bybee offered an argument for torture, the administration refused to condone or approve of it.

Bybee’s definition of torture laid the basis for negotiations on what interrogation practices could be used in Guantanamo Bay. On 2 October, 2002, several military officials, who were later involved in requesting “coercive” interrogations,72

72 Those in attendance of the meeting on 2 October, 2002, were COL Cummings, LTC Phifer, CDR
held a meeting that sought to determine how to understand what constituted prohibited interrogations and torture. These officials did not argue that the prohibition against torture did not apply to interrogations. Rather these officials were concerned with staying within the law. They were concerned with the negative publicity harsh interrogations would bring to the United States and with ensuring authorised practices were consistent with the US interpretation of the Convention against Torture (see Fletcher and Stover 2008, Appendix A). The techniques discussed were based on the Survival, Evasion, Resistance, and Escape (SERE) program, which help US troops resist torture by foreign forces by subjecting them as part of their training to “stress positions, forced exercise to the point of exhaustion, [and] sensory deprivation or sensory overload” (Fletcher and Stover 2008, 10, see also appendix A). Similar to the Bybee memorandum, they understood torture as constituting extreme forms of behaviour, drawing the line at death of the detainee (Fletcher and Stover 2008, Appendix A, 82).

In light of this meeting, on 11 October 2002, Major General Dunlavey (2002) and LTC Jerald Phifer (2002), who at the time were at Guantanamo Bay, wrote to the Commander of Southern Command and the Commander Joint Task Force 170 respectively requesting the approval of “counter-resistance” techniques. MG Dunlavey (2002, 225) argued that existing techniques had become less effective over time and new techniques were needed for interrogations of detainees at Guantanamo Bay. MG Dunlavey and LTC Phifer requested several categories of techniques, which were based on the SERE techniques. The techniques were divided into three categories, ascending in coerciveness. Category I techniques included yelling, deception, and use of multiple interrogators. Category II involved stress positions (maximum of four hours), use of falsified documents, isolation for up to 30 days (with extensions being

Bridges, LTC Beaver, MAJ Burney, MAJ Leso, Dave Becker, John Fredman, ILT Seek, SPC Pimentel (see Fletcher and Stover 2008, Appendix A).
approved by the Commanding General), interrogation in alternative environments, sensory deprivation, hooding, 20 hour interrogations, removal of comfort items, “Switching the detainee from hot rations to MREs,”73 removal of clothing, forced grooming, and use of individual phobias (e.g. dogs) to induce stress. Category III included threat of imminent death, exposure to cold water or weather, “Use of wet towel and dripping water to induce the misperception of suffocation,” and “Use of mild, non-injurious physical contact such as grabbing, poking in the chest with the finger, and light pushing” (Phifer 2002, 227-228).

On the same day, a memorandum was sent to General James Hill, the Commander of Joint Task Force 170, by LTC Beaver, the Staff Judge Advocate for the Department of Defense, outlining the legality of the three categories of techniques. Using the criteria similar to that outlined by Bybee in the 1 August 2002 memorandum, Beaver (2002) finds the three categories of techniques to be legal.74 Beaver argues the three categories do not reach the level of pain to constitute torture. She argues all three categories can be justified if used in good faith to achieve a “legitimate governmental interest” and there was no intention “to cause prolonged mental harm” (Beaver 2002, 232-233). That is, Beaver dissociates these techniques from “unnecessary” pain and suffering and categorises them as “necessary,” and hence, legitimate forms of pain. LTC Beaver cautions however that foreign courts have demonstrated the potential harm of the wet towel technique, and that pushing and poking technically constitutes an assault (Beaver 2002, 235).

On 14 November 2002, the Commander of CITF wrote to Major General Miller, who was heading the interrogation teams at Guantanamo Bay, and argued Category II and III techniques would be ineffective and “would have ‘serious negative

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73 MREs are the food rations that are given to army soldiers.
74 Unlike the Bybee memo, Beaver does not enter into a discussion about whether violations of the Eighth Amendment of the US constitution, which prohibits cruel and unusual treatment, could be justified based on necessity or self-defence.
material and legal effects’ on the investigation, and that the use of such techniques could ‘open any military members up for potential criminal charges’” (DoJ 2008, 89). Despite these warnings, on 27 November 2002 Secretary of Defence Donald Rumsfeld approved Category I and II techniques and the fourth technique in Category III that involved light pushing, grabbing and poking in the chest. The memorandum, which was written by Haynes II, the General Counsel to the Secretary of Defense, and signed by Rumsfeld, stated, “While all Category III techniques may be legally available, we believe that, as a matter of policy, a blanket approval of Category III techniques is not warranted at this time. Our Armed Forces are trained to a standard of interrogation that reflects a tradition of restraint” (Haynes 2002, 237).

This reasoning is important. Rumsfeld did not approve of all techniques because they were not effective, but because they did not reflect US history of restraint. It was morality and a tradition linked to a humane identity that prevented all these techniques being authorised. Yet despite the implied claim by Rumsfeld that the authorised techniques were legal and civilized, it received condemnation by US officials. Naval Criminal Investigative Service (NCIS) Director Brandt called the interrogation techniques “repugnant,” and vowed “that NCIS would not engage in abusive treatment even if ordered to and did not wish to be even indirectly associated with a facility that engaged in such practices” (Mora 2004, 3-4).

Admiral Mora, General Counsel of the Navy, condemned the practices in Beaver’s memorandum and the 2 December memorandum authorising the harsh interrogation techniques. In a 7 July 2004 memorandum, Admiral Mora recalls his attempts at trying to rescind the authorised coercive interrogation techniques. Mora claimed these techniques were cruel and inhuman and potentially reached the level of torture (Mora 2004, 14). The Bush memorandums were based on a poor legal analysis, and violated both American values and “the President’s directive to treat the detainees
“humanely” (Mora 2004, 6). Yet Mora also highlighted the strategic and political blowback of such practices. Mora warned of the dangers of escalating violence at Guantanamo as the military becomes accustomed to force; the failure of the memorandums to clearly define boundaries that cannot be crossed; the negative domestic and international public backlash that would arise from the techniques; how the techniques would inhibit “support for the War on Terror”; and how such practices would harm US relations with coalition partners and allies (Mora 2004, 10).

After failed attempts to get the techniques rescinded, on 15 January 2003, Mora wrote a draft memorandum expressing his concerns that the practices constituted at a minimum CIDT and possibly torture, and threatened to sign it if the interrogation practices were not revoked (Mora 2004, 14-15; Worthington 2007, 207-8). As result of Mora’s threat, on 15 January 2003 Rumsfeld sent out a memorandum to the Department of Defense (DoD) requesting the establishment of a Working Group to assess the legal, policy and operational issues relating to interrogations of detainees held by the US armed forces (Rumsfeld 2003a, 238). On the same day, Rumsfeld also rescinded his December 2 2002 memo that authorised Category I, II and III techniques at Guantanamo Bay.

On 16 April 2003, Rumsfeld wrote to the Commander of US Southern Command authorising certain techniques to be used in Guantanamo Bay based upon the recommendations of the finalised Working Report. The Working Report recommended 35 techniques, 24 of which were chosen by Rumsfeld (Church Report 2005, 5). The controversial water boarding technique was not present in the final Working Group Report. Many of the techniques were in the Field Manual 34-52 (FM34-52), which was the standard Department of Defense interrogation manual. However, Rumsfeld (2003b, 360-365) also approved several techniques not in the
manual including change of scenery up,\textsuperscript{75} change of scenery down,\textsuperscript{76} dietary manipulation, environmental manipulation, sleep adjustment, false flag,\textsuperscript{77} and isolation. This memorandum was secret, so secret in fact that Admiral Mora only discovered it a year later (Nowak 2006, 814).

Rumsfeld left open the possibility that other techniques could be used, provided a written request was sent outlining safeguards and rationale for their use (Rumsfeld 2003b, 360). Moreover, these techniques were only to be employed at Guantanamo Bay and under certain safeguards. These included approval and supervision of the use of techniques; interrogations were carried out by trained interrogators; and the techniques had to be used within a broader interrogation plan against a detainee who is believed to hold “critical intelligence” (Rumsfeld 2003b, 364).

What these memorandums demonstrate is the recognition of limits to appropriate behaviour relating to treatment of detainees during the “war on terror.” Not everything was permissible. Some interrogation techniques were not authorised by Rumsfeld but were given approval in the Working Report. These included threat of transfer to another country, prolonged interrogations and standing, forced grooming, physical training, face slap/stomach slap, removal of clothing, and increasing anxiety by use of aversions. Also, the approved techniques were not to be used in a “free-for-all”: they were restricted to Guantanamo Bay, and only to be applied on certain detainees that held “critical intelligence.”

What I have sought to show is that what constitutes “humane” treatment and “torture” can be exploited by states to better reflect their interests. In a similar vein to

\textsuperscript{75} This practice refers to “Removing the detainee from the standard interrogation setting (generally to a location more pleasant, but no worse” (Rumsfeld 2003b, 362).

\textsuperscript{76} This practice refers to “Removing the detainee from the standard interrogation setting and placing him in a setting that may be less comfortable; would not constitute a substantial change in environmental quality” (Rumsfeld 2003b, 362).

\textsuperscript{77} This practice refers to “Convincing the detainee that individuals from a country other than the United States are interrogating him” (Rumsfeld 2003b, 362).
the Landau Commission discussed in Chapter 5, Bybee manipulated legal uncertainties under international law to justify the US position on interrogations. This included defining “severe” pain and suffering to constitute extreme levels of pain, and using the severity of pain as a means to distinguish torture from CIDT. Moreover, Bybee selectively interpreted international case law to better support his interpretation of torture. Bybee ignored the legal precedents in the European Court of Human Rights and the IACHR, discussed in the last chapter, which moves away from the *Ireland* judgement and challenges Bybee’s legal argument.

Yet a further novel legal argument was that torture was not torture if the inflictor of pain did not specifically intend to use torture. As Beaver (2002, 230-233) explains, because the US uses the US constitution as an interpretation of CIDT, Beaver argued that US domestic case law has found a breach of the Eighth Amendment to have occurred when pain has been inflicted “maliciously” and “sadistically” and not in the context to “achieve a legitimate governmental objective.” Since torture is an aggravated form of this behaviour, according to the US, torture carried out for a legitimate governmental reason is not torture. The “war on terror” was not a free-for-all, but a regulated set of practices that sought to appeal to domestic law and international norms such as the torture taboo to justify and regulate their behaviour.

**Waterboarding and the CIA**

The use of waterboarding was not approved in the military interrogation techniques discussed above. In fact, as I noted, the use of waterboarding was removed from the Working Group Report concerning interrogation techniques so that in the final version of the Report it was not open for Rumsfeld to approve. However, waterboarding was used by the Central Intelligence Agency (CIA) during the “war on terror.” The
approved techniques listed above were for military interrogations. CIA interrogations were different. The Schlesinger Report revealed the CIA operated under a different set of rules than the military in regards to interrogations.  

The Helgerson Report (May 2004) provides some insights into the use of waterboarding and CIA interrogations. The Helgerson Report was established to examine the interrogation techniques used by the CIA from September 2001-October 2003. On the same day that Bybee wrote the now famous “torture memo” on 1 August 2002, he also wrote another memorandum for John Rizzo, Acting General Counsel for the CIA. This memorandum concerns whether certain interrogation practices the CIA planned to use on terrorism suspect Abu Zubaydah at Guantanamo Bay would violate the Torture Convention. Zubaydah was al-Qaeda’s “third or fourth man.” He was bin Laden’s lieutenant and managed al-Qaeda training camps (Helgerson Report 2004, Appendix C, 7). The Bybee memorandum looks at 10 suggested techniques the CIA wanted to have approved to be used on Zubaydah: attention grasp, walling, facial hold, facial slap (insult slap), cramped confinement, wall standing, stress positions, sleep deprivation, insects placed in a confinement box and the waterboard (Helgerson Report 2004, Appendix C, 2).

As one can tell, these techniques were different from those authorised for military use. Many of these techniques are used in the SERE training program for US troops and the practice of waterboarding is used in Navy resistance training exercises.  

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78 According to the Schlesinger Report (2004, 942), the CIA carried out interrogations in Department of Defence facilities and sometimes with military personnel. However, at Abu Ghraib, the CIA was allowed to conduct interrogations separately.

79 According to the memorandum, this technique consists of “grasping the individual with both hands, one hand on each side of the collar opening, in a controlled and quick motion. In the same motion as the grasp, the individual is drawn toward the interrogator” (Helgerson Report 2004, Appendix C, 2).

80 A flexible wall is constructed and the individual is placed against it. The interrogator pulls the individual forward and then back so they hit the wall. The false wall creates a loud noise which is intended to produce a shock in the individual (Helgerson Report 2004, Appendix C, 2).

81 Bybee states this involved inducing the detainee Zubaydah’s fear of insects by placing a caterpillar in a confinement box with Zubaydah; however, Zubaydah would be told it is a “stinging insect” (Helgerson Report 2004, Appendix C, 3).
(Helgerson Report 2004, Appendix C, 4, 6). Here is a description of the waterboarding technique as it was described to Bybee:

In this procedure, the individual is bound securely to an inclined bench, which is approximately four feet by seven feet. The individual’s feet are generally elevated. A cloth is placed over the forehead and eyes. Water is then applied to the cloth in a controlled manner. As this is done, the cloth is lowered until it covers both the nose and mouth. Once the cloth is saturated and completely covers the mouth and nose, air flow is slightly restricted for 20 to 40 seconds due to the presence of the cloth. This causes an increase in carbon dioxide level in the individual’s blood. This increase in the carbon dioxide level stimulates increased effort to breathe. This effort plus the cloth produces the perception of ‘suffocation and incipient panic,’ i.e., the perception of drowning. The individual does not breathe any water into his lungs. During those 20 to 40 seconds, water is continuously applied from a height of twelve to twenty-four inches. After this period, the cloth is lifted, and the individual is allowed to breathe unimpeded for three or four full breathes. The sensation of drowning is immediately relieved by the removal of the cloth. The procedure may then be repeated. The water is usually applied from a canteen cup or small watering can with a spout. You have orally informed us that this procedure triggers an automatic physiological sensation of drowning that the individual cannot control even though he may be aware that he is in fact not drowning. You have also orally informed us that it is likely that this procedure would not last more than 20 minutes in any one application (Helgerson Report 2004, Appendix C, 3-4).
In determining whether waterboarding and the other interrogation practices mentioned in the memorandum constitute torture, Bybee briefly reviews his analysis in the memorandum to Gonzales outlining standards of interrogation. Bybee defines “severe” pain and suffering as “extreme” and that mental suffering must be “prolonged.” Bybee reviews the 10 techniques and states that none constitute severe pain or mental suffering to constitute torture. Bybee states that even if these 10 different techniques were used in combination they would not inflict the necessary level of pain to constitute torture.

However, waterboarding constitutes a threat of imminent death, one of the constitutive elements of torture. Yet despite this, Bybee argued waterboarding does not violate Section 2340A for two reasons. First, because interrogators do not have the “specific intent” necessary for the act to constitute torture (Helgerson Report 2004, Appendix C, 16-17). And second, for an act to constitute torture the conduct must be assessed according to the detainee’s mental health status and history (Helgerson Report 2004, Appendix C, 17). Bybee reviews the CIA psychological reports on Zubaydah, which states he “does not have any pre-existing mental conditions or problems that would make him likely to suffer prolonged mental harm from your proposed interrogation methods” (Helgerson Report 2004, Appendix C, 8). Bybee concludes it therefore seems “highly improbable that such consequences would result here” (Helgerson Report 2004, Appendix C, 17-18).

Despite the different “rules” between the CIA and military intelligence, and the different interrogation techniques approved for use for the separate agencies, the same framework was used to understand the limits of interrogation tactics. Torture only constitutes extreme pain and suffering. This was an explicit attempt to re-define torture so that dangerous pain and suffering was localised to an extreme level, allowing the administration to legitimise interrogation practices that are prohibited under
international law. Yet despite the Bush administration’s violation of the taboo, what these memorandums suggest is that the taboo had a fundamental role in shaping Bush administration interrogation practices. The torture taboo provided a limit that interrogators could not cross because it was illegal and immoral. Bybee’s legal opinion that torture, as defined by the administration, could be carried out under extreme circumstances, was never adopted by Rumsfeld based on the premise that the US have a history of restraint. This is further evidence of the strength of the taboo, as the administration avoided taking measures that may have been deemed strategically effective but were immoral to do so.

**The Detainee Abuse Reports**

Although “enhanced interrogation” techniques were approved for Guantanamo Bay only, they soon spread to other battlefields such as Afghanistan and Iraq. In Afghanistan, US interrogators had relied on the FM 34-52 interrogation manual from October 2001 to December 2002. However, when it was deemed these techniques were not longer sufficient to gain intelligence, officers began looking for new techniques (Church Report 2005, 6). By early 2003, US interrogators began using interrogation techniques similar to those authorised by Rumsfeld in the 2 December 2002 memorandum for Guantanamo Bay (Church Report 2005, 6-7). This was due both to a separate “migration” of the techniques from Guantanamo to Afghanistan and a broad reading of the FM 34-52 manual (Church Report 2005, 6). Despite several changes to the interrogations in February 2003 and March 2004, it was not until June 2004 that it was ordered that interrogation techniques must not deviate from the FM 34-52 (Church Report 2005, 7).

Similar to Afghanistan, when the war broke out in Iraq in March 2003,
interrogators relied on the FM 34-52. By August, MG Miller had been sent to conduct a review of interrogation practices in Iraq, an investigation which occurred between 31 August and 9 September 2003 (Church Report 2005, 8). MG Miller found a lack of direction for interrogation techniques, and as a result, the CJTF-7 Commander Lieutenant General Sanchez wrote an interrogation policy on 14 September 2003 based on the April 2003 JTF-GTMO interrogation policy (provided to Sanchez by Miller) (Church Report 2005, 8). However, CENTCOM’s Staff Judge Advocate considered this policy “overly aggressive” and the policy was revised on 12 October 2003 so as to make it more similar to the FM 34-52 (Church Report 2005, 8). The Iraq interrogation policy was then revised two more times on 13 May 2004, and again on 27 January 2005, with the final two revisions strengthening safeguards and prohibitions against certain interrogation techniques (Church Report 2005, 8-9).

What effect did this re-definition of torture have in practice? These memorandums re-defined torture to push the boundaries of inappropriate behaviour further away. Fewer practices came to be understood as torture and this soon led to an escalation in violence by CIA and military personnel. The CIA digressed from explicit approval for techniques and began to use other techniques, as well as approved techniques with greater repetition. Despite the fact the CIA promised Bybee they would not use the 10 techniques in “substantial repetition” (Helgerson Report 2004, Appendix C, 11), the CIA waterboarded Khalid Shaykh Muhammad, the so-called “mastermind” of September 11, 183 times (Helgerson Report 2004, 45). There was also an escalation of other techniques not authorised in the Bybee memorandum, including use of handguns and power drills to scare the detainee, threats, stepping on shackles and using a “stiff” brush82 to bathe detainees, manipulating pressure points, mock executions, blowing cigarette smoke in the face of detainees until they talk, use

82 Described in the Helgerson Report (2004, 44) “as the kind of brush one uses in a bath to remove stubborn dirt.”
of cold environments, water dousing, and hard takedown\textsuperscript{83} (Helgerson Report 2004).

The escalation in military violence made wider newspaper headlines when the Abu Ghraib prisoner abuse scandal broke in April 2004. As a result the administration commissioned several investigations into the scandal. The Taguba Report (March 2004) and the Mikolashek Report (July 2004) examined army conduct in detainee and interrogation operations; the Schlesinger Report (August 2004) examined interrogation practices and their contribution to abuses in Guantanamo Bay, Afghanistan and Iraq; the Fay-Jones Report (August 2004) examined detainee abuse in Abu Ghraib; and the Church Report (March 2005) examined Department of Defense interrogation operations. The reports documented many abuses including physical violence such as punching, slapping and kicking detainees; photographing naked male and females detainees (including arranging them in “sexually explicit positions”); forcing male detainees to masturbate while being videotaped or photographed; forcing naked detainees to wear women’s underwear; forcing male detainees to form a pile so they could then be jumped on by officers; threatening detainees with pistols, rape, or military working dogs; and making detainees stand on MRE boxes with a sandbag placed over their head, and electric wires attached to hands, feet and genitals (Taguba 2004, 416-417).

The Church Report (2005, 16) argued there was no single explanation for the abuse. However, in all these reports similar findings were given as to the reasons for detainee abuse: poor (or lack of) leadership and soldier discipline; confusion over which interrogation techniques could be used in which battlefields; poor communication between Brigade leadership and its soldiers; failure to enforce military standards; psychological factors such as different cultural environments and the “presence of mortal danger” (Taguba 2004, 419, 436, 438); as well as the tactics of the

\textsuperscript{83} This was blacked-out in the Helgerson Report.
enemy which contributed to the abuse and failure of military leadership to react to early warning signs (Church Report 2005, 16).

The Schlesinger Report (2004, 909), Fay-Jones Report (2004, 989), and the Taguba Report (2004, 416) all point to how a small number of sadistic military troops contributed to the abuse, an argument echoed by administration officials (see US Senate Armed Services Committee 2004, 7-11). Yet concentrating the blame for abuse on low level soldiers ignores the role top level officials had in contributing to the abusive practices (see Human Rights Watch 2005a, 1). The detainee abuse reports mentioned above discuss a link to the internal memorandums and abuse, but they do not explicitly state that the memorandums were the problem. The reports state the “Counter-Resistance Techniques” which were intended for “enemy combatants” at Guantanamo were applied to Iraq and in Afghanistan, which violated the memorandum that authorised the techniques for Guantanamo Bay only (Fay-Jones Report 2004, 1003; Mikolashek Report 2004, 676; Schlesinger Report 2004, 949). The reports distinguished detainee “abuse” from the “lawful” use of coercive interrogation techniques, even though many of the “enhanced interrogation” techniques constituted CIDT and torture under international law. This reinforced the Bush administration’s argument that the “correct” application of these techniques did not constitute torture. In commissioning these abuse reports, the reports helped to reaffirm the Bush administration’s definition of torture.

However, the memorandums also played a role in contributing to the abuse by blurring the boundaries between conformity and violation. The memorandums did not clearly define what practices were prohibited and permissible, creating confusion among US forces. It was unclear for officers as to what practices constituted “humane” treatment, with different military officers interpreting “humane treatment” in different ways (Human Rights Watch 2005b, 19-21). As Admiral Mora wrote,
What did ‘deprivation of light and auditory stimuli’ mean? Could a detainee be locked in a completely dark cell? And for how long? A month? Longer? What precisely did the authority to exploit phobias permit? Could a detainee be held in a coffin? Could phobias be applied until madness set in? ... the memo’s fundamental problem was that it was completely unbounded – it failed to establish a clear boundary for prohibited treatment. That boundary, I felt, had to be at that point where cruel and unusual punishment or treatment began (Mora 2004, 7-8).

Even the FBI was unclear as to what practices constituted prohibited conduct (DoJ 2008, 131-140). A report into FBI knowledge of abuse and illegal behaviour shows that the FBI did not agree with the CIA and military use of “enhanced interrogation” techniques. Although the FBI had itself considered using “enhanced interrogation” techniques in 2002, this was rejected by FBI Director Mueller, who decided to stick with rapport-based techniques because they were shown in the past to be more effective interrogation techniques than coercive ones (DoJ 2008, 146). Yet this report also shows the reporting behaviour of FBI agents when they came into contact with military officials using the enhanced interrogation techniques. When in late 2002 FBI agents raised concerns about military interrogation techniques at Guantanamo Bay with FBI Head Quarters, the response was that it was legal for the military but not for the FBI, and the FBI should not get involved (DoJ 2008, 104-107). After the Abu Ghraib scandal emerged in April, 2004, the FBI formulated a policy in May on “Treatment of Prisoners and Detainees” (DoJ 2008, 131-135). It required FBI agents to report abuse and to remove themselves from the interrogation if the interrogator is violating FBI guidelines, even if the interrogator is complying with his/her own agencies interrogation guidelines (DoJ 2008, 135).

Although some agents reported abuse, many agents either did not see any abuse
or did not report it because they perceived it as military policy (DoJ 2008, 231). The report shows that there were in fact low reporting rates of abuse among FBI officials. This could be attributed to the fact that the agency wanted to play a role in counterterrorism and did not want to have to police other agencies’ conduct (DoJ 2008, 203-204). Moreover, even though FBI agents were instructed to leave the interrogation when non-FBI techniques were being used, only those not approved by the administration were to be reported. However, this position is dangerous as even those approved by the administration through its “enhanced interrogation” program constituted torture under international law. No executive order can justify torture, and this raises the possibility the FBI was not reporting cases of torture to officials.

It is by some linguistic genius that these abuse reports were able to document harm and violence carried out by US soldiers yet not to challenge the distinction between “enhanced interrogation” and torture. The abuse reports did not blame official government policy, or recommend top level administration officials be held accountable for the authorisation of coercive interrogation practices (Human Rights Watch 2005a, 19-25). According to the reports, the problem was the wrongful application of techniques, not the techniques themselves.

**Extraordinary Renditions**

In addition to re-defining torture to constitute extreme forms of pain and suffering, the Bush administration also violated the torture taboo by using what it called “extraordinary renditions”; that is, the “exporting” of detainees to foreign countries for detention and interrogation (see Sadat 2007; Satterthwaite 2007; Weissbrodt and Bergquist 2006). Before the September 11 terrorist attacks, the US rendition program served a different function than it did during the “war on terror.” Renditions had been
used by the United States in counter-terrorism policy since the late 1980s (The Constitution Project 2013, 165). At first renditions were used to capture a suspect overseas and bring them back to the US for prosecution (The Constitution Project 2013, 165; Open Society 2013, 13). These renditions were authorised by President Reagan under the National Security Decision Directive 207 in 1986, by President Bush I under the National Security Directive 77 in 1993, and by President Clinton under the presidential directives PDD-39 and PDD-62 (Open Society 2013, 14).

It was by 1995 that there was a shift in US policy whereby suspects were “rendered” for prosecution in foreign countries (Open Society 2013, 14). This was in response to the “serious prospect of Osama bin Laden acquiring weapons of mass destruction” (Council of Europe 2006, 13). The purpose of rendition was to break the al-Qaeda network, detain al-Qaeda members and bring them to justice (Council of Europe 2006, 13). In the words of Michael Scheuer (2005), a CIA official who began the rendition program and ran it for 40 months, renditions were not intended to capture and interrogate al-Qaeda suspects but to get them “off the street” (Council of Europe 2006, 14). These renditions required legal standards to be met for them to be carried out. This included a warrant and a profile on the suspect based on intelligence and legal review, help from the country to apprehend the suspect in their jurisdiction, and a place for detention after arrest (Council of Europe 2006, 13).

The intelligence community often spoke of the benefits of the rendition program. In 1998 and 2000, FBI Director Louis J. Freeh and CIA Director George Tenet spoke respectively in front of Congress arguing that the programme had brought terrorists to justice and prevented attacks against the United States (Amnesty International 2006, 5). Up until 2001, 70 renditions had been carried out, with Jordan, Morocco and Syria being the biggest recipients of renditions (Constitution Project 2013, 165-166).
After September 11 2001, President Bush signed a classified directive that shifted the focus of renditions away from prosecution to detention and interrogation (Amnesty International 2006, 6). This transformation was for two reasons. First, the administration wanted immediate results in the fight against terrorism, and since the military was ill-prepared, the CIA was relied upon to produce results (Council of Europe 2006, 15). And second, the CIA was provided with a mandate to operate its own secret detention centres, which came to be known as “black sites” (Amnesty International 2005; Council of Europe 2006, 15). The inclusion of black sites into the rendition network meant that suspects were no longer sent into the custody of other countries (Council of Europe 2006, 15). Rather, according to Amnesty International (2005, 3), it allowed the CIA “to collect intelligence through long-term interrogation, free from any legal restrictions or judicial oversight.” It is suspected that since the “war on terror” began, between 100 and 150 people have been victim to extraordinary renditions (Open Society 2013, 15; The Constitution Project 2013, 167).

Human rights groups and investigations by the Committee on Legal Affairs and Human Rights in the European Parliament, headed by Rapporteur Dick Marty (“Marty Report”), have found that the use of renditions and black sites have been made possible by the assistance and complicity of governments all over the world (Amnesty International 2005, 2006, 2010, 2011; Council of Europe 2006, 2007; Human Rights Watch 2008; Open Society 2013; The Constitution Project 2013; UN General Assembly 2010, Doc. No.: A/HRC/13/42). Although the actual number of governments involved is unknown because of the secrecy surrounding the renditions, it has been estimated that around 54 governments are complicit in assisting the CIA with

84 It is believed that between 2001 and 2007 there have been 1,245 extraordinary rendition flights. However, this figure does not take into account flights that may have been carrying “equipment, documents and people not associated with the rendition program” (The Constitution Project 2013, 167).
either renditions or hosting black sites. A 2006 and 2007 European investigation into European complicity in extraordinary renditions described the global scope of the program as a “spider’s web” because of its network structure that links so many countries around the world, including Europe, Africa, the Middle East and Asia (Council of Europe 2006, 2007).

The process of rendition itself was violent. What has been common in many of the Parliamentary and human rights investigations (see Council of Europe 2006, 22-24), as well as in the European Court of Human Rights (2012) case on renditions is the process of disorienting detainees during renditions. Once apprehended, detainees are stripped naked, photographs taken, and then they are re-dressed in a diaper and tracksuit. Detainees are then hooded, blindfolded with goggles, and ear muffs placed over their ears. Once on the plane, detainees are restrained (often in uncomfortable positions) for the entire flight. Stories by victims recall how they were not given toilet access and were forced to urinate and defecate in their diapers (The Constitution Project 2013, 168). Once in detention, detainees were often moved to different detention centres in different countries, unaware of the time, date, or the safety of their families (see Amnesty International 2005, 2006; Human Rights Watch 2008; The Constitution Project 2013, 167).

A case illustrative of not only the violence of the program, but of the complicity of European states in the CIA-run extraordinary rendition program, was the rendition of German national El-Masri. Wrongly suspected of being linked to Islamic organisations, El-Masri was apprehended and questioned by Macedonian authorities.

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85 In perhaps the most comprehensive review of the governments involved in renditions and black sites to date, the Open Society lists 54 governments involved in assisting the CIA. These include: Afghanistan, Albania, Algeria, Australia, Austria, Azerbaijan, Belgium, Bosnia-Herzegovina, Canada, Croatia, Cyprus, Czech Republic, Denmark, Djibouti, Egypt, Ethiopia, Finland, Republic of the Gambia, Georgia, Germany, Greece, Hong Kong, Iceland, Indonesia, Iran, Ireland, Italy, Jordan, Kenya, Libya, Lithuania, Macedonia, Malawi, Malaysia, Mauritania, Morocco, Pakistan, Poland, Portugal, Romania, Saudi Arabia, Somalia, South Africa, Spain, Sri Lanka, Sweden, Syria, Thailand, Turkey, United Arab Emirates, United Kingdom, Uzbekistan, Yemen, and Zimbabwe (Open Society 2013, 61-118).
on the Serbia/Macedonia border on 31 December, 2003. El Masri was then taken to the
Skopjski Merak Hotel and held on the top floor of the hotel incommunicado and
questioned by Macedonian authorities (European Court of Human Rights 2012,
par.18). El-Masri received death threats and was questioned for thirteen days. In
response to his treatment, El-Masri went on a hunger strike (European Court of Human
Rights 2012, par.19). On 23 January 2004, El-Masri was forced to make a statement in
front of a video recorder, saying he had been treated humanely (European Court of
Human Rights 2012, par. 20). He was then taken handcuffed and blindfolded to the
Skopje airport and handed over to CIA custody (European Court of Human Rights
2012, par.20-21). It is worth quoting at length El-Masri’s treatment by CIA officials at
Skopje airport:

Upon arrival, still handcuffed and blindfolded, he was initially placed in a
chair, where he sat for one and a half hours. He was told that he would be taken
into a room for a medical examination before being transferred to Germany.
Then, two people violently pulled his arms back. On that occasion he was
beaten severely from all sides. His clothes were sliced from his body with
scissors or a knife. His underwear was forcibly removed. He was thrown to the
floor, his hands were pulled back and a boot was placed on his back. He then
felt a firm object being forced into his anus. As stated by the applicant’s
lawyers at the public hearing of 16 May 2012, of all the acts perpetrated against
the applicant that had been the most degrading and shameful. According to the
applicant, a suppository was forcibly administered on that occasion. He was
then pulled from the floor and dragged to a corner of the room, where his feet
were tied together. His blindfold was removed. A flash went off and
temporarily blinded him. When he recovered his sight, he saw seven or eight
men dressed in black and wearing black ski masks. One of the men placed him
in a nappy. He was then dressed in a dark blue short-sleeved tracksuit. A bag was placed over his head and a belt was put on him with chains attached to his wrists and ankles. The men put earmuffs and eye pads on him and blindfolded and hooded him. They bent him over, forcing his head down, and quickly marched him to a waiting aircraft, with the shackles cutting into his ankles. The aircraft was surrounded by armed Macedonian security guards. He had difficulty breathing because of the bag that covered his head. Once inside the aircraft, he was thrown to the floor face down and his legs and arms were spread-eagled and secured to the sides of the aircraft. During the flight he received two injections. An anaesthetic was also administered over his nose. He was mostly unconscious during the flight. A Macedonian exit stamp dated 23 January 2004 was affixed to the applicant’s passport (European Court of Human Rights 2012, par.21).

In addition to renditions, “black sites” were used where many individuals have “disappeared” in US custody since the “war on terror” began (Human Rights Watch 2004, 8; see also Amnesty International et al 2007). These “disappeared” or “ghost” detainees are claimed to be “high-profile” detainees86 who are held by the US incommunicado for long-term interrogation (Human Rights Watch 2004, 8). They have “no access to the ICRC, no notification to families, no oversight of any sort of their treatment, and in many cases no acknowledgement that they are even being held” (Human Rights Watch 2004, 8). The concern about “ghost” detainees was addressed in the Taguba Report. The Report stated these “ghost” detainees were brought to various US detention facilities, an act which “was deceptive, contrary to Army Doctrine, and in violation of international law” (Taguba 2004, 425).

The operational shift in the use of extraordinary renditions after 9-11 therefore

86 This has been questioned by Human Rights Watch (2004).
can be explained in terms of strategic and operational interests. The US saw itself in an uncertain period whereby it did not know if another terrorist attack was imminent, and it had to do what was necessary, even if this meant violating judicial and legal protections of suspects in order to gain relevant intelligence information. Existing laws of war and criminal law were deemed insufficient to deal with the terrorist threat (Council of Europe 2006, 2).

However, despite the strong strategic and political justifications for the secrecy and purpose of renditions, what is also at play is how morality shaped these renditions. In 2005, Secretary of State Condoleezza Rice stated renditions were a “vital tool in combating transnational terrorism” (Human Rights Watch 2008, 7). However, she denied that the purpose of renditions was to send detainees to third countries for torture. Article 2 of the UN Convention against Torture prohibits states from extraditing (“refouler”) individuals into the custody of another state where they may be at risk of torture. Rice stated the US seeks diplomatic assurances from the recipient countries that detainees will not be tortured, and that the US “does not transport, and has not transported, detainees from one country to another for the purpose of interrogation using torture” (Human Rights Watch 2008, 8).

However, strong evidence suggests that extraordinary renditions were used to get foreign states to use interrogation methods that were prohibited to US officials. Michael Scheuer confirmed that he told administration officials that sending a detainee to Egypt, for example, would expose detainees to torture (Scheuer 2005). Scheuer states that when he told administration officials about the risk of torture, “They usually listened, nodded, and then inserted a legal nicety by insisting that each country to

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87 The European Court of Human Rights has strengthened this absolute prohibition by ruling in several cases that a country cannot “weigh the risk of ill-treatment against the reasons put forward for the expulsion” (Forowicz 2010, 212). For example, the Court found that a country cannot extradite an individual to a country where they are at risk of torture, even if that individual is deemed a security threat to the extraditing country (Forowicz 2010, 211-212).
which the agency delivered a detainee would have to pledge it would treat him according to the rules of its own legal system” (Scheuer 2005). This position has been supported by other intelligence officials. Former Middle East CIA official, Robert Baer, stated, “As I understand it, there’s a lot of franchising stuff out. Syria is a country, like Iraq, where they torture people. They use electrodes, water torture. They take torture to the point of death, like the Egyptians. The way you get around involving Americans in torture is to get someone else to do it” (Amnesty International 2006, 4).

The purpose of extraordinary renditions can be seen in the Department of Justice inquiry into FBI knowledge of abuse and torture by the US military, mentioned above (DoJ 2008). The DoJ Report examines a four-phase interrogation plan that was to be used on al-Qaeda detainee, Al- Qahtani, held in detention in Guantanamo Bay in 2002. As previously discussed, disputes arose between the military and FBI in relation to the use of coercive interrogations. In the initial stages of interrogating Al-Qahtani, the FBI took lead role. However, the military soon became frustrated with the FBI’s allegedly poor results and the former wanted to use more coercive techniques. The military wrote up a four-phase plan that would take over from FBI interrogations in November 2002 (DoJ 2008, 102). The interrogation was to move from the lower to the higher phases if the lower phase was unsuccessful (DoJ 2008, 87). Phase I involved giving the FBI until November 22 to continue the interrogations. Phase II involved placing a disguised informant in with Al-Qahtani to persuade him to talk. The Third Phase involved using the SERE techniques authorised in the 11 October, 2002 memorandum. When all these failed, Phase IV would be implemented:

Al-Qahtani would be sent ‘off Island’ either temporarily or permanently to ‘either Jordan, Egypt or another third country to allow those countries to employ interrogation techniques that will enable them to obtain the requisite information’ (DoJ 2008, 87-88).
Although “Phase IV” was never applied to Al-Qaeda’s interrogation, it highlights the purpose of the broader rendition program: to send detainees to other countries to carry out interrogation techniques prohibited to US interrogators. Such interrogations could be seen in the case of Saudi national, Abu Hamza al-Tabuki. Al-Tabuki was arrested in Pakistan in 2001 and interrogated by US officials. Al-Tabuki was then sent to Jordan because, US officials told him, Jordan “was more suitable…because American laws tie their hands and they cannot apply the methods of the Jordanians” (Human Rights Watch 2008, 20). Jordanian torture included violent beatings, death and rape threats, family insults, and beatings on the soles of the feet with large sticks, known as falaqa. Al-Tabuki recalls after the beatings “my flesh in my feet would tear apart, they would untie the rope and order me to run across the courtyard, over saltwater. Throughout this, they would throw questions at me and demand answers to them, while kicking and beating me all over with sticks, including my sensitive parts” (Human Rights Watch 2008, 20-21).

Further evidence that extraordinary rendition exposed detainees to torture was seen in the first court ruling concerning the legality of extraordinary renditions under international law. In the Case of El-Masri v. The Former Yugoslav Republic of Macedonia, the European Court of Human Rights ruled that the treatment of El-Masri by CIA officials at Skopje airport (see above) constituted cruel and inhuman treatment and torture (European Court of Human Rights 2012, par. 211). Moreover, it also found the Former Yugoslav Republic of Macedonia in breach of Article 3 of the European Convention (concerning torture and cruel and inhuman treatment) by handing El-Masri over to the CIA rendition program. The Court argued given the reliable information in the public domain that has exposed the “practices that have been resorted to or tolerated by the US authorities” it is “capable of proving that there were serious reasons to believe that, if the applicant was to be transferred into US custody under the
‘rendition’ programme, he would be exposed to a real risk of being subjected to treatment contrary to Article 3” (European Court of Human Rights 2012, par. 218).

The renditions program may be interpreted as a sign of the weakness of the taboo. Yet, it actually demonstrates its regulating effect on the US administration. The negotiation within the administration and its law enforcement agencies discussed above demonstrated how the US saw that it had limits on certain practices it could employ in interrogations, according to its definition of “torture” and “humane” treatment. As I show below, despite the fact this definition of “humane” behaviour violated international law, the Rumsfeld memorandums, as well as the Bybee memorandums, set boundaries as to what was appropriate behaviour for the administration. Extraordinary renditions further represent the taboo’s constraint: the US had to send detainees to third countries to carry out torture the US could not. If the taboo had no effect on the US, they would not have found renditions necessary and they would have carried out the interrogation practices of the Jordan GID themselves.

Moreover, the defences used by the administration in relation to extraordinary renditions demonstrate the presence of a “taboo” that needed to be seen to be respected. The defence of diplomatic assurances demonstrates to the international community that the US is taking precautions to ensure the detainee is not tortured. Although this has been condemned as a “legal nicety,” it demonstrates that a norm exists “out there,” regardless of the motives of the officials ordering the rendition. Yet renditions also show the constitutive power of the taboo. The torture taboo defines “civilized” states and secretly getting other states to torture allowed the US to continue to maintain its identity as a modern, humane state. The global nature of the rendition network created a hierarchy within international society that divided “civilized” states that “exported” detainees, and the “uncivilized” states that were the recipients. The torture taboo helped to distinguish and constitute identities and provide geographical
boundaries with meaning; in this case, countries which had no limits on torture and those that did.

In highlighting the strengths of the taboo, I do not discount the fact that renditions damaged the constraining effect of the taboo. The hierarchy created by the renditions challenges the absolute prohibition on torture and violates the non-refouler prohibition. In addition, the use of information gathered in foreign countries via means of torture (see Human Rights Watch 2010) has the potential to further encourage western liberal democratic states to use information gathered from torture in foreign countries in their own criminal investigations. Yet what is of focus here is the role the taboo played in shaping renditions and how the taboo continued to play a powerful role in state actions, despite its violation.

**Challenging “Enhanced Interrogation”**

How did actors within international society and in the United States react to the administration’s “enhanced interrogation” program? Was the use of waterboarding considered appropriate behaviour for a civilized state? Was the definition of torture as extreme pain and suffering accepted?

The Bush administration’s enhanced interrogation program received widespread condemnation around the world. After the Abu Ghraib scandal reached international news headlines in 2004, the administration went into damage control. President Bush went on several Arab news stations to explain and condemn the behaviour of those responsible for the Abu Ghraib abuse (Guardian 7 May 2004). Colin Powell publicly apologised for the abuses on behalf of the US, as did Rumsfeld in front of the Senate Armed Services Committee in May, 2004 (ABC News 16 May 2004; US Senate Armed Services Committee 2004, 7-11). Yet despite these attempts
to ameliorate the public damage to US reputation, the Abu Ghraib scandal undermined US legitimacy in the eyes of many in the Middle East. Ghassan Salameh, Lebanon’s former Minister of Culture, argued the US had “no moral authority” (Baroudi 2007, 402), while front page headlines in Arab newspapers reported “The Scandal” and “The Shame,” of US torture (*Haaretz* 2 May 2004). Abu Ghraib represented “despicable scenes” with citizens feeling “disgusted” and “humiliated” at the “ugly images” of torture and abuse (*Haaretz* 1 May 2004; *Haaretz* 2 May 2004).

The Bush administration received domestic criticism and opposition to its torture and enhanced interrogation policies. Editorial responses to the leaking of the “torture memos” condemned the administration for a “morally dubious culture of legal expediency” (*New York Times* 9 June 2004), “out-of-control government servants” (*Los Angeles Times* 9 June 2004), undermining democracy (Kuttner 2004) and providing a justification of torture for dictators (*Washington Post* 9 June 2004). Republican Senator, John McCain, a torture survivor himself, condemned the Bush administration’s use of torture in 2004. McCain (2005, 156-157) argued not only is respecting humanitarian law vital to protect American troops from harm, but the Conventions “cut to the heart of how moral people must treat other human beings” (McCain 2005, 157). To violate these laws, McCain argued, was to lose one’s moral standing in the world.

American public opinion has consistently been opposed to torture over the entire period of the Bush administration. Despite the many editorials and academic articles that have debated the use of torture (Alter 2001; Dershowitz 2006; Levinson 2004), as well as film and television challenging the absolute prohibition against torture (such as the television show *24* and the movie *Zero Dark Thirty*), a review of 32 public opinion polls in the US between 2001 and 2009 found an average of 55% of

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88 For a review of media releases from a variety of American newspapers, see *The Guardian* (10 June, 2004).
public opinion opposed torture (Gronke et al 2010, 437-438). This important study challenges the belief that the US public were in favour of torture, and demonstrates that even in the face of a terrorist attack, the US public did not condone or support torture (Gronke et al 2010, 437).

The administration also received condemnation from its law enforcement and intelligence officials. In a 2008 Senate Committee Hearing on the use of SERE techniques by the Bush administration during the “war on terror,” Admiral Mora draws the Senate Committee’s attention to the damage the use of torture had on US identity and its national security. Mora called the “harsh interrogation techniques” cruel and argued they had undermined American values and American security (US Senate Committee on Armed Services 2008, 58). Admiral Mora pointed to how the “legalised abuse” created divisions among the US and its allies who refused to be associated with those techniques and how the techniques harmed the respect the international community had for the US (US Senate Committee on Armed Services 2008, 59).

FBI officials also expressed public outrage against the “enhanced interrogation” methods. As discussed above, the Department of Justice Review on FBI knowledge of military interrogation techniques showed that the FBI disagreed with the techniques, labelling the military interrogation techniques “stupid, demeaning, and ineffective” (DoJ 2008, 110). Yet a more public statement by an FBI official was made in 2009 in a US Senate Committee hearing by experienced FBI interrogator Ali Soufan. Soufan, like McCain, invoked both moral and strategic arguments to condemn torture, arguing “coercive” interrogation methods are “slow, ineffective, unreliable, and harmful to our efforts to defeat al Qaeda” (US Senate Committee on the Judiciary 2009, 22, 22-24). Soufan advocated a rapport-building approach, rather than the coercive method which “subjugate[s] the detainee into submission through humiliation and cruelty” (US Senate Committee on the Judiciary 2009, 23).
These arguments, along with the negative impact US interrogation practices were having on counter-terrorism efforts were voiced by UK intelligence analysts from MI6 (Inkster and Nicoll 2010). The UN Committee against Torture condemned the US interpretation of torture and CIDT, arguing that practices such as waterboarding violates the UN Convention against Torture (2006, Doc. No.: CAT/C/USA/CO/2). Moreover, the use of diplomatic assurances that a person sent to another country will not be tortured has been condemned as inadequate by both Manfred Nowak (2006), the then UN Special Rapporteur on Torture, and in several court cases in the European Court of Human Rights (see Forowicz 2010, 217-228).

The Bush administration’s definition of torture stood in contrast to the US State Department’s definition of torture. In the annual human rights reports released by the State Department, the Department was condemning countries that were using the same techniques the Bush administration approved. These included waterboarding, solitary confinement, threat of dog attacks, stress positions, isolation, shackling of limbs, forced nudity, sleep deprivation, exposure to excessive heat and cold, and sensory and food deprivation (Malinowski 2005, 142-144). Even historically, the Bush administration’s interpretation of waterboarding as not constituting torture violated the position the US government has traditionally held toward the practice. When the United States used waterboarding in the Philippines at the turn of the twentieth century it was condemned by both the public and the US administration at the time as torture (Kramer 2008; Wallach 2007).

The US Changes Position

This widespread protest against the Abu Ghraib scandal as well as the release of the “torture memos” forced the US to change its position. In June 2004, the DoJ rescinded
the 1 August 2002 Bybee memorandum in full and replaced it with the Levin memorandum (2004) in December of 2004. The Levin memorandum was written in an accessible manner and released to the public to address the criticisms of the Bybee memorandum. It moves away from defining torture as constituting severe pain that constitutes organ failure or death as well as the notion that mental suffering must always be prolonged. And finally, the Levin memorandum (2004) removes notions that torture could be justified if carried out with “good reason,” arguing that motive is not relevant in determining whether torture has taken place. However, the memorandum continued to use severity of pain as the distinguishing feature between torture and CIDT (Levin 2004), bucking the trend of subsequent decisions made by the European Court of Human Rights in 2004 and 2005, which has given attention to both severity and the purpose of the act (see Forowicz 2010, 209-213).

The US took other measures to combat criticism of its interrogation techniques. On 31 December 2005, the Detainee Treatment Act superseded Rumsfeld’s memorandums and stated that there would be standardised interrogation techniques of those in detention of the Department of Defense. The “McCain Amendment” of the Bill sought to ensure that the legal basis of interrogations would be a return to the FM 34-52 Field Manual and no techniques were allowed outside of it (Nowak 2006, 816).

Despite such widespread criticism, after the Obama administration took office in 2009, former Bush administration officials continued to publicly express their support for techniques considered by the United Nations and the ICRC (2007) as torture, such as waterboarding. Continuing to maintain the notion that “waterboarding” was not torture, Karl Rove (Gabatat 2010), Former President Bush (Owen 2010) and Vice President Dick Cheney (2009) argued that waterboarding had saved lives. Cheney addressed the issue of waterboarding in a controversial speech on national security in 2009, which coincided with President Obama’s speech on the same topic. Cheney
argued enhanced interrogation was “legal, essential, justified, successful, and the right thing to do” (Cheney 2009).

What are we to make of this criticism toward the Bush administration’s definition of torture? First it demonstrates that international law does not just reflect the interests of the powerful as realism suggests. Nor can powerful states impose interpretations of the law upon others. Although powerful states may be able to manipulate international law, it does not mean they will always be successful in legitimising their interpretation. Powerful states battle alongside other actors who have opposing interpretations of the law and it is these battles that help facilitate the ongoing construction of the norms and institutions of international society. This has created an inter-subjective framework that has made it hard for the US to challenge. And second, these criticisms of torture harmed US identity and the ability to exercise the social power to taboo practices in international society. The moral and strategic condemnation of “enhanced interrogation” and the Abu Ghraib scandal harmed US identity as a civilized state. This further reinforces the constitutive power of the torture taboo in the formation of identities. The US were seen to be acting in a rogue manner, weakening their legitimacy in the eyes of others, and eventually leading to the defeat of their interpretation of torture.

**Conclusion**

This chapter has argued that despite the violation of the torture taboo by the Bush administration, an examination of these violations show the taboo’s strength rather than its weakness. The US sought to exploit the definitional uncertainties under international law to define torture to better reflect US security interests. This showed that the US acknowledged a taboo exists and that it matters, even during times of
necessity. Despite the fact the administration were concerned about another terrorist attack on US soil, security and strategic interests were not the only issues that guided US policy. Rather, morality played a powerful role in shaping what kinds of interrogations the US could use.

Similar to the Israel policy of “moderate physical pressure,” the US “enhanced interrogation” program sought to legitimise coercive interrogation practices to both a domestic and international audience. The term “enhanced interrogation” removes notions of excessive, unnecessary and cruel connotations from physical interrogations and re-labels them as improved and effective techniques. This re-definition of torture restricted the kinds of practices the US could employ during interrogations. The internal memorandums gave the US the option to set aside the taboo completely, but the administration decided to continue to claim to uphold it by limiting what kinds of practices came under the protection of the taboo. As a result, the US had to send detainees off to foreign countries through “extraordinary renditions” to receive harsher interrogation practices the US could not use.

I have not denied throughout this thesis that these types of violations have harmed the constraining function of the taboo. But what I have sought to bring attention to is the fact that even during times of crisis states go to efforts to represent themselves as norm abiding international citizens. The re-definition and outsourcing of torture demonstrates the US knew that torture was wrong and they therefore resorted to manipulating legal uncertainties to get what they wanted.

The analysis of material and strategic interests are important for understanding US actions during the “war on terror,” but as I have shown, an analysis of morality is integral if one if to gain a more complex insight into the reasons for the use of torture. The US did not prohibit some torture practices because they were deemed ineffective, but prohibited them for moral reasons. The tradition of the torture prohibition I have
traced throughout this thesis has proved too powerful for the world’s remaining superpower to openly challenge. The taboo has become more robust over time, even in the face of its global violation. I now turn to the conclusion to examine the implications my argument has for theory and practice in world politics.
Conclusion

Torture continues to remain a symbol of humanity’s ability to inflict cruel and unnecessary harm upon others human beings. Yet despite efforts to prohibit torture, international society continues to face widespread violations of the torture taboo when states are confronted with security threats. It was this dissonance that led to this thesis and the subsequent exploration of a number of important questions. If the torture prohibition is often violated by states, what role does the torture taboo play in world politics? Are realists correct in warning against the foolish belief that moral norms matter during times of crisis? And what does this dissonance mean for efforts to rid unnecessary harm and suffering from world politics?

In answering these questions, I have made three arguments. First, the torture taboo matters. More specifically, I have argued the taboo regulates behaviour and constitutes the interests and identities of states. And in order to do so, I have studied the very thing realists point to in order to show the weakness of moral norms: namely, their violation. This second argument has shown that when state interests and moral norms clash, norms may be violated, but this does not mean they have ceased to be important. States hide, deny, re-define and outsource their use of torture in order to prevent being condemned as an “uncivilized” state. This has placed moral limits and pressures on states at a time when morality apparently does not apply. And third, the most profound reconstructions of the torture taboo, both of its meaning, and its legal
constraints, have occurred in the face of its widespread violation.

Yet in order to demonstrate the power of the taboo, I have had to simultaneously ask another set of questions. Why is torture prohibited? How did we come to understand torture as a particularly cruel practice? How did the taboo develop? I have employed a genealogical study of the origins of the torture taboo from the eighteenth century to the present day. Moving away from a linear tale of the taboo, I have shown that torture is a historically contingent social construction that has developed through a series of fortuitous events and reinterpretations. Yet I have argued that its jumbled history does not make it any less important. The taboo contains immanent within it a cosmopolitan ethic that emphasises common vulnerabilities of humanity and lays out the foundations for a global moral community. The history of the torture taboo is not only about efforts to abolish unnecessary violence, but is integral to understanding what it means to be human (Asad 2003, 101).

Why the Torture Taboo Matters

The argument has been made that the torture taboo and its normative framework continue to operate on states during its violation and in times of necessity. In doing so, I have challenged the realist explanation that a focus on power and material forces best explains the nature of world politics. The “brooding shadow of violence” which socialises states into self-interested actors means that for the neo-realist, it is the “material structure of the international system” that shapes states (Williams 2005, 109). This statement does not tell us much about morality other than it is considered so unimportant in analyses of international relations that one can go without studying it. The relentless competition for security, the struggle for power over others and the lack of a global leviathan means that mistrust and fear dominate the international system.
and this conditions states to be concerned primarily with survival (Mearsheimer 1994-1995, 9-12). For Mearsheimer (1994-1995, 11), this logic can “create incentives for states to think and sometimes to behave aggressively.”

Although the neo-realist pays little to no attention to how morality shapes world politics, the classical realist seen most predominately in the work of Morgenthau argued international politics concerns both power and morality, and one must focus on both to gain a more nuanced understanding of state behaviour (Morgenthau 1945a, 1945b, 1993; see also Carr 2001, 92). However, an analysis of morality for classical realists focuses on how it limits behaviour, and that even then, it is not very effective during times of war. Realists, whether it be classical or neo-realism, argue moral norms concerning the prohibition of types of harm are fine when interests and morality do not clash. It is when security interests come to the fore that conflict with prohibiting harm becomes a problem. The historical continuation of the realist logic of anarchy means we find the ongoing use of violence when states see their security and strategic interests at stake. States get placed under pressure and this exposes our inhumanity toward others (Walzer 1978, 4).

Although not denying there is an element of truth here, I have argued the situation is far more complex than is suggested by realism. Even though torture may be used when it clashes with material or strategic interests, the normative principles are not sidelined completely and continue to operate on states. Realists give insufficient attention to the constitutive effects of norms and the pressures placed on states to uphold humanitarian principles, even during times of crisis or during norm violations. Torture cannot be justified in the national interest; it must therefore be hidden, denied, re-defined and outsourced. Torture techniques are favoured that do not leave marks on the body, thereby removing evidence that torture took place. These tactics are the product of morality: a state knows what they are doing is wrong. The fact that morality
applies during crises and war shows that morality plays a powerful role in world politics and can offer an alternative way of doing politics. It demonstrates that not all practices are permissible. The limits the taboo places on states offers hope that more humane forms of social organisation can be created in international society that can constrain the possibility for further superfluous violence between states.

I have analysed several case studies to support my argument. In Chapter 2, I focused on the use of torture by the Soviet Union during the “Great Terror” in the late 1930s and torture by Nazi Germany from 1933 until the end of World War II. I showed how despite the fact these countries widely violated the taboo neither regime openly challenged the torture taboo. Both regimes had to hide and deny torture because they knew it could not be justified in terms of national security. Moreover, the widespread Nazi violations provoked outrage among the Allied countries and provided an opportunity to concentrate efforts international society could take to prohibit unnecessary harm in world politics. As I discuss in more detail below, this resulted in strengthening the taboo through the Nuremburg trials and the Universal Declaration of Human Rights.

In Chapter 4 I argued the widespread violation of the torture taboo by France provided an example to highlight the taboo’s strength rather than its weakness. The moral pressures to not engage in unnecessary suffering had a profound influence on the French-Algerian war. France employed torture in secret, denying it was being sanctioned or widely used. However, domestic concerns that France was entering a state of moral decay from employing torture, combined with the international condemnation of French torture, contributed to the decision by France to withdraw from Algeria in 1962.

In Chapters 5 and 6, I showed that Israel and the United States manipulated international law by re-defining torture to better reflect their interests. Not only does
this act of re-definition demonstrate the acknowledgment of a taboo that needs to be seen to be respected, but neither state challenged the absolute prohibition on torture. Both states sought to define torture in a way that made a distinction between the legitimate infliction of pain during interrogation, and “torture,” which was to be prohibited. Although Israel and the US violated the taboo as understood under international law, by re-defining torture, they actually set limits upon their conduct, prohibiting those forms of behaviour they defined as torture.

The United States went one step further than Israel in that they established and ran an international network of extraordinary renditions and black sites that outsourced torture to foreign states. This was intended to get other states to use torture techniques that the US had prohibited itself. Although this too was a violation of the absolute prohibition and the principle of non-refoulement, it also shows the moral framework of the taboo in action. If no moral limits apply during times of exception, sending detainees to foreign countries for torture would not be necessary; the US would just carry out the practices themselves.

In none of these examples have I denied the fact that strategic or material interests contributed to the violation of the taboo. But what I have sought to show is that the hiding, lying, denying, re-defining and outsourcing shows that states are still conscious of the moral norm that should under no circumstances be violated. Moreover, the public outrage that resulted from these uses of torture had a profound impact on state strategy: it contributed to the French withdrawal from Algeria and forced both Israel and the US to back down from their re-definitions of torture.

This social condemnation demonstrates how the torture taboo can empower weaker actors and allow them to challenge the practices and policies of powerful states. Norms do not just reflect the interests of the powerful. In fact, the US and Israel’s attempt to re-define torture shows that powerful states cannot define norms
however they like. The norms and institutions of international society are reconstructed through a struggle of interpretations between different actors and authorities. This includes states, courts, human rights groups, and international institutions such as the UN. This struggle is over the ability to exercise power to define norms, and legitimise them to others in international society. As Finnemore (1996, 185) notes, “the relationship between norms and power” is more complex than the realist suggests. Norms are created through inter-subjective practices and cannot be imposed upon others through force.

A Genealogy of the Torture Taboo

How did torture get its stigma? How has it retained its absolute prohibition in the face of violations? And why is it that amongst all the forms of pain and suffering inflicted in international society, torture is one of the few, alongside practices like genocide, which is absolutely condemned? As Price (1997) showed in relation to chemical weapons, many forms of warfare inflict similar or more forms of suffering on victims than do chemical weapons, yet chemical weapons are stigmatised as a particularly heinous type of weapon. Following Price, I have argued that how we understand torture is not a natural or innate distaste for this particular practice called torture, but the product of political constructions and categorisations that labelled torture a dangerous and immoral form of suffering.

Since the time of the Greek city states, torture was considered a legitimate judicial practice that helped reveal the truth in criminal trials. In Chapter 1 I showed that torture was integral to gaining full-proof from suspects and constituting the sovereign’s right of the power to punish. Torture was further buttressed by drawing upon Christian values of pain, which helped constitute torture as a practice that could
offer redemption and salvation from sins. However, by the end of the eighteenth century, torture had become “uncivilized” and “barbaric.” The shift in the law of proof and the “secularisation” of pain (Caton 1985) helped to undermine the foundations of judicial torture. In addition, Beccaria linked torture to unnecessary and cruel punishments because torture required citizens to give up more liberty than was actually necessary to maintain a just and ordered society. It is here we see torture begin to emerge as a sociology of danger that undermines principles of justice and the moral fabric of society.

By the nineteenth century, the torture taboo had become more robust. Torture had generated a circular reasoning whereby torture was wrong because it was torture. The condemnation of torture was strengthened under the laws of war which associated torture with an attack on the defenceless and an excess of pain that was inflicted outside battlefield conflicts. The second major factor was the expansion of European colonialism which further reinforced the categorisation of torture as something found predominately in backward and barbarous societies. The increased contact of European with non-European societies reinforced the derogatory discourse that the “civilized” Europeans, who had prohibited torture, had to intervene in the non-European world to rid these societies of torture and “civilize” them into modernity. These two factors – the laws of war and European colonialism- reconstructed torture as a particularly dangerous form of pain by invoking a fear that to engage in torture was to set back the progressive development of human societies and regress into an inferior state of existence.

However, despite the fact the taboo represented a potent symbol of human progress toward abolishing unnecessary and cruel harm, by the twentieth century the taboo was violated on a widespread scale during World War II and the post-war period. Yet it was in these periods of inhumanity that the torture taboo had some of its
most profound reconstructions that made it more robust. Realists such as Morgenthau (1993, 224-249) have looked to World War II to show that the widespread atrocities demonstrated how morality during times of war is only cheap talk and that the conduct of war had subsequently led to the destruction of an international society. This thesis challenges this assumption. In Chapter 3 I argued that the Nazi atrocities during World War II produced an environment of self-reflection about the capacity of human beings to harm one another. The product was a concentration of efforts to eliminate unnecessary harm in international society. It did so in several ways.

First, the Nuremberg trials made the taboo more robust, prohibiting torture absolutely under Article 7 and 8 of the Nuremberg Charter. These articles provided no excuse or escape from punishment of superior or inferior officers that authorised or engaged in torture. The Universal Declaration of Human Rights further prohibited torture absolutely under Article 5. The Universal Declaration and Nuremberg Trials set the foundations for a proliferation of humanitarian and international human rights developments, seen in the 1949 Geneva Conventions, the 1966 International Covenant on Civil and Political Rights, and other international documents concerning medical ethics. The Istanbul Protocol (1999) sets out the obligations and duties of physicians to refrain from and report allegations of torture, as well as outline measures to document it.

The Nuremberg Trials and Universal Declaration also strengthened the categorisations of torture as “uncivilized” and dangerous. I analysed the Nuremberg cases concerning the Nazi medical experiments to show that the experiments were condemned absolutely because they constituted an attack on defenceless individuals and violated their autonomy by engaging in non-consensual and dangerous medical experiments. Despite the fact the German defence team argued the medical experiments were necessary in order to ensure German survival, the Nuremberg trials
ruled they represented an excess of pain that could never be justified.

Yet the post-war period also linked torture with a practice to destroy what it means to be human. The Nuremburg Trials labelled torture a crime against humanity. This categorisation further strengthened the sociology of danger by linking harm to the individual to harm to the social body of humanity more broadly. The drafting of the Universal Declaration followed in the steps of the Nuremburg trials by linking the prohibition of torture to the ability and capacity to live the good life. Torture destroys our innate human dignity, which forms the foundation for the secularism of the Universal Declaration. The immediate post-war period demonstrated that there were some moral principles that could not be violated under any circumstances, even in the face of threats to state survival. This was not only because it harmed a defenceless victim, but because torture posed a danger to others. Whereas in the eighteenth and nineteenth century torture was deemed dangerous to a political community, the danger was localised to the norm violating state. However, the Nuremburg trials and the Allied war propaganda during World War II grafted torture onto expansionist fascist policies, associating torture with a threat to international peace and security. This important political reconstruction has subsequently been naturalised and it has been taken for granted that violations of torture (and other human rights) pose a threat to international society. 89

The second reconstruction of the torture taboo under international law was in response to the 1970s and 1980s Amnesty International anti-torture campaigns. For the

89 The first four recitals in the Preamble of the Universal Declaration of Human Rights discuss the link between violating human rights and the threat to international peace and security (Morsink 1999, 319). However, to suggest that the Universal Declaration is merely a utilitarian framework for world order would be misleading. As Morsink (1999, 320) argues, the Declaration shows human rights have an independent foundation separate from international peace and security. “If this were not so, a government could torture people (or violate any other right) as long as it was thought or shown to serve the cause of world peace. This is precisely how most governments rationalize and justify their human rights violations, but it flies in the face of the truth about the Declaration and about human rights generally” (Morsink 1999, 320).
first time, Amnesty International (1973, 1984) documented how torture was employed on a worldwide scale for information, confessions, intimidation and punishment. Yet the subsequent campaigning by human rights groups and states in the United Nations provided the opportunity to strengthen the prohibition as actors expressed outrage and shame that torture continued to occur in the twentieth century. The UN Convention against Torture establishes a universal jurisdiction on torture and the principle of non-refoulement. Also, it established the Committee against Torture, and subsequently, the UN Rapporteur on Torture, which has helped document, expose and shame states into conforming to the torture prohibition.

These developments in the torture taboo have made it harder to openly challenge torture over time. States are increasingly turning to torture techniques that leave few (if any) marks on the body to hide evidence of torture (Rejali 2007). And in Chapters 5 and 6, I showed that liberal democracies have resorted to re-defining the torture taboo so they can openly engage in a wider range of coercive practices. This demonstrates the narrowing of taboo violations to a definitional or “legal struggle” (Asad 1997, 304-305). The debate is not whether torture can be used or whether there should be exceptions to the taboo, but rather an acceptance over the absolute prohibition and a contestation over what kinds of practices come within the prohibition.

It is a testament to the strength of the torture taboo that it can constantly face violations yet continue to become more robust over time. The torture taboo has developed in a different manner to other strong prohibitions in international society. The nuclear weapons prohibition has become more robust because of its non-use (Tannenwald 2007), while the chemical weapons taboo has become more robust as a mixture of non-use, strangeness (which has generated fear) and moral revulsion (Price 2007). Although the history of the taboo contains similarities with these accounts,
including the role of human rights activists, developments under international law (which not only discipline state behaviour but constitute identities (Reus-Smit 2004)), and other fortuitous events, what is novel about the taboo is that it has strengthened and developed in the face of widespread inhumanity. This paradox has important implications for both theory and practice in international relations.

Theory and Practice

What does this thesis contribute to theory and practice in international relations? I have drawn upon the constructivist literature that has given attention to the constitutive, regulating and ranking effects of norms (see Introduction for sources). I have sought to challenge the realist understanding that norms play a minimal role in world politics or that they represent an epiphenomena. Even when states violate the taboo to attain some strategic or material interest, the moral norm does not just cease to exist. It continues to shape state actions, interests and identities. This has real effects on states that can place limits on their behaviour or result in social sanctions that can de-legitimise particular policies and stigmatise the violating state as an “uncivilized” actor.

This builds upon the work of Walzer (1978) and shows that even during times of war or security crisis, moral deliberation continues to operate. Although classical realists like Morgenthau recognised that morality can place limits on states, I have gone beyond this and looked at the taboo’s constitutive effects. States hide their torture, use methods that do not leave any marks, or re-define it, because states know what they are doing is wrong and will not be accepted by international society. These constitutive effects can also be seen in the ranking of states as “civilized” or “uncivilized,” depending on their adherence to the taboo. This ranking effect helped to legitimise and justify colonial rule and the European civilizing mission in the non-
European world by declaring that European states had an obligation to prohibit cruel and unnecessary harm in “barbarous” societies. This hierarchy continues to exist today (albeit in a different form), with extraordinary renditions showing how “civilized” states, which have limits on inflicting pain, outsource torture to “uncivilized” states that do not. The power of the taboo comes not only from shaping actions but constituting who we are.

These constitutive, regulating and ranking effects help to understand why the strength of the taboo can be found by studying its violation. This offers a fresh contribution to constructivist literature that has so far sought to demonstrate the power of a norm by showing how it was not violated when it came into conflict with material interests (Price 1997; Tannenwald 2007). In Chapters 5 and 6 I showed that internalised norms can be contested in practice. No state wants to challenge the absolute prohibition of torture, so they re-define it. This creates a situation where what constitutes “torture” becomes contested as states increasingly try to re-define torture to better reflect their interests.

Yet I have also shown that widespread violations can also provide a site in which to make norms more robust. The major reconstructions of the torture taboo in the twentieth century have come as a result of widespread inhumanity. The Nazi atrocities during World War II and the global violation of the taboo from the 1970s onwards forced international society into a period of self-reflection about the potential and capacity for human beings to inflict unnecessary and cruel violence upon one another. These violations were met with condemnation and a strengthening of the taboo under international law. This builds upon the constructivist literature on the importance of arguing and debate to normative development (Checkel 2001; Sandholtz 2008). Yet it also flies in the face of tales of the torture taboo developing in a linear fashion, showing the strength of a genealogical analysis that emphasises chance.
occurrences and fortuitous events.

Violations do not necessarily mean a weakening of the norm. It is hoped that by showing that norms are still influential during their violations, other norms could be examined to see whether these findings can be generalised. Further studies on the violations of other norms could perhaps provide evidence of how strong a norm is in international society by determining whether it can survive continued violations.

However, this thesis also points to how difficult upholding the taboo can be in the face of state violence. Although the norm operated during its violation, it was still violated. It is useful here to heed Morgenthau’s advice that if one forgets about power they will pursue moral principles in vein. This is why I have continued to argue that the realist perspective continues to hold powerful insights in relation to prohibiting unnecessary harm in world politics. I have sought to build bridges between realism and constructivism literature by showing both perspectives can be strengthened by examining the role of morality during times of necessity and violations. Recent efforts have been made in the IR literature to facilitate dialogue between different theoretical traditions (Williams 2005, 128-168; Sil and Katzenstein 2010). I have drawn upon Linklater (2011) in this thesis by focusing on both the ability to harm and the measures taken to prevent harm in international society. In doing so, one will not remain blind to the ability and possibility of states to continue to harm for material interests. Yet at the same time, by focusing on how humanitarian norms have influenced states during periods of violation, one can see that states are not immune from moral norms and that international behaviour could therefore be different. As Linklater (2011, 258) argues, “the challenge is to identify prospects for transnational solidarities that are not utopian or fanciful, but which have the potential to keep pace with the development of the power to hurt in world politics.” In this way we can escape the realist notion of a brooding shadow of violence and find within the present the potential and possibility.
to create more humane social bonds that are able to better respond to and constrain violence.

How does this thesis contribute to practice? The torture taboo provides a moral resource that can be used by actors to pressure states into abolishing unnecessary harm (Linklater 2011, 264). I have shown that states are not immune from pressure from materially weak actors. States hide, deny, re-define and outsource torture so as to avoid the stigmatisation and social sanction from actors within international society. This is important for activists and international institutions, such as the UN, which seek to abolish unnecessary harm in world politics. This thesis demonstrates that documentation, exposure and public pressure has effects on states, and this work must be continued to demand better government accountability.

The interpretation of the definition of torture under international law should continue to shift in a direction that favours the dignity and wellbeing of the individual over the interests of the state. In a 1997 judgement, the European Court of Human Rights (1997) expanded what practices come within the notion of torture, arguing that rape constituted torture under Article 3 of the European Convention. Former Special Rapporteurs on Torture, Nigel Rodley (2002) and Manfred Nowak (2006), have argued in favour of distinguishing torture from CIDT on the basis on the purpose of the act, not the severity of pain inflicted, in order to better account for no-touch forms of torture. And more recently, the current Rapporteur, Juan E. Mendez, has argued in favour of a victim centred approach to understanding torture and the re-labelling of death row as CIDT and possibly torture (Mendez 2010; UN General Assembly 2012, Doc. No.: A/67/279).

As Dunne (2007, 282-283) has argued, the Courts have provided an important site of resistance during the “war on terror.” This is further evidence in the recent judgement in the El-Masri Case in the European Court of Human Rights in 2012 in
relation to extraordinary renditions constituting torture and cruel and unusual punishment. However, one must issue caution against trying to “better” define torture as a solution to stopping torture (as states violate the law regardless of its interpretation). But international society can minimise the opportunity for states to manipulate and exploit legal ambiguities. The failure of the US and Israel to legitimise their interpretation of torture shows that norms do not simply reflect the interests of the powerful, and alternative legal interpretations can de-legitimise and stop the practices of the most powerful states.

By seeing torture as part of “the sociology of danger,” it can also help challenge the emergence of “ticking-bomb” arguments that advocate exceptions to the torture taboo. By showing that violating the taboo harms the victim, torturer, and the broader social bonds in society, it can challenge these arguments by showing that the harm that would come from torture cannot be localised to just the alleged “terrorist” who is being tortured. Implementing torture warrants, as Dershowitz (2006) has suggested, would harm the interests of society by bringing about what Durkheim called “social dissolution” (Durkheim 1973, 53). Torture undermines the very moral foundation upon which society rests: respect for individual dignity. The protection of the individual’s dignity is therefore also in society’s interest (see Durkheim 1973, 53-54; Lukes 2006, 14-16).

The taboo also contains cosmopolitan sensibilities that help to link humanity by highlighting common vulnerabilities, which some have argued can provide a powerful means to break down insider-outsider mentalities (see Linklater 2011). The torture taboo protects unnecessary harm to the individual personality, dignity (the two are intertwined) and body. To break the will and destroy the personality is to destroy the possibility and capability for an individual to experience the good life. The personality is what links a common humanity by showing how all have a personality, yet at the
same time each individual’s personality is unique. To destroy this, is to destroy one’s
dignity and what it means to be human.

The taboo provides the potential of a cosmopolitan mentality immanent in the
present in another way. By defining what is bad, it seeks to prohibit forms of
behaviour yet simultaneously allow room for a plurality of different forms of life. As
Lukes (2008) has shown, by setting minimal standards in which no society can cross in
order to experience the good life, it allows one to go beyond moral relativism by being
able to lay judgement upon others. This provides the basis for a moral universalism but
also allows room for plurality of different forms of social organisation (Lukes 2008,
129-159).

Where to From Here?

Prohibiting torture today is vastly different from when it was prohibited in Europe in
the eighteenth century. Back then, critics such as Beccaria and Voltaire were
prohibiting a practice which was legal and which constituted a narrowly defined
institution with a specific function of revealing the truth and punishing offenders.
However, in the contemporary period, international society is facing a different
situation. The concern is no longer about prohibiting torture per se as it is about
forcing states to adhere to the prohibition. Moreover, unlike in Europe when the
abolitionist movement concerned only a few European countries, the current anti-
torture movement concerns states from around the world. The nature of the problem
and its vastness poses a different set of problems than what the eighteenth century
abolitionist faced.

The current approach taken by the international community focuses on two
main efforts. The first concerns the documentation, exposure and shaming of states
that violate the taboo. Although this has brought about change in some countries, its effectiveness has produced mixed results. In particular, it has sometimes forced torture further underground as states take extra measures to use techniques that leave few marks (Rejali 2007). The second method is used by the UN Committee against Torture and concerns strengthening law and establishing liberal institutions that seek to check the exercise of power by officials over those deprived of their liberty. Although this is a step in the right direction, their overall focus on establishing liberal institutions will miss how liberal democracies have violated the taboo. Democratic societies have more limits on their actions than authoritarian states but they still torture by re-defining, outsourcing and using techniques that leave no marks. As Kelly (2009) rightly points out, the Committee does not focus on why this cruelty was carried out in the first place. Action that could be taken includes measures that challenge the construction of identities that de-humanise others and make torture possible (Rorty 1993). Whether it be the Nazi constructions of “parasites” that need to be destroyed or the contemporary concern with the de-humanisation of “terrorists,” this approach would seek to ensure that all actors are seen to exist within a human community and that certain moral principles should not be transgressed.

A more radical alternative would be to look at strengthening cosmopolitan emotions and sympathy to those outside one’s immediate political community (Linklater 2011, 222-230). Such an approach would seek to replace the competition and power struggles of sovereign states with an “extension of moral emotions” where prohibitions on unnecessary harm would play a greater role in international society (Linklater 2011, 231). Seen in the work of Linklater (1998, 2011) and Falk (2009), such cosmopolitan visions would seek to create a post-westphalian world order that would replace the pursuit of the national interest as the highest moral virtue in world politics with values of inclusiveness and respect for human rights (Falk 2009, 192).
Such visions are not out of our reach, with many of the principles (as discussed throughout this thesis) being immanent in the present. However, constraining the state’s power to harm is not going to be easy or quick, and requires vigilance and patience. The challenge today of abolishing torture in practice is perhaps greater than the task that faced the abolitionist movement in the eighteenth century because of the nature and scope of the problem. However, efforts must continue to be made if we want to ensure the continuation of a taboo that protects individuals from unnecessary harm, embraces values of human solidarity, and provides the necessary protection for individuals to enjoy the good life.
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