

## CHAPTER 8

### SOVEREIGN BODIES, SOVEREIGN STATES AND THE PROBLEM OF TORTURE

**Lisa Hajjar**

*ABSTRACT.* *The interests of sovereign states and individuals do not always agree and this complicates the politics of human rights at the broadest levels. Relatedly, torture is not merely the infliction of pain but involves complex interconnections between morality, legality and politics. Justice, on the other hand, is an abstract principle that is devoid of the immediacy on physical destruction. And on the whole, the necessity for collective security takes precedence over the interests and desires of the individual.*

There remain deep tensions between the traditional internal autonomy of states (sovereignty) and international concern for individual welfare, tensions that pervade both the law and the politics of international human rights and embarrass the international effort to improve the condition of individual human beings everywhere. (Henkin 1990: 13)

Torture is the calculated infliction of pain, but it is also an emblem of state power. To talk about torture is not just to talk about pain but to enter into a complex discourse of morality, legality and politics. (Cohen 1991: 23)

[J]ustice is an abstract principle. In contrast, security is a tangible concern. Bombs and blood speak loudly, in clearer and more convincing tones than words and principles. Even from a moral standpoint, security's interest in survival takes precedence over the individual's interest in liberty. (Zamir 1989: 377)

#### *Introduction*<sup>1</sup>

Torture – the deliberate infliction of pain and suffering by agents or representatives of (some) authority – has been practiced in many societies throughout history and utilized for a wide variety of purposes: religious, juridical, punitive (see Peters 1985). But its construction as an “international problem”, which calls forth an international response, has a relatively recent vintage. The massive prevalence of state torture during World War II became one of the driving concerns behind a veritable revolution in

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<sup>1</sup> Attendance to the international seminar organized by the Centre for Rhetoric Studies, Cape Town, South Africa, was made possible thanks to a generous grant by the French Institute in South Africa.

international law to create and define human rights (see Henkin 1991; Lauren 1998).<sup>2</sup> And the struggle against torture figures centrally in the history of an international movement that has developed over the last few decades to promote human rights. Today, to talk about torture is to talk about a problem that is clearly and broadly construed as a form of human-rights violation. Moreover, within the pantheon of human rights, the right not to be tortured stands out as one of very few rights that are absolutely non-derogatable.<sup>3</sup>

In this article, my central concerns revolve around three general questions:

1. how the international legal prohibition of torture infringes upon (and thus alters) the sovereign powers of states;
2. how the right not to be tortured exemplifies the ways in which human beings are constituted through law as “international subjects”; and
3. how the practice of torture and efforts to enforce its prohibition affect and reflect struggles over rights – of humans and of states – in the contemporary era.

In general, the development of an international human-rights regime over the past fifty-odd years has encroached on the “terrain” of states by establishing new restrictive criteria and refining pre-existing standards of rule.<sup>4</sup> Among the effects of this process are a gradual, if partial, erosion of a Westphalian international order<sup>5</sup> where the sovereignty of the modern nation-state functioned as a supreme power and international laws were oriented overwhelmingly to the rights and responsibilities of states in their

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<sup>2</sup> Human-rights laws and humanitarian laws (laws of war) have distinct histories (the latter of far longer genesis), although together they have become sources of reference for the humane and lawful treatment of human beings.

<sup>3</sup> According to Fitzpatrick (1994: 209), there is a core consensus in the key human-rights instruments of four non-derogatable rights: the right to life; the prohibition on torture and cruel, inhuman and degrading treatment or punishment; the prohibition on slavery; and the principle of non-retroactivity of criminal laws.

<sup>4</sup> The phrase “human-rights regime” is commonly used in reference to the global(ized) enterprise of institutions and agents engaged in processes and practices to make, monitor and/or enforce international human-rights laws. Although this “regime” lacks anything resembling a centralized structure or power base, its institutional coherency derives from a general/common mandate to promote and enforce human rights, as defined by international law.

<sup>5</sup> The international order established by the peace treaties signed in Westphalia (now a part of the German Federal Republic) in 1648 CE (notably at the towns of Münster and Osnabrück). Putting an end to the Thirty-years War and the Eighty-years War, these treaties enacted the sovereignty of national states as a guiding principle. (Eds.)

relations with one another, excluding, for the most part, matters concerning the relations between states and their own subjects. However, the establishment of a human-rights regime did not undermine the centrality of states to political life around the world. Rather it entailed the elaboration of *internationalized norms of government* to which all states would be expected to adhere,<sup>6</sup> while preserving the general principles of states' rights, including those associated with institutional sovereignty (i.e., autonomy and non-interference).<sup>7</sup> Human rights are contemporary international legal constructs which obtain their "universalizing" character from the political fact that people are subjects of states, and states are subjects of international law.

As the period/process of decolonization wound down by the 1970s (see Simpson 1996), the international order largely assumed a post-colonial form envisioned in human-rights law: a globalized array of (ostensibly) independent sovereign states, each bearing responsibilities to provide, protect and respect the rights of people within its domain. In crucial ways, the human-rights regime accommodates and even reinforces state sovereignty because it relies on individual states to behave and conform, and depends on the system of states to act against those that do not (see Falk 1985).

Notwithstanding the persistence of state-centrism in the international order, the content of humanitarian laws and human-rights conventions promulgated in the decades since World War II signifies some important changes.<sup>8</sup> By "recognizing" that people have rights *as humans*, and not merely as protected classes of subjects in relations between states, the very meaning of being human has been redefined in and through international

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<sup>6</sup> As 'Abdullahi An-Na'im explains,

States are responsible for bringing their domestic law and practice into conformity with their obligations under international law to protect and promote human rights (...). This principle is fully consistent with the principle of state sovereignty in international law, since it does not purport to force any state to assume legal obligations against its will. It simply seeks to ensure that states effectively fulfill legal obligations that they have already assumed under international law (An-Na'im 1994: 167).

<sup>7</sup> The means of articulating and promoting international norms vary. They include the obligations incumbent on states as members of the United Nations (UN) to recognize the principles contained in the Charter and other UN conventions; activities at the international level to promulgate new laws and conventions, which bear the expectations that states will ratify and implement these laws domestically; and the far less centralized legal interpretative processes of "elevating" legal norms from conventional to customary status.

<sup>8</sup> The most important innovation in humanitarian law (laws of war) since World War II is the promulgation of the four Geneva Conventions of 1949 and their 1977 protocols. All human-rights conventions are of this post-war vintage.

law.<sup>9</sup> And through the elaboration of new standards and distinctions between what is legitimate or acceptable, and what is illegitimate and forbidden in the treatment of human beings, the meaning of state sovereignty has also been modified. For example, state practices like mass killings or forced relocations of domestic civilian populations, which once might have been criticized as “immoral” or “bad politics”, have been recast as *state crimes*, and their perpetrators made vulnerable to punishments and reprisals sanctioned by law. From the Nuremberg Tribunals of 1945 to recent exercises in international “humanitarian intervention”, the sanctity of the sovereignty principle has been circumscribed in ways that would themselves have been illegitimate in an earlier era (see Gutman & Rieff 1999; Minow 1998; Neier 1998).

Although the principles that undergird international human rights are far from being “universally” embraced or accepted, there are certain general understandings about what those principles are. Prevailing ideas about human rights integrate a vision of morality, law and politics. The moral dimension is premised on the assertion that all people have certain rights by virtue of their being human; the legal dimension holds that human rights are those enumerated and codified in international instruments; and the political dimension establishes obligations to act in accordance with these laws.<sup>10</sup> Thus, human rights, especially those characterized as “political” or “civil” in nature, represent international efforts to regulate the relationship between states and their subjects.

One of the major problems of human rights is how to bring the lofty principles enshrined in international law to bear in the government and treatment of people around the world. I would highlight two aspects of this problem, that relate directly to the practice and the prohibition of torture. One is the weaknesses and inefficiency of enforcement mechanisms at the inter-state level capable of effectively holding states accountable to the laws. The second pertains to the difficulties in interpreting the applicability of international laws when conflicting interests are at stake. Although *violations* of human rights are condemnable, the *reasons* underlying the violations are often imbricated in legally recognizable rights and interests of states. International laws recognize states’ rights to act in their own interests, and the determination of what those interests are is left largely to the

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<sup>9</sup> For example, Turner (1993) has suggested that a social theory of human rights can be built on the universality of the “frail human body” which needs protection from the vicissitudes of state violence and technologies of destruction.

<sup>10</sup> Although the ideals that comprise the range of “human rights” are contested and evolving, there is a core belief that certain rights are – or should be – universal.

discretion of states themselves (e.g., access, control and distribution of resources; immigration policies; criminal justice systems). Such prerogatives are fundamental to the politico-legal constitution of state sovereignty.

The potential contradictions between human rights and states' rights are heightened in times of conflict, whether manifesting as international war or internal strife. When states deem themselves to be at risk or threatened by "enemies", whether foreign or domestic, they can find substantial latitude in international law to justify the institution of exceptional measures to defend and protect "national security" as those in power perceive it (e.g., imposition of emergency legislation; restrictions on movement, speech and association). National security is generally interpreted in statist terms as the defence of the state itself and of the "public interests" for which the state is responsible (e.g., territorial integrity, law and order, national economy). The problem of delineating between circumstances in which a state's restriction or even outright violation of human rights can be construed as legitimate or acceptable, and those in which such derogations would be clearly illegitimate, create an interpretative morass. This problem becomes even more complicated when the violations alleged to be occurring are so grave as to warrant legally sanctionable reprisals. The debates that raged over the legal justification for intervention in the recent conflict in Kosovo exemplify this problem of interpretation: Was the evidence of potential genocide and ethnically motivated dislocation of Kosovar Albanians by Serbian military (and paramilitary) forces so compelling as to create a legal imperative for international intervention on their behalf,<sup>11</sup> or was foreign intervention in a "domestic" conflict (since Kosovar Albanians are citizens of Yugoslavia) an illegal violation of state sovereignty?

But such interpretative difficulties are also productive: they fuel discursive, political and legal interventions that serve, albeit in limited and inconsistent ways, to operationalize an international jurisdiction of law. Because of the institutional weaknesses of enforcement mechanisms at the inter-state level, non-governmental organizations that comprise the human-rights movement have found cause and opportunity to operate in the breach to promote adherence to international laws (see Keck & Sikkink 1998). The various strategies deployed for such purposes include monitoring and reporting on violations to foster awareness, advocacy work to encourage powerful actors (namely state governments and/or the United Nations) to

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<sup>11</sup> The actual form that this intervention took – by North Atlantic Treaty Organization (NATO) forces without obtaining the backing of the United Nations Security Council – complicates the issue further by raising questions about the legality of the pursued course of action.

intervene in ways that would curb or stop violations, and litigation to adjudicate the applicability of international laws. Human-rights activism and networking fulfil a panoptic function of international surveillance which feeds other types of efforts (military, diplomatic, economic) to regulate and “discipline” the behaviours and activities of states in accordance with the norms and standards of international law.

The issue of torture epitomizes both the challenges and the productive potential of human rights. The prohibition of torture, which is enshrined in a number of international instruments (see Kellberg 1998), extends to all human beings regardless of any aspect of their identity or political status (i.e., citizenship, nationality, race, nationality, religion, sex, etc). In so doing, it fortifies a universalizing conception of what it means to be human by constituting all people as “international subjects” with a common right not to be tortured. And because the prohibition of torture is non-derogable, it universalizes a common restriction on all states that applies under all circumstances, including conflicts and wars.

The extent to which the right not to be tortured is violated – as it is often and in many places – illuminates the gap between international legal standards and state behaviour. The prohibition is not adequately or effectively enforced in such a way that torture becomes *impossible*, or so potentially costly as to be *irrational*. The possibilities and rationalities for torture persist (even as torture is publicly denied) as an “emblem of state power” (Cohen 1991: 23), a tactic of control engaged in by dozens of states around the world, and creating tens of thousands if not millions of victims. But the picture is not entirely bleak nor is the gap between legal principle and political practice static. Rather, the legal prohibition sanctions forms of action that carry consequences. Allegations that torture is being perpetrated by public agents invite (incite) incursions into the sovereign domain of states, at minimum in the form of invasive scrutiny, and possibly manifesting as a more concerted punitive approach directed against those responsible for torture.

*The various issues and contestations that circulate around the problem of torture*

I begin with a conceptual framework for understanding of torture within the larger field of human-rights law and practice. I then take up the question of why states torture, focusing on the connection between the politics of national security and the perpetration of this particular brand of violence. I

draw briefly on examples of torture in Latin America and Northern Ireland, and then turn to Israel, the West Bank and Gaza (Israel/Palestine). There is a good reason for using Israel/Palestine as the key example: to date Israel is the only state in the world to have officially sanctioned practices that constitute torture according to international law, albeit under the euphemistic label of “moderate amounts of physical pressure.” It is the *publicness* of debates and contestations over torture in Israel/Palestine that provides a unique insight into the more general themes of this article, particularly the problematic relationship between national security and human rights. I consider in some detail the history of Israeli torture of Palestinians and struggles against it by Israeli and Palestinian human-rights lawyers, activists and organizations. A qualified victory in this struggle was achieved in September 1999, when the Israeli High Court finally rendered a decision against the commonplace use of state-sanctioned “pressure” tactics, although this decision does not go so far as to close the window of opportunity for continuing torture. I conclude by suggesting a connection between the problem of torture in Israel/Palestine and recent developments elsewhere in the world in the struggles against human-rights violations and violators.

### *Human rights and torture*

Many scholars who focus on human-rights issues work with an intention to cultivate or fortify connections between the academy and the political and legal terrains where struggles over rights are waged. Scholarly interventions can serve to substantiate exposures and criticisms of violations, and extend the kinds of challenges to prevailing conditions in which such violations occur. In my own work as a teacher, I gained a heightened appreciation for the utility of the problem of torture to understanding human rights from students in my seminar, “Human Rights in Theory and Practice”. To explain, most students begin the semester assuming that human rights are self-evident, and that the central problem is that they are frequently violated. Within a few weeks, however, their assumptions are challenged as they familiarize themselves with various debates over human rights (e.g., universalism versus cultural relativism), as they study the problematic history of the enterprise (e.g., the fact that part of the world was still colonized when key instruments and institutions were created, or the cynical uses of human rights to advance Cold War agendas), and as they consider that even the matter of who is “human” is not a universal given. By the middle of the semester, many of them become uncertain about what it means

to be “for” human rights, or even sceptical about their legitimacy as an internationalized concern. It is at this point that we come to the section on torture. I found that as they engage with the issue of torture, they recuperate a commitment to the idea that human rights are important, albeit informed by a more critical awareness of the problems and limitations. Moreover, by studying the kinds of efforts that are mounted to enforce the prohibition of torture, their appreciation for the value and necessity of rights-oriented action to fight and protest against violations is bolstered. Reflecting on what it is about torture that has such a powerful effect on my students, I can identify five elements that might account for such a response.

First, understanding torture and its prohibition provides certain clarifying insights into the nature of rights in general. As juridico-political constructs, specific rights are “created” by specific laws, notwithstanding the kinds of philosophical arguments which propose that rights have a “natural” or *a priori* basis which laws merely codify. The *right* not to be tortured is established by the laws prohibiting torture. This right is tantamount to the *outlawing of practices* that constitute torture, as defined by law. According to Article 1 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), the practices prohibited refer to

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 pain or suffering is inflicted by or at the instigation or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Understanding the right in terms of prohibited practices helps to counter a common misconception that rights are things (that can be owned, given, lost, etc.). Rights are not things, despite that they are often framed and discussed as such because of the ways law reifies by categorizing, defining and delimiting its objects. Rather, *rights are practices that are required, prohibited or otherwise regulated within the context of relationships governed by law.*

It is important to note that, contrary to uses of the term “torture” in everyday language, its legal definition does not extend to all kinds of inflicted pain and suffering.<sup>12</sup> The prohibition of torture hinges on the nature

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<sup>12</sup> Such a “popular” rather than “legal” understanding of torture is used by Asad (1996) when he cautions that we should be sceptical about the universalism of the prohibition of torture because it

of the relationship between victims and perpetrators. For example, slapping someone, tying her up, denying her sleep or food, though all potentially brutal, dehumanizing and illegal, do not qualify *legally* as “torture”<sup>13</sup> unless the “torment [is] inflicted by a public authority for ostensibly public purposes” (Peters 1985: 3).<sup>14</sup> It is also important to note that the quantity, intensity and duration of pain and suffering that would qualify as torture are vague and contested.<sup>15</sup> However, the prohibition is contingent primarily on the purpose or motivation behind the practice rather than the effects on the victim (see MacEntee 1996).

Second, the international prohibition of torture is both a product and an epitomization of changing ideas about legitimacy in relationships between states and human beings, and the rights of each. Understanding the impetus behind the prohibition helps to historicize the development of human rights. At a particular point in recent history, the practice of torture came to command a degree of opprobrium that transformed (elevated) it into a matter deemed to warrant international regulation. Torture is not necessarily the “worst” form of abuse that states can perpetrate on human beings – for if one had to rank horrors, genocide and disappearances might top the list. Rather, the construction of torture as an international crime hinges on the kind of

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represents a

modern dedication to eliminating pain and suffering [and] often conflicts with other commitments and values (Asad 1996: 1082).

While his points about modern (and Western) views of pain are well-taken, he mistakenly conflates pain and suffering with torture in order to make an argument that understandings of and attitudes about pain are not universal and therefore cannot be marshalled into a “universalist discourse” of prohibition. It is on this basis that he can ask why sadomasochism is not prohibited under the rubric of torture (Asad 1996: 1099). However, torture is legally defined as a particular kind of political practice that depends on the nature of the relationship within which it occurs, and it is to this specificity that the prohibition is directed. In other words, the prohibition attends to the kind of practice that torture entails rather than the kind of effect it produces (i.e., pain and suffering).

<sup>13</sup> Some noteworthy efforts, especially by feminists, are being taken to expand the legal definition to include forms of torment inflicted by “private” actors, thereby extending the prohibition covered by existing laws on torture to include domestic violence and even female genital mutilation. See, for example, Copelon 1994; Coomeraswamy 1999.

<sup>14</sup> The concept of “public authority” is not strictly limited to states; it could include any organized movement or group that exercises a level of control and authority over populations and/or territory.

<sup>15</sup> Efforts to quantify pain are sometimes used to distinguish between “torture” and “cruel, inhuman or degrading treatment.” According to Rodney (1987: 80),

only the organs of the European Convention of Human Rights have attempted to conceptualize the difference between the various limbs of the formula of the prohibition (torture, inhuman treatment, degrading treatment...).

relationship between people and the state that the prohibition seeks to regulate. It is the perpetration of pain and suffering on people who are *in custody*. This specificity distinguishes torture conceptually, empirically and legally from other forms of violence, such as those arising in the context of warfare or conflict (see Scarry 1985). Moreover, the imperative to prohibit this particular brand of violence has become so widely accepted among the international community that it has acquired the status of customary law,<sup>16</sup> and as such carries extra-territorial jurisdictional force that would enable any state to prosecute those suspected or charged with perpetrating or abetting torture.

Third, the content of the international legal prohibition of torture represents an “ideal” type of human-rights norm. It invests humans with a kind of sovereign right over their bodies and minds (albeit limited to the legally prescribed context). Like the principle of sovereignty governing relations among states, this right establishes principles of sanctity and security based on respect for boundaries (in this case the body and mind of the individual). Furthermore, this individualized sovereignty is accorded greater weight than the sovereign rights of states because international law explicitly prohibits torture under all circumstances. There are no exceptions (not even the famous “ticking bomb” rationale) that allow for the suspension or derogation of the individual’s right not to be tortured.<sup>17</sup> If the state is the arbiter of legitimate violence, as is well established in international law, and torture is an illegal form of violence, then the state has no *right* to torture. Thus, the right of people not to be tortured marks an important line in the limits of states’ rights. In contrast to the ambiguities and loopholes characterizing many of the laws governing human rights, the legal prohibition of torture is “muscular” and uncompromizing.

There are, of course, debates over the legal parameters of the prohibition, notably whether it would include the death penalty or corporal punishment. But these debates are marginal to the discourse on torture (which is not to suggest that they are of marginal importance) because they conflate torture and punishment. Torture may be punishing in terms of the violence that it entails; it might provide a means to punish (e.g., its use in eliciting a

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<sup>16</sup> For example, in *Filartiga v. Pena-Irala*, the USA Court of Appeals, Second Circuit held that the right of freedom from torture is part of customary international law.

<sup>17</sup> Article 2.2 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment states:

No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

confession that is then used to secure a conviction); and its widespread use might be construed as producing an effect of collective punishment. But ultimately the practice of torture is distinct – that is, distinguishable – from punishment because it occurs outside the scope of judicial review and control.<sup>18</sup> *Torture is extra-legal.*

Fourth, the powerful, globalized consensus to the effect that torture constitutes a human-rights violation exemplifies the possibilities of universalism in a political world defined by differences.<sup>19</sup> No society on earth advances the claim that torture, *as legally defined*, is a valued or integral part of its cultural heritage or political culture. If such an argument *could be made*, it would be: the practice of torture would be acknowledged rather than denied. On a related point, the prohibition of torture universalizes a common status for human beings as “individuals with rights”. While the human-rights regime is rightly criticized for privileging Westernized notions of the autonomous individual over collective identities, there is no debate that the practice of torture produces individualized suffering or that the right not to be tortured inheres in the individual rather than some collectivity.

Fifth, the struggle against torture is among the most visible and productive manifestations of human-rights activism. The results of such activism have served to make a liar of every torturer who has said to his victim,

Go ahead and scream. No one will hear you.

The world has heard – has been forced to hear – if not the screams themselves, then at least the echoes of such screams. Through monitoring, reporting and documenting torture, those screams have been brought into the public domain where they demand and command an audience. The practice of torture may be denied by those who perpetrate it as well as by those who are indifferent to the suffering of its victims, but when torture is alleged, the secrecy on which it depends is challenged, and the kind of power it embodies is confronted. Even if the practice of torture is never completely eradicated, the organized, collaborative efforts to enforce the prohibition

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<sup>18</sup> According to Garland (1990: 17),

Punishment is (...) the legal process whereby violators of the criminal law are condemned and sanctioned in accordance with specified legal categories and procedures.

See also Garland 1990: 241-47. It is worth noting that in this 300 page book about punishment, the term “torture” does not appear in the index and there are only a handful of passing references to it in the text.

<sup>19</sup> For a discussion of the historical roots of this universal norm, see Peters 1985.

empower activists around the world.<sup>20</sup> More importantly, this empowerment is dynamic, as indicated by the burgeoning attention to human-rights laws and the influence of human-rights organizations on international politics.<sup>21</sup>

### *Why torture?*

Now we must ask, if there is such a powerful prohibition against torture, and this prohibition enjoys such a wide international consensus, why does torture remain a shockingly prevalent problem? If one were to accept state rhetoric at face value, there is no torture in the world. No torturing regime defends or even acknowledges its own torture *as torture*. Sometimes they simply lie. Sometimes they shift the blame to “aberrant” or “overzealous” agents who acted against orders. Sometimes they rely on euphemisms, claiming that their practices do not qualify as “torture” (see Cohen 1995a, 1995b, 1996). Yet when a state utilizes torture tactics, there are justifications at work, even if they are shrouded in secrecy and denied in public.

The justifications and rationalizations for torture are often traceable to *raisons d'état*, especially when the torturing state can claim a threat to national security. As Edward Peters (1985: 6-7) explains, the history of modern torture is integrally related to the history of the modern state.

Much of modern political history consists of the variety of extraordinary situations that twentieth-century governments have imagined themselves to face and the extraordinary measures they have taken to protect themselves. Paradoxically, in an age of vast state strength, (...) much of state policy has been based on the concept of extreme state vulnerability to enemies, external or internal (...). By focusing on the public character of torture (...) we may be able to regard torture in the twentieth century no longer in the simplistic terms of personality disorder, ethnic or racial brutality, residual primitivism, or the secularization of ecclesiastical theories of coercion, but as an incident of some forms of twentieth-century public life (...) less observed but no less essential to the state's notion of order.

The modern state, despite the manifold forms it takes, bases its claims to institutional legitimacy (domestic authority and international recognition) on its status and identity as the representative of the socio-political collective

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<sup>20</sup> For example, the UN Committee against Torture (a mechanism of the Convention against Torture) invites and relies on information provided by non-governmental organizations that investigate allegations and monitor the occurrence of torture and ill-treatment.

<sup>21</sup> In 1984, the year the Convention against Torture went into effect, the UN created the position of a Special Rapporteur on Torture. Among the responsibilities of this position is an annual public reporting to the UN Commission on Human Rights about the Rapporteur's interventions in specific countries and responses received.

that comprises the nation. National security, then, is grounded in a *politics of representation* – of a national “society” or “community” by the state. Although national security imperatives are context-specific, the extent to which they are invoked to justify torture raise some common questions:

- what/whose interests does the state represent,
- how can those interests be threatened,
- why is torture perceived as a “necessary” means to combat a threat (whether utilized as a punitive reprisal or “defensive” strategy), and
- who could be construed by state agents as appropriate targets for such practices?

The use of torture in the defence of national security contributes to the constitution and reinforcement of national boundaries. It establishes a class of innocents – those members of the nation *in good standing*, whose interests and security are the responsibility of the state. It simultaneously operationalizes a politics of exclusion of categories of people deemed to threaten the national order, who either “need” to be tortured or do not deserve not to be. Of course, inclusions and exclusions of various sorts are integral to – indeed, constitutive of – state politics, whether obtaining along demographic lines of national, ethnic, racial or religious difference, or along ideological lines of political difference. But when it comes to the relationship between national security and torture (and other types of gross violations), the politics of inclusion and exclusion manifest themselves as an extreme form of differentiation between the “legitimate community” and “enemies of the state”. Those subjected to torture are categorized as a dangerous or degraded “type”, and their dehumanization is *confirmed* through torture. In this regard, torture compares to warfare, since both are forms of violence directed at “others” (see Scarry 1985: 60-63, 139-45). But what distinguishes torture from warfare is the nature of the practice itself. The practice of torture targets individuals already in custody.

One of the most common forms of demonization is the charge of terrorism, which smacks of danger and thus provides an “ideal” justification for state violence and the suspension or derogation of human rights. Terrorism is a concept both broad and flexible enough to encompass a variety of challenges to the political authority of the state and/or the economic status quo (emphasizing violence, but not necessarily limited to violence). It tends to be applied to non-state actors or organizations engaging in struggles against the state (see Weinberg 1992). However, in national-security discourse, terrorism often is represented as *sui generis*, lacking any

cognizable logic of its own beyond a will to terrorize, to which the state *responds* with “counter-terrorism”. Given the well-documented relationship between “counter-terrorism” and torture, the critical issues are how the casting of resistance as terrorism occludes the *relational* nature of violence, delegitimizes whatever grievances stimulate or motivate anti-state activism (e.g., repression, discrimination, denial of the right to self-determination), and contributes to the delineation between “legitimate” and “illegitimate” communities, leaving the latter vulnerable to state violence and perpetuating an atmosphere of conflict. In a 1987 report to the UN Commission on Human Rights, the Special Rapporteur on Torture writes:

Especially where civil strife has taken the form of guerilla tactics, military and security personnel feel threatened and may gradually fall into the practice of physical abuse and torture to extract information about their opponents. Every person living within the guerilla area may be seen as a potential enemy who withholds information and may, therefore, be forced to disclose it by all available means.[T]he inevitable effect of such practices is that mutual hatred increases and life becomes ever more violent. (UN Doc. E/CN.4/1987/13, ch. VI, para. 73, cf. Duner 1998: 120)

The issue of resistance by non-state groups, including terrorism, has been a particularly vexing problem in the interpretation and application of international human-rights law, and an enduring point contention between the international human-rights movement and state governments (see United Nations: General Assembly Resolution 48/122 of 20 December 1993: Human Rights and Terrorism, para. 2). Typically, governments criticized for violating the human rights of their opponents have tended to respond that such criticisms are biased. Such governments tend to argue that comparable scrutiny and criticism is not directed against violations perpetrated by non-state groups; they may also claim that states’ own perceptions of the dangers their enemies pose to national security are not given adequate consideration. For those who champion the doctrine of national security, human rights themselves pose a subversive threat to limit the state’s capacity to engage in “counter-terrorist” activities.

A somewhat contradictory element in the justification of torture is the imperative of public denial. Because of the powerful international prohibition of torture, states have an interest in not being *labeled* as engaging in or condoning torture, because such labelling would make them liable or vulnerable to reprisals. However, as long as states can deny that torture is occurring, or as long as they manage to distinguish their coercive interrogation practices from torture, the rights of the individual can be subordinated to the rights of the state. According to Antonio Cassese (1990: 91-92),

“Modern” torture has become more “sophisticated”. Although physical pain continues to be inflicted, with increasingly refined instruments, often endeavours are made to use methods that leave no traces – and therefore no evidence – in order to avoid any possible accusation.

The perceived need to torture and the compelling need to lie about or deny it are two sides of the same coin: the power and rights of the state, both in relation to its human subjects, and in relation to other states in the international order.

Understanding why states torture involves a consideration of the particular (context-specific) threats to national security that they consider themselves to face. In South America, for example, throughout the 1970s and ’80s, a number of regimes utilized torture (and other illegal practices) on an enormous scale, and coordinated such activities among themselves. Why? In *A Miracle, a Universe*, Lawrence Weschler (1998: 98-99) summarizes an explanation for the gross violation of human rights in Brazil, Uruguay, and elsewhere on the continent. He situates these practices within an interlocking national, regional and global context. Briefly, the model of import-substitution industrialization began to fail in the late 1950s and into the 1960s in country after country. The working classes and leftist groups were sufficiently mobilized and organized to exert strong political demands and claims on social goods. However, economic crises made it increasingly difficult for states to maintain even existing levels of health and educational services, and pension benefits, giving rise to political crises, including anti-state violence. Across the continent, militaries seized power with the aims of ending unrest, depoliticizing assertive workers, (re-)privatizing production, and reinserting the national economies back into the global capitalist system. The resultant rampancy and scale of violations of human rights, among which torture featured prominently, were related to the threat to national security that these regimes purported themselves to be combating, namely a localized manifestation of “international communism”.<sup>22</sup> Although most of the victims shared a common national identity with the perpetrators, the justification for extraordinary state violence was provided by an ideological differentiation demonizing leftists, communists and socialists. Those targeted by the military regimes were construed as national traitors and/or

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<sup>22</sup> Within the context of the Cold War, but especially after the Cuban revolution gave “international communism” a foothold in the region, the USA military and intelligence services played an active role in bringing together and training members of the hemisphere’s militaries, and contributing to their indoctrination in the dangers of the communist menace and the value of free-market economics. The USA-run School of the Americas was one of the training grounds for South and Central American torturers, and USA agents played a direct and indirect role in torture and other gross violations throughout the hemisphere.

guilty by association or proximity to traitorous political movements. Weschler (1998: 121) describes the doctrine of national security guiding these military regimes as

a fearsome piece of work. To begin with, there is the matter of sheer breadth of the threat it feels justified in enjoining. The enemy – the International Communist Movement – is perceived as covertly operating everywhere, all the time, in all fields of human endeavor. The threat is no longer conceived as one of conventional war, nor even as one of *sedition* (the doctrine's word for armed insurrection), but rather as one of *subversion*.

In recent years, most of the South American military regimes have been replaced by civilian governments, and “international communism” has eroded as a feasible threat. In some countries there have been investigations and published reports on state violence, taking as their title “never more” (*nunca mas, nunca mais*). But a question remains whether the governmental transitions have sufficiently changed the relationship between people and the state to guarantee that the prohibition against torture will be respected in the future. The doctrine of national security remains strong, and the imperatives of fighting “terrorism” continue to be utilized to justify violent reprisals against insurgents.<sup>23</sup> For example, the governments of Peru and Colombia have sought to isolate their own battles against guerrilla groups from the constraints of human rights, and the Inter-American Commission on Human Rights has avoided including terrorism into its mandate (see Tomasevski 1998: 194-97).

In Northern Ireland, which has been wracked by decades of conflict, the main protagonists of violence were the British government, Protestant “loyalist” militias, and the Irish Republican Army (IRA). The politics of differentiation in Northern Ireland assumed national, sectarian and ideological form, obtaining as a conflict over the nature and boundaries of the state itself: an independent, reunited Ireland versus a permanently divided Ireland with the north remaining linked to the United Kingdom. While Britain castigated IRA resistance as nothing more (or less) than terrorism, the IRA has defined its cause as a political anti-colonial struggle against foreign rule. In *Formations of Violence*, Allen Feldman (1991) highlights the relational nature of political violence throughout Northern Ireland, including the state's use of torture in the interrogation of prisoners. He distinguishes his concerns from those of Elaine Scarry (1985), who focuses specifically on the *torture relationship*, and for whom victims

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<sup>23</sup> While charges of terrorism were leveled against opponents during the era of military regimes, these days anti-state activism tends to lack a popular base and/or an ideological mandate of socio-political transformation.

become objects because they lose all agency as torture “unmakes” their world. While Feldman concurs that the infliction of pain does indeed objectify victims, he contextualizes torture within the broader context in which it occurs. He proposes that captured IRA members who were subjected to torture retained their subjectivity because they comprehended their suffering as part of the national struggle, in which they were actively engaged.<sup>24</sup>

The body made into a political artifact by embodied acts of violence is no less a political agent than the author(s) of violence. The very act of violence invests the body with agency. (Feldman 1991: 7)

It is not only a matter of what history does to the body but what subjects do with what history has done to the body. (Feldman 1991: 177)

Feldman’s informants (at least the more “hardened” paramilitaries) discuss interrogation as a “shared political arena” in which both interrogators and interrogees are participants (rather than actors and objects).<sup>25</sup> He describes how prisoners counteracted the violence perpetrated upon them through “counter-instrumentation” of their own bodies,<sup>26</sup> for example provoking a beating to force the interrogator to play his “ace card” right away, thereby diminishing his capacity to maintain control over the interrogation (Feldman 1991: 138-39).

The history of British torture of Irish prisoners in Northern Ireland bears some striking similarities to Israeli torture of Palestinians from the occupied West Bank and Gaza. First, in both contexts, as resistance against the state escalated over the years, governance was increasingly organized in terms of counter-insurgency. Second, both states fancy themselves liberal democracies committed to the rule of law. But both have utilized emergency legislation and justified their own uses of violence as legitimate and necessary means of dealing with terrorism. In both contexts, terrorism is conceived quite broadly in terms of how it is defined (opposition to the state) and who can be suspected of engaging in or supporting it. Third, while the use of “torture” is officially denied, allegations by prisoners, lawyers and human-rights activists have forced judicial intervention to grapple with the

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<sup>24</sup> Scarry localizes torture in the body of its victims, expressed poignantly with the phrase “my body hurts *me*.” In contrast, Feldman’s account of torture could be expressed with the phrase “my *cause* hurts me.”

<sup>25</sup> In my own research among Palestinian prisoners, a number of the more highly politicized activists offered similar analyses of their experiences in Israeli interrogation.

<sup>26</sup> Other examples of IRA paramilitaries’ “counter-instrumentation” of their bodies included the “blanket,” “dirty” and hunger strikes.

contradictions between “enemy” individuals’ rights and the state’s right to preserve security as it sees fit. Fourth, in both contexts, the struggle against torture has focused domestic and international attention on the once-hidden world of interrogation (see Feldman 1991: 110-14; Ginbar 1996). The comparison falls, however, on the states’ responses to allegations of torture (Ginbar 1996: 5-9). A legal challenge was mounted against Britain’s “five techniques” in the interrogation of suspected IRA activists on the grounds that they violate the European Convention on Human Rights (*Ireland v. United Kingdom*).<sup>27</sup> Although a majority decision by the European Court of Human Rights decided that the five techniques do not amount to “torture”, but to the lesser – also prohibited – category of “inhuman and degrading treatment”, the British government decided to forego their use.<sup>28</sup> In contrast, the Israeli state, suggesting that its own interrogation tactics compare to Britain’s five techniques, has taken the unprecedented step of according public sanction for their use. This position is based in part on the European Court’s decision that such techniques do not constitute “torture.”

### *Israeli national security versus Palestinian human rights*

Before proceeding with a consideration of Israel’s distinctive position on interrogation, it is necessary to consider briefly how the Israeli-Palestinian conflict has played out as a case study of the potential contradictions between national security and human rights. Since Israel is a Jewish state, national security is defined ethno-nationally. While the meaning of Jewish/Israeli *security needs* has changed over time, the meaning of *security threats* has remained remarkably consistent since 1948: it encompasses anything that can be construed as challenging Israel’s existence and viability as a Jewish state or the safety and well-being of members of the Jewish nation. Thus, Palestinians’ collective/national aspirations have been deemed threatening – and demonized – on the grounds that they compete and conflict with those of Jews, since both nations have claimed the same “homeland”.

Because Palestinians are stateless and dispersed, their struggle for national rights (i.e., to sovereignty and self-determination) has taken

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<sup>27</sup> The five techniques include wall standing (i.e., position abuse), hooding, subjection to noise, deprivation of sleep, and deprivation of food and drink.

<sup>28</sup> The European Commission to Prevent Torture opined that the five techniques do constitute torture. The British government accepted the opinion of the European Commission and the minority decision of the European Court that the tactics constitute (or come close to) torture.

“unconventional” forms, including guerrilla warfare. The Palestine Liberation Organization (PLO), which emerged in the 1960s to lead this struggle, was characterized by the Israeli state (until 1993) as a terrorist organization, and its members and supporters as terrorists or proponents of terrorism. For the Israeli state, although Palestinians are exteriorized along national (i.e., demographic) lines, the threat they pose to Israeli national security is *geographically* “internal” because of the large number of Palestinians living under Israeli rule, whether as citizens (i.e., those residing inside the 1949 armistice boundaries, or “Green Line”) or residents of the territories occupied in 1967 (i.e., the West Bank and Gaza). Since most Palestinians have identified with the PLO (regarding it as their national representative), it was easy for Israeli officials to justify the repression of Palestinians on the basis of Jewish/Israeli national security and the negative imperatives of governing a segment of “the enemy” within. As Israeli lawyer Dana Briskman (1987: 57) comments,

Generally speaking, everything connected to Palestinian Nationalist [sic] activities and especially to the PLO was considered *prima facie* a threat to security which could justify limitations and restrictions of rights.

For those Palestinians living under Israeli military occupation in the West Bank and Gaza, their individual and collective rights are ostensibly guaranteed by international legal instruments, most prominently the Fourth Geneva Convention. However, the Israeli state has rejected the *de jure* applicability of the Fourth Geneva Convention to its rule in the West Bank and Gaza on the grounds that these areas are not “occupied” but “administered”.<sup>29</sup> From this highly controversial interpretation of its legal rights and duties in these areas, the Israeli state has accorded itself the prerogative to define – and circumscribe – Palestinian rights on terms of its own choosing, rather than those set out in international law.

By charting such an “original” politico-legal course for itself, Israel has resisted the influence and authority of the international community on matters relating to the government of both the land and population of the West Bank and Gaza. This defiance suggests a larger tension between the principles of state sovereignty and the trend in international legal discourse over the last 50 years that seeks to curb the excesses of state autonomy.<sup>30</sup>

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<sup>29</sup> This involves a complex legal, political and historical argument. See Hajjar 1994; Shamgar 1982a; Shehadeh 1988.

<sup>30</sup> For example, Israel does not recognize the authority of the commissions governing the International Covenant on Civil and Political Rights or the Convention against Torture, although the government does submit periodic reports.

What makes the Israeli case so interesting and difficult is that Israel does not reject the importance of legality to assessments of its rule over Palestinians in the West Bank and Gaza. Rather, it holds that its policies and practices are legally viable, if different from international opinion; that Israel has the right, as a sovereign state, to interpret its obligations independently because these interpretations arise out of the actual conditions on the ground (including the fight against terrorism); and that it cannot be made to do otherwise because alternative interpretations are advanced in attempt to constrain Israel politically (and perhaps to bolster or benefit its enemies) (see Bar-Yaacov 1990; Shamgar 1982a: 32-33; Shefi 1973; Yahav 1993). According to Itzhak Zamir (1989), an Israeli High Court justice, the privileging of national security over “basic human rights” finds very wide support in Israel.

It is particularly difficult in Israel to reach a suitable balance between the interest of national security and that of human rights. The special conditions which prevail here foster an extreme approach, which tends to assign absolute priority to national security above all other interests, and to disregard the need to strike a balance between them. This approach finds adherence both among the general public as well as in ruling circles. (Zamir 1989: 376-77)

The discourse and politics of Israeli national security incorporate an explicit or inferred reference to national identity and difference. This is evident in the ways security laws are applied, and in the ways (potential and actual) “victims” and “perpetrators” are construed. For example, inter-communal violence is regarded as a security violation if it involves Palestinian-on-Jewish attacks, but if the protagonists are reversed, it is usually treated as a “crime”, the latter often bearing lesser punishments and higher burdens of proof for conviction. Only in the rarest of instances have Jews been accused of violating Israeli security, and these cases tend to involve either anti-Zionist activities of some sort or direct attacks against the state (e.g., the assassination of Prime Minister Yitzhak Rabin). It is by understanding the nature of Israeli state rule over Palestinians (especially the prerogatives that the state has accorded to itself in the name of security), that we can understand how and why Israel has sought to legally justify and politically rationalize its violation of Palestinian human rights, including the use of violent and coercive tactics on prisoners during interrogation.

### *Israeli torture*

Generally, practices of torture are obscured by the clandestine nature of interrogation and the institutional insularity of security agencies. Most of

what is publicly known about torture comes from those who have been on its receiving end. This was the case in Israel/Palestine until 1987. That year, an official commission of inquiry, headed by former High Court justice Moshe Landau, issued a groundbreaking report about the activities of the General Security Services (GSS) (Landau 1987).

The Landau Commission Report confirmed what had long been alleged by Palestinian detainees, their Palestinian and Israeli lawyers, and numerous human-rights organizations: that GSS agents had routinely used violent interrogation methods on Palestinian detainees since at least 1971, and that they had routinely lied about such practices when confessions were challenged in court on the grounds that they had been coerced.<sup>31</sup> While the Landau Commission was harsh in its criticism of GSS perjury, it adopted the GSS's own position on the rationale that coercive interrogation tactics are necessary in the struggle against "hostile terrorist activity".<sup>32</sup> The Landau Commission described GSS interrogators as "ideological criminals" who had erred while doing their "national duty" (see Landau Commission Report, pp. 31-39). According to the report:

The investigation staff of the GSS is characterized by professionalism, devotion to duty, readiness to undergo exhausting working conditions at all hours of the day and night and to confront physical danger, but above all by high inner motivation to serve the nation and the state in secret activity, with "duty being its own reward", without the public glory which comes with publicity. It is all the more painful and tragic that a group of persons like this failed severely in its behavior as individuals and as a group. In saying this we are not referring to the methods of interrogation they employed – which are largely to be defended, both morally and legally (...) – but to the method of giving false testimony in court, a method which now has been exposed for all to see and which deserves utter condemnation. (Landau 1987: 4)

The most problematic aspect of the report was not what it revealed about the past, but the conclusions and recommendations it offered. The report's authors argued that national security imperatives demand the option of coercion in the interrogation of Palestinians, and that the state should sanction GSS agents' use of physical and psychological "pressure" in order to eliminate their need to perjure themselves.

Before addressing the consequences of the Landau Commission Report and the debates and contestations that have ensued in its wake, we should

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<sup>31</sup> In Israeli courts, rules of evidence require that a confession be given of the detainee's free will in order to be legally admissible. Nevertheless, the leading school of thought in the Israeli legal system holds that even if coercive methods are used, the confession can be admissible if it was *signed* without coercion. See Human Rights Watch/Middle East 1994: 243-44.

<sup>32</sup> The Landau Commission also adopted the broad definition of terrorism utilized by the GSS, which encompasses virtually all forms of Palestinian nationalism.

consider the history of torture in Israel/Palestine prior to 1987. A comprehensive history of Israeli interrogation has yet to be written, and the conditions do not exist for such an undertaking. It is useful, however, to compare what is known about this history with official Israeli discourse on the subject prior to the publication of the Landau Commission Report.

Between the late 1960s and 1987, numerous accounts and reports of Israeli interrogation methods were published, but those which claimed the routine use of torture and ill-treatment were officially challenged as anti-Israel lies and smears, and refuted by arguing that such claims were based on pernicious fabrications by Palestinians and other “enemies of the state.” Since information about interrogation *does* rely on accounts provided by those who have been interrogated, for decades many international observers were sceptical or reluctant to label Israel a torturing state because of the difficulty of independently confirming such claims. For example, Amnesty International did not use the word “torture” in reports on Israel until 1990, although it had long been involved in researching and publishing on matters related to the interrogation of Palestinians (Cohen 1991: 24). Certainly another factor tempering criticism of Israeli interrogation practices was the zeal with which claims of torture were challenged by officials and supporters of the state.

In the early years of the Israeli occupation of the West Bank and Gaza, Palestinian resistance manifested itself predominantly as armed struggle by a small number of *feda'iyin* (guerrilleros), and it was met with Israeli responses that were predominantly military (as opposed to legal). To the extent that captured *feda'iyin* were interrogated, the main purpose was general information-gathering, and the use of torture tended to be “penal” (i.e., to punish) rather than “judicial” (i.e., to extract confessions to be used in court).<sup>33</sup> There were two reasons for the limited need for “court-worthy” confessions during this period: one was the wide scale use of administrative measures such as detention and deportation to punish and deter resistance, and the other was a tendency among *feda'iyin*, when captured, to readily admit their actions and accept the consequences because they considered themselves prisoners of war.

Eventually, the decline of armed attacks from within the occupied territories and the expanded capabilities of the Israeli military court system coupled to allow for increased use of legal (as opposed to military) means to deal with and punish resisters. As the demand grew for forms of evidence that would hold up in court, interrogation was increasingly aimed at

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<sup>33</sup> On this distinction see Rejali 1994: 6.

producing confessions to be used for conviction. By 1970-71, the complete isolation – and thus effectiveness – of interrogation as an institutional component of the legal process had been achieved (Hunt 1987). Some lawyers representing Palestinians began reporting claims by their clients of the use of measures such as beatings, electric shock, death threats, position abuse, cold showers, sexual abuse, and denied access to toilet facilities. In 1970, the Israeli publication *Zu HaDerech* reported a new policy to discourage military courts from investigating the conduct of interrogators:

Noting the importance and vitality of [the GSS's] security responsibilities in this area, it is the duty of the court to avoid disturbing them in their tasks (cited in Amad 1973: 19).

Some of the ill-treatment is merely primitive: prolonged beatings, for example. But more refined techniques are also used, including electric-shock torture and confinement in specially-constructed cells. This sort of apparatus, allied to the degree of organization evident in its application, removes Israel's practice from the lesser realms of brutality and places it firmly in the category of torture ("Israel Tortures Arab Prisoners").

Although the Israeli government, through its embassy in London, ridiculed the findings and conclusions of the article as "fantastic horror stories" in a published response (July 3, 1977), then-Prime Minister Menachem Begin personally ordered a curtailment of torture in Israeli prisons and detention centres.<sup>34</sup> However, by the end of the 1970s, local and regional events (including intensified Jewish settlement activity in the occupied territories and the signing of an Egyptian-Israeli peace treaty) led to an escalation of Palestinian resistance against the occupation, which in turn led to an escalating number of arrests and interrogations. By the early 1980s, the hiatus on torture had ended.<sup>35</sup>

The events that precipitated the establishment of the Landau Commission were not directly related to the interrogation of Palestinians. Rather, two scandals implicating GSS agents had come to the public's attention, one involving torture of an Israeli Circassian officer in the army (who had been

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<sup>34</sup> To compensate for governmental restrictions on this means of gathering information and evidence, beginning around 1979 the GSS developed a new technique: the procurement and use of Palestinian informers in prisons. See Be'er & Abdel-Jawad 1994: 63.

<sup>35</sup> An important legal development relating to interrogation was instituted in 1981; henceforth, a person could be convicted on the (sole) basis of a third-party confession, whereas previously a conviction was contingent on a first-party confession or material evidence. This legal development was modelled on the domestic Israeli "Law Amending the Evidence Order, 1979" (see Tsemel 1989: 130). This institutionalized the admissibility of hearsay and expanded the "benefits" accruing from interrogation. These benefits also accrue to GSS agents: each conviction that results from an interrogation is recorded as a credit in the personnel file of the agents who conducted the interrogation (see Levy 1990).

suspected of treason), and the other involving the murder of two Palestinians already in custody (they had hijacked a bus) and a subsequent cover-up (see Lahav 1988). The Landau Commission's mandate was to bring to light any illegal actions perpetrated by the GSS and, in doing so, begin the process of restoring public (Jewish Israeli) confidence in the security establishment. However, the report of the Landau Commission, especially the recommendation that the state sanction the use of violent interrogation tactics, became a topic of intense criticism and debate.<sup>36</sup>

The Landau Commission Report advanced the argument that Israeli penal law could be interpreted to allow interrogators to use "moderate physical pressure" (as well as various forms of psychological pressure) as part of the fight against terrorism.<sup>37</sup> According to this argument, the "necessity defence" legally permits people to use violence in "self-defence", thereby mitigating criminal liability of someone acting to prevent grievous harm.<sup>38</sup> However, in applying such an argument to interrogation, the "self" is the Jewish nation, and the "people" are Israeli state agents operating in an official capacity. Thus, in a single rhetorical manoeuvre, the people, the nation and the state are conflated and represented by the GSS. By the same turn, Palestinian detainees are dehumanized; they become, not people with a right not to be tortured, but *a priori* "terrorists" and "ticking bombs". The Landau Commission's rationalization for such measures is based on a three-part contention:

1. that Palestinians have no moral right to legal protection given their predisposition toward terrorism,
2. that the GSS operates morally and responsibly in discharging its duties to

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<sup>36</sup> For example, a double issue of *Israel Law Review* (1989) was devoted to critical assessments of the Landau Commission Report. See also Public Committee against Torture in Israel 1990; Cohen & Golan 1991, 1992; Ron 1997.

<sup>37</sup> The law at issue is Section 277 of Israel's penal code, which prohibits the use of physical force during interrogation. According to this law, a public servant is liable to imprisonment for three years if s/he uses or directs the use of the use of force against a person or threatens or directs a person to be threatened for the purpose of extorting a confession or information relating to an offence. The Landau Commission suggested that this prohibition could be legally circumvented by utilizing a broader interpretation of the "necessity defence", as contained in Section 22 (Article 34 [11]) of Penal Law, 1977.

<sup>38</sup> The Landau Commission report suggested that the necessity defence could be interpreted to include not only its originally intended exception for cases of "imminent danger", but could also include "the concept of lesser evil", by which

the harm done by violating a provision of the law during an interrogation must be weighed against the harm to the life or person of others which could occur sooner or *later* (p. 57, emphasis in the original).

- preserve national security, and
3. that GSS interrogation methods do not constitute torture (see Landau 1987: 79).

The recommendations of the Landau Commission were adopted by the government, making Israel the first (and thus far the only) state in the world to officially sanction the use of interrogation methods that constitute torture according to international law. In doing so, Israel set in motion the first public challenge to the core principle underlying the legal prohibition against torture: that the individual's right not to be tortured takes precedence over any possible state right or interest. The coincidental timing of the Report's publication (October 30, 1987), its endorsement by the Israeli cabinet (November 8) and the outbreak of a Palestinian *intifada* (uprising) (December 9) bore directly on the handling of security suspects at a time when the number of people being arrested and interrogated was skyrocketing. Thus we can say that the Landau Commission Report decisively transformed the *discourse* of Israeli interrogation while preserving the *practices*. Whereas prior to Landau, the state had denied torture categorically, now it denies that "moderate physical pressure" constitutes "torture".<sup>39</sup>

The specific methods and guidelines that the Landau Commission recommended, and that the state accepted, were contained in a classified appendix to the report. Although secret, human-rights lawyers and activists seeking to challenge their legality have forced the state to admit or acknowledge that routine methods include threats and insults, sleep deprivation, hooding and blindfolding, position abuse, solitary confinement (including in refrigerated or overheated closet-like cells), subjection to excessively filthy conditions, and physical violence (including a method known as "shaking" which produces a whip-lash effect<sup>40</sup>) (see Cohen &

<sup>39</sup> For example, the Office of the Military Advocate General (1992: 10) stated,

While, in dealing with hardened terrorists involved in the commission of grave security offences, the use of a certain degree of force is often necessary to obtain information, the disproportionate exertion of pressure on subjects (i.e., by torture or maltreatment) is strictly forbidden. Israel has repeatedly condemned all use of torture.

<sup>40</sup> The use of "shaking," a method of physical violence that leaves no marks on the body, was extensively used after the adoption of the Landau Commission's recommendations. In 1995, the Israeli cabinet approved "shaking" in "exceptional circumstances." Following the death of a Palestinian detainee, 'Abd al-Samad Harizat, as a direct result of shaking, the late prime minister Yitzhak Rabin said,

There was a malfunction in the interrogation method. It had been used against 8,000 interrogees and there was no problem.

Golan 1991, 1992; Ginbar 1996; Human Rights Watch/Middle East 1994). As a result of legal pressure brought on the state by lawyers representing Palestinian clients, the government formed a ministerial committee in 1991 to look into interrogation. This committee's deliberations resulted in a revised set of guidelines, although any changes in tactics were minimal.<sup>41</sup>

In 1991, the policy of permitting "moderate physical pressure" became more legally problematic when the Israeli Knesset<sup>42</sup> ratified the UN *Convention against Torture and Other Cruel, Degrading or Inhuman Punishment*. The government exempted itself from adhering to this Convention in its conduct vis-à-vis Palestinian residents of the West Bank and Gaza on the grounds that the political status of these areas remains to be determined,<sup>43</sup> a line of legal reasoning that draws on the Israeli distinction between "administration" and "occupation" (Human Rights Watch/Middle East 1992). That year, a draft Law against Torture was submitted by Hadash (a coalition of leftist Israeli parties) to the Knesset, but it did not survive a first reading.

Over the decades of Israeli occupation, tens of thousands of Palestinians have been subjected to interrogation methods that constitute torture. Between 1987 and 1994 alone, an estimated 23,000 people were tortured. Despite the publicity surrounding this problem, the Israeli government, courts and a majority of the Jewish public consistently refused to accept that the international prohibition against torture applies to Palestinians. Even some leading Israeli legal liberals have refused to acknowledge and condemn torture by state agents. For example, Ruth Gavison, a prominent law professor and president of the Association of Civil Rights in Israel (ACRI, the country's largest and most prestigious civil rights organization), was quoted as saying,

I don't know of any state which confronts terror attacks of the sort we deal with here, and which does not strike against the body or welfare of detained persons suspected of being connected to terrorist activity (cited in Baram 1998: 23).

Despite overwhelming evidence that methods used routinely in interrogation constitute torture, such broad and consistent refusal on the part of the Israeli mainstream to take a stand against torture has served to marginalize and even demonize those Israelis involved in the struggle

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Interview on Kol Israel, July 29, 1995, cited in Ginbar 1996: 58.

<sup>41</sup> The new guidelines were issued in a classified booklet titled *The Procedure for Extraordinary Authorization during Interrogation*. See Ginbar 1993.

<sup>42</sup> The Israeli Parliament (Eds.)

<sup>43</sup> This exception takes no account of the fact that interrogation of Palestinians from the territories actually takes place within the territory of Israel (i.e., inside the 1949 armistice line).

against it. The latter have been criticized in speech and print as “sympathizers” or “defenders” of “terrorism” for their efforts (see Levy 1999).

### *Legal challenges to torture*

Every year, Israeli human-rights lawyers have submitted hundreds of petitions to the Israeli High Court on behalf of Palestinian clients in interrogation;<sup>44</sup> most of these petitions seek an *order nisi* (show cause) for incommunicado detention, and/or Court intervention to force prison authorities to grant a meeting with the client, and/or to challenge the use of violent tactics in the case of that specific client. But some lawyers affiliated with Israeli human-rights organizations, of which the *Public Committee against Torture in Israel* (PCATI) has been most active, have mounted a more aggressive and expansive litigatory campaign seeking a Court decision to declare the use of physical and psychological violence illegal because it conflicts with domestic Israeli penal law and international conventions to which Israel is a signatory.<sup>45</sup> One PCATI attorney, Allegra Pacheco, described this work as a “Sisyphus-like struggle in the highest court in Israel to permanently abolish torture in Israel” (1999a: 9).

In 1991, PCATI petitioned the High Court to void the Landau Commission Report and publicize the secret interrogation guidelines. The petition was rejected in 1993; the Court stated that the guidelines have the status of an “internal directive” and therefore are not subject to judicial intervention. Although the justices handling the petition were privy to the guidelines, they did not render an opinion regarding their legality vis-à-vis Israeli or international laws. In 1994, PCATI brought a petition against the government of Israel that was even more ambitious in its aims: in addition to calling again on the Court to order the state to publish the secret guidelines, the petition challenged the GSS’s right to detain and interrogate people without explicit legislative authorization (see Pacheco 1999a: 10-33). The petition challenged the GSS’s existence as “extra-legal”<sup>46</sup> and the content of

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<sup>44</sup> Although Palestinian lawyers have also been involved in the legal struggle against torture, only lawyers who are members of the Israel Bar Association are permitted to bring cases and petitions before the High Court.

<sup>45</sup> For a collection of PCATI petitions and High Court decisions, see Pacheco 1999a.

<sup>46</sup> The petition pointed out that the GSS operates under the authority of the Israeli government and the office of the Prime Minister,

based on the assumption that it is an executing arm of the government, carrying out the

its activities as “aberrant” and illegal. On this latter point, PCATI drew, in part, upon the new Basic Law: Human Dignity and Liberty (1994). According to the petition,

[T]he fact that the government authorizes the [GSS] interrogators to harm the bodies and dignity of persons is a constitutional disgrace which undermines the integrity of the legal system and challenges its right to exist (Pacheco 1999a: 13).<sup>47</sup>

The High Court issued an *order nisi*, but it left the case pending.

Although the High Court was not entirely immune to granting relief in certain cases, its general pattern of decisions and delays served to preserve the secrecy of GSS interrogation practices and confirm the state’s ability to exempt itself from adhering to international conventions in its treatment of Palestinian detainees. Thus, the High Court effectively added its stamp to the position that using violent tactics on Palestinians is legally permissible. Such a rationalization hinges on the notion that any harm perpetrated by interrogators is lesser than the possible harm that detainees pose for the class of innocents, those civilians who are the victims (actual or potential) of terrorism. Consequently, the High Court was directly contributing (rather than passively conceding, as is sometimes argued) to the subversion of the right of individuals not to be tortured, by according the state an anachronistic form of extreme and absolute sovereignty to do as it will to the bodies of its subjects. Needless to say, Israeli and Palestinian human-rights activists, as well as other sectors of the international human-rights movement, have been highly critical of the Court’s failure to apprehend Israeli torture as a crime, let alone act to prevent it. As one Israeli human-rights organization, B’Tselem, described the situation as recently as 1998:

In Israel, torture is institutionalized, with its own routine and systematic bureaucracy. Torture is governed by detailed regulations and written procedures. A whole contingent of public officials participate in the practice of torture: in addition to the GSS interrogators who directly perpetrate torture, doctors determine whether a detainee is medically fit to withstand the torture, a ministerial committee headed by the Prime Minister oversees the procedures, state attorneys defend the practices in courts and finally the High Court of Justice has effectively legalized torture by approving its use in individual cases without ruling on its legality in principle. (Felner 1998: 1, 15)

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residual jurisdiction of the Israeli government to defend the security of the state... (Pacheco 1999a: 12)

What makes the GSS “extra-legal” is that, not only is there no specific law regulating it, but its activities usurp the jurisdiction of other bodies that are regulated by law: the GSS

maintains a parasitical relationship with authorized authorities like the police or the prison service (Ibid: 16).

<sup>47</sup> The petition also argued that the prohibition against torture is “universal,” “customary” and “absolute,” and quoted from the *Filartiga* (USA) decision (Pacheco 1999a: 25-27).

A legal breakthrough in the struggle against torture came as a result of several petitions challenging specific tactics referred to as *shabeh*. *Shabeh* is a combination method involving tying a detainee to a small slanted chair, keeping a filthy sack over his head, exposing him to loud music and sometimes extremes in temperature, and causing sleep deprivation. Drawing on an earlier High Court decision (*Mubarak et al v. GSS*) which ruled that painful handcuffing is prohibited, PCATI attorneys representing two clients (Fuad Awad Qur'an and 'Abd al-Rahman Ghanimat) sought a decision that would serve to prohibit *shabeh* on the basis that it constitutes methods that cause pain.

In January 1998, the High Court combined these petitions with four others pertaining to interrogation, and convened an unprecedented panel of nine justices to consider the matter.<sup>48</sup> At the first hearing, state attorney Shai Nitzan acknowledged that *shabeh* causes pain and affects the detainee's physical and mental state, but asserted that it is not used *in order to cause pain*; rather, it is an administrative measure used to control people during the "waiting" period between interrogation sessions (Pacheco 1999b: 5). The High Court adjourned after a single day without ruling on the petitions. Rather, the Court issued a statement calling on the Knesset to take responsibility by promulgating legislation, rather than leaving it up to the Court to decide each petition in an *ad hoc* manner. While such a statement coming from the country's highest judicial authority is problematic on a number of levels, the most glaring is its disregard for the already existing laws that govern interrogation: the international instruments prohibiting torture.

The nine-justice panel reconvened for a second one-day session on May 20, 1998, at which time state attorney Nitzan offered a new explanation for the use of *shabeh*: he admitted that it was indeed a factor in the interrogation process rather than merely an administrative measure. Although this was, in effect, an admission that the government had been lying to the Court for years, no action was taken. The panel reconvened for a third time on January 13, 1999. At that hearing, one of the PCATI attorneys, Allegra Pacheco, drew the Court's attention to the fact that in May 1998 the *UN Committee against Torture* (the international body authorized to monitor adherence to the *Convention against Torture*) had reiterated its position that Israeli interrogation tactics include methods constituting torture, and should cease

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<sup>48</sup> In an attempt to marshal public pressure and influence the High Court, B'Tselem released a new report, *Routine Torture*, the day before the scheduled hearing at a press conference during which actors demonstrated some of the interrogation methods regularly used on Palestinians. Pictures and images of these re-enactments were covered by all the major Israeli media.

immediately (see B'Tselem 1998: 12). One justice on the panel asked Nitzan to comment on this, to which he quipped,

We all know quite well how the United Nations decides when it comes to Israel,

thereby suggesting that the problem was international anti-Semitism rather than the state's use of torture. That was the end of the discussion (Pacheco 1999b: 1). Once again, the Court adjourned without setting a date for continuation. However, in February 1999, Nitzan announced a change in *shabeh*, stating that cloth hoods would be replaced by blackened goggles, that the small slanted chairs would be replaced by regular chairs, and that prisoners would not be shackled quite as tightly. Nevertheless, lawyers claimed that these purported changes were not, in fact, instituted in the treatment of most prisoners (Pacheco 1999b: 1-2).

Finally, on September 6, 1999, the High Court rendered a ruling prohibiting *shabeh*, "shaking" and other forms of *routine* violence during interrogation.<sup>49</sup> Although this decision marked a victory for the thousands of victims of torture, as well as for human-rights lawyers and activists, it fell short in a number of crucial regards. It neither acknowledged that GSS interrogation methods constitute "torture", nor completely forbade their continued use under "exceptional circumstances." The Court's ambivalence about curbing GSS prerogatives was evident in the words of Chief Justice Aharon Barak: "Our apprehension that this decision will hamper the ability to properly deal with terrorists and terrorism disturbs us." Moreover, the Court suggested (again) that the government could pass legislation to legalize these methods. Steps to do so were subsequently prepared.

In recent years, the problem of torture has taken a new twist. The political changes wrought by the Israeli-Palestinian negotiations – which began in 1991, produced a Declaration of Principles in 1993, and led to the establishment in 1994 of a Palestinian Authority (PA) with limited "self-governing" powers in parts of the West Bank and Gaza – have not ended the incidence or risk of torture in Israel/Palestine. On the contrary, Palestinians have continued to be tortured by the thousands in the interest of Israeli national security, only now the torturers also include Palestinian as well as Israeli security agents.<sup>50</sup> This extension of torture into the age of negotiated

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<sup>49</sup> Two days after the decision was issued, on September 8, 1999, Human Rights Watch (HRW) sent a letter to Yossi Beilin, Israeli Minister of Justice, urging him to submit legislation to the Knesset clearly prohibiting torture and ill-treatment, and begin prosecuting GSS agents responsible for torture. According to Hany Megally, executive director of the Middle East and North Africa division of HRW, "It's up to Minister Beilin to give the ruling teeth."

<sup>50</sup> Between 1994 and 2000, at least 19 Palestinians have died while in custody of the Palestinian

agreements stands as a scathing indictment of the “achievements” of recent diplomacy. PA torture, like Israeli torture, must be understood in the context in which it occurs: the larger political agenda of the PA, namely the project/process of state-building, hinges on an ability to satisfy Israeli security demands. Thus, torture becomes a means for the PA to demonstrate its “good faith” intentions in this context where torture is no crime.

### *Conclusion*

Torture has become an international matter through the promulgation and uses of international laws and conventions that prohibit it. Certainly Israeli and Palestinian human-rights lawyers and activists have understood the importance of situating their activities within a larger – global – context in their efforts to bring international laws and political pressure to bear on both the Israeli state and the PA to stop torture. In keeping with such efforts to situate the “local” within a “global” context, I would like to suggest a connection between struggles against torture in Israel/Palestine and recent developments elsewhere in the world. In the 1990s, the human-rights enterprise entered a new era. This phase is characterized by the development of agendas and strategies to prosecute violators of human rights.<sup>51</sup> Many of the international laws governing human rights include mechanisms for enforcement through prosecution, but it is only recently that such options have begun to be exploited.<sup>52</sup> The establishment of international tribunals for Rwanda and the former Yugoslavia, the passing of a treaty to create a permanent International Criminal Court, and the arrest of former Chilean dictator Augusto Pinochet all indicate moves in this direction. Although there are serious problems with each of these examples, they represent significant, albeit nascent, changes at the international level: an expansion of the human-rights enterprise from a struggle *for rights* to a struggle *against violators*. I would argue that targeting violations *legally* (rather than diplomatically, economically or militarily), and charging, trying, convicting

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Authority.

<sup>51</sup> In this particular regard, I would suggest a positive reading of what Carol Greenhouse (1998: 15) more sceptically describes as an emergent “criminal trial paradigm”: “[T]he public fascination with spectacular public interrogations (...) suggests the pervasiveness of the criminal trial as a public discourse involving high stakes and emotions.”

<sup>52</sup> Indeed a recurring theme in human-rights scholarship published prior to the mid-1990s is frustration with a pervasive refusal to take seriously the legal options, thereby relegating human rights to the realm of moral outrage or, at best, political leverage.

and punishing violators in courts of law – in other words, turning the *violence of law* against the perpetrators of state violence – has a potential to affect and alter the ways in which state power over people is exercised.

Of all the human-rights violations that international laws target, torture lends itself most readily to a litigatory agenda. This is being vividly demonstrated in the Pinochet case. Pinochet was arrested in London on the basis of an indictment issued by a Spanish judge. He was charged with a number of violations of international law. The first decision by the British House of Lords rejected the legal grounds for the charges of genocide (because the victims of Pinochet's regime do not "fit" the legal definition since they were not killed because of their national, ethnic or religious identity). But the decision upheld the indictment on the charge of torture (as well as attempted murder). Although this decision was overturned subsequently on a technicality, a second decision by the House of Lords narrowed the scope of indictable crimes,<sup>53</sup> but upheld the indictment on charges of torture. This development has literally revolutionized the ways in which people around the world can imagine – hope and fear – new uses of existing laws. At a March 1999 conference, "Investigating and Combating Torture" (sponsored by the University of Chicago), Sir Nigel Rodney, UN Special Rapporteur on Torture, noted that torture is the reason Pinochet remains in England.

At this juncture, the prospect that those who perpetrate or abet torture might face prosecution holds forth a possibility for changing the practices and discourses associated with the sovereign rights of states, at least in regard to their treatment of people in custody. The challenge is in transforming the principled prohibition against torture into practice. Of course, states that lie, deny or euphemize about their own use of torture are unlikely to enforce domestically the UN Convention against Torture. But the enforceability of this convention is extra-territorial, a provision which makes geography itself a potential resource in the struggle against torture. At the risk of sounding glib, torturers sometimes travel. Pinochet was arrested during a personal trip to London. This involved a kind of "human-rights intelligence" to take advantage of his movement out of Chile, where he enjoyed an impunity of his own making.

In countries around the world, many torturers and their records are known. The first question is whether such knowledge can be translated effectively into a basis for action should an opportunity to use it arise. The

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<sup>53</sup> The second decision by the Court of Lords made 1988 the cut-off year for indictable crimes, because this was the year the United Kingdom signed the Convention against Torture.

second question is how to translate the possibilities into *legal obligations* to act by those who are empowered to do so, namely the governments of other states. The possibilities have been illuminated by recent events and developments; following Pinochet's arrest other leaders suspected of authorizing or perpetrating torture (e.g., from Iraq, Yugoslavia, Croatia) have reportedly cancelled or terminated plans to travel abroad out of fear of their own arrest. The translation and consolidation of these possibilities into broader action begs the contribution of scholars to advance substantive arguments that might prove influential in transforming the enforcement of international law from a political option into a legal duty. While it remains too early to tell whether torturers will face increasing risk of prosecution in some legal venue, this prospect should give pause to any state that uses torture, for when it comes to torture, there is no legal defence.

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