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Article

*1 THE TORTURING DEBATE ON TORTURE

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***2** I. Introduction

“I had always a most earnest desire to know how to distinguish the true from the false, in order that I might be able clearly to discriminate the right path in life, and proceed in it with confidence.” [FN1]

The torture debate has long been the subject of a comprehensive body of scholarly writing. The defeat of the Nazi regime during World War II, the establishment of the United Nations, including the U.N. Charter, the conclusion of international treaties on the protection of human rights (especially the right of human dignity), and the establishment of a general prohibition against torture and other forms of inhuman treatment, have led the international community to believe-albeit with a degree of naivety-that evil does not exist among us anymore. However, it seems that the tragedy of 9/11, including the War on Terrorism declared by the Bush administration, [FN2] has awakened the international community to a new-old era, thus making the implicit explicit and the unclear obvious. In this new-old era, the international community has come to realize that like “terrorism,” “torture” still exists among us, and that which was considered a triumph for human rights following the conclusion of the Convention Against Torture, was merely a symbolic achievement.

What is unique about the torture debate in the post-9/11 era is the vulnerability of the absolute taboo against the prohibition of torture. The declared War on Terrorism generated a particular correlation between terrorism and torture. Namely, the unprecedented intensification of terrorist activity in the past century has increased the chorus of voices in favor of torturing those suspected of terrorist activity. For these voices, torture is not perceived to be as evil as terrorism, or at least is not perceived to be equivalent in nature to that of terrorism. The reason, as argued, is that the legitimate purpose underscoring the torture of terrorists-namely, saving the lives of innocent people-negates the arguable evil otherwise embodied in torture conduct. To a certain degree, this has also been the incentive for those who recently have been advocating for a new regime of “judicial torture warrant [s].” [FN3] What underlies these voices is the speculative belief that ***3** torture prevents and eradicates terrorism. Such a belief rests arguably on the view that we know terrorism when we see it. [FN4] However, as correctly stated by Immanuel Kant, “[t]o produce a

history entirely from speculations alone seems no better than to sketch a romance. Thus it could not go by the name of speculative history but rather only that of fiction." [FN5]

If we are genuinely committed to establishing a well-organized international community, it should be clear that we cannot be driven by speculative beliefs. It should also be emphasized that what distinguishes enlightened and organized societies from barbarian ones is the reliance of the former on principles of respect for human dignity, including other maxims of justice, reason, and proportionality. In an organized society, not all means justify even the loftiest ends. Efficiency is one thing, but legality is another. An organized society demonstrates that which is legal and stable. In an organized society, no single governmental branch stands above the Law; they all act in accordance with what the Law demands and compels. [FN6]

It is the aim of this article to break up the dogmas and outmoded paradigms of torture, to affirm the right dogmas through the method of skepticism, and to criticize and correct the wrong dogmas through the method of reasoning. [FN7] In so aspiring, I am well aware of the difficulty entailed in an attempt to draft an article on the entire torture debate. Realistically speaking, in the course of contemplating and organizing my thoughts and arguments, the task seemed quite impossible to me. However, with methodology and reason, I became more optimistic, and the mission came to seem feasible. Accordingly, I have decided to analyze the basic premises of the torture debate by addressing the following issues: (1) defining torture; (2) punishing torturers; (3) justifying, excusing, or pardoning torturers; and (4) conducting legal interrogation. I strongly believe that discussing these four issues will enhance future study of the torture debate, whether or not one agrees with my arguments and suggestions. In the course of formulating my arguments, I am driven by my intuition that it is the duty of all scholars to draw a theory regardless of the event, but never to articulate a theory in ***4** light of the event. [FN8] Scholars are guardians of the principles of reason and proportionality, and they are expected to be the ultimate guardians of objectivity.

In Part II, I open this article by outlining torture law de lege lata as reflected by several international and national statutory norms and cases. In that part, I criticize existing law on the torture debate-especially the enigma of defining what constitutes torture-for its lack of conceptuality and coherency. I argue that the articulation of the existing definition of torture has been politically motivated and delineated into a form that suits what the international community observes to be torture in modern life. However, it is my view that such a definition is not compatible with the history of torture practice, nor will it suit future torture practice, particularly in view of the rapid development of technology.

I also argue in Part II that both international and national judicial tribunals have constantly failed to fulfill their capacities in the course of interpreting statutory norms, in adhering simply and superficially to a methodology of citing and reciting existing statutory text, and by ignoring the conceptual and theoretical grounds of the torture phenomenon. In addition, I will show that in the course of developing their case law by adhering to an ad hoc examination methodology, which could be a correct methodology if implemented with reason and coherency, several international tribunals have made contradictory decisions about the meaning of torture.

Then, in Part III, I examine several leading legal essays on the definition of torture, thereby lending support to the criticism in Part II. These essays support my criticism suggested in Part II and elaborate on the possible conceptual understanding of the torture phenomenon.

In Part IV, I offer my conceptual understanding of the torture phenomenon as premised on five conceptual distinctions that characterize the torture situation: (1) superior versus inferior, (2) active versus passive, (3) theatricality versus secrecy, (4) fear versus security, and (5) pleasure versus suffering. Part IV analyzes the torture phenomenon in the abstract, out of context.

In Part V, I discuss the role that "torture" plays in the jurisprudence of crime and punishment. In that part, I criticize the haste in creating new crimes for every phenomenon that we dislike and disdain without paying any attention

to fundamental principles of criminal law theory. I primarily criticize courts for their explicit ignorance of the conceptual distinction between constitutive elements of criminal guilt and other aggravating factors for sentencing. Such distinction is of the utmost importance in every ***5** criminal trial, especially in common law systems where the criminal trial consists of two clearly distinctive phases: the determination of culpability stage and the sentencing stage.

Finally, in Part VI, I target five taboos that recur in the torture debate, aiming, thereby, to refute or uphold them. These are: (1) the illusive nature of the ticking-bomb enigma, (2) the unjustifiable grounds of the prohibition against torture, (3) the inexcusable torturers, (4) compassion toward torturers, and (5) the administrative aspects of a reasonable interrogation.

Hereon, I only hope that this article can play the part of attracting jade by laying bricks.

II. Defining the Indefinable: Between the Mind and the Heart

It has been largely believed that one can know "terrorism" when one sees it. [FN9] Opposing this view, I once argued that "there are concepts that we do not see, and even if we do, we cannot be sure what they are. Among these concepts we count not only terrorism, but also war and democracy." [FN10] What I had in mind in contending so was the rationale that there are phenomena that appeal to the heart before they are captured by the mind-these are phenomena that appeal to the feelings.

This classification is of the utmost importance in our inquiry into potentially adequate definitions of phenomena such as terrorism, torture, war, and democracy. This is true in general, but truer in particular, in the realm of criminal liability where it is required that the definition of a crime not be vague, but rather be narrowly tailored in order to satisfy the constitutional requirement that all criminal prohibitions provide fair notice to persons before making their conduct criminal. [FN11]

***6** A phenomenon that appeals to the feelings is intangible and amorphous in nature. Taken as it is, out of context, a conceptual definition, which outlines the bold features of such a phenomenon, satisfies the aforementioned constitutional requirement. In contrast, a phenomenon that appeals to the mind is more tangible, visible, and definable. For this kind of phenomenon, a conceptual definition is only the end of the beginning in our journey towards formulating a clear and particular constitutional definition.

Terrorism, for example, appeals to the feelings, but not to the mind. The tragic events of 9/11 and the bombings in London and Madrid serve as good examples in this regard. At first blush, it was not immediately clear after the attacks whether they were terrorist attacks or criminal actions. The bombings in London and Madrid could have been a Mafia criminal commission or even a regular criminal commission, such as the almost regular occurrence of violence in American schools where one fine morning a teenager decides to open fire on other pupils.

As for the 9/11 attacks, it was not until Osama bin Laden expressed his pride in the success of the attacks committed by members of his organization, al-Qaeda, on TV that we understood that America was under terrorist attack. Until then, one could have thought of many possible scenarios to explain the events; for example, a technical problem in the jets' engines could have been the reason for the enormous collisions with the Twin Towers.

The idea is that although people witnessed the tragedy, they were not able to tell for sure if they were witnessing criminal conduct or acts of terror. [FN12] The kind of terror and fright that terrorism generates was not felt until the moment the American nation realized that Osama bin Laden was behind the scenes operating the attacks. Only then was an extreme fear distributed among the American nation.

Terrorism, therefore, illustrates the kind of phenomenon that we recognize once we feel it. It has been my view that such a phenomenon deserves to be conceptually defined, thereby criticizing all existing definitions as being politically motivated. [FN13] A conceptual understanding of “terrorism” would suggest inquiring not only into what we see today as terrorism, or what previous generations have perceived as terrorism, but rather endeavoring to define the phenomenon of terrorism out of context. [FN14] My call has been to arrive at a conceptual definition, the fundamental meaning of what terrorism stands for. [FN15]

***7** The case for torture is not much different. The American declared War on Terror has given rise to an intense discussion of alleged torture practice at Abu Ghraib and Guantanamo Bay. Among examples of such practices were the photos released from Abu Ghraib showing a number of American military personnel taunting naked prisoners who were forced to assume humiliating poses. [FN16] One may plausibly argue that those who saw the pictures, directly or through the media, could tell for sure that the acts committed against the prisoners constitute torture, regardless of any previous knowledge of the legal definition of torture.

I am skeptical though, whether this is realistically possible in the first place. In my view, it is only when the context is clear that it is possible for a person to tell whether or not torture is taking place. This is also the case for the Abu Ghraib example. To elaborate on my view, I will refer to two further critical examples. One example is that which concerns the notorious Nazi regime and the outrageous pictures of naked Jewish people walking towards their deaths at the highly condemned Nazi concentration and eradication camps. The other example concerns the work of the famous American artist Spencer Tunick, who has been well known for his photos showing installations that feature hundreds, if not thousands, of nude people posed in artistic formations.

Here we have three pictures: Abu Ghraib, Nazi concentration camps, and Tunick's artistic work. While the photos from Abu Ghraib and the Nazi concentration camps can be easily classified as a living testimony of torture activity, this is not the case for Tunick's installations. Tunick's work has never been understood as involving torture. At worst, Tunick was arrested several times only because of his activity outdoors, and even then the charges against him were quickly dropped. Descriptively speaking, some of Tunick's photos show naked people lying on top of one another, thus composing an installation of a small human hill. How are these photos different from the Abu Ghraib pictures? They are different only if we understand the context within which the pictures were taken.

It is significantly important to outline that while it is possible that Tunick's work is highly and stiffly criticized, it is not the same kind of criticism that we convey toward torture activity. To this extent, the context matters. Therefore, not every picture that alludes to torture-like activity is in fact about torture.

Here we are then, like “terrorism,” “torture” appeals to the feelings and, therefore, it must be conceptually defined in the abstract and out of context. The same photos from Abu Ghraib could have been pictures of a father holding his five little children naked as a matter of punishment. The ***8** father would definitely be prosecuted (e.g., for assault) and would very likely be found guilty, but no one would consider torture a crime in this context. At most, inhuman treatment or punishment could be taken into account under article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950. [FN17]

What are the conceptual grounds then for torture? Before coping with this question it is first worth getting a grip on existing definitions of torture, as provided primarily by international documents.

A. A HAZY DEFINITION

The prohibition against torture has been the subject of several international and national documents-among them, article 5 of the Universal Declaration of Human Rights of 1948; [FN18] the Geneva Convention Relative to the

Treatment of Prisoners of War of 1949; [FN19] article 3 of the European Convention; [FN20] article 7 of the International Covenant of Political and Civil Rights of 1966; [FN21] article 5(2) of the American Convention on Human Rights ***9** of 1969; [FN22] the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1975; [FN23] article 5 of the African Charter on Human and Peoples' Rights of 1981; [FN24] article 1(1) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984; [FN25] and article 55(1)(b) of the Rome Statute of 1998. [FN26]

All of these documents simply provide a general absolute prohibition against torture. However, a definition of "torture" was provided only in three places. Article 1(1) of the Convention Against Torture provides that:

> For the purposes of this Convention, "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 ***10** pain or suffering arising only from, inherent in or incidental to lawful sanctions. [FN27]

This definition has been duplicated, almost word-for-word, from the definition provided by article 1(1) of the Declaration on Torture. [FN28] However, it is worth noting that the latter brings into play an additional feature by providing that "[t]orture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment." [FN29] Thus, it seems that the Declaration Against Torture seeks to distinguish between torture and other forms of humiliation and abuse that do not amount to torture. But, as has been noted by the International Criminal Tribunal for the Former Yugoslavia in the Delalic case, "this quantitative element is implicit in the requisite level of severity of suffering." [FN30]

The third definition of torture was provided by the Rome Statute, which basically follows the path of the Convention Against Torture. Yet, the statute adds several elements that adapt the definition to the context with which the statute is most concerned, namely, criminal prosecution. [FN31]

***11** Perceiving article 1(1) of the Convention Against Torture as the most prominent, dominant, and universal provision in this context, I will now cast the discussion mainly around it. As it stands today, the definition provided by the Convention Against Torture [FN32] supplies more questions than answers.

Examining the Convention's definition, most scholars of international criminal law jurisprudence adhere to a methodology that sheds light solely on its substantive characteristics. Antonio Cassese, [FN33] for instance, draws a line between the objective elements of the definition and its other subjective elements. Another example would be Daniel Rothenberg, who offers four distinctive components of the definition: actions, perpetrators, victims, and objectives. [FN34] However, less focus has been placed on a more disputed matter regarding torture-the substantive nature of the phenomenon of torture rather than its substantive structure.

The Convention's definition embraces two kinds of nature. On the one hand, the Convention's definition is very limited in nature. It constrains its applicability in several ways: (1) torture cannot be committed by omission since the definition speaks only of an "act"; [FN35] (2) the torturer must be a public officer, or acting in a official capacity; (3) the victim of the torture activity must be a person, a human being; [FN36] (4) for torture to be considered in the first place, it must be the case that the torturer had the intention [FN37] to inflict severe suffering (physical or mental); (5) the mentioned "intention" not only addresses the torture's harm, but also is concerned with the purposes for which the torture's harm is caused; and (6) at first blush, the purposes for which "torture" can be considered are limited in

nature, although the provided list for these purposes is not an exclusive one; [FN38] however, it seems that the purposes are limited to circumstances that take place only at the time of the interrogation.

***12** On the other hand, the Convention's definition offers some explicit loopholes that allow one to think of the definition as open-ended. As already provided, the definition is not limited solely to the four purposes listed within article 1(1); [FN39] rather, these listed purposes constitute an illustrative charter of the kind of purposes with which the definition is most concerned. The Convention's definition also extends to acts causing pain or suffering (physical or mental) if intentionally inflicted for "any reason based on discrimination of any kind." [FN40]

Ironically, whereas the Convention Against Torture holds the promise of providing a clear definition for the "torture" phenomenon, a simple reading of the Convention's definition makes it clear that such an end has not been achieved. To elaborate on this charge, the Convention does not tell, for example, what "any reason based on discrimination of any kind" [FN41] means. These are very vague terms; however, these are exactly the kinds of terms that allow for future judicial development of the law. But, while future judicial development is always welcomed, thus keeping the law as close as possible to the sentiments of the international community, it must still be clear that such a definition stands in complete contrast to the longstanding solid constitutional pillar of criminal law theory, according to which, there is no crime and no punishment without prior legislative warning, as expressed in the Latin maxim nullum crimen, nulla poena sine lege. [FN42]

In spite of this clear violation of one of the most fundamental principles of criminal law theory, judicial tribunals have made some "interpretive use[s]" of this provision, thus holding, inter alia, that rape constitutes torture if all the other conditions required under the Convention's definition are fulfilled. [FN43] Was this solely a judicial interpretation of a statutory legal norm, or rather, a wider "judicial legislation" of a new crime!? The question seems to be rhetorical only.

Allow me now to voice my thoughts, queries, and contemplations on the perplexing premises of the Convention's definition.

I. Why is torture by omission not possible under the explicit language of the Convention? Why is the definition limited only to ***13** "acts"? Should there not be a duty for an official to take reasonable measures and thereby seize the commission of torture, once such a commission comes to his attention!?

II. Why can only public officers or others acting in an official capacity be regarded as torturers!? Why can private actors not be condemned for torture? Why is "state action" such a requirement here!? [FN44]

III. Why is the Convention's definition limited only to "severe" pain or suffering!? How can this severity ever be measured!? Is it not true that one person's pain is another person's severe pain, and vice versa?

IV. Why did the drafters of the Convention find it compelling to provide an illustrative list of purposes with which torture is most concerned? Was the definition articulated by them not clear and detailed enough?

Later on, these mysteries will elaborate on my understanding of the conceptual definition of "torture." However, at this stage, I would like to express that which my intuition urges me to express. I already have the impression that the Convention's drafters have trapped themselves by articulating a definition that is hybrid in character. I strongly believe that such puzzlement is due to the fact that in doing their work, their minds were captured by certain historical practices of torture, as well as by certain political incentives and motivations. [FN45]

B. JUDICIAL FANCY FUZZY TERMINOLOGY: THE FAILURE TO EXPLORE THE MEANING OF TORTURE

In the wake of enforcing the general prohibition against torture, several legal tribunals, both international and national, were faced with the definition question. As we shall shortly learn, no single tribunal has ever given any kind of substantive elaboration on the Convention's definition. Rather, they have sought to clarify what has already been

said on torture. Henceforth, I will consider the leading cases in this regard.

The Ireland case, decided by the European Court of Human Rights (ECHR), demonstrates well the judicial reluctance to exceed the outmoded dogmas of the existing definition of torture. [FN46] As I shall shortly explain, ***14** neither in the Ireland case, nor in any other case, have judicial tribunals asked the fundamental and basic question of "what constitutes torture?" Rather, they have adhered to a simple and superficial reading of the relevant text of the Convention Against Torture.

The Ireland case [FN47] involved the practice of the so-called "five techniques" in the course of interrogating those who were suspected of acts of terror. The question at stake concerned whether these techniques constituted torture in violation of article 3 of the European Convention. The "five techniques" include: (1) wall standing in a stress position, (2) hooding, (3) subjection to noise, (4) deprivation of sleep, and (5) deprivation of food and drink. [FN48]

Obviously, the European Convention does not include any definition of the concept of "torture," but rather a general prohibition against torture. This case, therefore, called the ECHR to consider the possible meaning of "torture." However, the ECHR avoided doing so. Instead, it laid out general themes on ill-treatment, holding that ill-treatment "must attain a minimum level of severity," [FN49] which shall be determined on a case-by-case basis, depending on the circumstances of each case. In the wake of such an ad hoc examination, considerations like "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." [FN50] shall be taken into account.

The ECHR held that the five techniques "were applied in combination, with premeditation and for hours at a stretch; they caused, if not actual bodily injury, at least intense physical and mental suffering and also led to acute psychiatric disturbances during interrogation." [FN51] However, the ECHR ironically concluded that they did not constitute acts of torture, but rather inhuman and degrading treatment for they "did not occasion suffering of the particular intensity and cruelty implied by the word 'torture' as so understood." [FN52]

The ECHR did not even explain what kind of suffering amounts to torture. With benign words on the general prohibition against torture, absent even minimal substance, the ECHR simply borrowed the distinction between torture and other inhuman treatment from article 1(2) of the Declaration on Torture, which provides that torture is distinguishable from other ***15** forms of "cruel, inhuman or degrading treatment or punishment" based on the aggravation and deliberateness of the commission. [FN53]

Bearing in mind this decision, one might have the impression that the court acts randomly in deciding between what constitutes torture and what counts as causing less severe pain than that which is required for torture. It is clear that something is missing in the court's treatment of the definition of torture, and that something is seriously superficial in the court's understanding of the depth of the legal problem. Further cases before the ECHR support my inquiries, and I shall now address some of them.

Before doing so, I must note that the following cases prove that the ECHR has been treating the torture dilemma in a very superficial manner, not only reciting what has been superficially developed in the Ireland case, [FN54] but also referring to the simple words of the Convention Against Torture, instead of further developing the theory underlying the Convention's definition. This deserves criticism.

Does "birching" [FN55] constitute a violation of the European Convention's prohibition on torture, inhuman, and degrading treatment or punishment? This was the question before the ECHR in the Tyrer case. [FN56] This case involved the birching of a fifteen-year-old student for assaulting his classmate. [FN57] The birching included removal of his trousers and underwear. [FN58] In rejecting the contention of torture, the ECHR found it enough to refer to the distinction articulated in the Ireland case, as well as to the Convention Against Torture, without providing any further

explanation as to what level of severity amounts to torture. [FN59] For the court, it seemed the Ireland case was a self-evident precedent even though the Ireland case did not tell us much; rather, the Ireland case merely provided citations to some paragraphs from the Convention Against Torture and the Declaration on Torture. To that extent, the court failed again to explore the grounds of the definition of "torture."

However, it was the ECHR in this case that decided to develop another distinction, this time between "inhuman punishment" and "degrading punishment."***16** One may ask what the conceptual grounds for this distinction are. The ECHR provides no answer except that which reminds us of the court's methodology of citing simple extracts, holding that "Article 3, by expressly prohibiting 'inhuman' and 'degrading' punishment, implies that there is a distinction between such punishment and punishment in general." [FN60] In concluding that the acts discussed in this case constitute degrading punishment, the court further "explained" that for punishment to be degrading, it must involve a particular degree of humiliation or debasement. [FN61] Such assessment must be done on an ad hoc basis, depending on the particular circumstances of each case. [FN62] Here again, as in the Ireland case, the court adhered to vague terminology, as well as created new distinctions, yet no explanation of the substance of these distinctions was provided. [FN63]

However, I should still make it clear that I am not suggesting that the court should have delineated a long list of particular acts that constitute degrading and inhuman punishment or torture. Rather, the court is expected to further explain that which, from the court's perspective, establishes the "particular level" to which the court constantly refers. The court must provide at least certain general outlines. In the absence of these outlines, or conceptual outlines, the puzzle can never be resolved. [FN64]

To support my criticism, let me now consider the Aksoy case of the ECHR, [FN65] which involved acts of stripping the interrogatee "naked, with his arms tied together behind his back, and suspend[ing him] by his arms." [FN66] Unlike the Ireland case, the ECHR concluded here that the acts committed against the interrogatee amounted to torture. [FN67] Notably, the court even adhered to the precedent as "developed" by the Ireland case regarding the distinction between "torture" and "other forms of inhuman treatment," but still reached a different conclusion than that which the Ireland case borrowed from the Declaration on Torture. Such a result leads to some serious conclusions: first, that the circumstances involved in the Ireland case were not as cruel as the circumstances described in the Aksoy case; and second, that the ECHR failed to explain in the Aksoy case what makes the Palestinian***17** hanging constitute torture in light of the "five techniques" discussed in the Ireland case! [FN68]

However, such a failure to explore the conceptual definition of torture has not been the sole domain of the European community. The Supreme Court of Israel (SCI) was also faced with similar circumstances to those at issue in the Ireland case. [FN69] The SCI had to decide whether acts practiced by the General Security Service (GSS) interrogators against those suspected of terrorist activity, such as shaking the suspect and placing him in stressful positions, fell within the limits of reasonable interrogation. [FN70]

Chief Justice Aharon Barak, who wrote the opinion for the court, adopted a genuine legal methodology, thus avoiding the inquiry into the definition of "torture." Justice Barak did not even refer to the Convention Against Torture. Instead, he stated that the case before him called for an examination of the merit of the institution of "reasonable interrogation," noting that, "a reasonable investigation is necessarily one free of torture, free of cruel, inhuman treatment, and free of any degrading conduct whatsoever." [FN71] But, what constitutes torture, cruel, inhuman treatment, and degrading conduct? This question was simply neglected. [FN72]

In support of my impression that the SCI was reluctant to address the issue of defining torture, it is worth highlighting Justice Barak's own words: "Indeed, violence directed at a suspect's body or spirit does not constitute a reasonable investigation practice." [FN73] With these words, Justice Barak leaves the reader puzzled, for one now knows

what this kind of practice does not constitute-namely, reasonable interrogation-but not what it does constitute.

Again, the ECHR and the SCI are not alone in this long-term "timidity" to engage in a serious conceptual discussion of the meaning of torture. Several cases of international tribunals on personal criminal liability support this conclusion. If up until this point I have been speaking about the puzzle of the definition of torture, then the International Criminal Tribunal for the Former Yugoslavia (ICTY), for example, has muddied the water further, thereby making the puzzle more complicated. The Delalic case [FN74] ***18** has been the leading case in this regard. In that case, the ICTY held clearly that "mistreatment that does not rise to the threshold level of severity necessary to be characterized as torture may constitute another offence," [FN75] adding that inhuman treatment is the kind of action that "deliberately causes serious mental or physical suffering that falls short of the severe mental and physical suffering required for the offence of torture." [FN76]

Interestingly, while holding so, the court noted that no abstract threshold of pain or suffering could be determined. [FN77] In addition, it is worth mentioning that the court emphasized that both acts and omissions may constitute torture so long as the torturer demonstrates the required intent. [FN78] On this last point, one may raise an eyebrow, for it is not clear how "torture by omission" has come to exist; the court did not explain this position. [FN79]

To conclude on this point, in my view, it is wrong as well as dangerous to believe that the existing definition of torture does not require further elaboration by judicial review. Any text that provides a definition is not self-evident, but rather requires interpretation and elaboration; this is for judges to do. However, such development may not involve creating crimes that are not clearly included in the text. In addition, such judicial developments suggest to domestic and international legislatures how to address the conceptual grounds of the phenomenon of torture. In the absence of this sort of judicial activity, instances such as the notorious American torture memos should come as no surprise to us. [FN80]

Section 2340 of title 18 of the United States Code [FN81] defines torture 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." [FN82] On its face, the American definition has the same substance and components as the Convention's definition. [FN83] However, as I have already asserted, any kind of legislation requires interpretation; the mere existence of a legal norm does not ultimately give it substance.***19** As for the Convention's definition, I have contended so far that legal tribunals have failed to launch an inquiry into the meaning of the Convention's definition. In the American context, the story is slightly different. Following the American-declared War on Terror, the Bush administration asked the U.S. Department of Justice to submit memos on, inter alia, the standards of conduct under the Convention Against Torture, as implemented by 18 U.S.C. §§ 2340-2340A. [FN84]

In the Gonzales memo, for example, it was provided that the kind of torture that the United States Code proscribes includes only,

> acts inflicting, and that are specifically intended to inflict, severe pain or suffering, whether mental or physical. Those acts must be of an extreme nature to rise to the level of torture within the meaning of Section 2340A and [The Convention Against Torture] [C]ertain acts may be cruel, inhuman, or degrading, but still do not produce pain and suffering of the requisite intensity to fall within Section 2340A's proscription against torture. [FN85]

Now, one may certainly oppose the Gonzales memo's understanding of the meaning of torture. However, as regards the Gonzales memo, in the absence of substantive interpretation by international tribunals, it is only plausible to expect that other domestic authorities will feel free to articulate their own understanding of the prohibition on torture in a way that serves their own interests.

Having said that, I shall express my own wonder and disdain, upon reading the Gonzales memo, for it undermines the basic pillars upon which the general prohibition against torture stands. According to the Gonzales memo, "specific intent" cannot be established if the actor acts "knowing that severe pain or suffering was reasonably likely to result from his actions, but no more." [FN86] In addition, the memo limits the degree of pain and severity to the most possible extreme, thus including within the meaning of torture only "death, organ failure, or serious impairment of body functions." [FN87] The memo further considers only "prolonged mental harm" to rise to the level of severe mental pain or suffering. [FN88]

***20** The Gonzales memo is the kind of danger that I have in mind by criticizing the reluctance of, particularly, international legal tribunals to cross the outmoded dogmas and engage in the substantive conceptual meaning of the phenomenon of "torture."

The question remains then: What constitutes torture? This shall not be an inquiry into the existing Convention's definition, but rather a journey into the conceptual and purposive grounds of the phenomenon of torture. I shall now consider the leading scholarly perspectives on the conceptual meaning of torture.

III. Between Clarification and Criticism

Jeremy Waldron has recently correctly expressed the view that the Convention Against Torture does not really suggest any definition on the concept of "torture," rather, that it supplies only a general prohibition against torture. [FN89] It is his opinion that underlying the Convention's definition is the theory that we know torture when we see it. [FN90] Among other things, Waldron criticizes the so-called "puke" test. [FN91] He contends that there are many things which, upon being witnessed, are very likely to make a human being puke, but that, in and of itself, does not mean that all the things witnessed constitute torture. [FN92] What lies between the lines of Waldron's well-articulated essay is the call for an urgent formulation of a conceptual and structured definition of the torture phenomenon.

Like Waldron, David Sussman stiffly criticizes the Convention's definition, asserting that the Convention Against Torture "does not address the central question of what counts as the infliction of [the] requisite sort of suffering , or the broader context that might have to be in place to distinguish torture from other forms of coercion, manipulation, or intimidation." [FN93] To elaborate on his criticism, he provides that Donald Rumsfeld's rejection of the international condemnation of what has been viewed as torture practice in Abu Ghraib. [FN94] In this context, Rumsfeld argued that while the photos released from Abu Ghraib might reflect a practice of humiliation or a kind of abuse, they still do not show any act of torture. [FN95]

In order to fill in the conceptual vacuum in the Convention's definition, Sussman suggests that while the infliction of intense pain might be a feature of torture, the main distinctive feature of torture is passivity of the ***21** victim, namely, the "alienation of the victim from his own bodily and emotional life that force[s] passivity before pain and fear can engender." [FN96] Perfectly described by Sussman, the victim of torture must be one that cannot fight back; he is, rhetorically speaking, handcuffed. [FN97] In his words, "the torture victim realizes that he has no room to maneuver against his antagonist, no way to fight back or protect himself, and he must realize that his antagonist operates an awareness of this as well." [FN98]

A similar approach was adopted by David Luban, who asked the question: "What makes torture ?" [FN99] Luban answers the question by putting primary focus on the psychological aspects of the torture phenomenon. [FN100] He argues that one must understand the conceptual interaction between the torturer and the victim in order to understand the conceptual meaning of torture. As he puts it,

> Torture aims to strip away from its victim all the qualities of human dignity The torturer inflicts pain one-on-one, deliberately, up close and personal, in order to break the spirit of the victim-in other words, to tyrannize and dominate the victim. . . .
>
> . . .[T]orture isolates and privatizes. Pain forcibly severs our concentration on anything outside of us; it collapses our horizon to our own body and the damage we feel in it [I]t becomes impossible to pay attention to anything else. [FN101]

While I may express certain sympathy with such an approach, Luban still does not tell us "what makes torture," but rather only tells us "what torture makes." Namely, he does not articulate a conceptual definition of the torture phenomenon, but rather delineates a conceptual scheme of the outcomes of the torture practice.

In his essay, What We Have Seen Has Been Terrible, Daniel Rothenberg puts the emphasis on another component of the torture phenomenon. [FN102] He argues that torture is not solely about the obvious harm that torture entails, but rather that it is about "the logic of power that motivates its practice."***22** [FN103] In my modest view, this is one of the key perceptions to capturing the conceptual understanding of "torture." [FN104]

IV. Conceptual Understanding of Torture

To understand the conceptual grounds of "torture," one must first distinguish between the core components of "torture," and the other components that loiter in the periphery. The core components solely concern the phenomenon being examined. These components aim to describe the substance of the phenomenon. They target the situation, namely, the interaction between the torturer and the victim. Unlike the core components, the peripheral components describe the constitutive elements of the phenomenon not in abstract, but rather within a particular context. For example, peripheral components may suggest that for the purposes of criminal prosecution, only torture that is committed by a state agent shall be criminally punished; yet at the core-component level, all kinds of torture conduct are condemned, whether practiced by private actors or executed by state agents. [FN105] In this part, I am prepared to limit the discussion to the core components, which, in my view, constitute the only required elements of the conceptual understanding of "torture."

There is much in common between torture and terrorism to the extent I dare contend that torture is a form of terror. I once stiffly criticized existing definitions of terrorism. It has been my view that most international scholars seek to articulate a definition of terrorism in light of what they see nowadays as terrorism. [FN106] In addition, this kind of definition "has more a political inspiration than a theoretical one." [FN107] I strongly believe that this has also been the case for "torture." The trouble is that such definitions might not match acts of torture that were exercised throughout history, and certainly cannot match future torture practice, especially in light of the rapid development of modern, sophisticated interrogation techniques.

Understanding the conceptual premises of terrorism may elaborate on our understanding of "torture" as it leads one to think of torture as a form of terror, namely, as a form of imposing extreme fear on the victims of torture. [FN108] The question then concerns the motivation that stands behind this kind of extreme fear. What is the kind of pain and suffering required in order for us to be able to condemn a certain act as torture? And, what is ***23** happening between the torturer and the victim that makes both of them understand that one is torturing and that the other is being tortured?

Speaking of torture on the conceptual level allows us to think of this phenomenon outside of any particular context, and implies a situation of interaction between the torturer and the victim. The characteristics of the torturer and the victim lend themselves to five cumulative, conceptual distinctions: (1) superior versus inferior, (2) active versus passive, (3) theatricality versus secrecy, (4) fear versus security, and (5) pleasure versus suffering. [FN109]

A. Superior versus inferior

Torture as a conceptual phenomenon is available only in cases where a degree of superiority between the torturer and the victim exists. This superiority is not a matter of an official rank or position that the torturer holds, but rather an expression of the attitude that the torturer conveys toward the victim. Such attitude embraces not only the message that the torturer is superior to the victim, but primarily that the victim is inferior to the torturer-the victim is merely an object controlled by the torturer. Such messages may not be objectively perceived simply by reading or viewing the circumstances surrounding the torture experience, but rather must be clear from the subjective interaction between the torturer and the victim. Such an attitude may exist in the relationship between a father and his son or daughter, a husband and his wife (especially in third-world countries or Eastern societies where the man is viewed as superior and the woman is inferior), a judge and a defendant in court, an investigator and a suspect, and a teacher and his or her pupil. These are only a few examples where, under certain subjective circumstances, an attitude of superiority versus inferiority can be observed.

It is true that, literally speaking, inferiority is the opposite of superiority. However, from a conceptual perspective, it is not always the case that whenever somebody is superior to the other the latter is necessarily inferior to the former. From a logical point of view, it is plausible to argue that superiority implies subordination, yet it does not necessarily imply inferiority. In a criminal investigation, it is always the case that the interrogator is superior to the suspect and that the latter is subordinate to the investigator. This is as well the case in the relationship between a father or mother and his or her son or daughter, and between a husband and his wife (especially in Eastern societies). However, one shall not imply inferiority simply based on existing subordination.

***24** It is my view that inferiority consists of further characteristics than simply one being subordinate to another person. Inferiority is about humiliation; it is about a kind of constant fear that occupies the heart and the mind of the inferior-a fear that is imposed, or that is caused, or that is controlled, or that can be ceased by the superior. This inferiority is about the passive characteristics of the inferior against the active features of the superior; it is about his restricted power to react to acts and expressions of the superior.

Such inferiority views the victim as an object; [FN110] the victim is not someone who acts, but something that is being acted upon, [FN111] namely, as a complete means for achieving certain ends. Such treatment constitutes humiliation for it infringes on the basic dignity with which all creatures were born. [FN112] This is the kind of humiliation that causes dehumanization, thus stripping the victim of the attribute of being a person in the first place. [FN113]

B. Active versus Passive

It is impossible to imagine a torture situation where both the torturer and the victim are active actors. It must be the case that the victim is a passive participant. His passivity is expressed through his inability to react to the torturer's provocations. [FN114]

A torture situation is characterized by the torturer's initiation. The torturer preempts the circumstances by which the whole situation is driven, the victim has no control over these circumstances. He is merely a reactive person.

Not only is the victim reactive, but his reactivity is also constrained to a serious degree. It is not that the victim is willing to be static, but rather that because of the situation imposed on him, he is coerced to be passive. Like an animal that is struggling upon its slaughter, the victim of torture is keen to release himself, to cease the torturer's power and domination over him, to react to the torturer's provocations, and even to avenge. Yet, all of these he simply cannot do. The torturer confines him, literally and metaphorically.

It is of course not always the case that the victim's hands are physically cuffed. Sometimes, it is the power, official position, and dominance of the torturer that restrain the victim from reacting. It is not about the victim's physical inability to react, but often it is his mental handicap that prevents ***25** him from capturing the overriding motivation of the torturer. The victim is simply "unable to shield herself in any significant way, and unable to effectively evade or fight back." [FN115] This kind of passivity is what creates the extreme fear and instability that surrounds the victim; it is exactly what makes the victim vulnerable and impotent. [FN116]

C. Theatricality versus Secrecy

George Fletcher once argued that, among other things, terrorism is characterized by its theatrical aspect. It has been Fletcher's view that terrorism is meaningless if committed in secret. Underlying his argument is the logic that terrorists are proud of their terrorist commissions, thus expressing their guiltlessness. [FN117]

While the phenomena of torture and terrorism might share a core component concerning the imposition of extreme fear on their victims, it is still the case that unlike terrorism, torture takes place in deep darkness. Torturers always invoke justifications for committing their wrongs; they do not argue that torture is legitimate. At best, their argument is that their conduct is needed to meet exceptional or extraordinary circumstances. Unlike terrorists, torturers not only feel guilty, but also seek to justify their wrongs; thus negating them by invoking all possible criminal defenses. In addition, those who are accused of practicing torture, unlike terrorists, feel shame about the accusation against them. For them, the accusation of torture is no less than the mark of Cain. Finally, unlike terrorists, torturers are not willing to admit their arguable wrongs. They are keen to keep their practice in secret. They are not proud of their actions, though they are very likely, in certain contexts, to be proud of the outcome of their torture practice, especially when interrogators have succeeded in preventing a terrorist attack, although still they are ashamed of the practice itself. [FN118]

Additionally, torture is more effective if committed in secret because such deep darkness creates the atmosphere required to isolate the victim-to terrorize, frighten, and overwhelm him. Among other factors, such mystery breaks the victim's spirit and promotes the torturer's dominance over the victim. [FN119]

***26** D. Fear versus Security

The word "terror" owes its etymology to Middle English: from the Anglo-French word terrour; from the Latin word terrere, which means "to frighten" (the word terrere is related to the Greek word trein, which means "to be afraid"); and to the Latin word tremein, which means "to tremble." [FN120] Torture (torture in French, tortura in Spanish, and folterung in German) generates "fear"; it is the same kind of fear with which terror is associated. The phenomenon of torture stands at the distinctive point between fear and security. It describes two characters: one who enjoys a high degree of security and confidence, and another who is subject to constant and overwhelming fear.

The torturer receives his power, confidence, and security from his status, [FN121] position, rank, or authority. This kind of confidence and security is what grounds the torturer's absolute dominance and control over the victim. Taken together, the security and the confinement are what grant the torturer the power to treat the victim as a mere object, namely, to inflict upon him whatever he wishes.

As for the victim, he is under the kind of fear that captures victims of terrorism. All crimes generate fear, but terror and torture generate a different kind of fear. It is a constant and intensive fear that is not ceased simply when the overwhelming circumstances do not take place anymore. This is the kind of fear that definitely, and not speculatively, follows the victim until his death, even after the circumstances of the torture practice stop existing. It is not

merely about the tragedy and the nightmares that follow the incident. Rather, it is about the instability that also captures the victim's soul during the torture activity; it collapses his horizon into his own body and soul, thus making it impossible for him to pay attention to anything else but the intense and constant fear. [FN122] Usually, it is the case that the victim is struggling not necessarily for his life, but primarily for his dignity, for his existence as a creature, and for preserving the lowest level of human conditions. This distinction between security and fear illustrates the kind of mercy that the victim begs for from the torturer. [FN123]

E. Pleasure versus Suffering

Torture is not possible if the victim is not suffering. International documents put emphasis on a high degree of suffering; they even speak of ***27** physical or mental pain. [FN124] With this approach I do not agree. I understand the international community's enthusiasm for adhering to such an approach, thus emphasizing its strong condemnation of torture activity, as well as expressing the idea that torture is a unique and rare phenomenon that does not take place whenever suffering or pain takes place. However, condemnation is one thing and defining it is another. Besides that, I am not really sure if torture is so rare, especially in the aftermath of 9/11. [FN125] The fact that we did not speak of torture very often in the period between World War II and 9/11 is not evidence that torture was not among us. However, nowadays, in the existence of media and modern technology, as well as the large number of human rights organizations, the debate has become more active and imminent.

It is my view that suffering is a constitutive element of the conceptual definition of torture. However, the degree of this kind of suffering does not necessarily need to be so severe. The idea of “suffering” must be understood as combined with the other above mentioned four conceptual distinctions. That is, the fact that the victim is being intimidated by the torturer, while at the same time he, the victim, is restrained and “handcuffed,” and thus cannot react, is in itself the kind of suffering that generates the sort of fear with which torture is associated. This understanding of “suffering” contributes to our perception of the notion of pain. Having said that, we do not really need serious and severe pain in order to classify a certain activity as torture.

As for the torturer, it is not necessary to confine the conceptual definition of torture solely to the circumstances where the torturer intends to elicit information from the victim, where he intends simply to cause suffering to him, or where he intends to impose pain on him. For the conceptual definition, the torturer's purposes are simply irrelevant. The only relevant elements are those that concern the situation, the victim, and the torturer's general intention to torture the victim (namely, the intention of creating the terrifying atmosphere as demonstrated by the five conceptual distinctions, which is associated, in this context, with the commission of regular crimes of violence against the person/body)-a state of mind that can also be satisfied if the torturer was aware of the natural consequences of his actions. [FN126] Once it is torture, it always shall be so perceived, regardless of the purposes underpinning it.

***28** Speaking of irrelevance, and to sum up, I would like to set out three important points on the conceptual grounds of the phenomenon of torture, and in doing so, primarily criticize, implicitly, the existing definitions of torture. In my view, for the conceptual meaning of torture, (1) it is irrelevant who torturer is-he can be a private actor as well as a state agent; (2) it is irrelevant what kind of pain or suffering is being inflicted on the victim, nor is the degree of such pain or suffering inflicted relevant; and (3) the torturer's purpose is simply irrelevant.

Taken together, the previously mentioned five conceptual distinctions shall enable us now to form a broad understanding of the phenomenon of torture.

V. Torture in Context: Torturers as Dangerous Criminals

I have already contended that for criminal purposes it is plausible that domestic legislatures restrict the imposition of criminal liability only to, for example, the infliction of severe pain or suffering, or to torture that is being committed by state agents, as a matter of legislative policy or other domestic interests, thereby adapting the criminalization to the sentiments of the community. But, the question first must be whether "torture" constitutes a separate and independent crime!

Ariel Dorfman once observed that "torture is of course a crime committed against a body." [FN127] Johan Vyver has "confirmed" this view, adding that, like terrorism, torture is a crime. [FN128] Is this really true? Could it not be the case that torture is nothing but the conventional violence of crimes against the body (or the person) with which we are already familiar (e.g., murder, assault, rape, battery, mayhem, etc.)? If so, what role then do my five suggested conceptual distinctions play in the course of convicting and punishing torturers? These questions have great significance in criminal law systems of the common law legacy.

Common law systems, in criminal cases, distinguish between proceedings that determine guilt or innocence and the sentencing stage. On the contrary, criminal cases in civil law systems consist of one single phase, combining both the guilt/innocence proceedings and the sentencing assessment proceedings. The importance of the common law distinction lends itself to ***29** the logic-on which both legal jurisprudences agree-that within the guilt/innocence proceedings, the trial judge (or the jury in a jury-based system) must consider evidence that solely concerns the criminal commission, thus avoiding so-called biased evidence. This means that many facts that are relevant to sentencing- for example, prior convictions, testimony to the personal circumstances of the offender, testimony to his character, expressions of regret by the offender himself, and other criteria of dangerousness-are considered irrelevant at the stage of determining guilt of the commission of the crime. [FN129] This is the promise of the presumption of innocence-understood as a constitutional requirement of the right to a fair trial or to due process of the law-that a person is innocent until proven guilty.

Within the guilt/innocence proceedings, therefore, the judge may not be exposed to anything that is extrinsic to the proof of the crime itself; evidence bearing on prior history, war record, and family morality are simply considered irrelevant at this stage of the trial. At this stage, only elements bearing on the guilt question are relevant. Such evidence concerns the wrongdoing committed by the offender, the state of mind in which the wrongdoing was committed, and the attribution of the wrongdoing to the offender himself. These are the constitutive elements of criminal guilt. [FN130]

The trouble is that in civil law systems, judges sitting in criminal cases are already exposed to biased evidence at an early stage of the criminal trial. This becomes obvious in light of the method by which such systems are run. It is the civil judges themselves who interrogate the defendant about his person, name, residence, occupation, marital status, and prior criminal record. One may then plausibly wonder how civil judges are not biased as they have already been exposed to such incriminating materials. It is believed-without much evidence I dare note-that professional judges can handle this kind of incriminating material without losing their impartiality. [FN131] However, I do not understand how a judge can remain so unbiased, as professional as he may be, while the entire file of the offender (the dossier) has been turned over to him by the civilian-partial investigator.

The dichotomy between the different common law proceedings is important not only in regard to which evidence is submitted when, but is also significant in regards to the degree of proof required for proving such evidence. While evidence submitted at the guilt/innocence proceeding needs to be proved "beyond a reasonable doubt," the burden is lower at the sentencing stage, namely, "by a preponderance of the evidence."

Allow me now to step back to our torture enigma and argue for the common law distinction. Bearing these distinctions in mind, it seems that if ***30** Dorfman and Vyver are right-namely that torture is a crime [FN132]- then, it

follows necessarily that in coming to accuse, for instance, an interrogator of torture activity, the prosecution must bring before the court evidence of such activity, thus proving them guilty beyond a reasonable doubt. However, the question remains: What is it that the prosecution is required to prove beyond a reasonable doubt? Do not these acts-so-described as torture- simply constitute murder, rape, assault, and other violent activities with which all penal codes of any organized legal system are familiar? I am of the opinion that the answer is affirmative. To elaborate on this, let us consider the following examples:

I. Mike is a serial killer; he has been killing innocent people, whom he picked arbitrarily. This he has been doing in certain ways that cause serious suffering to his victims prior to their death. For instance, one victim he cut into pieces while she was alive. Another victim was raped first in front of her son's eyes, and then was killed in an outrageous manner.

II. John is a well-respected gentleman in the community for being a very successful public speaker against terrorism. All of a sudden, John became a widower after his wife was kidnapped and killed by a terrorist organization. The kidnapping took place at midnight while John was not at home, and no one but his neighbor, Alexander, witnessed this. The terrorists, having figured that Alexander saw them that night, threatened to kill him if he revealed their identity. In the absence of Alexander's cooperation, the police and the state secret services failed to find out who was behind the crimes and decided to suspend the investigation, but John sought revenge. He kidnapped Alexander, locked him in the basement of his house in the dark, seated him on a small chair, and kept him awake day and night. Every time Alexander fell into a sleep, John awakened him by tossing freezing water on his face. John did all this in order to elicit information about the terrorists' identities.

III. Edward's daughter Jane is not an easy child; she brings her parents many troubles. One time it was just too much for her parents, for she kept yelling for no reason, and every time she was asked by her parents about the reason, her screaming became louder. As a matter of “educational punishment,” her parents decided to lock Jane inside her room for the entire day, but even that did not help. Then it was the idea of her mother, Marta, that they must not just lock Jane inside the room, but also must subject her to intensely loud noises. After ten hours of such intense noises, her parents realized that Jane had fainted. Upon hospitalizing her, her parents ***31** were told that their daughter now suffers from a serious mental disability caused by the extremely loud noises to which she was subjected.

IV. George is a serial killer who kills innocent people just for pleasure; he enjoys seeing dead bodies. After committing his crimes, he takes pictures of the dead bodies and posts them inside his private “bloody album.”

V. Daniel is a special agent of the state secret service who likes to adhere to violence, not as a matter of belief that this is the only effective interrogation method to confront terrorism, but rather because he enjoys subjecting his suspects to pain and suffering. In doing so, he simply feels satisfied and happy.

These five examples involve torture as conceptually understood. However, it is plausible that Mike, John, Edward, Marta, and George will not be prosecuted for torture. At worst, George will be accused of murder; Mike of murder, rape, and assault; John of kidnapping, assault, and abuse; and Edward and Marta will be accused of assault and of abuse of a helpless minor. Note that examples I, II, III, and IV, substantively speaking, constitute torture even according to, for example, the Convention Against Torture. [FN133] However, the Convention Against Torture does not apply to them because the actors (torturers) are not state agents, but rather are private persons.

Unlike those four examples, the case is slightly different when it comes to example V. Intuitively, the circumstances surrounding example V lead us to think first about torture. Again, conceptually speaking, example V represents a classic case of torture. However, it is not clear whether Daniel has committed torture in accordance with the definition provided by the Convention Against Torture. The Convention's definition does not provide a conclusive list of purposes for torture activity; [FN134] however, the listed purposes are common in nature. Namely, if by means of interpretation we seek to extend the Convention's definition to new unlisted purposes, then these new pur-

poses should be of the same nature as the purposes already listed. The proof is the Convention's words “for such.” [FN135] So what is this nature to which I am referring? I doubt if one can point out what this nature must be, but one certainly can tell what this nature should not be; namely, general or abstract purposes do not fit here. The listed purposes are concerned with obtaining information or confessions, punishing, intimidating, and coercing. [FN136] It is true that the Convention provides a large loophole for recognizing more purposes as it says, “or for any reason based on discrimination***32** of any kind.” [FN137] Yet, the purposes that could be recognized in accordance with this provision must be based on “discrimination of any kind.” [FN138] That is to say, it is very likely that a torturer who does so, solely for the purpose of pleasure, might not be condemned under the Convention Against Torture even if all the other conditions are met.

If this is true, was it then really torture that American service members committed against Abu Ghraib prisoners whom they coerced to assume certain humiliating poses while naked? According to the Convention's definition, the answer might be negative. This case does not even come close to Daniel's example, for the latter involves severe pain and suffering while the former involves, at best, some kind of humiliation and a low degree of suffering. Note that the Convention's definition is concerned only with severe pain and suffering. [FN139] So, what stood behind the harsh criticism to which American soldiers who participated in the Abu Ghraib abuse were subject!? The answer, I believe, is to be found in the five conceptual distinctions I suggested in Part IV.

Let me now turn back to Mike, John, Edward, Marta, and George from examples I, II, III, and IV. Did they commit torture in accordance with my suggested conceptual understanding of torture? Yes, they did. However, even if any penal code includes an independent crime called torture, would they ever be prosecuted for torture? No. Why is that? Because the only scenario that we have in mind when we speak of torture is that of an evil state agent (torturer), locking a cuffed suspect in an interrogation room, deep in a dark basement while a single light is swaying above his head, and subjecting the suspect to extreme and severe pain and suffering. Should that be the only scenario? Of course the answer is no. To this extent, although Mike, John, Edward, Marta, and George have committed torture, no one would expect that they would be prosecuted for torture, but rather for crimes such as murder, assault, rape, and/or abuse.

We have come to conclude then that for torture to be identified, the nature of the actor-whether private or state agent-is irrelevant. In addition, the purpose for which torture is committed is also irrelevant. What is relevant is the phenomenon. These are the core components of the phenomenon, those that I have previously expressed through the five conceptual distinctions which characterize our conceptual understanding of the torture phenomenon.

But the question remains: How does the conceptual understanding of torture come into play in the criminal context? Namely, how ought the torture***33** committed, not only by Mike, John, Edward, Marta, and George, but also by Daniel, be reflected in a criminal trial if they are prosecuted?

Like terrorism, torture expresses the overriding motivation that the torturer holds in the course of creating the circumstances, which lead any observer to conceptually perceive that a situation of torture is taking place. In the context of criminal law, this overriding motivation-as ought to be understood in light of the five conceptual distinctions-constitutes a ground for enhancing the sentence given upon establishment of criminal guilt. That is, Mike, John, Edward, Marta, George, and Daniel should be prosecuted for regular violent crimes, such as assault, mayhem, abuse, rape, and murder. Torture is not a separate crime. Simply stated again, torture involves nothing but the crimes against the body with which we are already familiar. However, these crimes against the body, in the context of torture, are accompanied by an overriding motivation, which is reflected through the five conceptual distinctions. This overriding motivation constitutes an aggravating factor that should enhance the criminal penalty.

Bearing in mind the dichotomy between the guilt/innocence proceeding and the sentencing stage in common law

criminal cases, the question now becomes whether the overriding motivation that is captured by the torture phenomenon is an aggravating factor that must be proved before the trial judge (or the jury in a jury-based system) beyond a reasonable doubt, or be left for the sentencing stage to be thereby proved by a preponderance of the evidence?

In my book The Meaning of Criminal Law, [FN140] I have expressed the view that aggravating elements address a foundational distinction of the substantive criminal law between guilt and dangerousness. Guilt bears upon a determination in the past. Dangerousness addresses the future. Guilt is a determination of a prior wrongdoing, an action that has been accomplished (ex post facto). Dangerousness is a speculative future determination that bears upon "something that might reoccur" (ex ante). Guilt targets the internal premises of the criminal action, namely, the interplay between the offender and the community, and therefore, it is for the community to determine the offender's guilt. On the contrary, dangerousness is an outside institution; it does not exist between the community and the offender, but between the offender and the judicial system that is responsible for the adminstration of criminal justice. Therefore, it is for the trial judge to adjudicate the dangerousness question. Finally, while guilt is a notion of fair condemnation, dangerousness is a concept of fair warrant and "notice."

***34** Again, in a criminal law system of the common law, which purports to avoid biased convictions, this distinction is of the utmost importance. [FN141] The question then is: Does torture, as an overriding motivation, bear upon the guilt question or upon the offender's dangerousness?

During the guilt/innocence proceeding, the prosecution seeks to prove the offender's guilt beyond a reasonable doubt. I am of the view that "guilt" is a unique feature of criminal law. Criminal law can punish only "guilty" people, for only a guilty person could generate a unifying perspective on criminal liability. [FN142] "Guilt" is the barometer for community condemnation and denunciation. [FN143] Therefore, guilt is required in order to measure the severity of the condemnation that the community ought to direct toward the criminal upon violating norms of correct conduct (wrongdoing). Ignoring such a measure would render criminal condemnation arbitrary, thus violating the criminal's right to due process of law. Treating all criminal defendants equally, regardless of the degree of wrongdoing that they have committed, shows a clear ignorance of the human capacity to make a rational choice. This is treating the criminal as an object, humiliating him, and accordingly, infringing on his right to dignity. [FN144]

The overriding motivation that torturers have in committing their crimes constitutes the degree of concrete dangerousness of domestic crimes against the body. This is the kind of dangerousness that distinguishes the common commission of, for example, murder, and murder as an act of terror; or which distinguishes the commission of "assault," and "assault causing bodily harm." As such, torture is not a new crime. The aforementioned "overriding motivation" does not even bear upon the so-called guilt-constitutive elements, but rather on the degree of the danger that torturers demonstrate against the community as such, and the specific victim in particular. For this reason, the overriding motivation should not be confused with mens rea elements, which do bear on the constitutive elements of guilt. The dangerousness of torturers might be taken into account in imposing criminal punishment, and be proved by a preponderance of the evidence, but this may not happen until they have been proven guilty of the commission of common crimes of violence beyond a reasonable doubt. [FN145]

My basic claim then is that torturers are not more culpable or guilty of their offenses because they are torturers, but that they are more dangerous, and that is a factor to be considered in sentencing. Having said this, it must be clarified that while terrorists are dangerous because they perceive themselves ***35** as guiltless, as doing the right and proper thing, as acting out of the law, and are thus proud of their actions, torturers are dangerous because they are led by an overriding motivation to accomplish their ends whatever the means. Although torturers might think that they are not guilty, they are of the belief that they are acting out of the law, or alternatively, acting within the law but breaching it for good reasons that might provide certain justifications or give them some excuses for their actions.

Now that I have provided my argument and explained and elaborated on it, I shall now put straightforwardly what I could have contended in the beginning. My ultimate argument stands in contrast with article 4 of the Convention Against Torture, which requires that all state parties make torture an aggravating crime at the domestic level. [FN146] Yet, the Convention also suggests that torture constitutes an aggravating factor, thus enhancing the penalty for those who are found guilty of committing torture. [FN147] However, the Convention does not tell us much about whether such aggravating factors bear on the constitutive elements of the crime required to be proved within the guilt/innocent proceeding, or simply on the dangerousness of the criminal, and therefore, could be sufficiently proved by a preponderance of the evidence at the sentencing stage. I believe that such a classification must be articulated by the judiciary in accordance with the fundamental principles of criminal law theory upon which I have elaborated at length in this part. [FN148]

VI. The March of Folly: Refuting/Upholding Taboos on Torture

Speaking of the nature and ambit of the prohibition on torture, it has been repeatedly contended that torture shall not be justified, nor shall it be excused; the prohibition on torture is absolute. The absolute nature of the prohibition on torture has become a maxim and a taboo under international law. The idea is that torture constitutes a forthright form of barbarism, which should have no place in a civilized society. [FN149]

A. The Ticking-Bomb Enigma

The years following the tragedy of 9/11 revived an old discussion regarding the possible justifications for torture, especially under the overwhelming circumstances as described by the oft-cited ticking-bomb scenario,***36** whereby a suspect, believed to have planted a time bomb or who knows about a planted time bomb, which if not defused, will kill many innocent people. [FN150]

The problem is that the ticking-bomb scenario suffers from acute conceptual, practical, and theoretical problems. [FN151] Frankly, this issue has been the subject of a comprehensive body of scholarly writing. Therefore, I will only point out, in a nutshell, my questions about the possible deficiencies of the ticking-bomb scenario.

Which cases are covered by the ticking-bomb exception? Should the ticking-bomb exception apply only in cases where many innocents are very likely to be killed? How many innocents are needed at the level that triggers the invoking of the ticking-bomb exception? If there is such a fixed number of innocents, then who has the legal and moral authority to make such a determination? Besides that, does human dignity-on which the prohibition against torture stands [FN152]-allow, in the first place, for such a utilitarian cost-benefit analysis approach? [FN153]

Furthermore, if the ticking-bomb scenario illustrates that which is imminent, then who can guarantee that torture leads to eliciting the truth regarding the place of the ticking bomb? Logically, especially in the case of dealing with terrorists who are keen on achieving their goals, it is very likely that terrorists will give their interrogator false information to gain more time for the bomb to explode. Once this happens, obviously there is no justification for torturing the terrorist, and the only option available would be prosecuting him for his terrorist activity.

In addition, the scenario with which we are dealing is not as sharp and clear as it is voiced by those who advocate it as an exception to the absolute prohibition on torture. Clearly, there is a certain chain of command to whose attention the facts regarding the planted time bomb must first be brought, and the latter should then move forward to gather information, locate the suspects, arrest them, and interrogate those who really have knowledge of the planted time bomb. It becomes clear now that we are dealing with a very long process, and it is not as imminent as it is so described.

These wonders and questions lead us to think of the ticking-bomb scenario not only as a hypothesis, but primarily as a forced, demagogical scenario that purports to create fear and instability in the public opinion, and ***37** thus to urge the adherence to torture activity. In this regard, I must note that there could be many possible efficient methods with which to confront terrorism, yet not every efficient method is a legal one, and not every legal one is constitutional. We, as an international community, are thus distinguished from terrorists and evil persons in that we are a civilized and organized society-we are not barbarians.

To end up on this note, the wonders and questions I have raised against the ticking-bomb scenario are widely branded the "slippery slope" argument. To elaborate on the "slippery slope" argument, without further explanation, it is worth addressing that which Alan Dershowitz has recently suggested in his book, Why Terrorism Works. In Dershowitz's view, torture may be a morally and constitutionally acceptable method for interrogators to extract information from terrorists when the information may lead to the immediate saving of lives. [FN154] Obviously, Dershowitz bears in mind forms of nonlethal torture, [FN155] which should be regulated by explicit, judicial authorization, namely, "judicial torture warrants." [FN156]

If torturers are so afraid of the mark of Cain, and thus so persistent in pursuing justification for their actions, then I do not see how Dershowitz is so keen on denoting this shameful mark on the judiciary. The House of Lords once rejected the permissibility of evidence obtained by means of torture, even if obtained outside the land of Great Britain, in order to protect and preserve the integrity of the court, thus holding that it is a bedrock-moral principle that torture is unacceptable. [FN157] Cherif Bassiouni has voiced his opinion that "the difference between a great nation and a mighty nation is not measured by its military wherewithal, or its ability to exercise force, but by its adherence to higher values and principles of law." [FN158]

B. On the Unjustifiable Nature of Torture

With this, it has been said that the question remains: Why is the prohibition on torture so absolute? That is, why can torture not be justified? Obviously, article 2(2) of the Convention Against Torture and article 3 of the Declaration on Torture leave no doubt that even public emergency may not ***38** justify the use of force. [FN159] Note only that Francis Lieber, in 1863, prohibited torture even in the state of military necessity. [FN160] To this extent, these international documents stand as a symbol of the triumph of human rights. [FN161] Intuition resonates that the absolute nature of the prohibition on torture emerges from the kind of disgust, humiliation, and derogation that torture activity involves and generates. But, intuition is not enough, reasoning is required. Such reasoning lends itself to the basic identity of the phenomenon of torture.

I have argued that the fact that we have entitled the phenomenon of "torture" a "crime" does not mean that this phenomenon is an independent crime. It has been my assertion that the kind of illegal conduct of which "torture" consists is nothing but that with which we are familiar in regards to other domestic crimes of violence against the body. To this extent, torture is not so different from murder, rape, assault, theft, arson, and burglary. They are all illegal types of conduct which are absolutely prohibited.

When I argue that murder, for instance, is not permissible under any circumstances, I am well aware of the counterargument whereby one may wonder: What about self-defense? Well, it is very important to understand that self-defense is not a license to commit murder. Rather, self-defense is a legal license to avert an imminent threat of aggression in a proportionate manner when necessary, and which might lead, in certain cases, to the death of the aggressor. However, causing the death of the aggressor is not the same as killing a person. While the latter case requires the intent to kill a human being in the absence of provocation, the former consists of the intent to avert an aggression. [FN162]

Here we are then: self-defense might cause the death of the aggressor, but in the absence of the intent to kill, the crime of murder does not come into play. It is impossible for a person to invoke the defense of self-defense against an accusation of the crime of rape, for example. Why is that? Because in the rape crime, for the actor, namely, the criminal, to be found guilty of such a crime, it must be first proved that he had the intention to ***39** have intercourse against the victim's will. [FN163] Such intention, if established, has nothing to do with an intention to avert an aggression available within the self-defense scenario. The same is the case for torture. It is impossible for an interrogator to argue that he caused the torture of the suspect in the course of his efforts to avert an imminent threat of aggression.

Self-defense is about the wrongdoing and not about the aggressor. It is about the danger, but not about the dangerous person, which means that once the aggression is seized, the force used for averting the aggression must be seized as well. [FN164] Like rape, torture requires not only the regular intent with which other crimes of violence against the body involve, but it also requires, among other things, the intention of creating the terrifying atmosphere as demonstrated by the five conceptual distinctions, which is associated, in this context, with the commission of regular crimes of violence against the person/body. [FN165] While obviously we can think of many cases whereby intending to avert an aggression, the death of the aggressor might occur, I can think of no single instance whereby attempting to avert an aggression, the rape of the aggressor occurs or the torture of the aggressor (e.g., the terrorist) will incidentally happen. [FN166] This is then, why torture is absolutely prohibited, but this is also why it cannot be justified.

C. “Necessity” for the State-Is It Possible?

Having argued so, the question remains one of necessity. In the oft-discussed example of an interrogation directed by the secret service of a particular legal system, can the interrogators invoke the defense of necessity for practicing torture? It is true that criminal law theory distinguishes between two kinds of necessity: excused necessity (personal necessity) and justified necessity (lesser-evil doctrine). [FN167] However, before examining these two kinds of necessity, the distinction between justification defenses and excusing defenses must be clarified. [FN168]

***40** Claims of justification concede that the definition of the offense is satisfied, but challenge whether the act is wrongful; claims of excuse concede that the act is wrongful, but seek to avoid the attribution of the act to the actor. Justifications speak to the rightness of the act. Justifications include “consent, lesser evils, self-defense, defense of others, defense of property and habitation, self-help in recapturing chattels, the use of force in effecting arrests and executing legal judgments, as well as superior order.” [FN169] To understand the theory of justification, one may consider the paradigmatic example of self-defense. A, an aggressor, threatens to attack B. B is not required to wait until A attacks him; it is B's right to act, namely, to respond to A's imminent threat to the extent this is required in order to repel A's attack. B's action satisfies the elements of the crime of assault. [FN170] However, the fact that B acted under the theory of self-defense negates the wrongdoing embodied in his action (zero wrongdoing). Moreover, justifications express the idea that B has done the right thing. [FN171]

Excuses concern the actor's accountability for a concededly wrongful act. [FN172] Interposing a claim of excuse concedes that there is a wrong to be excused. The claim challenges the attribution of the wrongdoing to the actor.

> If the excuse is valid, then, as a matter of definition, the actor is not accountable or culpable for the wrongful act. The focus of the excuse is not on the act in the abstract, but on the circumstances of the act and the actor's personal capacity to avoid either an intentional wrong or the taking of an excessive risk. [FN173]

Insanity, involuntary intoxication, necessity, and duress are classic examples of the concept of excuses. They express compassion. The assumption is that there are certain situations in life in which people have no choice but to engage in harmful and unjust actions-as George Fletcher puts it: “Their back is to the wall.” [FN174] These are situ-

ations where people are caught in overwhelming circumstances. They must, therefore, break rules of criminal law (e.g., kill or steal) in order to survive. However, “these actions are un ***41** just for they entail attacks on innocent people, people who are not wrongful aggressors themselves.” [FN175]

It should be clear by now that interrogators may not invoke the defense of personal necessity. Only those who are subject to the imminent danger (the overwhelming circumstances) are allowed to act against the terrorists as a matter of necessity, and thus be excused. A third party, whatever his position might be (e.g., security guard, police officer, or interrogator), may not assert the necessity defense and seek to be excused from criminal liability. In addition, it may also be noted that only people can be excused, mainly because excuses focus on the actor's personal capacity to avoid either an intentional wrong, or the taking of an excessive risk. Therefore, state agents acting within their official capacity represent the state, and the state may never be excused. Moreover, the state is supposed to act only lawfully, for when it acts unlawfully it undermines the legal grounds upon which it stands.

By eliminating all these options, we have remained with the possibility of justified necessity, namely, with the lesser-evil doctrine. However, the applicability of this defense, in regard to torturers, is very problematic for several reasons. First, the nature of justifications is to negate the wrongdoing otherwise embodied in the wrongful action. Torturers intend to commit an act of torture, as I have conceptually defined it, and like rape, their attempts to avert any terrorist aggression against innocent people do not result in torturing the suspect unless there is such an intention to do so (namely, the intention of creating the terrifying atmosphere, as demonstrated by the five conceptual distinctions, which is associated, in this context, with the commission of regular crimes of violence against the person/body). In the existence of such an intention, we are dealing with a clear case of prohibited torture, for the wrongdoing element was not negated. In any case, it cannot be the message that a civilized and organized legal system seeks to convey to the public that torture is right.

Second, justified necessity is largely invoked when a life may be spared at the expense of property damage; namely, damaging property in order to save a human life is a justified act by reason of justified necessity. Such is the case when A breaks into B's shop seeking to get a fire extinguisher in order to put out the fire that has engulfed C's car, and thereby, to save the life of C's child who is locked inside the vehicle.

***42** Obviously, any legal system that grants a place of honor to human dignity shall not make it possible to invoke the defense of justified necessity in cases where one person seeks to save his own life, or the life of others (as many as they may be), by risking the life of another person, or other people. My assumption is that no life is worth more than another; the lives of all persons are equal. Frankly, scholars of utilitarian orientation will not agree with my approach; they might even strongly criticize me. However, if I desert my approach, I can easily anticipate that the biblical dilemmas on saving lives will shortly become true. For example, assuming that I agree that it should be justified conduct to save the lives of one hundred persons by risking the life of one person, the question then becomes: should it be justified to save the lives of seventy people by risking the lives of thirty others? What about risking the lives of fifty-one people in order to save the lives of forty-nine others? [FN176]

Let us make the case even harder. Assume that the defense of justified necessity would not be possible in cases where at stake are the lives of two ordinary people; would it be available when at stake is the life of a Prime Minister, a President, a King, or an Emperor against the life of an ordinary person? Whose life is worth more? If this sounds like an easy enigma, then what about saving the life of a President by risking the lives of one hundred ordinary people, one thousand people, or one million people? Whose life is worth more? What are the moral grounds for evaluating one's life as worth more than others? Who decides? Where are the limits? These are very complicated questions that I doubt should be resolved by simply adhering to the doctrine of “lesser evils.”

D. Mercy by the “Queen” -Solving the Puzzle

In reality, the question of evaluating one person's life against another's has appeared more than once before judicial tribunals. I shall consider a leading and oft-cited case in this regard. Henceforth, I will call it the “cannibalism case.”

Dudley, Stephens, Brooks, and Parker were cast away in a storm while on an English yacht. The yacht was damaged by the storm, forcing the four men to abandon it and escape in an open boat, which belonged to the yacht. They had no supply of food except for two tins of turnips. On the fourth day, they were able to catch a small turtle, which they had completely consumed by the twelfth day. After twenty days, being over one thousand miles from land, Stephens and Dudley decided, without the consent of Brooks, that they would kill and eat Parker. Parker was the youngest and weakest of ***43** them all. Dudley offered a prayer for forgiveness and then put a knife to Parker's throat and killed him. Dudley, Stephens, and Brooks all fed upon Parker's body for four days, and shortly after that, they were rescued, but they were not in good health. It was clear that if the three remaining men had not fed upon Parker's body, they probably would have died of famine before they were eventually rescued. It was also clear that Parker would likely have died before all the others because he was in a much weaker state. Upon returning to land, Dudley and Stephens were arrested and brought to trial.

The court found them guilty of murder. In its reasoning, the court held that where a private person, acting on his own judgment, takes the life of another, he is guilty of murder, unless his act can be justified by self-defense, which was not the case here for Parker neither attacked nor threatened to attack Dudley and Stephens. It is notable that the court was well aware of the overwhelming circumstances upon which both Dudley and Stephens acted. The court made it clear that while it may have been necessary to kill Parker for their survival, it was not an excusable or justifiable killing. Yet, although the court deemed the acts of the defendants to be murder, it did not deem them to be evil. Upon finding Dudley and Stephens guilty of murder, the court imposed the sentence of death upon them. [FN177] Later on, the Crown accepted the arguments for compassion and reduced their sentence to six months imprisonment. [FN178]

The reason I am raising this case here is that there are cases where our intuition as human beings leads us to demonstrate some kind of compassion towards certain situations, even though we are very decisive regarding their wrongfulness. It is not an impossible scenario that an interrogator saves the lives of thousands of innocent people by torturing one person suspected of terrorist activity. Imagine that the British secret services had been able to catch a Nazi leader, torture him, and reveal the Nazi conspiracies of the Holocaust, for example. By this, the lives of millions of Jews would have been saved. Then, it would be clear that the British interrogators committed something wrong for which they should be responsible and found guilty. Yet, some kind of compassion toward the whole situation becomes intuitive (though not toward the wrongdoing they committed). Formally speaking, if these interrogators were prosecuted, they would, and they should, be found guilty for this wrongdoing, and punishment must be imposed on them accordingly-exactly as was the situation in the cannibalism case. So, how ought this “sense of compassion” be expressed in a proper and legal manner?

***44** The only way to avoid the execution of judgment is by the grant of pardon/clemency/mercy (ius aggratiandi) by the head of the state, such as a King, Queen, or President. This solution dates back to the Saxon rule a lege fuae dignitatis. [FN179] Underlying this solution is the idea that laws cannot be based on principles of compassion to guilt; yet justice is bound to be administered in mercy, and the latter is within the prerogative of the Crown. [FN180] In administering his prerogative, the Crown may take into account considerations that otherwise may not be admissible in the formal criminal trial. Indeed, such considerations are limited to what is lawful and just in a larger sense. Of course, the range, ambit, and purpose for which a pardon may be granted, as well as the object, manner, and method of pardon, can be subject to serious dispute, both philosophically and practically. [FN181]

Granting pardon does not mean that the wrongdoing embodied in the crime at stake was negated, nor does it

mean that the criminal is personally excused and that criminal responsibility should thus not be attributed to him. Rather, all it means is that a kind of compassion is demonstrated by society, as represented by the Crown, toward the situation in which the criminal was involved. Because of its special nature, pardons shall not be granted on a daily basis, but must be reserved for very rare and unique situations. As for the punishment, granting a pardon would mean commuting the sentence, lessening, or entirely removing it. Although the Crown has the ultimate power to grant a pardon, it is still the judiciary that implements that which the law compels, and therefore, the Crown's power should be subject to judicial review, though limited only to extreme cases, such as where the Crown takes into account novel considerations, or the Crown's decision is extremely and manifestly unreasonable.

Ultimately, as William Blackstone expressed,

> [t]he effect of such pardon by the king is to make the offender a new man; to acquit him of all corporal penalties and forfeitures annexed to that offence for which he obtains his pardon; and not so much to restore his former, as to give him a new credit and capacity. [FN182]

***45** To conclude on this issue, it is worth clarifying that a pardon is by no means a criminal defense; at best it is a gesture by the Crown. However, like criminal defenses, it is characterized by its ex post, but not ex ante, nature. [FN183] Having said that, it does not constitute an authority to act. [FN184] Interrogators do not have the authority to torture suspects based on the possible future granting of a pardon, nor do they have any assurance (or interest of reliance under public law) that such a pardon would be granted to them in any particular case. [FN185] To this extent, it should be clear that the rule is that torture is absolutely prohibited, exactly as rape, fraud, and robbery are all absolutely prohibited. The possibility of granting a pardon to a torturer would depend on an ad hoc examination of each case independently. There must be neither a general rule against a pardon, nor a general rule for a pardon in advance.

It must be clear that by engaging in torture activity in given circumstances, interrogators take certain liberties that otherwise they are not entitled to take. As such, they are exposing themselves to the risk of criminal prosecution exactly as they take the chance of being granted a pardon by the Crown upon setting out their arguments in seeking compassion thereto.

E. The Reasonable Limits of a CriminaL Interrogation

At this stage, I would have hastened toward ending my article, concluding therein with all that has been argued, suggested, and reasoned. However, since torture is very often discussed in the realm of criminal investigation, it is then required that I spend a further discussion on the nature of criminal investigation, thus understanding not only that which interrogators may not do, but also that which they may do.

The topic of criminal investigation is controlled not only by criminal law, but also by administrative law. While criminal law is the law of “shall not do,” [FN186] administrative law is driven by certain principles regarding the range and ambit of administrative authority, which is subject to principles of reasonableness and proportionality.

Somehow, the accusation of torture activity emerges every time any kind of violence against suspects is taking place during the interrogation. Mistakenly, one might get the impression that the Convention Against Torture, or other international documents, proscribe the use of violence during criminal interrogation. Interrogations, especially if conducted by secret services-in particular in the context of terrorist activity-are not a cafe meeting;***46** they consist of inconvenient conditions, [FN187] which may obviously include the use of violence. However, the degree and level of this violence and inconvenience must be reasonable and proportionate, taking into consideration the purpose of the investigation, as well as the balance between the suspect's rights and the interests protected by the interrogation.

In other words, in conducting their investigation, interrogators must always adhere to the least coercive means. A degree of violence and discomfort must only be considered when necessary. Even then, they may inflict violence or discomfort only in a proportionate manner. Bear in mind that these limits on a criminal interrogation assist us in delineating what is reasonable and proportionate.

By now, it should be clear that torture, as conceptually defined in this article, is completely excluded from the ambit of a "reasonable interrogation." To elaborate on our understanding of the nature of a "reasonable interrogation," I shall end this part with Justice Barak's well articulated words:

> Our concern, therefore, lies in the clash of values and the balancing of conflicting values. The balancing process results in the rules for a "reasonable interrogation." These rules are based, on the one hand, on preserving the "human image" of the suspect, and on preserving the "purity of arms" used during the interrogation. On the other hand, these rules take into consideration the need to fight crime in general, and terrorist attacks in particular. These rules reflect "a degree of reasonableness, straight thinking, and fairness." The rules pertaining to investigations are important to a democratic state. They reflect its character. An illegal investigation harms the suspect's human dignity. It equally harms society's fabric. [FN188]

VII. Conclusion

An old English proverb states that "A good beginning, makes a good ending," which translates in German as "Was gut beginnt, wird gut enden," and in French as "Bien commencer, amene a bien terminer."

I started this article, in Part II, by visiting the basic pillar of the torture debate-that which concerns the meaning of "torture." By considering existing international documents and other leading cases of international and national judicial tribunals, I have come to conclude that the existing definition***47** of torture, as well as the case law in this regard, suffers from serious conceptual deficiencies, including other problems of coherency and reasoning. It has been my conclusion also that such treatment of the torture phenomenon is politically motivated, and that it suits, at best, what we observe as torture nowadays. Such understanding does not suit other historical practices of torture, and certainly will not be compatible with future torture practices. In support of this view, I provided in Part III, in addition to my reasoning, several perspectives of leading scholars on this jurisprudence.

In Part IV, I offered a conceptual definition of the phenomenon of torture, thus sketching five conceptual distinctions whereupon torture conduct can be recognized. These five conceptual distinctions treat "the phenomenon of torture" as standing in itself and out of context, which allows this definition to suit not only current practices of torture, but also historical and future ones. It has been my suggestion that if conceptually understood, torture is described by highlighting a kind of game of mental resistance between the torturer and the victim, [FN189] the competition of minds between he who dominates the situation and he who is dominated, [FN190] and the emotional pressure that is imposed on the victim by he who is taking control of the situation. [FN191] It has been my view that the torturer is conceptually perceived as the superior and the active actor who acts in secret with ample confidence, thus imposing fear on his victim and causing him a degree of suffering. On the contrary, the victim of torture is one who is inferior and passive; he is the "handcuffed," terrified, and suffering character.

Bearing in mind these five conceptual distinctions, in Part V, I turned to discuss torture in the criminal context. I concluded that the existing understanding of "torture" as a separate crime is simply wrong, for it lacks the conceptual grounds of substantive criminal law as illustrated in the discussion on crime, guilt, and punishment. I argued that not every phenomenon that we, as a community, dislike must be articulated automatically as a separate crime. Instead, we must consider the conceptual distinction between guilt and dangerousness, which relies on the common law practice of criminal trials, thus separating the guilt/innocence proceeding and the sentencing stage. My view has been that torture does not bear on the constitutive elements of guilt, and that torture involves the classic types of conduct with

which we are familiar in other domestic crimes of violence against the body or the person. In addition, I concluded Part V by arguing that torture represents the overriding motivation of the torturers, thus reflecting the degree of dangerousness upon which they are acting. Such dangerousness is ***48** a relevant aggravating factor at the sentencing stage, which the prosecution is required to prove by a preponderance of the evidence.

In Part VI, I sought to address certain taboos in the torture debate, thus refuting or upholding them. I started Part VI by strongly criticizing the ticking-bomb scenario, which arguably justifies torture conduct. I argued that such a scenario is impossible in real life. Furthermore, I explained the absolute nature of the prohibition against torture from a new perspective, noting that such an absolute feature of the prohibition resembles that of any other prohibition against murder, rape, assault, and all other criminal prohibitions. I also explained why torturers cannot argue for the case of self-defense following their engagement in torture activity, elaborating on the distinction between the intent with which self-defense is concerned, intent to avert an aggression, and the intent with which torture is concerned, namely, the intent to create a terrifying atmosphere as demonstrated by the five conceptual distinctions, which is associated, in this context, with the commission of regular crimes of violence against the person/body. It has been my view that while a person may cause the death of an aggressor without having the intent to kill him, it is impossible to cause the torture of a person by merely intending to avert an aggression.

Then, I examined the possibility of excluding the criminal responsibility of interrogators by means of justified or excused necessity. In this course, I concluded that neither defense stands for interrogators, even in cases where the community is tempted to express sympathy towards the situation with which they were involved. I supported my arguments by relying on the nature of the well-known distinction in criminal law theory between justifications and excuses.

Having contended so, still, immediately after that, I suggested that there may be situations where, although interrogators have committed wrongdoing by engaging in torture conduct, and although they must be condemned for such wrongdoing, we as a community are very likely to demonstrate a degree of compassion towards the situation with which they were confronted. Such compassion can be expressed through the President's or Crown's power to commute, lessen, or entirely remove the sentence. In this way, we still acknowledge the wrongdoing embodied in the conduct and the condemnation attributed to the torturer, but at the same time avoid the punishment for good reasons of compassion.

At this stage, I was strongly encouraged to take one further step to explain to interrogators not only that which they must not do, but primarily, that which they are entitled to do. Specifically, I tried to focus on the administrative limits of a legal criminal interrogation, thus suggesting that any such limits must be proportionate and reasonable ones.

We can now end where we began, namely, with the conception of human dignity. Recently, it was the German Bundesverfassungsgericht (Federal***49** Constitutional Court) that affirmed and emphasized the absolute nature of the right to human dignity. [FN192]

If I were asked to summarize the nature and the basic character of the prohibition against torture in two words, it would be “Human Dignity,” as explicitly acknowledged in all relevant international documents. [FN193] From a conceptual point of view, this is where the prohibition against torture draws its absolute character. As correctly viewed by Immanuel Kant, “[i]n the kingdom of ends everything has either a price or a dignity. What has a price can be replaced by something else as its equivalent; what on the other hand is raised above all price, and, therefore, admits of no equivalent has a dignity.” [FN194] If this is true, then obviously torture can never be justified, nor can it be excused, for no utilitarian considerations can ever be taken into account once human dignity is at stake.

Having put forth my views and arguments directly, I am not naive as to the perplexing nature of reality. Interrog-

ators are not sitting and relaxing behind a desk, reading novels or academic books and articles on how they should be conducting their investigations, and even when they do so, it still might not be clear for them how they should implement the theories of this jurisprudence. Real life is much more complex than one may describe it in an article or a book, no matter how well articulated it may be. However, as William Bridges once said, "we come to beginnings only at the end." [FN195] Yet, as the American proverb suggests, "from small beginnings come great things." [FN196] Ernest Hemingway correctly viewed that "there are some things which cannot be learned quickly, and time, which is all we have, must be paid heavily for their acquiring. They are the very simplest things." [FN197]

For the honor of man's dignity, and for future generations, may it be a better future for humanity.

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[FN1]. RENE DESCARTES, DISCOURSE ON METHOD 9 (Ernest Rhys ed., John Veitch trans., E.P. Dutton & Co. 1912) (1637).

[FN2]. THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 5 (2002), available at http://www.whitehouse.gov/nsc/nss.pdf.

[FN3]. See, e.g., ALAN M. DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE 156-63 (2002).

[FN4]. See discussion infra Part II.

[FN5]. IMMANUEL KANT, Speculative Beginning of Human History, in PERPETUAL PEACE AND OTHER ESSAYS ON POLITICS, HISTORY, AND MORALS 49, 49 (Ted Humphrey trans., Hackett Pub. Co. 1983) (1795) (emphasis added).

[FN6]. See MOHAMMED SAIF-ALDEN WATTAD, THE MEANING OF CRIMINAL LAW: THREE TENETS ON AMERICAN & COMPARATIVE CONSTITUTIONAL ASPECTS OF SUBSTANTIVE CRIMINAL LAW 44 (2008) (explaining that the term "law" refers to the laws enacted by legislative bodies [i.e. statutes, constitutions, and treaties] and is to be distinguished from the term "Law," which refers to the higher concept of the "good and just law" binding on all human beings [i.e. the moral or religious law]; if the "law" contradicts the "Law," the latter must prevail).

[FN7]. Id. at 202-04.

[FN8]. Mohammed Saif-Alden Wattad, Resurrecting "Romantics at War": International Self-Defense in the Shadow of the Law of War-Where are the Borders?, 13 ILSA J. INT'L & COMP. L. 205, 220 (2006).

[FN9]. Cf. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (“I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description, and perhaps I could never succeed in intelligibly doing so. But I know it when I see it. . . .”). Although the court in Jacobellis is referring to pornography, arguably, terrorism is another act that is difficult to define, but which people recognize when they see it.

[FN10]. Mohammed Saif-Alden Wattad, Is Terrorism a Crime or an Aggravating Factor in Sentencing?, 4 J. INT'L CRIM. JUST. 1017, 1030 (2006).

[FN11]. See Mohammed Saif-Alden Wattad, The Meaning of Guilt: Rethinking Apprendi, 33 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 501, 506 (2007); see also Colautti v. Franklin, 439 U.S. 379 (1979); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Power v. Texas, 392 U.S. 514 (1968); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 1055, at 1070-71 (6th ed. 2000); Mohammed Saif-Alden Wattad, The Meaning of Wrongdoing: A Crime of Disrespecting the Flag: Grounds for Preserving ‘National Unity’?, 10 SAN DIEGO INT'L L.J. pt. IV(C) (forthcoming 2008).

[FN12]. Wattad, supra note 10, at 1029.

[FN13]. Wattad, supra note 10, at 1025.

[FN14]. Wattad, supra note 10, at 1021.

[FN15]. I define “terrorism” as “imposing fear on the nation as such.” Wattad, supra note 10, at 1022.

[FN16]. See Seymour M. Hersh, Torture at Abu Ghraib: American Soldiers Brutalized Iraqis. How Far Up Does the Responsibility Go?, THE NEW YORKER, May 10, 2004, at 42.

[FN17]. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950 amend. Nov. 1998, 213 U.N.T.S. 221, E.T.S. 5 [hereinafter European Convention]. Article 3 of the European Convention speaks of “torture or inhuman or degrading treatment or punishment.” Id. Compare article 3 of the Convention with A. v. United Kingdom, 90 Eur. Ct. H.R. 2694 (1998). It is not clear from the decision whether the court was referring to the prohibition against torture, or rather to the prohibition against degrading punishment. A. v. United Kingdom, 90 Eur. Ct. H.R. 2694 (1998). It is my impression that the court was concerned with the latter prohibition. See id. para. 13.

[FN18]. “No one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.” Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 3, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948).

[FN19]. “[T]he following acts are and shall remain prohibited at any time and in any place whatsoever with respect : violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture. . . .” Geneva Convention Relative to the Treatment of Prisoners of War art. 3.1, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind.Id. art. 17. “Collective punishment for individual acts, corporal punishment, imprisonment in premises without daylight and, in general, any form of torture or cruelty, are forbidden.”

Id. art. 87. “Grave breaches shall be those involving any of the following acts, if committed against persons or property protected by the Convention: willful killing, torture or inhuman treatment, including. . . .” Id. art. 130.

[FN20]. “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.” European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

[FN21]. “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.” International Convention of Civil and Political Rights art. 7, Dec. 16, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171.

[FN22]. “No one shall be subject to torture or to cruel, inhuman, or degrading punishment or treatment.” American Convention on Human Rights art. 5(2), Nov. 22, 1969, 1144 U.N.T.S. 123.

[FN23]. Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452 (XXX), U.N. GAOR, 30th Sess., Supp. No. 34, U.N. Doc. A/10034 (Dec. 9, 1975) [hereinafter Declaration on Torture].

[FN24]. “Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.” African Charter on Human and Peoples' Rights art. 5, June 27, 1981, 21 I.L.M. 58.

[FN25]. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1(1), Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85 [hereinafter Convention Against Torture].

[FN26]. “In respect of an investigation under this Statute, a person shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment.” Rome Statute of the International Criminal Court art. 55(1)(b), July 17, 1998, 2187 U.N.T.S. 90. [hereinafter Rome Statute]. The Rome Statute makes torture a crime against humanity (article 7(1)(f)), as well as a war crime (article 8(2)(a)(ii) and article 8(2)(c)(i)). Id. arts. 7(1)(f), 8(2)(a)(ii), 8(2)(c)(i).

[FN27]. Convention Against Torture, supra note 25, art. 1(1).

[FN28]. The Declaration on Torture states:

> For the purpose of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.

Declaration on Torture, supra note 23, art. 1(1).

[FN29]. Declaration on Torture, supra note 23, art. 1(2).

[FN30]. Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment, para. 457 (Nov. 16, 1998).

> This differs from the formulation utilized in the Declaration on Torture in two ways. First, there is no reference to torture as an aggravated form of ill-treatment in the Torture Convention Secondly, the examples of prohibited purposes in the Torture Convention explicitly include “any reason based on discrimination of any kind,” whereas this is not the case in the Declaration on Torture.

Id.

[FN31]. “‘Torture’ means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.” Rome Statute, supra note 26, art. 7(2)(e) (emphasis

added). Regarding torture as a crime against humanity, under the Rome Statute, it must be proved that the torture was committed as part of a widespread or systematic attack directed against any civilian population, and that the torturer had knowledge of the attack. See Bernard F. Hamilton, New Court Offers New Torture Definition and New Hope for Victims, 5 U.C. DAVIS J. INT'L L. & POL'Y 111, 112 (1999).

[FN32]. Hereinafter “Convention's definition.”

[FN33]. ANTONIO CASSESE, INTERNATIONAL LAW 446-47 (2d ed. 2005); ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 119-20 (2003); see also Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment, para. 455-74 (Nov. 16, 1998).

[FN34]. Daniel Rothenberg, “What We Have Seen Has Been Terrible”: Public Presentational Torture and the Communicative Logic of State Terror, 67 ALB. L. REV. 465, 473-76 (2003).

[FN35]. Most criminal codes in the world provide that “act” is defined as an “act or omission.” See GEORGE P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 68 (1998) (recognizing, however, that unless the Convention Against Torture provides so, an “omission” is not a form of an “act”).

[FN36]. Hereinafter “torture's harm.”

[FN37]. See ANTONIO CASSESE, INTERNATIONAL LAW 446-47 (2d ed. 2005).

[FN38]. The Convention's definition uses the terms “for such.” Convention Against Torture, supra note 25, art. 1(1).

[FN39]. The four listed purposes are: (1) obtaining information, (2) obtaining confessions, (3) punishing, and (4) intimidating or coercing. Convention Against Torture, supra note 25, art. 1(1).

[FN40]. Convention Against Torture, supra note 25, art. 1(1).

[FN41]. Convention Against Torture, supra note 25, art. 1(1).

[FN42]. See Mohammed Saif-Alden Wattad, The Meaning of Guilt: Rethinking Apprendi, 33 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 501, 510 n.41 (2007).

[FN43]. The International Criminal Tribunal for the Former Yugoslavia (ICTY) has recognized that rape, if the other conditions of the Convention's definition are met, constitutes torture. See Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment, para. 496 (Nov. 16, 1998); see also Aydin v. Turkey, 50 Eur. Ct. H.R. para. 86 (1997).

[FN44]. See generally Winston P. Nagan & Lucie Atkins, The International Law of Torture: From Universal Proscription to Effective Application and Enforcement, 14 HARV. HUM. RTS. J. 87, 113 (2001).

[FN45]. By this accusation, I only mean that they were trying to articulate a definition that can be adopted by as many countries as possible, thus achieving at least the general condemnation embodied in the Convention.

[FN46]. Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) (1978).

[FN47]. Id. para. 96.

[FN48]. Id. para. 96(a)-(e).

[FN49]. Id. para. 162.

[FN50]. Id.

[FN51]. Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) para. 167 (1978).

[FN52]. Id.

[FN53]. Id. (quoting Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452 (XXX), art. 1(2), U.N. GAOR, 30th Sess., Supp. No. 34, U.N. Doc. A/10034 (Dec. 9, 1975)).

[FN54]. Ireland, 25 Eur. Ct. H.R. (ser. A).

[FN55]. “Birching” refers to the fact that the branches of the birch tree were formerly used for beating people as a punishment. See A.S. HORNBY, OXFORD ADVANCED LEARNER'S DICTIONARY OF CURRENT ENGLISH 108 (Jonathan Crowther & A.S. Hornby eds., 5th ed. 1995).

[FN56]. Tyrer v. United Kingdom, 26 Eur. Ct. H.R. (ser. A) (1978).

[FN57]. Id. para. 9.

[FN58]. Id. para. 10.

[FN59]. Id. para. 29.

[FN60]. Id. para. 30.

[FN61]. Tyrer v. United Kingdom, 26 Eur. Ct. H.R. (ser. A) para. 30 (1978).

[FN62]. Id.

[FN63]. See Ireland, 25 Eur. Ct. H.R. (ser. A); see also Aydin v. Turkey, 50 Eur. Ct. H.R. para. 86 (1997).

[FN64]. See generally Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) (1989) (declining to decide whether putting someone on death row constitutes torture in and of itself).

[FN65]. Aksoy v. Turkey, 26 Eur. Ct. H.R. 2260 (1996).

[FN66]. Id. paras. 23, 64 (describing the position of the prisoner). Hereinafter, this incident will be referred to as the “Palestinian hanging.”

[FN67]. Id. para. 64.

[FN68]. See Selmouni v. France, 1999-V Eur. Ct. H.R. (1999); Ribitsch v. Austria, 336 Eur. Ct. H.R. (ser. A) (1996) (elaborating on the absence of a clear theory regarding the meaning of “torture”); Tomasi v. France, 241 Eur. Ct. H.R. (ser. A) (1993).

[FN69]. HCJ 5100/94 Public Committee Against Torture in Israel v. The State of Israel [1999] IsrSC 54(4) 817 [hereinafter Israeli Case Against Torture].

[FN70]. Id.

[FN71]. Id. para. 23.

[FN72]. It is plausible only to believe that Justice Barak intentionally avoided the problematic grounds of defining "torture."

[FN73]. See Israeli Case Against Torture, supra note 69.

[FN74]. Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment, para. 468 (Nov. 16, 1998); see also Prosecutor v. Kunarac, Case Nos. IT-96-23 & IT-96-23/1, Judgment, (Feb. 22, 2001); Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, para. 593-94 (Sept. 2, 1998); Prosecutor v. Furundzija, Case No. IT-96-21, Judgment, (Dec. 10, 1988).

[FN75]. Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment, para. 542 (Nov. 16, 1998).

[FN76]. Id.

[FN77]. Id. para. 544.

[FN78]. See id. paras. 468, 543.

[FN79]. Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment, para. 468 (Nov. 16, 1998).

[FN80]. See Jeremy Waldron, Torture and Positive Law: Jurisprudence for the White House, 105 COLUM. L. REV. 1681 (2005).

[FN81]. See id. at 1707.

[FN82]. 18 U.S.C. § 2340(1) (2000 & Supp. V 2005) [hereinafter American definition].

[FN83]. Convention Against Torture, supra note 25, art. 1(1).

[FN84]. Memorandum from Jay S. Bybee, Assistant Attorney General to Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002), in THE TORTURE PAPERS 172, 172 (Karen J. Greenberg & Joshua L. Dratel eds., 2005), available at http://news.findlaw.com/nytimes/docs/doj/bybee80102mem.pdf [hereinafter Gonzales memo].

[FN85]. Id. at 172.

[FN86]. Id. at 174.

[FN87]. Id. at 176.

[FN88]. Id. at 177.

[FN89]. Waldron, supra note 80, at 1694.

[FN90]. Waldron, supra note 80, at 1695.

[FN91]. Waldron, supra note 80, at 1695 n.63.

[FN92]. Waldron, supra note 80, at 1695.

[FN93]. David Sussman, Defining Torture, 37 CASE W. RES. J. INT'L L. 225 (2006).

[FN94]. See id. at 225.

[FN95]. Id.

[FN96]. Id. at 227.

[FN97]. Id. at 229.

[FN98]. Id. at 227.

[FN99]. David Luban, Liberalism, Torture, and the Ticking Bomb, 91 VA. L. REV. 1425, 1429 (2005).

[FN100]. See id.

[FN101]. Id. at 1430.

[FN102]. Rothenberg, supra note 34, at 465.

[FN103]. Rothenberg, supra note 34, at 465.

[FN104]. Rothenberg, supra note 34, at 465.

[FN105]. See discussion infra Part V.

[FN106]. Wattad, supra note 10, at 1012.

[FN107]. Wattad, supra note 10, at 1025.

[FN108]. Wattad, supra note 10, at 1021, 1023.

[FN109]. Hereinafter, these distinctions will be referred to as “the five conceptual distinctions.”

[FN110]. Joyce S. Dubensky & Rachel Lavery, Torture: An Interreligious Debate, in THE TORTURE DEBATE IN AMERICA 162, 172 (Karen J. Greenberg ed., 2006).

[FN111]. FLETCHER, supra note 35, at 43.

[FN112]. Wattad, supra note 42, at 532, 535.

[FN113]. Luban, supra note 99, at 1430.

[FN114]. Sussman, supra note 93, at 225, 227-28.

[FN115]. Sussman, supra note 93, at 227.

[FN116]. Sussman, supra note 93, at 227.

[FN117]. George P. Fletcher, The Indefinable Concept of Terrorism, 4 J. INT'L CRIM. JUST. 894, 909-10 (2006).

[FN118]. This is the case when, because of torture practices, the victim confesses to a particular terror activity, for example, and the authorities are then able to take all possible measures in order to prevent the terror attack in advance.

[FN119]. Luban, supra note 99, at 1431-32.

[FN120]. Wattad, supra note 10, at 1023.

[FN121]. Not necessarily from an authority or public status.

[FN122]. Luban, supra note 99, at 1430.

[FN123]. Sussman, supra note 93, at 227.

[FN124]. E.g., Convention Against Torture, supra note 25, art. 1(1).

[FN125]. See M. CHERIF BASSIOUNI, Great Nations and Torture, in THE TORTURE DEBATE IN AMERICA 256, 258 (Karen J. Greenberg ed., 2006).

[FN126]. On the dolus eventualis doctrine (conditional intent), see GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 445 (2000), and Mohammed Saif-Alden Wattad, The Rome Statute & Captain Planet: What Lies Between 'Crimes Against Humanity' and the 'Natural Environment?', 11 FORDHAM ENVTL. L. REV. (forthcoming 2008).

[FN127]. Ariel Dorfman, The Tyranny of Terror-Is Torture Inevitable in Our Century and Beyond?, in TORTURE: A COLLECTION 3, 8 (Sanford Levinson ed., 2004). This essay is a revised version of a keynote speech delivered on June 25, 2002, at a conference in Washington, D.C., organized by Sister Dianna Ortiz and the Torture Abolition and Survivors Support Coalition International (TASSC).

[FN128]. John D. Van der Vyver, Torture as a Crime under International Law, 67 ALB. L. REV. 427, 458 (2003). But see Wattad, supra note 10, at 1027-30 (arguing that terrorism is not a crime, but is an aggravating factor in sentencing).

[FN129]. Wattad, supra note 10, at 1027-30.

[FN130]. Wattad, supra note 10, at 1027-30; see also Wattad, supra note 42, at 543-49.

[FN131]. Wattad, supra note 10, at 1018-19.

[FN132]. Dorfman, supra note 127, at 8; Van der Vyver, supra note 128, at 458.

[FN133]. Convention Against Torture, supra note 25.

[FN134]. Convention Against Torture, supra note 25.

[FN135]. Convention Against Torture, supra note 25.

[FN136]. Convention Against Torture, supra note 25.

[FN137]. Convention Against Torture, supra note 25.

[FN138]. Convention Against Torture, supra note 25.

[FN139]. Convention Against Torture, supra note 25.

[FN140]. MOHAMMED SAIF-ALDEN WATTAD, THE MEANING OF CRIMINAL LAW: THREE TENETS ON

AMERICAN & COMPARATIVE CONSTITUTIONAL ASPECTS OF SUBSTANTIVE CRIMINAL LAW (2008).

[FN141]. WATTAD, supra note 6, at 80.

[FN142]. Wattad, supra note 42, at 541.

[FN143]. Wattad, supra note 42, at 539.

[FN144]. Wattad, supra note 42, at 539.

[FN145]. Wattad, supra note 10, at 1028.

[FN146]. Convention Against Torture, supra note 25.

[FN147]. Convention Against Torture, supra note 25.

[FN148]. See also Wattad, supra note 42, at 544-45.

[FN149]. See, e.g., William Safire, Seizing Dictatorial Power, N. Y. TIMES, Nov. 15, 2001, at A31.

[FN150]. See Luban, supra note 99, at 1440-45.

[FN151]. David Luban argues that the ticking-bomb stories amount to intellectual fraud. See Luban, supra note 99, at 1427.

[FN152]. See Convention Against Torture, supra note 25, preamble; see also Declaration on Torture, supra note 23, art. 2.

[FN153]. E.g., BverfG, Feb. 15, 2006, docket number 1 BvR 357/05, available at http://www.bverfg.de/entscheidungen/rs20060215_1bvr035705en.html.

[FN154]. See DERSHOWITZ, supra note 3, at 148.

[FN155]. For example, inserting sterilized needles under the fingernails to produce unbearable pain without any threat to health or life.

[FN156]. DERSHOWITZ, supra note 3, at 141.

[FN157]. See A. v. Sec'y of State for the Home Dep't [2005] UKHL 71 (U.K.); see also Mohammed Saif-Alden Wattad, “Did God say, ‘You shall not eat of any tree of the garden’?”: Rethinking the “Fruits of the Poisonous Tree” in Israeli Constitutional Law, 5 OXFORD U. COMP. L.F. (2005), http:// ouclf.iuscomp.org/articles/wattad.shtml.

[FN158]. BASSIOUNI, supra note 125, at 260.

[FN159]. Convention Against Torture, supra note 25, art. 2; see also Declaration on Torture, supra note 23, art. 2.

[FN160]. U.S. War Dep't Gen. Order No. 100 (1863), reprinted in THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 3 (Dietrich Schindler & Jiri Toman eds., Martinus Nijhoff Publishers 1988) (1973). It is notable that the Lieber Code was originally binding only on the American forces; however, to a great extent, it contributed to the customs of war existing at that time.

[FN161]. See Oona A. Hathaway, The Promise and Limits of the International Law of Torture, in TORTURE: A

COLLECTION 199, 199 (Sanford Levinson ed., 2004).

[FN162]. See GEORGE FLETCHER & STEVE SHEPPARD, AMERICAN LAW IN A GLOBAL CONTEXT: THE BASICS 581-83 (2005); see also FLETCHER, supra note 35, at 76; WATTAD, supra note 6, at 532-33. For a general overview of the right to self-defense, see GEORGE P. FLETCHER, A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL (1998).

[FN163]. FLETCHER, supra note 126, at 701; see also Regina v. Morgan, [1975] 2 W.L.R. 923 (Can.).

[FN164]. GEORGE FLETCHER & STEVE SHEPPARD, AMERICAN LAW IN A GLOBAL CONTEXT: THE BASICS 532-33 (2005).

[FN165]. See supra note 109 and accompanying text (outlining the five conceptual distinctions).

[FN166]. The same rationale applies to theft, robbery, and fraud. These harmful consequences do not occur by chance; rather, they are well connected to the intention of the actor to bring about their occurrence. See Fletcher, supra note 35, at 62.

[FN167]. See Khalid Ghanayim, Necessity in Western Legal Philosophy, 19 CAN. J.L. & JURISPRUDENCE 31 (2006).

[FN168]. For general study on this issue, see Albin Eser, Justification and Excuse: A Key Issue in the Concept of Crime, in 1 JUSTIFICATION AND EXCUSE: COMPARATIVE PERSPECTIVES 17 (Albin Eser & George Fletcher eds., 1987), and Kent Greenawalt, The Perplexing Borders of Justification and Excuse, in 1 JUSTIFICATION AND EXCUSE: COMPARATIVE PERSPECTIVES 263, 263 (Albin Eser & George Fletcher eds., 1987).

[FN169]. FLETCHER, supra note 126, at 769.

[FN170]. Wattad, supra note 8, at 214-15.

[FN171]. Justifications indicate that the act is acceptable in the eyes of society, and that doing it is both correct and desirable. The public is encouraged to perform like acts. See Wattad, supra note 8.

[FN172]. FLETCHER, supra note 126, at 759.

[FN173]. FLETCHER, supra note 126, at 789-99.

[FN174]. FLETCHER, supra note 35, at 130-31.

[FN175]. FLETCHER, supra note 35, at 131. When the conduct is merely excused, the implication is that the act is both antisocial and prohibited. Society refrains from imposing criminal punishment in recognition of the actor's dire circumstances-the acquittal is not an expression of the conduct's acceptability. Therefore, reinforcing public faith in respecting social values and criminal norms requires that we clearly distinguish among the various defenses to criminal liability.

[FN176]. See BverfG, Feb. 15, 2006, docket number 1 BvR 357/05, available at http://www.bverfg.de/entscheidungen/rs20060215_1bvr035705en.html.

[FN177]. Regina v. Dudley & Stephens, 14 Q.B.D. 273 (1884) (U.K.).

[FN178]. See also FLETCHER, supra note 35, at 132.

[FN179]. See 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: PUBLIC WRONGS 389-90 (Univ. Chi. Press 1979) (1765-1769).

[FN180]. Id. at 389.

[FN181]. Id. at 391-95; see also Austin Sarat & Nasser Hussain, Toward New Theoretical Perspectives on Forgiveness, Mercy, and Clemency: An Introduction, in FORGIVENESS, MERCY, AND CLEMENCY 1, 1 (2007).

[FN182]. BLACKSTONE, supra note 179, at 259 (emphasis added); see also IMMANUEL KANT, METAPHYSICAL ELEMENTS OF JUSTICE 144 (John Ladd trans., 2d ed. 1999) (“The right to pardon a criminal [ius aggratiandi], either by mitigating or by entirely remitting the punishment, is certainly the most slippery of all the rights of the sovereign.”).

[FN183]. WATTAD, supra note 6, at 81-82.

[FN184]. See Israeli Case Against Torture, supra note 69, paras. 36-37.

[FN185]. See Israeli Case Against Torture, supra note 69, para. 40.

[FN186]. WATTAD, supra note 6, at 183.

[FN187]. See Israeli Case Against Torture, supra note 69.

[FN188]. See Israeli Case Against Torture, supra note 69, para. 22 (citations omitted).

[FN189]. See Israeli Case Against Torture, supra note 69.

[FN190]. See Israeli Case Against Torture, supra note 69.

[FN191]. See Israeli Case Against Torture, supra note 69.

[FN192]. BverfG, Feb. 15, 2006, docket number 1 BvR 357/05, available at http://www.bverfg.de/entscheidungen/rs20060215_1bvr035705en.html; see also GRUNDGESETZ [GG] [Constitution] art. 1 (F.R.G) (“Human dignity shall be inviolable.”). “Human Dignity” is translated as Menschenwurde in German.

[FN193]. See Convention Against Torture, supra note 25, art. 2; see also Declaration on Torture, supra note 23, art. 2.

[FN194]. IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 42 (Mary Gregor trans. & ed., Cambridge Univ. Press 1998) (1785) (emphasis added).

[FN195]. WILLIAM BRIDGES, TRANSITIONS: MAKING SENSE OF LIFE'S CHANGES 157 (2d ed. 2004).

[FN196]. American proverb, author unknown.

[FN197]. ERNEST HEMINGWAY, DEATH IN THE AFTERNOON 192 (1932).
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