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HUMANITY, PRISONERS OF WAR, AND TORTURE¹

Torture and other forms of cruel and degrading treatment have been condemned by all the relevant documents in international law for over a hundred years. Torture has been condemned so strongly that it is normally said that it is unacceptable even when seemingly required by military necessity.² I will here mention only the most significant of the documents. Common Article 3 of the 1949 Geneva Conventions states that torture “shall remain prohibited at any time and in any place whatsoever.”³ The 1966 International Covenant on Civil and Political Rights, in Article 7, states that “no one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.”⁴ The 1984 Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment creates an absolute ban on torture.⁵ And the 1998 Rome Statute of the International Criminal Court, in its own condemnation of torture as a crime against humanity as well as a war crime, refers to torture as one of the Grave Breaches of the Geneva Conventions.⁶ Adam Roberts, summarizing these and other documents, says: “the laws of war . . . have helped to bring about a degree of acceptance and observance of certain valuable basic ideas: for example . . . that there can be no justification for torture.”⁷

Despite the fact that torture of prisoners of war has been condemned by every major document in international law, it has seemed to some, especially those in the administration of George W. Bush, that terrorism creates a special case for how prisoners of war (POW) are to be treated.⁸ The prisoner may belong to a “cell” of those who have committed themselves to the use of tactics that risk horrible consequences for many innocent people. The prisoner may have information about future attacks on civilian populations that could, if learned, be instrumental in the prevention of these attacks. In addition, in a “war” against terrorists, it seems clear that the terrorist side is not willing to play by the rules of war, and hence that the terrorist prisoners should not be afforded the privilege of humane treatment that they deny to others. Nonetheless, I will argue that POWs should be treated humanely in that they are not subject to torture when captured and imprisoned. Our humanity demands as much.

I will ask what it is about humanity that might restrict or prohibit the use of torture and other forms of physical coercion in the treatment of POWs. In Section 1, I draw on insights from Hugo Grotius to argue that it is the principle of humanity not justice that should be definitive of the rules of war, especially concerning torture of POWs. In Section 2, I consider how the circumstance of being captured and placed into confinement changes the rules of the game. In Section 3, I argue that there is a fiduciary or stewardship relationship between a captor and a POW that underlies the obligations of humanity of captors and dictates that POWs not be tortured.

1. GROTIUS ON SLAVES AND PRISONERS OF WAR

In the seventeenth century, Grotius begins the task of considering what can be done to prisoners in wartime by setting out what he thinks is true according to principles of natural justice and the current law of nations. He begins by pointing out that at his time it was thought that POWs were simply to be treated as slaves. Yet, “in the primitive condition of nature, no human beings are slaves.”⁹ No one can kill or limit the liberty of another person, as a matter of natural justice, “unless the latter has committed a capital crime.”¹⁰ Yet, many states have given to masters the absolute right over their slaves. According to the conventionally based law of nations, slaves may be justifiably killed or tortured; indeed “there is nothing which a master is not permitted to do to his slave.”¹¹ Grotius puts the point starkly by saying: “even brutality on the part of masters towards persons of servile status is unpunishable,” and then points out that “limits have been set to this power by the Roman law” nonetheless.¹²

Grotius also claims that most states treat POWs similarly to slaves. Indeed, “all without exception who have been captured in a formal public war become slaves from the time they are brought within the lines.”¹³ As a result, according to the law of nations, there is no limit, even concerning brutality, to what may be inflicted on prisoners of war with impunity. Grotius signals that he finds this to be disturbing, but at this point in the *De Jure Belli Ac Pacis* (Book III, Chapter VII) he does not disagree with the doctrine that POWs have no customary rights at all, just as is true of slaves. Although, he does say that giving captors the right to punish POWs may reduce the likelihood that they feel the need to kill their prisoners outright, there is no attempt to limit this right of captors by considerations of what the captives deserve. From the perspective of the law of nations in the seventeenth century, there are apparently no restrictions on what can be done to POWs.

Yet, Grotius argued that there should be severe restrictions placed on captors concerning POWs. In Chapter XI of Book III, Grotius begins by saying that there is “a limit to vengeance and to punishment.” Grotius argues: “Even where justice does not demand the remission of punishment, this often conforms with goodness, with moderation, with high-mindedness.”¹⁴ It is shortly after this remark that Grotius makes his famous allusion to “humanitarian instincts” that should govern how we treat our enemies.¹⁵ Nowhere is this more important, in my view, than in the treatment of those who are confined by one party, especially where the party in question has every reason to want to exact vengeance or retribution on those who have been killing members of one’s armed forces. Indeed, Grotius says: “To spare prisoners is commanded by the nature of goodness and justice.” Even when burdened by too many POWs, it is better to “release all rather than to kill them.”¹⁶

According to Grotius, while prisoners should not be killed, they may in some cases be punished. But the punishment must be based on the specific crimes they have committed, that is there should be no “retaliation except against those who have done wrong.” On grounds of justice, those who have done wrong deserve to be punished only according to the extent of their wrongful behavior.¹⁷ This is the basis of the contemporary view that prisoners should only be punished proportionately to what each has specifically done, for to do otherwise is for the captors to enforce an unjustified “sharing of punishing” upon the prisoners.¹⁸ In particular, contrary to what was believed at his time, Grotius argued that hostages should never be put to death, no matter what their leaders do, unless the hostages “have themselves done wrong.”¹⁹ Considerations of justice, plus the important idea of humanity, combine together to place severe restrictions on what can justifiably be done to POWs, even if the prisoners are the enemy and have taken the lives of the captors’ troops.

Grotius thus presents a strong case for thinking that POWs, like slaves, should be treated humanely, and should only be punished, and to that extent, based on specific wrongs that they have done, not based on what others around them have done, or what their leaders have done. What Grotius objected to were reprisals taken against POWs for what their leaders, or perhaps fellow soldiers, have done. Grotius also objected even to treating confined prisoners as harshly as they may have deserved. For the principle of humanity required that to be honorable more restraint was needed based on seeing people as fellow humans rather than as enemies deserving of punishment. In the case of POWs, who have been confined, a Grotian position is even stronger in insisting that extreme restraint be exercised.

Grotius insists that on the battlefield there is no other moral option but to exact punishment only proportionate to wrongs that have been done. War is truly a state of nature, where no one has the authority to create judicial proceedings to determine whether a punishable offense has occurred and to what extent it should be punished. But after a soldier has been captured, or has surrendered, that soldier is now under an authority that can provide a proper judicial basis for determining whether, and how, that soldier should be punished. On the battlefield there is no authority to determine who is guilty and who is not, and quick decisions need to be made so that one's life is not jeopardized. In such situations, it is sometimes justifiable to punish someone who is not convicted of a crime. But once one is off the battlefield, and there is a civil authority that can determine guilt and innocence, it is no longer justifiable to punish those who have not been convicted of a crime.²⁰

The laws of nations seem to allow for abuse of POWs as a kind of recognition that the conquering army could have simply killed these soldiers rather than sparing their lives. The conquering army gets to treat POWs as slaves for no other reason than as one of "so many advantages" from its victory over the captured soldiers.²¹ Grotius is so focused on providing reasons for why prisoners of war should not be killed that he does not say much about other forms of treatment of these prisoners. But in a series of telling remarks in Chapter XIV of Book III, Grotius argues that severe punishment is not acceptable according to natural justice and "humane considerations."²² Indeed, POWs should be treated with moderation, rather than with severity, as the title of this chapter ("Moderation in Regard to Prisoners of War") indicates, because in the end they should be treated "as second selves, since they are human beings no less than we are."²³

Humanitarian considerations are most at play when we are discussing confined soldiers who have unjustly refused to disclose information that is of military importance, or soldiers who were fighting an unjust war. In both cases, justice-based considerations do not rule out abuse of these prisoners. If information is needed to save lives, and it is unjustly withheld, extracting that information by the use of torture does not seem to be clearly unjust. And justice-based considerations, having to do with what the prisoners deserve for fighting without just cause, actually tell against restraint. Yet the laws of war should counteract the strong possibility of abuse, perpetrated by those who have weapons against those who do not. This is especially true of POWs since there is also a strong tendency of armed captors to wish to act in unrestrained ways against

those who have information that could save their comrades' lives or against those who were moments before captured plotting the destruction or injury of the capturing soldiers.

So we have several important lessons from an examination of Grotius' seventeenth century discussion of our topic. First, POWs are not to be treated in an unrestrained way. Most importantly, these prisoners are not to be subjected to reprisals for what their leaders or comrades have done. Second, POWs are not to be summarily dealt with, as might perhaps be justified on the battlefield, since these prisoners are now under the authority of the conquering army and subject to the same judicial adjudications of their cases as would be true of anyone else in society. Once off the battlefield, all parties are back in society and no longer in the state of nature. Third, captives are in a special moral situation since they are utterly dependent on their captors, and vulnerable in ways that soldiers on the battlefield are not. Fourth, considerations of humanity are especially apt in POW cases since the capturing army is virtually unrestrained otherwise. We must be scrupulous in insisting that these prisoners be treated humanely.

While justice-based considerations tell against some abuse of POWs, such considerations will not tell against all such abuse. A Grotian argument can be advanced that nonetheless humanitarian considerations, especially having to do with compassion and mercy, should rule out nearly all forms of abuse and torture of POWs. In section 2 I will advance that argument in more detail by considering the special status that POWs occupy and the moral relevance of that status. From this "humanitarian" perspective, POWs should be treated with moderation and not with the severity that might otherwise be deserved.

2. CONFINEMENT AND TORTURE

On the model of a two-person battle, or a duel (a model that has problems to be sure), certain kinds of advantage bestowed on one party but not the other is thought to be unfair. If each played by exactly the same rules, then war as a contest of strength would be an acceptable way to settle disputes. According to Walzer and contemporary defenders of Just War Theory, if the contest is fair then soldiers have a kind of moral license to kill and injure each other.²⁴ Once the battle has ceased, different considerations of fairness apply. In this section, I want to spend some more time analyzing the significance of the changed circumstances of the soldier who is captured or who surrenders as far as the fairness of the contest is concerned.

Assume there is a convention in war as follows: if a soldier wishes to surrender, and to be spared from being killed in exchange for being removed from the battle, that soldier should throw down her weapons and raise a “white flag.” Why would it be worse to kill her after she raised the white flag than before she did so? In wartime situations, the surrendering or captured soldier is no longer able to defend herself the way she was before since she is now unarmed and has foresworn the use of weapons. The soldier now needs certain protections and restraints that were not needed before. And after placing herself under the command of a previously belligerent force, other forms of restraint, than merely not being killed, are also called for.

Confinement, whether forced or voluntarily sought, makes a difference in how we are to treat a person. Imagine a boxing match in which one of the participants has had his hands shackled behind his back. The fight will not be considered to be a fair one, and any blows landed by the unshackled boxer will not be considered to be justified the way they would have been if his opponent was also unshackled. But what if one boxer voluntarily shackles himself and steps into the ring? That the act was voluntary would certainly make a difference, but it would still be considered inhumane for the unshackled boxer to land blows on the defenseless shackled boxer. Of course, when a soldier surrenders it is not merely as if he has shackled himself, since the soldier to whom he surrenders retains his or her arms and can take the surrendering person’s life in a second. The soldier who surrenders is more like the boxer who resigns from the match but is still in the ring – he has taken himself out of the contest, and now we are back to a time when the rules are not that of a contest between adversaries who are roughly equal.

In life, as opposed to contests, people do not feel entitled to kill each other; indeed, in life intentionally killing someone is considered one of the worst things that one human can do to another human. So, after a soldier is captured or surrenders, there is a very serious question about whether the soldier is still a soldier, and hence still subject to the odd rules of contests, or not a soldier, perhaps some kind of a civilian. One way to answer this question is to realize that soldiers are taught to try to escape and return to battle. So, if the soldier has been captured, there are good reasons to think that he is still a soldier since he will try to return to the battle. If the soldier voluntarily surrenders, things are much more complicated, since it is unclear why he would have surrendered if he still intended to return to the battle. And yet, there certainly are situations where the soldier feels that surrender is the only hope, at the moment, of saving his life, but where the soldier also hopes, later, to be able to return

to the battle under more favorable terms than when he surrendered. In both situations, as long as the soldier is indeed confined he is not in a contest with anyone.

In US criminal law, it is thought to be an aggravating condition if an assailant first binds his victim, or finds him incapacitated, and then kills him. The idea is supposed to be that not giving the victim a chance to try to save his or her life makes the act of violence much worse than it would have been otherwise. When a person is confined, and hence has little opportunity to defend herself, then injuries done to that person seem especially unjustified. It seems clear that one person takes advantage of another person's vulnerability.²⁵ Indeed, even if a person deserved to be injured, there is something especially nasty about preventing the person from properly defending himself or herself or even from striking back. It appears that one is taking advantage of another. At very least we would say that it is worse (an aggravation) to injure someone who one is controlling than to injure someone who is not under one's control.

Think of one of the most disturbing pictures from the Abu Ghraib Prison to have surfaced in the Iraq War in 2004. A prisoner huddles outside his cell. He is stripped naked and has no weapon with which to defend himself. His hands are tied. Two growling dogs are on long leashes snapping at him. Other prison guards, all fully clothed and with weapons, seem to be surrounding the prisoner, and generally encouraging the dogs to attack the prisoner. The prisoner cowers, bent almost into a fetal position, in expectation of the attack to come. This is so clearly an instance of inhumane treatment that when this picture was published and then broadcast it caused outrage around the world.

Things look especially bad if the person in question has voluntarily placed himself or herself under the captor's care, and the captor is now abusing the prisoner. One way to understand this is to see things as if there has been a kind of contract where the surrendering soldier offers to stop fighting in exchange for a guarantee not to be assaulted, and by accepting the prisoner's surrender, the capturing army seems to accept the terms of the surrender. On this analysis, abusing the surrendering prisoner is a violation of an agreement. And the soldier who is forced to put down his arms and who then cooperates with his captors, also seems tacitly to accept a similar contract where his or her cooperation is exchanged for a promise of good treatment while in captivity. But this does not fully capture the seriousness of the matter, for even if there was no contract it would still seem to be wrong for the confined soldier to be abused.

There is also a kind of fiduciary or at least stewardship duty that is quite independent of any explicit or implicit contract. Where one party

has voluntarily assumed the role of protector and where that party is in control of another, an obligation of heightened care arises for the protector. If one surrenders, but also hopes to go back to the battle, or if one is forced into the dependent role by being captured, why should one be treated with restraint? At least in part, this is because one is forcibly placed under the care of another and that other then has a fiduciary or stewardship obligation to provide care for the one who is dependent. Of course, the capturing army can refuse to accept the surrender, or not attempt to capture enemy soldiers. But if it does accept them, it has placed them under its care and then members of the army must treat the prisoners with much more consideration than if the prisoners were still free to fight.

The fiduciary or stewardship obligation is clearest when the soldier has surrendered; but what of those who have been captured? While the captured soldier has not voluntarily placed himself in the care of the capturing soldier, this is in effect what has happened nonetheless. By capturing rather than merely killing an enemy soldier, the capturing soldier could be understood to be merely securing a slave, as Grotius said was the custom at his time in the early seventeenth century. But even slaves, or perhaps especially slaves, are owed humane treatment since their condition is so vulnerable. Indeed, it is the vulnerability rather than the voluntary act of the captured soldier that triggers the fiduciary or stewardship obligation. The fact of one's vulnerability, combined with the voluntary acceptance of the vulnerable one as dependent upon the capturing soldier that creates the obligations to act humanely.

The confinement of soldiers as prisoners, as I said above, changes the rules of the game so that the captor goes from being a competitor of the enemy soldier to having a kind of fiduciary or stewardship responsibility for the soldier. And with this change, the idea of proportionality of treatment takes on a much greater prominence. Before capture or surrender, the enemy soldier should not be killed or injured unless this was somehow necessary for one's own survival. But the traditional rules of war allowed for quite wide latitude in terms of what was acceptable behavior in this domain, since it was assumed that soldiers were all on the same level, at all times ready to kill or injure one another. After capture, even on this (mistaken) view, it could no longer be assumed that soldiers are all ready to kill or injure one another, for among other reasons the captured soldier no longer has the ready means to effect this killing or injuring.

So, while it seems to matter how it came to be that a soldier is currently in confinement, in all such circumstances, the rules of war have traditionally set severe limits on what can legitimately be done to a confined

soldier. It is mainly the fact of confinement that changes the moral universe, as we will see in Section 3. The question then is whether this change is enough to warrant the claim, often made throughout the centuries, that prisoners must only be punished proportionately to what they deserved based on what they had done while incarcerated. Why can't prisoners be tortured, either to obtain needed information, or to set an example to others still fighting, or as representatives of those who unjustly tried to kill members of the capturing army?

3. HUMANITARIAN OBLIGATIONS AND PRISONERS OF WAR

The confinement of soldiers as POWs, changes the rules of the game so that the captured soldier goes from being a competitor of the enemy soldier to being the enemy soldier's fiduciary or stewardship responsibility. The key consideration, I think, is that once a soldier is under the control of an enemy army, that soldier cannot be seen as a combatant and must be treated as a ward of the capturing army, with the rights that would be associated with someone who is now being forcibly subjugated by another. Once confined, the duty of the detaining soldiers is to treat the detainees as their fiduciary or stewardship responsibilities, regardless of what they might have done or learned while on the battlefield. In light of our earlier discussion, it is interesting that one of the earliest English cases to discuss fiduciary obligations referred to the trust relationship as a "principle of humanity."²⁶ The status of the POW, as confined, dependent, and vulnerable is crucial. Humanity requires restraint in such situations.

Fiduciary duties, as framed by the principle of humanity discussed earlier, normally attach in situations when a person has placed into another's hands either his or her own life or a valuable piece of property that the fiduciary is trusted to take care of. It is the trust that one person expresses to another that generates the fiduciary duty. It is a violation of this trust to abuse the life or object that one has been entrusted to care for. Fiduciary duties can also arise when one person has been placed in a position of dependence vis-à-vis another person. Think of the guardian of a minor child. In general, it seems to me, the fiduciary duty originates in the dependence or vulnerability of one person toward another, either voluntarily or involuntarily caused. If this is right, or if there is a relationship somewhat like that of the fiduciary relationship that fits this bill, then I would argue that the prisoner/warden or detainee/confiner relationship is of this sort.

Stewardship relationships are slightly less stringent than fiduciary relationships, and I have said that I am not sure which of these models is best for understanding the relationship between POWs and their captors. Some see fiduciary relationships as incredibly stringent, where the one party must place the interests of the second party over everything else even the interests of the first party. As I will explain, I do not have this in mind when I talk of fiduciary relationships. For that reason it might be better to think of these relationships as stewardship relationships. Stewardship relationships are not as well defined as fiduciary ones but seem to call for extra care on the part of the steward. While I think that a bit more than this is required of captors toward POWs, I am willing to admit that this might be the best way to capture that relationship, if the only alternative is a very severe understanding of fiduciary relationships.

A fiduciary relationship is a “functional relationship . . . not a contractual one since the expectations of the parties are not based on mutual promises, consideration or consent, for one party owns and has custody of the other party.”²⁷ These are the words of the authors of *American Jurisprudence*, (2nd edn), concerning the nature of the relationship between a parent and a subsidiary corporation. Interestingly, these authors then go on to say that this type of fiduciary relationship is “like the relationship between parent and child, warden and prisoner” which is also based on “the status of the parties.”²⁸ While there are many forms of fiduciary relationships, they all have in common the idea that “a person in a fiduciary relationship is under a duty to act for the benefit of the other as to matters within the scope of the relationship.”²⁹

In a sense, it does seem appropriate to think of prisoners of war and their captors as existing in a fiduciary relationship since the captor certainly controls, and even could be said to own, the POW. If there are duties of the captor to the POW they are certainly not based on contract. And while it may seem to be too much of a stretch to think of the POW as a child or ward, this is not so important since there are many other forms of fiduciary relationships than those that are based on complete dependency. When one person is rendered vulnerable and the other person is assigned the care and protection of the vulnerable one, a fiduciary relationship can also arise. In the most dependent relationship the duties are extremely strict, where the dominant party is to sacrifice his or her interests for the sake of the dependent party, as in the case of parents and children. But when the dependency is not quite that great, then it makes sense to think that the duty is also less strict, perhaps where the dominant party must give slightly more weight to the dependant party’s interests than to the dominant party’s interests. And the idea here turns on

status, as does the original Grotian idea of humane treatment that follows from the Seventeenth-century idea of the principle of humanity.

While soldiers may do various horrendous things on the battlefield, once they have been captured (or have surrendered) it does not matter what they have done on the battlefield (at least before trial), for as confined soldiers they are all roughly equal in terms of how they should be treated. At the very least, those who hold POWs must meet a minimum of morally acceptable conduct regardless of what the POWs have done on the battlefield. And the main reason for this is that confinement transforms these previously dangerous soldiers into people who are dependent on their captors for many of the essentials of life. Of course it might be necessary to place some prisoners into special cells because of a greater risk of escape, or of hurting the guards. But to torture POWs based on what they have done on the battlefield, or based on trying to obtain the information they attained on the battlefield, is not acceptable, as both the US Supreme Court and the Israeli Supreme Court recently held.³⁰

The idea that all POWs are to be treated with restraint is the background assumption of the Third Geneva Convention when it declares that:

Persons taking no active part in the hostilities . . . shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion, faith, sex, birth or wealth, or any other similar criteria.³¹

Thus, the Third Geneva Convention subscribed to the view that there is a minimum that all such POWs can demand, regardless of who they are or what they did on the battlefield. They are not to be subject to reprisals and, while they can be disciplined for what they do while in custody, punishment for what they did while on the battlefield must wait until there has been a proper judicial proceedings.

The moral argument for thinking that captors should not abuse POWs hinges on the relationship of dominance and dependency between them. Once a person is in such a relationship, then it is status rather than behavior that counts morally. The captor is to treat the POW humanely, and to follow the specific restraints that that entails, because of the vulnerable and dependent position of the prisoner of war. The POW is to be treated mercifully, regardless of what that person did on the battlefield, because of the current status of the prisoner of war. Remember Grotius' comment that if there are too many prisoners of war to be treated humanely in a camp, then the captors have a duty to let them all go free. The fiduciary or stewardship relationship means that the captor must look to the interest of the prisoner with slightly more importance than the captor's interests. The dependency status of the POW demands as much.

I wish to end this paper by addressing the question of whether it is justifiable to abuse prisoners in cases of extreme emergency. Here the classic case involves officials of George W. Bush's Administration who may have signed secret orders allowing for such prisoner abuse by the CIA in order to stop a future terrorist attack on the United States in 2004. If only these prisoners could be made to talk, they may be able to tell who was planning such an attack as well as where and when it was to occur. Isn't this indeed the classic case of extreme emergency, and hence a basis for thinking that the rules of war could be suspended so as to achieve this clearly worthwhile military objective, despite the moral and prudential equality of the prisoners?

I wish to argue that if there are such cases that are ever justified by the principles of proportionality and necessity, they are far fewer, and much harder to justify fully, than people like to think. I admit that there might be cases where torture appears to be justified. I am nonetheless inclined to support an absolute ban nonetheless. I accept absolutist or near-absolutist principles when they are very narrowly tailored, as is true of the prohibition on the torture of POWs. While abuse might be justified in extreme emergencies, given that these cases are themselves extremely rare, it will also thus be rare indeed that detaining soldiers might be justified in torturing or otherwise abusing POWs. And it is always bad policy to set rules on the basis of very rare exceptional cases. So, while it might indeed appear that there could be emergency cases of justified torture, since we do not want to be rule fetishists, nonetheless it could still make good sense to have rules, such as are enshrined in the Geneva Conventions common Article 3, that prohibit such practices

The rules of war constitute a system of norms for regulating the behavior of States and their agents, in the absence of a World State. And the system of norms is meant to apply to one of the most stressful of times, when war has broken out and both sides to a dispute not only call the other "enemy" but also can find no other way to resolve the dispute but to attempt to annihilate each other. In such times, to have any agreement about what are the rules of the game must be seen as a good thing. Humanitarian law is about just this attempt to reconfigure the way people think, so that it is possible that peace might be restored, and that in the mean time suffering is reduced. It is in this way that we can understand why the rules of war, especially concerning torture, are said to derive from the "laws of humanity and the dictates of public conscience."³²

NOTES

1. This paper is cut from Chap. 7 of my booklength manuscript, “War Crimes and Just Wars,” which is itself the second volume of a projected multivolume work on the normative foundations of international criminal law. The first volume, *Crimes Against Humanity: A Normative Account*, was published by Cambridge University Press in 2005.
2. *The Commentary on Geneva Convention (I)*, by Jean S. Pictet et al., Geneva: International Committee of the Red Cross, 1952, pp. 134–135, points out that the prohibition on torture was to be an unconditional requirement as one of the main ways to give specificity to the idea of humanity and humane treatment in the common core of the Geneva Conventions. This was understood to be an advance over earlier Geneva Conventions that did not clearly indicate that torture and other forms of inhumane treatment were to be prohibited even when seemingly required by military necessity.
3. Geneva Convention (III), Article 3.
4. The International Covenant on Civil and Political Rights, 999 UNTS 171 (December 9, 1966), Article 7.
5. Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment, 23 ILM 1027 (1984).
6. Rome Statute of the International Criminal Court, Article 8.
7. Adam Roberts, “Introduction,” *The Documents on the Laws of War*, 3rd edn (Oxford: Oxford University Press, 2001), p. 31.
8. See: “Memo for Alberto R. Gonzalez, Counsel to the President,” prepared by the Justice Department Office of Legal Counsel, August 1, 2002. This and many other documents are collected in Karen J. Greenberg and Joshua L. Dratel (ed.), *The Torture Papers: The Road to Abu Ghraib*, (New York: Cambridge University Press, 2005).
9. Hugo Grotius, *De Jure Belli ac Pacis* (On the Law of War and Peace) (1625), translated by Francis W. Kelsey (Oxford: Oxford University Press, 1925), p. 690.
10. Grotius, *De Jure Belli*, p. 256.
11. Grotius, *De Jure Belli*, p. 691.
12. Grotius, *De Jure Belli*, p. 691.
13. Grotius, *De Jure Belli*, p. 690.
14. Grotius, *De Jure Belli*, p. 731.
15. Grotius, *De Jure Belli*, p. 733.
16. Grotius, *De Jure Belli*, p. 739.
17. Grotius, *De Jure Belli*, p. 741.
18. Grotius, *De Jure Belli*, p. 741.
19. Grotius, *De Jure Belli*, p. 742.
20. Grotius, *De Jure Belli*, p. 59.
21. Grotius, *De Jure Belli*, p. 692.
22. Grotius, *De Jure Belli*, p. 764.
23. Grotius, *De Jure Belli*, p. 762.
24. See Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 1977, 2000).
25. See Robert Goodin, *Protecting the Vulnerable* (Cambridge: Cambridge University Press, 1984).
26. *Hylton v. Hylton* (1754) 28 Eng. Rep. 349, 2 Ves Sen 547, at 549.

27. 18A Am Jur 2d CORPORATIONS Sect. 773.
28. 18A Am Jur 2d CORPORATIONS Sect. 773.
29. Restatement of Trusts (3rd), Sect. 2.
30. Justice O'Connor, writing for the majority, stated: "Captivity is neither punishment nor an act of vengeance . . . A Prisoner of War is no convict; his imprisonment is a simple war measure . . . He is disarmed and from then on must be . . . treated humanely." *Hamdi v. Rumsfeld*, 2004, 72 USLW 4607.
31. Geneva Convention III, Article 3.
32. The so-called "Martins Clause" of the Preamble of Hague Convention (IV) Respecting the Laws and Customs of War on Land, 1907, declares that "Until a more complete code of the laws of war has been issued . . . the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized people, from the laws of humanity, and the dictates of the public conscience."