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Customary International Law and Torture: The Case of India

A. Mark Weisburd*

I. INTRODUCTION

This paper examines the contradiction between statements from well-respected sources regarding customary international law as it bears on torture and the actual behavior of states as to torture. It does so by focusing on one state, India. The purpose of the paper is both to make clear the conflict between state behavior and rules that are supposed to be law and to reflect on some of the implications of and conundrums raised by this situation. This paper will discuss the claim that prohibitions against torture and violations of human rights are a part of customary international law, suggesting that they are not, nor should they be.

II. THE VIEWS OF THE AUTHORITIES

In his inaugural report as the first Special Rapporteur on Torture for the UN Commission on Human Rights ("Commission") Pieter Kooijmans wrote:

Torture is now absolutely and without any reservation prohibited under international law whether in time of peace or of war. . . . [T]he prohibition of torture can be considered to belong to the rules of jus cogens. If ever a phenomenon was outlawed unreservedly and unequivocally it is torture. . . . If there was some disagreement [in the General Assembly] in respect to [the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment], it had to do with the methods of control and implementation. There was no disagreement whatsoever on the fact that torture is absolutely forbidden.¹

Clearly, Kooijmans saw torture as a violation of international law. He did not, however, purport to ground this conclusion on the language of any particular international agreement. Rather, he referred without specificity to various international instruments, to a draft document from the International Law

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1. Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Report by Special Rapporteur, Mr. P. Kooijmans, appointed pursuant to Commission on Human Rights resolution 1985/33, UN Doc E/CN4/1986/15 1 (1986) (footnotes omitted).

Commission, to a declaration (necessarily non-binding) by the General Assembly, and to a treaty to which even to this day—fourteen years after Kooijmans wrote—slightly more than one third of the members of the United Nations are not parties.² Conspicuous by its absence was any reference to the actual practice of states regarding torture.³

Nor is Kooijmans' approach idiosyncratic. The American Law Institute's *Restatement (Third) of the Foreign Relations Law of the United States* ("Restatement") also labels torture as a violation of customary international law,⁴ citing in support the language of certain treaties and international instruments, provisions of the domestic laws of certain states, and international and domestic court decisions.⁵

Since Kooijmans's legal conclusions were not grounded on any particular treaty language, presumably his statement reflected his view of non-treaty international law, that is, customary international law. Certainly that is true of the *Restatement*. Customary international law, however, is defined as the general practice of states accepted as law.⁶ It is therefore striking that both of these arguments for the illegality of torture depend entirely on references to what might be called rhetorical evidence of law rather than on a demonstration of the actual behavior of states with regard to torture. In fact, it would not be accurate to assert that it is the general practice of states to refrain from torture. On the contrary, Amnesty International has received reports indicating that, as of the year 2000, torture is "widespread or persistent" in approximately seventy states.⁷

Well-respected authorities thus insist that the rule regarding torture established by international law is different from that which one would infer from state practice. This paper explores some of the difficulties raised by that approach through a focus on India.

III. INDIA AND TORTURE: THE SITUATION ON THE GROUND

The most recent report of the current Special Rapporteur on Torture for the Commission on Human Rights includes the following paragraph relating to India:

By letter dated 19 November 1999, the Special Rapporteur advised the Government that he had received information alleging routine torture in detention facilities throughout the country. The police and jailers allegedly torture or ill-treat

2. UN Millennium Summit, *Multilateral Treaty Framework: An Invitation to Universal Participation* 33–34, UN Doc DPI/2130 (2000).

3. Kooijmans, UN Doc E/CN4/1986/15 at 5–9 (cited in note 1).

4. *Restatement (Third) Foreign Relations* § 702(d) (1986).

5. *Id.* at Rptr n 5.

6. See Statute of the International Court of Justice Art 38(1)(b), 59 Stat 1055, Treaty Ser No 993 (1945).

7. Amnesty International, *Campaign Launch Report: Take a Step to Stamp Out Torture* (Amnesty 2000), available online at <<http://www.stoptorture.org:8080/report/index.htm>> (visited Mar 25, 2001).

new prisoners to obtain money and personal articles. Police are reported to torture detainees frequently during custodial detention.⁸

Similarly, the US Department of State in February, 2000, reported regarding India as follows:

The law prohibits torture, and confessions extracted by force are generally inadmissible in court; however, torture is common throughout the country, and authorities often use torture during interrogations. In other instances, they torture detainees to extort money and sometimes as summary punishment. . . .

The UN Special Rapporteur on Torture noted in 1997 that methods of torture included beating, rape, crushing the leg muscles with a wooden roller, burning with heated objects, and electric shocks. Because many alleged torture victims die in custody, and others are afraid to speak out, there are few firsthand accounts, although marks of torture often have been found on the bodies of deceased detainees. The UN Special Rapporteurs on Torture and on Extrajudicial Killings renewed their requests to visit during the year, but the Government did not permit them to do so.

The prevalence of torture by police in detention facilities throughout the country is borne out by the number of cases of deaths in police custody. . . . Although police officers are subject to prosecution for such offenses under Section 302 of the Penal Code, the Government often fails to hold them accountable.⁹

Indian sources tell the same story, and make clear that oppressive police practices, common under British rule,¹⁰ have continued since India attained its independence. For example, a study of police methods in the state of Kerala concluded that the police in that state resorted to torture in a high percentage of cases. The Chairman of India's National Human Rights Commission has said, "Daily the Commission receives petitions alleging the use of torture, and even of deaths in custody as a result of the acts of those who are sworn to uphold the laws and the Constitution and to ensure the security of its citizens."¹¹

To be sure, there is some support for the proposition that Indian law forbids torture. Although the Constitution of India does not explicitly prohibit torture, Article 14 of that instrument provides, "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."¹² Further, Article 21 provides, "No person shall be deprived of his life or personal liberty except according to procedure established by law."¹³ With reference to

8. *Civil and Political Rights Including Questions of Torture and Detention: Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to Commission on Human Rights resolution 1999/32, UN Doc E/CN4/2000/9 98 (1999).*

9. US Department of State, *1999 Country Reports on Human Rights Practices 2335 (2000).*

10. James Vadakumchery, *Human Rights and Police in India 89-91 (APH 1996).*

11. J. Venkatesan, *India: National Human Rights Commission Urges Government to Ratify UN Torture Convention, Hindu (Jun 26, 2000).*

12. India Const, Art 14.

13. *Id* at Art 21.

these provisions, the Supreme Court of India observed in *Mullin v Union Territory of Delhi*:¹⁴

Now obviously, any form of torture or cruel, inhuman or degrading treatment would be offensive to human dignity and constitute an inroad into this right to live and it would, on this view, be prohibited by Article 21 unless it is in accordance with procedure prescribed by law, but no law which authorises and no procedure which leads to such torture or cruel, inhuman or degrading treatment can ever stand the test of reasonableness and non-arbitrariness: it would plainly be unconstitutional and void as being violative of Articles 14 and 21.¹⁵

While this language may be dictum—the issue in *Mullin* was not torture, but severe limitations on a prisoner's access to her lawyer and her family¹⁶—it is certainly unequivocal. Similarly, the court appears to have labeled torture a violation of the Indian Constitution in another case, again in dictum.¹⁷ In addition to these interpretations of India's constitution—which are strongly suggestive at a minimum—India is also a party to the International Covenant on Civil and Political Rights ("ICCPR"),¹⁸ Article 7 of which forbids torture.¹⁹

Even at the level of the law on the books, however, the situation is not entirely unambiguous. Section 197 of India's Code of Criminal Procedure permits the governments of India's states (which control the police forces) to forbid prosecution of public servants employed by the states. Further, state statutes imposing procedural roadblocks on the prosecution of police officers have been interpreted somewhat ambiguously by India's courts. Two cases in particular are illustrative.

*Patel v State of Gujarat*²⁰ involved a statute from an Indian state which barred actions based on criminal complaints against police officers regarding "any act done under colour or in excess of any such duty or authority," unless the complaint was brought within one year of the alleged wrong. The complainant alleged that the officers had arrested him on a false charge as part of a conspiracy. The Supreme Court of India read the state statute as applying to any act which could be committed only by virtue of the actor's official position and held that its limitations period barred prosecution.²¹

14. AIR 1981 SC 746.

15. Id at 753.

16. Id at 748–49.

17. *Sobraj v Superintendent, Central Jail*, 65 AIR 1978 SC 1514, 1516, 1517.

18. UN Millennium Summit, *Multilateral Treaty Framework* at 17 (cited in note 2).

19. International Covenant on Civil and Political Rights Art 7, 999 UNTS 171, 6 ILM 368, 370 (1967).

20. *Patel v State of Gujarat*, Crim App 485, 2000 SOL Case No 363, available online at <<http://www.supremecourtonline.com/cases/297.html>> (visited Mar 25, 2001).

21. Id at paras 15–17, 21.

However, the same court reached the opposite result in *Unnikrishnan v Alikutty*,²² a case involving a comparable statute from a different Indian state. There an individual attempted to initiate criminal proceedings against police officers who had allegedly tortured him. The decision turned on a state statute purporting to forbid courts to hear cases based on complaints against police officers “on account of any act done in pursuance of any duty imposed or authority conferred on [them],” unless the complaint was filed within six months of the date of the alleged wrong.²³ The court read the statute as not applying to acts amounting to an abuse of authority, because such acts could not reasonably be said to be “in pursuance of any duty imposed or authority conferred.”²⁴

In *Unnikrishnan*, the court distinguished *Patel* solely by reference to the difference in the wording of the two statutes; it did not rely on the fact that the former involved allegations of torture. The court made no reference to constitutional protections in either case, suggesting that such procedural statutes could have the effect of severely limiting the scope of the prohibitions against torture discussed above.

Other protections provided by law also seem weak. Section 25 of the Indian Evidence Act (1872) forbids using confessions made to police officers as evidence of crime, apparently to remove the incentive for police to engage in torture.²⁵ However, § 27 of the same act provides:

[W]hen any fact is deposed to as discovered in consequence of information received from a person accused of any crime, in the custody of a police-officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.²⁷

In other words, the disincentive to torture would be eliminated if the police could hope, for example, to recover the proceeds of a theft by mistreating a suspect.²³

22. Crim App 747, 2000 SOL Case No 506, available online at <<http://www.supremecourtsonline.com/cases/1115.html>> (visited Mar 25, 2001).

23. *Id.* at para 6.

24. *Id.* at para 22 (“if a police officer assaults a prisoner inside a lock-up he cannot claim such act to be connected with the discharge of his authority or exercise of his duty unless he establishes that he did such acts in his defence or in defence of others or any property. . . . Similarly . . . a policeman keeping a person in the lock-up for more than 24 hours without authority is not merely abusing his duty but his act would be quite outside the contours of his duty or authority”).

25. *Id.* at paras 23–24 (“counsel for the appellants . . . made a last attempt to salvage the appellant . . . on the strength of a recent decision rendered by this Court in *K.K. Patel*. . . . That decision was rendered in consideration of . . . the Bombay Police Act. The phraseology used [in that Act] is far wider than [in this Kerala Act]. . . . If [the Kerala Act] were given the interpretation sought . . . by . . . appellants, it may give rise to calamitous consequences”).

26. Codified in Vol 4, Part II of the Indian Code of 1955. See Vadakumchery, *Human Rights and Police in India* at 5 (cited in note 10) (“The British rulers were aware of this loathsome practice and they tolerated it—nay, allowed and encouraged it silently.”).

27. *Id.* at §4.

28. Vadakumchery, *Human Rights and Police in India* at 5 (cited in note 10) (noting that, while Sections 25 and 26 of the Indian Evidence Act, 1872 essentially treat police as untrustworthy by deeming

As ambiguous as India's law on the books may be regarding torture, the law in action regrettably seems quite tolerant of official torture. The fact is that police officers in India are rarely prosecuted for maltreatment of suspects.²⁹ Furthermore, Indian police are apparently not trained in non-forcible interrogation techniques.³⁰ Perhaps most significantly, some public figures do not seem to take the issue seriously. For example, in the face of public condemnation of the killing by police torture of the sole eyewitness to a high-profile murder, the then vice-president of India's current ruling party declared that the matter was "being blown out of proportion."³¹

Nor has India been forthcoming in accepting any non-treaty international legal obligation to prevent torture. At the time the ICCPR was drafted, India was not prepared to acknowledge that international law included protections for human rights. Its stance is apparent in the debates in the Third Committee of the United Nations General Assembly on a draft of the ICCPR produced by the Commission on Human Rights. Under that draft, all parties to the ICCPR would have been obliged, upon a complaint from any other party, to submit to intervention by the Human Rights Committee if the complaining state exercised its right to refer the matter.³² The draft later was amended to make submission to this procedure voluntary—that is, states could become parties to the ICCPR without accepting the Human Rights Committee's authority to intervene in claims brought against them by other parties.³³ Speaking in 1966 in support of this amendment, India's representative explained that his state's position was motivated in part "by the feeling that time had not yet come to set up an international legal system for the enforcement of human rights throughout the world."³⁴ Similarly, India's refusal to adhere to the Optional Protocol to the ICCPR³⁵—which permits an individual to bring to the Human Rights Committee complaints that a state has violated the individual's rights under the Covenant—was justified by the Joint Secretary of Home Ministry in 1980 on the ground that the Indian government believed that "complaints by individuals against any executive

confessions made to police or in their presence inadmissible as evidence in the courts, Section 27 essentially provides police with an incentive to torture suspects by rendering such confessions admissible if they lead to a recovery).

29. Human Rights Watch et al, *Police Abuse and Killings of Street Children of Street Children in India* 83 (1996); Bisheshwar Mishra, *Check on Third Degree in Law Rarely Used: Panel*, *The Times* (India), 2000 WL 26001255 (Sept 1, 2000).
30. Vinay Tewari, *Why Custody Deaths May Continue*, *The Times* (India), 2000 WL 17830559 (Apr 5, 2000).
31. *Mockery of Justice: Police Commit Murders and Criminals Go Free*, *Statesman* (Jun 20, 2000).
32. UN GAOR, 21st Sess, UN Doc A/6546 para 398 (1966).
33. *Id* at para 436.
34. UN GAOR, 3d Comm, 21st Sess, UN Doc A/C3/SR1416, para 2 (1966).
35. Additional Protocol to the ICCPR, 6 ILM 383 (1967).

action should be dealt with only by national courts and not by an International Organisation.³⁵

Thus, the overall picture for India with regard to torture is not good. Although its internal law has been interpreted as forbidding torture—and in fact contains provisions aimed at preventing it—these provisions are not enforced, and their effect is lessened by the operation of other enactments. In fact, police torture is common. Most disturbingly, those instances of torture which come to light seem to evoke little reaction from the top levels of the Indian government. That government, furthermore, has questioned whether international bodies should play any role in overseeing its practice regarding human rights.

IV. INDIA AND TORTURE: INTERNATIONAL REACTION

In evaluating the international legal standing of a practice, it is of course not enough to determine the behavior of one state. The reaction of other states to that behavior is at least as important. However, in the case of torture in India, other states appear to take little public interest in the matter, other than with respect to some incidents in connection with separatist violence. From 1990 on, no mention is made in any of the volumes of *The Australian Year Book of International Law*, *The British Year Book of International Law*, *The Canadian Yearbook of International Law*, or *The South African Yearbook of International Law* regarding India's record of torture, even though each of these publications provides considerable detail regarding the actions taken by governments of each of these states as those actions bear on questions of international law.

The attitude of the United States toward torture in India is not easily characterized. In March 1995, Assistant Secretary of State for Democracy, Human Rights, and Labor John Shattuck testified before Congress and, after noting the seriousness of India's human rights abuses, stated:

This Administration has energetically engaged the Government of India on human rights, both privately and publicly, at every level. I plan to travel to India on a human rights mission in May. There is a growing awareness within India that more needs to be done to protect the rights guaranteed by India's constitution. We have stressed a cooperative, constructive approach, believing that the solutions lie in full acknowledgment by the government of the problems, and in institution-building. Indigenous NGOs will be essential and we seek to foster their work.³⁷

In addition to this indication of US action regarding India's human rights record, the United States has at least expressed general concern regarding the human rights

36. *Id.* at Art 2.

37. John A. Shattuck, *Human Rights and Democracy in Asia*, statement before the Subcommittees on Asia and the Pacific and International Operations and Human Rights of the House International Relations Committee (Mar 16, 1995), reprinted in 6 *US Dept State Dispatch* 273, 278 (1995).

situation in Kashmir³⁸ (though its position on this matter has been somewhat ambiguous), and has criticized India forthrightly and in detail in the Department of State's annual reports on human rights practices.

On the other hand, the United States in recent years has not seriously criticized India's apparent indifference to the routine use of torture by its law enforcement officers. Public statements by US officials stress the democratic character of the Indian political system, and simply do not address the human rights violations committed by the police in India.³⁹

V. INDIA'S PRACTICE AND THE INTERNATIONAL REACTION: IMPLICATIONS FOR INTERNATIONAL LAW

The foregoing account makes clear 1) that Indian police officers regularly torture persons in their custody; 2) that this behavior, though contrary to Indian law and condemned by Indian courts, seems to be tolerated by leading government officials (or in any case the suppression of this behavior is not treated as a matter of high priority); 3) that at least in the past India has denied the applicability of customary international law to the behavior of its officials; and 4) that other states, though calling attention to India's behavior, have apparently made no public protest regarding this endemic torture, but rather have focused on the admittedly democratic character of the Indian government. What is the impact of these observations on any putative rule of international law forbidding official torture?

Preliminarily, it is clear that there can be any doubt as to the answer to this question only as regards customary international law. To the extent that India's treaty obligations preclude official torture, its record in this area demonstrates that it has violated those obligations. Most obviously, India is in almost continuous violation of Article 7 of the ICCPR. Indeed, its behavior in this regard has drawn the attention of the expert body that reviews the reports required by that Covenant.⁴⁰

But what impact does India's behavior have on customary international law? How does it affect arguments that torture is contrary to the international legal obligations of states not parties to any treaty forbidding torture?

One answer to this question would start with the assumption that customary international law is created by states' behavior. More specifically, this approach would inquire whether agents of any significant number of states regularly used torture in

38. Shirin R. Tahir-Kheli, *India, Pakistan, and the United States: Breaking with the Past* 67, 58–59, 140–41 (Council on Foreign Relations 1997).

39. Thomas R. Pickering, *US Policy in South Asia: The Road Ahead*, Remarks at the Foreign Policy Institute, South Asia Program, Paul H. Nitze School of Advanced International Studies, The Johns Hopkins University (Apr 27, 2000).

40. *Concluding Observations of the Human Rights Committee: India*, UN Doc CCPR/C/79/Add81 para 23 (Aug 4, 1997).

such a way that their political superiors could be presumed to be aware of the practice. If a given state could be said at least to acquiesce in the use of torture by its servants, it would also be relevant to know how other states reacted to that situation. On this view, behavior in which large numbers of states engaged and which evoked no significant reaction from other states could not be said to violate customary law. Necessarily therefore, any putative prohibition on the behavior could not be of *jus cogens* status. The sorts of evidence of customary international law on which the Special Rapporteur and the American Law Institute relied would not be irrelevant—they could usefully illuminate ambiguous cases—but such evidence would not control in the face of proof of actual practice at variance with the thrust of non-binding resolutions, International Law Commission drafts, and so on.

If this approach were followed, India's practice would seem to make it very difficult to argue that official torture violates customary international law—the government of a country comprising approximately one-sixth of the population of the world tolerates widespread and widely-reported torture by its police. This situation, moreover, has generated little international criticism of the state in question, and no international sanctions. Further, Indian use of torture is not new, but has taken place throughout the period during which many claimed that a prohibition against torture was becoming part of customary international law.

This conclusion will be challenged by those who note that there is some disagreement among scholars as to the relative significance of different types of action for the development of customary international law, at least as far as the customary law of human rights is concerned. It was pointed out above, for example, that Special Rapporteur Kooijmans based his assertion that torture was illegal on the fact that it was forbidden by international instruments, condemned in certain non-binding actions taken by certain UN organs, and prohibited by a treaty to which a substantial number of states were not parties. Further, he did not address—in the context of the legality of torture—the fact that large numbers of states regularly engaged in the practice. In short, whether a substantial number of states regularly engaged in torture was irrelevant to the Special Rapporteur's determination of whether torture was illegal, and indeed had no bearing even on the issue of whether the prohibition on torture was of *jus cogens* status.

The American Law Institute's *Restatement* takes the same approach to the customary law of human rights:

International human rights law governs relations between a state and its own inhabitants. Other states are only occasionally involved in monitoring such law through ordinary diplomatic practice. Therefore, the practice of states that is accepted as building customary international law of human rights includes some forms of conduct different from those that build customary international law generally.⁴¹

41. *Restatement* § 701, Rptr nn 1, 2 (cited in note 4).

According to this view of the matter, India's actual behavior with respect to torture would be essentially irrelevant in determining the state of the customary international law on torture.

One difficulty with this approach is that it does not explain why it would make sense to derive customary law in any field, including that of human rights, from anything other than the behavior of states toward one another. To begin, the fundamental assumption underlying the international law of human rights is that a state's treatment of its own nationals is a matter of international concern. If that assertion is true, each state presumably takes an active interest in the internal workings of other states. If, however, the fact is that states "only occasionally . . . monitor[]" one another's human rights practices,⁴² it would seem that the most logical inference is that internal human rights practice is *not*, in fact, a matter of international concern. To assert that methods of identifying international law on a subject must be altered because of states' lack of interest in the subject raises the question of whether there is, in fact, any international law on the subject.

More fundamentally, the Kooijmans/ALI approach would seem to contradict the rationale for attributing any law-making force to international practice. Presumably, it makes sense to view widespread and repeated practice as creating obligations because such practice creates expectations in those who observe or are affected by the practice. Further, when behavior becomes commonplace, it is reasonable not only to assume that it will be repeated, but also to rely on that assumption. This reliance could take the form of expecting those who are currently engaged in the practice to continue in that fashion, as well as assuming that those engaging in the practice would consider similar behavior by others to be legitimate.

This view is reinforced if one applies the term "practice" not only to the first action in a sequence, but to reactions to that action as well. For example, if State A implements a particular policy regarding its right to regulate scientific research on its continental shelf, that action can surely be seen as constituting a "practice" regarding the extent of state authority over the continental shelf. If State B denies that international law permits State A to behave as it has and, for example, demands reparation for State A's interference with a research team from State B, that too is "practice." As such it would contribute to the expectations that States C, D, and so on will form regarding the regulation at issue. If the controversy ends with State A receding from its position, the net effect of the sequence of actions will reinforce expectations that the type of activity in which A tried to engage is a violation of international law. Conversely, if State B's initial reaction to A's action had been to emulate it rather than to seek reparation for it, the sequence of events would have

42. *Id.* at Rptr n 2.

contributed to expectations that these two states would both continue their behavior and accept similar behavior from third states.

If basing law on practice can be justified in terms of the expectation practice creates, then whether a given act counts as "practice" should depend on whether that act will generate expectations regarding future acts. Thus, whether Special Rapporteur Kooijmans and the ALI were correct in treating as evidence of customary international law the General Assembly's adoption of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Declaration") should depend on whether that action would have created expectations that states who support the Declaration would themselves refrain from torture and demand similar behavior from other states. As Kooijmans noted, the Declaration was adopted by consensus; thus the procedure involved in its adoption would have involved giving the members of the General Assembly an opportunity to object to its adoption and, when no objections were raised, treating the Declaration as adopted. Since the General Assembly in 1975 would have included among the non-objectors a number of states in which official torture was regularly practiced—for example, India—Kooijmans's position would appear to amount to the assertion that such a state's failure to object to the Declaration would have led other states to expect it to abandon a practice well-entrenched within its political system.

It is not apparent, however, why such expectations would have been reasonable, especially given the non-binding character of the Declaration. Similarly, Kooijmans refers only to the adoption of the Convention; he did not consider the implications of the extent to which states have in fact adhered to that Convention. Even fourteen years after Kooijmans's report, however, only 119 states have become parties to that treaty. In other words, approximately thirty-seven percent of UN members have elected not to accept the legal obligations created by the Convention. This relatively high rate of non-acceptance seems to undercut the argument that the mere adoption of that treaty by the General Assembly would lead states to expect one another to refrain from torture.⁴³

Thus it is difficult to defend the position that the sorts of evidence on which Kooijmans relied should give rise to expectations that the widespread practice of torture would disappear. Anyone developing such expectations would have been much mistaken, since official torture in fact remains common.

It might be argued, however, that it is a mistake to tie the creation of non-treaty international law exclusively to the processes whereby expectations regarding future behavior are generated. The difficulty with this position, however, is that it requires

43. *Id.*

either finding some other way of determining the attitudes of states to a particular rule of international law, or rejecting the relevance of state attitudes completely.

It is difficult to imagine how states' attitudes could be determined other than by looking at the behavior that would give rise to expectations. Indeed, the concept of a state's attitude in this connection seems ambiguous. It posits a situation in which a state "really" thinks X, but in fact does Y. Passing over the admittedly difficult issue of attributing attitudes to collectivities such as states, one must ask in what sense an entity could be said to believe something if its actions are inconsistent with its beliefs. To be sure, there is no contradiction between the assertion that entity X abhors torture even while engaging in it; human beings often find themselves doing things they would rather not do. But there is a contradiction between asserting that torture is never permissible under any circumstance and in fact engaging in torture, since the practice demonstrates that the actor believes that some circumstances justify torture. The assertion, in other words, is simply a mischaracterization of the actor's actual belief.

There is an additional disadvantage to shifting attention from states' practices to states' "beliefs." Such a shift would greatly increase the difficulty of determining what does and does not count as evidence of a belief. It would also raise the question of who is to make the determination. In this latter connection, a number of scholars have noted the increasing role of academics in shaping customary international law.⁴⁴ The more vague the source of international law, the more powerful the self-designated experts who claim to cut through the confusion to identify rules which, curiously, often bear an uncanny resemblance to the experts' own preferred substantive solutions. Of course it is true that in some states significant authority is accorded to legal experts who hold no official position. In other states, particularly the United States, this not the case, and there seems to be no strong reason to insist that those states that do not accord scholars such law-making authority in domestic law are somehow compelled to defer to those scholars in matters of international law. Yet the more broadly (and less clearly) the potential sources of customary law are defined, the more power is in fact shifted to these unofficial creators of law.

Another alternative to relying on expectation-creating state behavior is to divorce international law entirely from the states. The obvious question, however, is what the source of international law would be if not something to do with states. I have recently

44. See, for example, J. Patrick Kelly, *The Twilight of Customary International Law*, 40 Va J Intl L 449, 468-69 (2000) ("There is, throughout the Restatement and the writings of many scholars and advocates, a tendency to prematurely conclude that one's policy preferences, particularly when shared by other Western societies, have become customary norms"); Paul B. Stephan, *International Governance and American Democracy*, 1 Chi J Intl L 237, 241-42 (2000) ("Within the academic community, the belief that a body of human rights law exists independently of any particular publicly constituted lawmaking body is an article of faith.").

addressed elsewhere the difficulty of relying on such non-empirical sources of law.⁴⁵ It is enough at this point simply to note that the idea of deriving law from some source other than the determinations of state actors is highly controversial and thus lacks the degree of acceptance necessary to ground an internationally-binding set of legal rules. Given the degree of disagreement among cultures as to the basic elements of morality, it seems highly unlikely that the content of any such rules would be considered legitimate throughout the world.

There is yet another objection to divorcing international law from state behavior. To regard as "law" a rule which states neither obey nor seek to compel other states to obey is in essence to see law as something other than a practice actually manifested in the day-to-day workings of society. It would apply the term "law" to a system not descriptive of the norms followed among states. But surely a legal system is the embodiment of both 1) the set of social norms that are enforced at the most formal level available to the society that is supposedly governed by those norms and 2) the enforcement mechanisms used to apply those norms. To label as "law" a body of rules not corresponding to a system in fact applied by the society whose law is in question is oxymoronic.

Aside from this definitional problem, labeling as "international law" rules which states do not treat as legally binding could have the practical effect of weakening the relevance of international law. If there should be a body of international legal rules that are in fact irrelevant to the actual behavior of states, one would risk suggesting that all international law is similarly irrelevant, including those rules firmly established by state practice or by operating treaty regimes.

In short, there is good reason to doubt that international law can be unaffected by an important state's refusal both to conform its behavior to a putative rule of law or to accept that international law could properly bind it regarding the matter. Equally, it is doubtful that a rule, the violation of which by one state in concrete cases is simply ignored by other states, could fairly be described as a "rule" of customary law. India's tolerance of official torture and other states' indifference to the practice thus combine to severely weaken any argument that torture is a violation of customary international law.

VI. REFLECTIONS ON THE PROPER RESPONSE TO THE WEAKNESS OF INTERNATIONAL LAW

One convinced by the foregoing could respond by calling for a change in attitude toward states guilty of widespread human rights violations. If the difficulty with the legal status of human rights norms is that states commonly breach those norms

45. See A. Mark Weisburd, *International Law and the Problem of Evil*, 34 *Vand J Transnatl L* (forthcoming 2001).

without encountering any effort by other states to coerce obedience to the norms, then let states begin responding vigorously to human rights violations by other states. If India ignores its police officers' propensity to torture, then punish India. Let other states criticize it publicly and if the criticism produces no change, let some form of sanctions be imposed. Such a response, the argument would go, would vindicate the putative legal prohibition on state torture. Indeed, anything less would amount to a concession that there is no *legal* obligation (at least outside the treaty context) to observe the prohibition.

This view brings into sharp focus an aspect of the international law of human rights that usually draws little comment: how much weight *ought* the international community put on human rights violations? Would it in fact be a good idea to treat violations of human rights norms as significant violations of customary international law?

The India case provides an opportunity for considering this question. If other states chose to treat India's violations of human rights norms as violations of international law, those states would necessarily have to be prepared to take actions which would likely damage their relations with India. It is most unlikely that any government of India would fail to react negatively to a state which, for example, imposed economic sanctions because of the widespread use of torture by the Indian police. To call for states to take such steps thus amounts to a determination that preventing such human rights violations in India ought to be an objective so important to other states that the chance of achieving that objective would justify those states in putting their relations with India at risk.

It is by no means obvious that other states ought to make India's human rights record the focus of their dealings with India. Such an approach ignores the many ways in which India's actions can affect states far beyond South Asia. This is most obviously true with respect to the hostility between India and Pakistan, both now nuclear weapons states. There is a very strong international interest in seeking to reduce the likelihood of nuclear war between those two states. If a state were to impose significant sanctions on India because of India's human rights violations, that state would risk engendering a degree of resentment and suspicion strong enough to weaken its ability to work with the Indian government to moderate threats to peace. As distasteful as the use of torture by the Indian police is, it is not clear that efforts to respond to that practice are as important as, for example, the avoidance of a nuclear exchange.

A second objection to interfering in India's human rights violations considers the practicalities involved. According to the reports quoted above, the practice of torture by the Indian police is widespread—ingrained in the police culture of India. Uprooting that practice would be a very difficult undertaking, apparently requiring a complete restructuring of the Indian law enforcement system. Assuming that no one would advocate subjugating India in order to carry out such a restructuring, the only institution in a position to undertake such a transformation is the government of

India itself. Non-forcible means at the disposal of foreign states simply are not adequate to encourage the Indian government to take such a step. Economic sanctions have not proven to be very successful in inducing states to alter their domestic policies. There is only one example of international pressure playing a role in inducing a significant change in a state's domestic policy regarding a human rights issue: that of South Africa's abandoning apartheid. In that case, furthermore, sanctions were essentially world-wide and imposed in the context of significant resistance to apartheid within South Africa.⁴⁶ There is little reason to believe that a similar effort could be launched against India, and there is currently no opposition within India to police torture comparable to the opposition within South Africa to apartheid.

A related problem with such an international response is that it would be difficult to focus any sanctions on those persons most responsible—police officers. Unlike cases of human rights abuse in some other states, it seems difficult to argue that the prevalence of police torture in India represents a conscious policy choice by government decision-makers. Rather, this situation seems in the first instance to be a product of custom among police officers. Officials charged with supervising the police may well tolerate the practice, but it would be difficult to prove that the officials had inspired it. In such a situation, the sanction tools available to foreign states could not be precisely targeted; they could, in other words, fail to affect the persons whose actions were objectionable, while harming persons having no connection to the activity at which the sanctions were aimed.⁴⁷

In addition to the foregoing points, it is necessary to consider the consequences and implications of seeking to coerce a state with a democratically elected government to follow a course of action not clearly sought by the country's electorate. It must be stressed that India's voters have not been indifferent to human rights violations in the past. In 1975, then-Prime Minister Indira Gandhi proclaimed emergency rule, under the rubric of which she greatly curtailed civil liberties and increased her own powers. Programs to force Indian men to undergo vasectomies, slum clearance programs that impacted particularly heavily on Muslims, and economic aspects of emergency rule produced widespread disaffection. When Mrs. Gandhi sought to legitimize her rule by calling parliamentary elections late in 1977, she was instead repudiated by the electorate, with the opposition winning two-thirds of the seats in the lower house of the Indian parliament. In other words, opposition fueled in significant part by strong

46. See A. Mark Weisburd, *Implications of International Relations Theory for the International Law of Human Rights*, 38 Colum J Transnat'l L 45, 80-82 (1999) ("Although President de Klerk denied that his government acted in response to those sanctions, he also observed, after the prerequisites had in fact been satisfied, that 'one may expect further international developments to follow if anything like morality exists in international politics.'").

47. Karin von Hippel, *Democracy by Force: US Military Intervention in the Post-Cold War World 172-73* (Cambridge 2000).

reactions against human rights violations produced an electoral victory for parties opposing those violations.⁴⁸

The persistence of police torture in India, then, cannot be explained by reference to the impossibility of using India's electoral system to attack such torture. Rather, it would appear that this issue is simply not as salient for voters as were the types of human rights violations that led to Mrs. Gandhi's electoral defeat. This is not to say, of course, that the Indian government has somehow received an affirmative mandate to persist in the use of torture, but rather that voters, in the final analysis, do not seem to consider the issue very important. To insist that international law nonetheless obliges India to eliminate this practice, then, amounts to substituting the judgment of the international community for that of the Indian electorate. In other words, it points up the remarkably limited importance placed on democracy by the international law of human rights.

An insistence on the primacy of international human rights norms in the face of relative popular indifference seems undesirable for at least two reasons. In the first place, it seems impossible to classify efforts to enforce such norms against India as anything less than a form of imperialism. In this context it is not strictly accurate to apply the label "cultural imperialism" to the situation.⁴⁹ To phrase the problem in

48. Paul R. Brass, *The Politics of India Since Independence*, IV-1 *The New Cambridge History of India* 41–43 (Cambridge 2d ed 1994) ("The results confounded any reasonable expectations that Mrs. Gandhi . . . could have had.").

49. The discussion in the text, it should be stressed, is not meant to minimize the problems normally addressed under the cultural imperialism rubric. Briefly, it is argued in some quarters that the values embodied in international human rights norms are those of Western cultures and have no claim to universal validity. Insistence on such universal validity, it is further argued, amounts to subordinating the values of other cultures to those of the West, and could thus be seen as imperialistic. The response to this argument by supporters of the international law of human rights is to marshal philosophical support for claims of the universal validity of human rights. Such attempts have relied to a great extent on the argument that respect for human rights is compelled by the concept of human dignity, perhaps reinforced by some reference to natural law. Consider Jack Donnelly, *Universal Human Rights in Theory and Practice* 17 (Cornell 1989) ("Human rights are 'needed' not for life but for a life of dignity . . . human rights arise from 'the inherent dignity of the human person.'"); Oscar Schachter, *Human Dignity as a Normative Concept*, 77 *Am J Intl L* 848, 848–49 (1983) ("Political leaders, jurists and philosophers have increasingly alluded to the dignity of the human person as a basic ideal so generally recognized as to require no independent support."); Louis Henkin, *Human Rights: Religious or Enlightened?*, in Carrie Gustafson and Peter Juviler, eds, *Religion and Human Rights: Competing Claims?* 31, 35 (ME Sharpe 1999) ("For our time, one can—one has to—justify human rights by some contemporary version of natural law, *whether religious or secular*, by appeal to a common moral intuition of *human dignity*."). While this is not the place to address these arguments in detail, it is at least fair to observe that this approach is question-begging. It seeks to demonstrate that one cannot simultaneously respect human dignity and violate a person's rights, then relies on this demonstration as establishing a duty to refrain from rights violations. This conclusion follows, however, only if there is some prior duty to respect a person's dignity—and whether any such duty exists is the question to be answered. Further, this approach simply ignores those religious traditions which reject the possibility of human beings determining proper standards for behavior without guidance from God, as is true in Islam, for example. See *Universal Islamic*

cultural terms is to delve into the issues of how the term "culture" is to be defined, who is to determine the values of a particular culture, and what weight is to be given to the possibility of change over time in a culture. In contrast to the fuzziness of such a discussion, the conflict here is stark, and its existence undeniable. International human rights law insists that eradicating torture is very important, while the voters of India can only be assumed to place much less weight on the importance of this goal.

If those supporting the eradication of torture should seek to coerce India into changing its policy, therefore, their actions can only be seen as forcing an ordering of priorities different from those that India has freely and democratically chosen. Nineteenth century imperialists frequently sought to justify their subordination of other peoples by reference to the superiority of the values the imperialists would put in place. Imperialists at that time were frequently no less sincere than are human rights advocates today—but sincerity, presumably, is no justification for demanding that a people replace their own values with those of outsiders. Given India's democratic character, it seems accurate to analogize to imperialism any efforts to force India into placing more weight on the goal of eliminating torture than its voters think appropriate.⁵⁰

Aside from its imperialistic character, a demand backed by coercion that the Indian government place greater weight than it has on the importance of eradicating torture seems paradoxically inconsistent with the basic rationales for the international law of human rights. Such a demand amounts to a claim that, in the event of a clash between the priorities purportedly established by the international law of human

Declaration of Human Rights, preamble, para d, reprinted in C.G. Weeramantry, *Islamic Jurisprudence: An International Perspective* 176 (St. Martin's 1988) ("that rationality by itself without the light of revelation from God can neither be a sure guide in the affairs of mankind nor provide spiritual nourishment to the human soul.").

50. It might be argued that insisting on the validity of international human rights norms in the face of the indifference of the Indian electorate is comparable to a court holding unconstitutional a statute enacted with a strong popular backing. In both cases, a counter-majoritarian process subordinates popular preferences to values considered fundamental. But the analogy does not hold. Constitutional rights enforced in any particular state can reasonably be expected to conform to the expectations of the people of that state. When legislation violates constitutional rights, the situation can be seen as a values conflict within a given culture, with the values advanced by the legislation conflicting with those protected by the constitution. When a court enforces the constitution, it in essence is acknowledging the existence of a value conflict and resolving the conflict in favor of the value considered more important by the community in question. When the conflict is between a practice within a given state and a purported international human rights norm, however, it is by no means clear that both values are considered valid in the state in question. For example, one would be hard-put to demonstrate that preventing the police from engaging in torture is in fact considered crucially important in India, however much weight this value might be given elsewhere. Further, the content of a constitution is ultimately under the control of the people governed by it; constitutions can be amended. In contrast, no one state can alter the content of international law, however bad the fit between the values of the people of that state and the values embodied in an international rule.

rights and those valued by an electorate, a public official's first duty is to adhere to international standards—values preferred by other states rather than those preferred by the voters who have elected the official. This amounts to a claim that governments are responsible in the final analysis to the international community rather than to the people they govern. Such a claim seems impossible to reconcile with the respect for the autonomy of the individual that is at the heart of the idea of human dignity—the principle most frequently cited as the foundation of the concept of universal human rights.⁵¹ Rather, it amounts to treating human beings as unable to determine what is good for them and in need of protection from the consequences of the mistaken choices they make. Respect for human dignity requires respect for human beings' capacity for choice, including choices made by those elected to carry out public business. Ultimately, assertions of the need to subordinate democracy to the priorities of international human rights law are oxymoronic. Coercing a democratic state such as India to alter its law enforcement structure for reasons that do not seem to strike a chord among the Indian electorate amounts to just such an assertion.

VII. CONCLUSION

This paper has sought to make three points. First, that police torture is common in India, despite judicial and academic disapproval and despite both widespread public awareness of the fact and the apparent willingness of the Indian electorate to reject politicians who violate crucial rights. Second, that this situation contributes to doubts about the legal status, outside the treaty context, of international norms labeled as forbidding police torture, both because of the apparent low priority given to this problem by India and because other states seem unwilling to call India to account for its attitude. Finally, that it would be undesirable for other states to seek to enforce the norm against police torture by acting against India in light of the self-interest of the rest of the world, the practical difficulty of acting effectively, and the fundamental contradiction in coercing a democratic state in the name of human dignity.

This discussion will have done some good if it sparks more general reflections on the policy issues raised by the very idea of treating respect for human rights as required by international law. In the international legal system, a legal rule which is not enforced ceases to be a legal rule. In the human rights field, however, enforcing rules is not only difficult and costly to the enforcers, but costly to those expected to benefit from enforcement. This situation points up a fact that often gets lost in the debate about human rights: it is one thing to say that people would always be better off if a government did X or refrained from doing Y. It is quite another thing to assert that people would always be better off if a government not inclined to do X or inclined

51. See for example Donnelly, *Universal Human Rights* (cited in note 47); Schachter, *Human Dignity* (cited in note 47); Henkin, *Human Rights* (cited in note 47).

to do Y were coerced into changing its inclinations. To legalize human rights norms amounts to saying that the goal of human rights protection justifies employing coercive means against democratic states whose behavior does not comport with such norms. It is hardly necessary to note the pitfalls in arguments providing blanket justification, in the name of noble ends, of means all too often shown to be capable of gross misuse.

