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Ontological Crimes Against Humanity

In a recent article in the *European Journal of International Law*, Christopher Macleod challenged philosophers to provide a conceptual and moral basis for crimes against humanity, noting that the “principal difficulty...is the ambiguity of the word ‘humanity.’”¹ Acts of murder, rape, torture, and enslavement mentioned in international statutes and tribunals since World War II, and now prosecuted in the International Criminal Court, are undeniably crimes in the ordinary sense; but why are they “against humanity;” what is humanity such that some, but not all, crimes are *against* humanity? Macleod observes that humanity in this context has two distinct meanings: “It can be used to refer to the species to which we all belong,” i.e. the human race, and “it can also be used to refer to that thing which is common to the class of all persons, in virtue of which they are all human,” i.e. their human nature.² If humanity means all human kind, then the crimes identified in international law injure the collective body of humans, in a manner analogous to harm caused by ordinary domestic crime to the public or “the people.” If, however, humanity is identical to “humanness” or “human nature,” then a crime against humanity need not threaten the human race as such as it would injure or diminish a core feature such as autonomy, rationality, or dignity qualifying someone for membership in the human community. Interpreted this second way the quality of being

human is not a material or genetic feature of biological humanity, but something of moral and/or metaphysical significance.

In this paper I shall examine both options for defining humanity set out by Macleod. They support principles of international criminal law and both appear in the terminology of legal scholars and trial judges commenting on crimes against humanity. I am also going to suggest an alternative approach to understanding the phrase “against humanity,” which is conveyed by neither of Macleod’s two options. Borrowing a phrase from Adriana Cavarero, I shall speak of crimes against humanity, especially the crime of torture, as ‘ontological crimes.’³ An ontological crime is one that attacks the being of the human being, with the intent either to eliminate or to distort it in a horrific way. Since the ontology of the crime has to be normative for all nations, it should be unhampered by complicated and divergent cultural assumptions about the essence of human beings. I locate that common ontology in the human body and its being in the world. This suggests that it is not necessary for a court to have a normative definition of humanity acceptable to a multitude of diverse religious and ideological viewpoints. An ontological crime against the human body does not need to be judged according to *a priori* universal moral norms. It appears on earth as a horrific fact of inhumanity for any state to condemn using whatever moral and legal norms it wishes to establish, *after* the fact, so to speak. In short, I shall claim, to borrow from Patrick Hayden, that the creation of a cosmopolitan legal regime has been motivated by the “horror that humanity inspires rather than by Kantian awe at the ‘moral law within.’”⁴

I. The development of an international criminal law with respect to crimes against humanity (CAH) culminates in the adoption in 1998 of the Rome Statute establishing the International Criminal Court in The Hague. While the statute is neither definitive nor comprehensive with respect to the juridical interpretation of such crimes, it will serve to introduce us to the most up to date legal understanding of the elements of crimes against humanity. Section 1 of Article 7 lists ten acts that constitute such crimes “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.” They are (in abridged form): murder, extermination, enslavement, deportation, imprisonment in violation of fundamental rules of international law, torture, sexual crimes including rape and enforced pregnancy, persecution, enforced disappearance of persons, and apartheid.⁵ The statute includes a catch all sub section (k), which provides a minimal explanation as to why any and all of these acts are singled out for international prosecution. It notes that crimes against humanity shall also consist of “Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”⁶ The intent of this clause is to single out acts for prosecution that are exceedingly cruel. Commentators have recognized, however, that great suffering and injury are neither sufficient nor necessary reasons for classifying an action as a CAH. Although such crimes do indeed often cause terrible suffering and loss, they a) need not do so and b) if they do, what occurs need not be any worse than the suffering brought about by legitimate acts of war. Indeed the carnage and horror of war itself is often much worse than the torture or persecutions condemned in the Rome Statute.⁷ Nevertheless, the killing of combatants and civilians in war, while tragic, need not be criminally inhuman

or inhumane in the intention of the Rome Statute. Indeed the rules and conventions of war are intended to draw a line between violence proper, however massive, and the violence of war crimes and inhuman acts.

Tribunals adjudicating prosecutions of CAH sometimes will point not to the magnitude of the suffering caused by such crimes but to the magnitude of the victim. In those cases what is distinctive about CAH is that humanity itself, not only specific individuals, suffers as a victim of the crime. The trial chamber for the case of Erdemovic (1998), prosecuted at the International Criminal Tribunal for the Former Yugoslavia (ICTY), writes that “the concept of humanity as a victim....essentially characterizes crimes against humanity.” It notes that “rules proscribing crimes against humanity address the perpetrator’s conduct not only towards the immediate victim, but also towards the whole of humankind.”⁸ The court in this case affirms the first of Macleod’s two definitions of “humanity,” wherein the whole of humankind, taken as a collective being, is victimized in such a way as to be damaged by the perpetrator of the crime. In an apt phrase, Macleod speaks of humanity as a *‘grand-etre’*: “Defining a crime against humanity to be damage to the *grand-etre*, then looks philosophically respectable. Damage may be said to be done when a serious violation of the *grand-etre*’s interests occurs...”⁹ Macleod emphasizes that it is not the being of a particular person which is injured by a CAH but is rather all humanity taken together as a single (collective, *grand-etre*) being. That then is what makes a CAH an extraordinary crime and separates it from the class of ordinary felonies, not its intensely cruel suffering, injury, and mayhem. How can the interests of humanity as a whole be injured or diminished? In what sense are

actions taking place in a remote corner of Cambodia or Sudan, for example, capable of harming the rest of us?

Larry May addresses this question in his book, *Crimes Against Humanity: A Normative Account*. Like Macleod, May defines humanity as the “community of man,” analogously to the concept of a “people” in the language of domestic criminal law.¹⁰ Just as in ordinary criminal law the accused is prosecuted in the “name of the people,” so also in international crime, the perpetrator comes before the tribunal or the international criminal court in the “name of humanity.” The reason that humanity is implicated, even in the absence of an organized world state, is that some crimes threaten the basic security interests of all human beings. Appealing to what he terms the “International Harm Principle,” May asserts that the minimal interest of the human community is one of security and safety; hence, any action which threatens the safety and well being of humankind is subject to prosecution as a crime against humanity. May writes, “The security principle will provide a moral minimalist basis for understanding *jus cogens* norms in international criminal law.”¹¹ May does not need what he would regard as metaphysically suspect categories of dignity, ideal value, natural law or human rights to legitimate international regulations.¹² A self-described Hobbesian positivist, he need only draw upon the minimal security interest humankind has in making sure that genocide, slavery, torture or forced deportations not appear in the world.

May’s international harm principle surely applies when crimes against humanity are committed in the course of war, for war cannot with confidence be confined to the parties initially engaged in the conflict.¹³ When the agent of a crime against civilians is the state itself, when the crimes are widespread and systematic, and when they are carried

out in a time of civil or national warfare, then a threat to the security interest of all peoples may be realistic. Since human kind has an interest in its own safety, international prosecutions of CAH are plausibly understood to be sought for the sake of this interest. However, the Rome Statute explicitly drops the connection with warfare from its articles and lists crimes like rape, torture, and enforced pregnancy that cannot realistically be assumed to threaten the security interests of all nations, especially in peace time. Indeed, one reason it is easy for the international community to ignore and resist action against atrocities in Burma or Sudan, is that because of their remoteness these atrocities are precisely *not a threat* to the world as a whole. While I may have an interest as a fellow human being that someone in Burma not be tortured, it does not seem plausible that it is because torture will become more widespread and threaten *me!* The question remains as to how a state's attack of its own citizen threatens the rest of humankind and thus rises to the level of an international crime.

May's response to this concern is to emphasize the group-based character of CAH.¹⁴ A civilian population may be attacked because of some shared characteristic, like religion, race, or ethnicity. Crimes against humanity are like domestic hate crimes that target someone for her sexual preferences, the color of her skin or her disability, distinguishing them thereby from ordinary felonies. The core cases of CAH are ones in which Jews, Bosnian Muslims, and sub-Saharan Africans have been targeted for murder, genocidal extermination, forced deportation, and rapes. May's point is that while murder and rape have always been part of the human condition they need not qualify as crimes against our collective humanity within the meaning of international law. When, however, such crimes exhibit an indifference to human personality and target individuals solely

because of some group characteristic they happen to have, then they should attract the attention of the international community.¹⁵

How does the group based character of CAH correlate with the international harm principle and the judgment that the security interests of all mankind are at risk? May needs to demonstrate that the targeting of a member of a Tutsi ethnic group just because he or she is a Tutsi foreshadows outcomes that threaten the security interests of us non-Tutsis. Humanity does have a stake in the fact that people are being persecuted because they are gay, Muslim, or Tutsi, but is it correct to identify that stake with security alone? If we broaden the interests of mankind beyond those of security then our starting principles cannot be constrained by May's minimalism. In fact, May himself hedges when he tries to explain problem of group based harms. "Group based harms," he writes, "are of interest to the international community because they are more likely *to assault the common humanity of the victims* and to risk crossing borders and damaging the broader international community" (Italics added).¹⁶ Assaulting the "common humanity of victims" cannot be equated to a likelihood of violence actually crossing national borders, but it is a plausible, *non-consequentialist* reason why a crime can be classified as one against humanity. May's use of "common humanity" actually better fits Macleod's second sense of 'humanity' as a shared quality identifying all members of the human race, and not simply members of a group. Assaults against one's gender, sexual preference, ethnicity, and religion would threaten humanity in the second sense, for our group characteristics are indeed ways in which we express and validate our common humanity.

II. A trial chamber of the ITCY (Kupreskic, 2000) stated that “it is possible to identify a basic set of rights appertaining to human beings, the infringement of which may amount, depending on the accompanying circumstances, to a crime against humanity.”¹⁷ In another case before the ITCY (Furundzija 1998), the moral principle of respect for human dignity was said to be “the basic underpinning and indeed the very *raison d’être* of international humanitarian law and human rights law.”¹⁸ Crimes against humanity diminish what another court called the “ideal value” of the human being.¹⁹ The language of rights, dignity, and ideal value points to another way of construing the meaning of humanity in Article 7 of the Rome Statute. A CAH need not endanger the security interests of or otherwise damage humanity collectively, but it may wound an important moral feature belonging to each one of us, a feature that we regard as essential to our being human. In religious language we could call that the sacred value or preciousness of man; in the more humanistic, enlightenment language of the jurists we would use terms such as dignity or basic rights. In any case since our value, dignity and rights are strongly connected to our group based identity, it seems reasonable to think that a crime against humanity that assaults populations because of a group based trait also violates their dignity and their right to express their humanity in this way. While group based traits differ, every human being has equal moral significance and it is that which group based harms harm, not the security of humankind.

Do moral properties like dignity, rights, ideal value, and autonomy constitute a sound philosophical basis for defining and justifying international criminal norms? This question, of course, evokes a vast, complicated literature in moral and political theory. To maintain our focus on the more limited issue of CAH I would like to turn the discussion

specifically to the crime of torture and ask about its relation to human dignity. Torture is explicitly named as a crime against humanity in the Rome Statute and is one of the few acts of governments that with little controversy violates *jus cogens* norms.²⁰ Torture counts as a crime against humanity even if only a single person is tortured by a government, suggesting that the interest of the international community in forbidding torture is not its own security, but rather the peculiar nature of the injury suffered by the torture victim. Most recent moral arguments about torture locate that injury in an affront to the victim's dignity.

One of the most illuminating discussions of torture and dignity can be found in the work of David Luban. In torture, he writes, the victim loses "all the qualities of human dignity that liberalism prizes."²¹ What are these qualities of dignity? Luban, drawing on rabbinic texts, thinks of dignity, not so much as a metaphysical trait of a human soul, but rather as a feature of a relationship between human beings, one of whom is the dignifier and the other is the dignified.²² Dignity is a relational property functionally dependent on respect, which in turn is a way of treating human beings in such a way as not to humiliate them. In Luban's opinion, non-humiliation offers a minimal, but still effective moral norm: "Non-humiliation may not exhaust the concept of human dignity, but it strikes me as the paradigm of what respecting human dignity means. At worst, non-humiliation will be a useful naturalized stand-in for the more grandiose, but vaguer concept of 'respecting human dignity.'"²³ When I treat someone in a non-humiliating manner I exhibit respect for her and in that respect her dignity reveals itself as an important feature of her humanity.

Luban's account has the advantage of situating dignity in a human relationship rather than deducing it from an essentialist or naturalist ontology. Because it is not restricted by such an ontology, it might serve a politically diverse international community as a way of conceptualizing the moral offense to 'humanity' in CAH. How specifically does Luban's view of dignity pertain to the crime of torture? While the language of the 1985 UN Convention Against Torture emphasizes extreme pain and suffering in its definition of torture, Luban holds that the inhumanity of torture consists not in pain *simpliciter* but in a tyrannical denial of respect to the victim: "Torture is the living manifestation of cruelty, and the peculiar horror of torture within liberalism arises from the fact that torture is tyranny in microcosm, at its highest level of intensity."²⁴ Torture's humiliation of its victims is akin to rape—"all torture is rape and rape is tyranny." The awfulness of rape cannot be simply equated to whatever pain and harm, mental or physical the victim suffers. The wrong of rape, in Luban's eyes, lies in its abject subjection of the victim to an overwhelming power that has withdrawn any semblance of respect for the humanity of the victim. The experience of this sheer absence of respect is humiliating, filling the victim with feelings of shame and worthlessness. The same could be said for the victim of torture.

While Luban's characterization of torture captures the awful perversion of human relationships that exist between the torturer and the victim, they do not seem to get at the deeper wrongs it causes. If I re-describe either rape or torture in political terms as an illiberal relationship of domination and humiliation I may say something true but somehow attenuated because that language misses the horror of the event. There is, I think, in Luban too much of an emphasis on *relationship* that leads him to underestimate

the terrible thing that is done to the very *being* of the human being. He does admit that liberals usually link torture to physical violations. He comments on the shameful humiliations of prisoners at Abu Ghraib, observing that while there was probably not an infliction of the excruciating pain that constitutes torture in the meaning of the UN Convention, these violations of the prisoner's bodies, their distorted postures, the perverted sexual games, the forced dehydration, the exposure of genitals, the presence of feces and urine, and so forth, did amount to a degree of torture.²⁵ But if this is so, then the wrong of torture would not consist entirely in the pain suffered or in disrespectful humiliation, but in an evident *wrong done to the human body*, a wrong wonderfully conveyed in the words of a delegate to the 1949 European Convention on Human Rights: "I say that to take the straight beautiful bodies of men and women and to maim and mutilate by torture is a crime against high heaven and the holy spirit."²⁶ The contorted state of the "beautiful body" in torture offers repugnant and sufficient evidence of torture's inhumanity. Whatever else humanity means, it means *not* being that crooked, ugly, and maimed thing in the torture chamber.

III With this acknowledgment of the importance of the body, we have another perspective for understanding the basis for crimes against humanity. Following Mcleod's lead we have touched upon several reasons why world governments might regard certain acts as being *against humanity*: their exceptional cruelty; the risks they pose to the world order; the deprivations of human making qualities like dignity; and their humiliating distortion of human relationships. Underlying these various ways of defining inhumanity is the fundamental ontology of the human body by virtue of which the human being is a

being in the world. Whatever else a crime against humanity might be it is first of all an act against the “beautiful body,” an outrage against the flesh manifest to anyone from any cultural perspective. It is important, however, to understand what ‘the body’ means in this context.

Louis Seidman, like Luban, believes that the wrong of torture does not solely derive from its amplification of pain but from its concentration on the body: “The challenge, then, is to give an account of torture that captures its physicality and embodiment.”²⁷ The account of embodiment that Seidman offers is rooted in a Cartesian assumption that normally we identify ourselves with our free and conscious ego that holds sway over our body. Torture abnormally reduces this self to our body, subjugating the mind to the automatic reflexes of the organism. Citing torture victim Jean Amery’s observation that the “the tortured person is only a body, and nothing else,” Seidman concludes that the torture is “about what happens to the mind when we realize that we are only body.”²⁸ The victim of torture is compelled to confront an unbearable truth, a materialist truth conveyed by modern science, that she is no longer the autonomously free person she thought she was but is merely a substance deterministically regulated by the laws of nature: “What is wrong with torture is that it reminds us of something that we do not want to know: that our belief in materialism and our belief in the existence of human will cannot be reconciled. Moreover, torture forces us to resolve the conflict by admitting, against our ‘will’ ...that we have no will.”²⁹

I take Seidman to be making two distinct claims about torture. First, it operatively reduces the human self to bodily functions and secondly, it epistemologically subverts our belief that we are more than bodies. The core wrong of torture lies in dispelling the

conviction that somehow a person by virtue of having a mind and a will had more worth than a robot, animal or other natural object. Apart from the questionable Cartesian assumptions in his argument, I believe that Seidman misrepresents what the self undergoes in torture. The body in torture is a different body than the body we usually are. This is a truism, but it is important to stress the fact because we need to acknowledge in a stronger way than Seidman that torture assaults the bodily being of the human being not simply the will or consciousness. In normal experience my body is the bearer of my being; it *is* 'me,' not a foreign substance that I have to control or over rule. Torture causes unimaginable pain and the perceptible breakdown of the bodily self, expressed in grimaces, screams, grotesque postures, and mutilated flesh, turning that body into an alien being or non-self. The victim is tortured, not by being reduced to his carnality and "nothing more," but by having that carnality itself become horrifyingly monstrous. In order to appreciate properly the comment Seidman quotes from Jean Amery, that in torture one becomes a body and nothing more, one should connect it to Amery's other remarks about how the torture victim loses his trust in the world and can no longer feel at home there. This recognizes that I live in the world as an embodied being, as an upright "beautiful" body and it is that carnal reality which has been distorted and stunted in the torture chamber. I don't lose my mind just because I become my body; I lose my body and so my mind, as well as my worldly existence. This loss is an offense against the being of the human and for that reason I would characterize torture as an ontological crime or a crime against the physical ontology of humanity. As expressed by Cavarero "Whoever shares in the human condition also shares in disgust for an ontological crime."³⁰

Elaine Scarry has given us one of the best phenomenological accounts of torture ever written in her book, *The Body in Pain*. The body she describes in powerful, chilling prose is not the Cartesian anatomical object that Seidman believes it to be. The tortured body is a wounded animal body whose voice is a pathetic scream.³¹ Torture does not collapse the self *into* the body; it causes the body itself to shrivel while annihilating its being as a living, minded, and world inhabiting organism. Scarry writes that every pain is a kind of death and torture a kind of mock execution. The tortured body is no longer “my body” no more than is a cadaver. In torture as in death, the body dies and so the very being of the human way of being in the world dies as well, leaving behind an anti-body, an anti-human thing. That is why torture is a crime *against the human*.³² Scarry evokes the strange paintings of Francis Bacon to draw an analogy with the tortured body. Bacon gives us an image in which a being is “mercilessly exposed to us, not merely because he is undressed, unshielded by any material or clothing, but because his melting body is turned inside out, revealing the most inward and secret parts of him.”³³ The torturer in an interrogation quite literally wants the victim “to spill his guts,” to turn himself inside out, and reveal his body as so much excess and waste. If in the expressive, living body we see in each other’s face a common humanity, then in the stripped, soiled and beaten flesh we witness our common inhumanity.³⁴

Conclusion There is a remarkable scene at the conclusion of Ari Folman’s film, *Waltz with Bashir* (2008), which had been until that point an *animated film* about Israel’s 1982 invasion of Lebanon. The scene takes the viewer into the refugee camp of Shatila in Beirut where Christian Falangists notoriously had massacred hundreds of Palestinian

women, children, and old men. Abruptly the film shifts from animation to documentary footage and we are presented with the shocking sight of children's' crumpled, lifeless, and fly infested corpses. We do not need to ask ourselves at this moment what human making feature has been stripped from the corpses or whether the security interests of mankind have been threatened by the massacre in order to recognize that a crime against humanity has taken place. In this documented carnage evil shows that it has sufficient ontological weight to announce its own inhumanity and to merit universal condemnation. That is really the chief point of these reflections. It is true that I have not provided a sufficient account as to why an ontological crime against the body falls under international law, or how it might differ from ordinary murders, rapes, or assaults, since any act of brutality may destroy the bodily being of the human without thereby becoming a crime against humanity in the eyes of the law. One would need to do a lot more work than I can do here to pair the idea of an ontological crime with more formal legal criteria such as the Rome Statute's proviso that the crimes be "widespread and systematic." Still it is remarkable that with all their immense differences in perspective on world events, the nations of the earth can agree on the sickening nature of certain crimes and resolve to prosecute them in international tribunals if they cannot be dealt with otherwise. The horror of crimes against humanity lies in their repulsive treatment of the human body. On that we can all agree, despite our philosophical and religious differences on the essence of humanness or the meaning of concepts like respect and human rights. Ironically, the best chance we have of a world that acknowledges and safeguards a common humanity is to first agree on what is inhumanly against humanity.

Notes

¹ Christopher Macleod, “Towards a Philosophical Account of Crimes Against Humanity,” *The European Journal of International Law* XXI (2) (2010), p. 283 .

² Macleod., p. 283.

³ Adriana Cavarero, *Horrorism: Naming Contemporary Violence*, translated by William McCuaig (New York: Columbia University Press, 2009).

⁴ Patrick Hayden, *Political Evil in a Global Age: Hannah Arendt and International Theory* (London and New York: Routledge, 2009), p. 9.

⁵ Section 7 of the Rome Statute may be found at the U.N. web site:

<http://untreaty.un.org/cod/icc/statute/romefra.htm>.

⁶ A similar description had appeared in the International Criminal Tribunal for Rwanda in the Akayesu trial (Sept. 2 1998, para 578:) “The act must be inhuman in nature and character, causing great suffering, or serious injury to body or to mental or physical health.” See *Genocide, War Crimes, and Crimes Against Humanity: Topical Digests of the Case Law of the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia*.(New York: Human Rights Watch, 2004), p. 33.

⁷ Without doubt, however, the magnitude of an atrocity such as the Holocaust may motivate the international community to bring the perpetrators to justice under the title of crimes against humanity. That was the case at Nuremberg. The 1943 Legal Committee of the United War Crimes Commission cited the “magnitude or savagery” of the Nazi atrocities which “shocked the conscience of mankind.” See Richard May and Marieke Wierda, “Is there a Hierarchy of Crimes in International Law?” in Lal Chand Vohrah and others, editors. *Man’s Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese*. (The Hague, London and New York: Kluwer Law International, 2003), p. 525.

⁸Cited by May and Wierda, p. 517.

⁹ Macleod, p. 298. Admitting that a “*grand-etre*” might seem to be a strange metaphysical entity, he states, “humanity, thought of as one entity, can be said to have a conscience or interests on its own terms.” p. 293.

¹⁰ Larry May, *Crimes Against Humanity: A Normative Account* (Cambridge: Cambridge University Press, 2005) p. 82.

¹¹ May, p. 68.

¹² He does say “If *jus cogens* norms are indeed readily apparent to most people, then there are seemingly strong normative reasons for supporting a natural law basis, especially a religiously

motivated natural law basis, of *jus cogens* norms to justify prosecutions of international crimes.” p. 36. He obviously wants to provide an alternative route to such norms.

¹³ This, of course, was the case with World War II, and this was the context in which the Nuremberg Charter formulated the charge of crime against humanity for the first time. It also the reason that the charter for International Criminal Tribunal for the Former Yugoslavia insisted on keeping a link between crime and war time context, even though the charter for the International Criminal Tribunal for Rwanda eliminated that connection. See the discussion in Margaret McAuliffe deGuzman, “The Road from Rome: The Developing Law of Crimes against Humanity,” *Human Rights Quarterly*. Vol 22 (2), May 2000, pp. 335-403.

¹⁴ May, p. 83.

¹⁵ Historically “widespread and systematic attacks” do target specific groups; however it should be pointed out, a CAH is not limited to such targeting. In particular, torture in particular need not be part of a genocidal program. May admits this: “I am willing to admit that it is not necessary that harms be group-based for them to rise to the level of international crimes.” Of torture he confesses “Torture is the only practice currently seen as condemned by *jus cogens* norms that does not readily have a group orientation.” p.87.

¹⁶ May, p. 83.

¹⁷ Cited by May and Wierda, p. 527.

¹⁸ See Navanethem Pillay, “The Rule of International Jurisprudence in Redressing Crimes of Sexual Violence,” in Vohrah and others, p. 690.

¹⁹ In June 1948 the supreme court for the British zone in Hamburg stated that a crime against humanity requires that “a person suffer harm directly to himself or to his property or assets in a way that manifests a total disregard for his ideal value as a human being, with consequences for all of mankind.” See May and Wierda, p. 525. Notice that the court, like May, combines a consequentialist judgment with a deontological principle of “ideal value as a human being.”

²⁰ See Helen Duffy, who holds that the prohibition of torture has attained *jus cogens* status. *The ‘War on Terror’ and the Framework of International Law*. (Cambridge: Cambridge University Press, 2005). p. 312, note #188.

²¹ David Luban, “Liberalism, Torture, and the Ticking Bomb” in Karen Greenberg, editor, *The Torture Debate in America* (Cambridge: Cambridge University Press, 2006), p. 38.

²² David Luban, “Human Dignity, Humiliation, and Torture,” *Kennedy Institute of Ethics Journal*. Vol. 19 (3) 2009, p. 216. See also Christopher McCrudden who too takes ‘dignity’ to mean “a shorthand way of summing up how a complex, multi-faceted set of relationships

involving Man is, or should be, governed: relationships between man and man, man and God, man and animals, man and the natural environment, man and the universe.” “Human Dignity and Judicial Interpretation of Human Rights,” *The European Journal Of International Law*, Vol 19 (4) 2008. p. 675.

²³ Luban (2009), 216

²⁴ Luban (2006), 43

²⁵ See Luban(2006) , pp 42-43 and Luban (2009), pp 221-223.

²⁶ Cited by Edward Peters, in *Torture*. (Oxford: Basil Blackwell, 1985), p. 147.

²⁷ Louis Michael Seidman,. “Torture’s Truth”, *The University of Chicago Law Review*, Vol. 72 (3) Summer, 2005, p. 903.

²⁸ Seidman, See pp 908 (note 82) and 909.

²⁹ Seidman, p. 905.

³⁰ Cavarero, p.16

³¹ Scarry, Elaine. *The Body in Pain: The Making and Unmaking of the World*. (Oxford and New York: Oxford University Press, 1985) p. 30.

³² Scarry, p. 48.

³³ Scarry, p. 53.

³⁴ Scarry says, “For the torturer, it is not enough that the prisoner experience pain. Its reality, although already incontestable to the sufferer, must be made equally incontestable to those outside the sufferer.” p. 52. We can connect what Scarry writes about the “body in pain” with what the critic Adriana Cavarero calls “horrorism,” a form of violence that she says exceeds death itself. Her example of horrorism is that of a female suicide bomber who not only kills others but explodes her own maternal body. She writes, “In an act that strikes at the human qua human the butchers embrace horror with conviction as though the repugnance horror arouses were more productive than the strategic use of terror.” She adds that the act of horrorism is an “offense to corporeal unity.” Cavarero, p. 9. Applied to torture horrorism suggests torture is inhuman because of what it does to the corporeal being of the human being; it turns it inside out into an entity of disgust and revulsion The appropriate response to this vision is horror. Not all crimes or all deaths arouse horror, for a corpse or a wounded body may elicit sadness, loss, anger, or even terror. When the body, however, appears to have been wasted as so much excess matter then the sight of that superfluous being is one of horror and revulsion.
