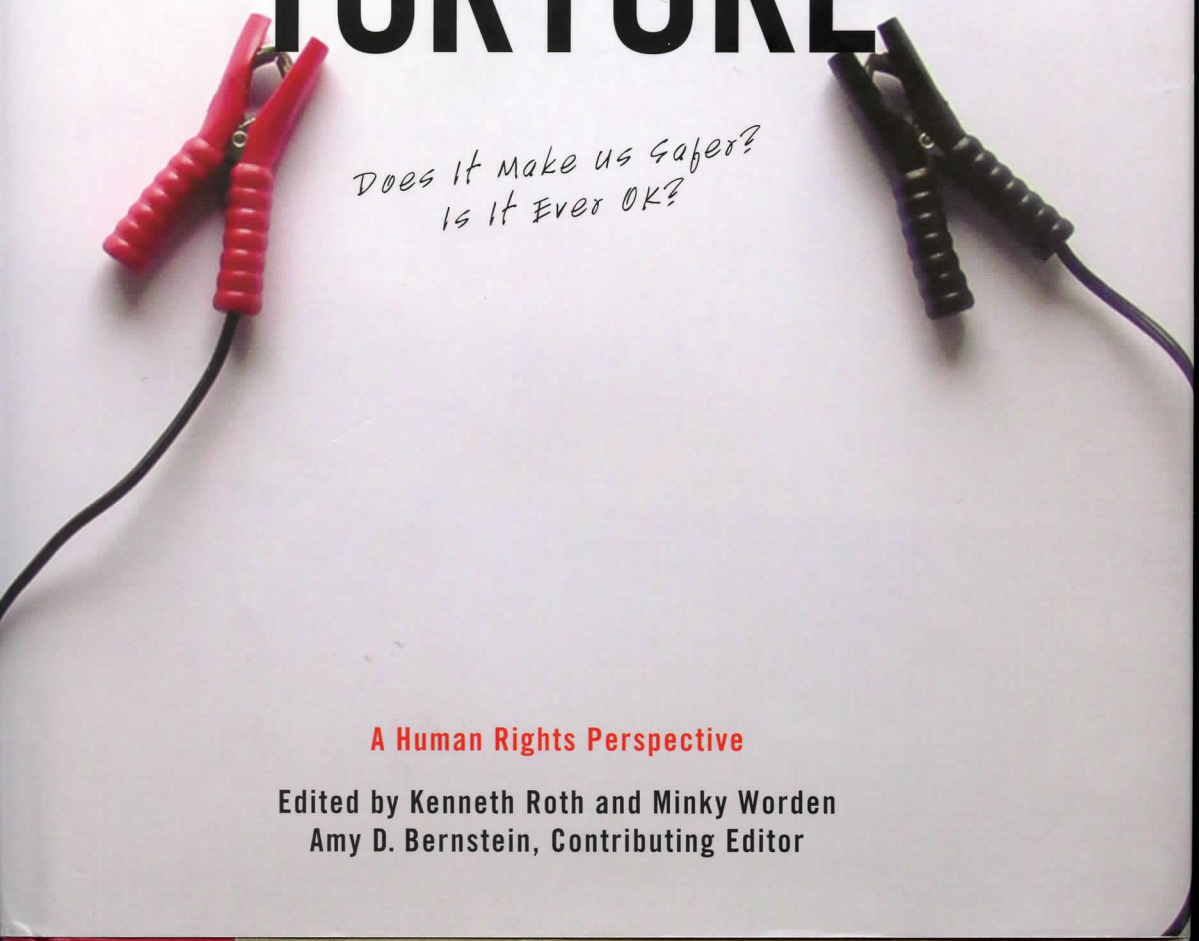
TORTURE



Does It Make Us Safer?
Is It Ever OK?

A Human Rights Perspective

Edited by Kenneth Roth and Minky Worden
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A HISTORY OF TORTURE

James Ross

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In 1764, Pietro Verri, a Milanese aristocrat and intellectual, completed a scathing treatise on the practice of torture. But to publish it would have humiliated his father, a respected senator who had long opposed Austrian rule over Milan by defending traditional practices, including the use of torture to obtain confessions. So Verri, along with his brother Alessandro, a prison administrator, sought help from the Society of Fists, a reformist group whose name derived not from the punch it carried but from the fisticuffs that invariably ended meetings. They found it in a brilliant but indolent twenty-five-year-old marquis named Cesare Beccaria.

With Verri's prodding and editing, Beccaria wrote *On Crimes and Punishments.* In a few dozen pages, Beccaria denounced torture and other judicial practices of the day and drew a link between society's treatment of criminals and the prevention of crime. Torture, he wrote, "is a sure route for the acquittal of robust ruffians and the conviction of weak innocents." To Verri's everlasting consternation, Beccaria's little pamphlet became a bestseller throughout Europe—and eventually the most influential work on criminal justice ever written.

By century's end, most nations in Europe had banned judicial torture—that is, torture lawfully used to compel confessions and testimony. Historians have challenged whether Beccaria changed European thinking on torture or merely captured emerging judicial and humanitarian trends. Yet the result was to ensure that judicial torture, an accepted practice in Europe for more than five centuries, would thereafter bear the burden of moral opprobrium. While the reality of torture is very much with us today, it remains universally condemned. The attacks of September 11, 2001, and the campaign against global terrorism have, however, renewed the debate over torture's legitimacy.

This essay spans twenty-five hundred years of state-imposed torture in Europe: from ancient Greece and Rome, the resurrection of judicial torture in the late Middle Ages, the Inquisition and later witch hunts, to judicial torture's abolition in the eighteenth century and its return in the twentieth. It considers not *how* people were tortured but rather the justifications for and criticisms of its use. And it seeks to explain why the post–World War II human rights treaties, which banned torture absolutely, have failed to fully convince the public that even in an age of terror, torture is forever unacceptable.

Ancient Greece and Rome

In ancient Greece, slaves and foreigners could lawfully be tortured to provide confessions and eyewitness testimony in legal disputes, but free citizens were not subject to torture. The rationale was not simply a question of status but reflected society's vision of the obtainment of truth. The testimony of a free citizen was considered to be tainted by his capacity to reason, which could produce truth or lies. Thus, while breaking an oath by lying in court risked expulsion from society, a free citizen might still reason that the risk was worth taking.

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ture as the highest form of truth. Slaves were expected to lie if questioned openly, particularly if they feared punishment from their master. But if tortured, slaves were considered to have sufficient reason to tell the truth—to end the torture. Thus the Greek legal orator Demosthenes, among others, could argue:

> Wherever slaves and free men are present and facts have to be found, you [the jury] do not use the statements of the free witnesses, but you seek to discover the truth by applying torture [*basanos*] to the slaves. Quite properly, men of the jury, since witnesses have sometimes been found not to have given true evidence, whereas no statements made as a result of torture have ever been proved untrue.[1]

Those who questioned the use of torture included Aristotle, who notably addressed the issue in his instruction on the techniques of persuasion, *Rhetoric:* "Torture is a kind of evidence, which appears trustworthy, because a sort of compulsion is attached to it." But he pointed out that "those under compulsion are as likely to give false evidence as true, some being ready to endure everything rather than tell the truth, while others are really ready to make false charges against others, in the hope of being sooner released from torture."[2] But while Aristotle the pragmatist questioned evidence obtained through torture, he never contested the practice of torturing slaves.

The Roman republic followed the Greek practice in legal proceedings of subjecting only slaves to torture. With the expansion of Roman authority under the Empire, the neat distinction between free citizen and slave blurred, as there developed after the second century CE a class of freed slaves and non-Romans with partial rights of citizenship. During the late Empire, judicial torture was extended to include this very large group of second-class citizens.

The legal basis for torture in Rome could be found in Justinian's

Code, a collection of imperial constitutions, and *Digest,* the opinions of jurists. Chapter Eighteen of Book Forty-Eight of the *Digest,* "De Quaestionibus" ("On Torture"), would later provide classical authority for torture in the civil law systems of Europe. Roman legal writers endlessly debated the efficacy of torture. According to the famed jurist Ulpian:

> [T]orture is not always to be trusted, nor is it always to be disbelieved: it is a delicate, dangerous and deceptive thing. For many persons have such strength of body and soul that they heed pain very little, so that there is no means of obtaining the truth from them; while others are so susceptible to pain that they will tell any lie rather than suffer it.[3]

As the modern historian Edward Peters has written, "Instead of questioning the method, the [Romans] surrounded it with a jurisprudence that was designed to give greater assurance to its reliability, a jurisprudence that is admirable in its skepticism and unsettling in its logic."[4]

Crucially, there was one context in which free citizens of Greece and Rome could be subjected to torture: in cases of treason. Though never judicially permitted, rulers seemed to have few qualms about using their extrajudicial powers to torture those suspected of plotting against them. And while there were those who questioned the excesses of Rome's unstable caesars, the use of torture to protect the emperor was not seriously challenged.

For Roman authorities, it was not a major leap to extend the practice of torturing traitors (those rejecting the *corporeal* authority of the emperor) to torturing the new Christians (those rejecting the emperor's *heavenly* authority). The early church leader Tertullian exposed the unique nature of their cruel treatment: A suspected Christian would first be tortured to confess to the crime of being a Christian, then tor-

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tured again to denounce the faith the authorities had tried so hard to elicit. These justifications for torture, like the "De Quaestionibus," would also have long-term historical consequences.

The Civil Law Revolution

In the long period after Rome's fall—roughly from the sixth to the twelfth century—"criminal law" was predominately private, and public authorities did not actively investigate offenses. Instead, an injured person would bring accusations against the alleged perpetrator and find a court that had jurisdiction over both parties. If the swearing of freeman's oaths did not elicit the truth, the court would turn the matter over to the "judgment of God," that is, resort to trial by ordeal or judicial combat.

While such practices eventually came to be judged as primitive, barbaric, and irrational, they provided little opportunity for the authorities, whether secular or ecclesiastical, to engage in torture. Expressing sentiments that the Catholic Church would not repeat for nearly a thousand years, Pope Nicholas I in 866 castigated the use of torture in Bulgaria, which then was considering joining the Western church: "A confession must be spontaneous, not extracted by force. Will you not be ashamed if no proof emerges from the torture? Do you not recognize how iniquitous your procedure is?"[5]

The twelfth century witnessed a revolution in law.[6] Central was the emergence of public law, which required codified laws and a judicial system staffed with trained judges and state prosecutors. The new system sought to do away with the irrationalities of the accusatorial process. Officials in Italy and France looking for a source of authority latched onto Roman law, which legal scholars versed in the *Code* and the *Digest* accepted as an expression of supreme legal reasoning.

The civil-law justice system developed a rigid structure for the pros-

ecution of serious offenses. Two elements, a perpetrator and circumstantial evidence of a crime, known as *indicia,* were necessary to bring forward a prosecution and justify the interrogation of the accused. But *indicia* alone were not enough for a conviction. Convictions required "proofs": the testimony of two eyewitnesses or the confession of the accused.

In this way, an effort to rationalize and reform the law instead brought about an acceptance of the torture chamber for five hundred years. It should be noted that the revival of judicial torture arose from the rules of evidence adopted, rather than from any genuine requirements of ancient Roman law. Finding the two eyewitnesses to convict frequently proved impossible, leaving confessions as the primary basis for convictions. The criminal confession, considered no less sacred than a sacramental confession, gained the status of the "queen of proofs." This provided easy encouragement for local magistrates, and later judges and prosecutors, to impose torture.

As torture flourished, so did rules to regulate it. Torture to obtain confessions was permitted so long as it matched the severity of the crime and the strength of the *indicia* against the accused. Rules detailed the manner in which torture could be conducted and the judicial officers who needed to be present (which did not include defense counsel). Later developments allowed for witnesses as well as defendants to be tortured. Thus, unlike Greek and Roman law, which permitted torture based on the status of the accused, the emerging justice systems of Europe integrated torture into general legal procedure.

Roman law procedure was rapidly adopted by states on the continent. The new technology of moveable type helped to disseminate and regularize legislation and jurisprudence throughout Europe. Numerous legal scholars sought to explain and improve upon the system. The fifteenth-century Flemish jurist Philippe Wielant justified torture as "a simple regard for truth and a demand for such perfect proof that noth-

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ing short of a confession would satisfy it." (He urged that a truthful confession could easily be assured by torturing a son in the presence of his father, and a wife before her husband.)[7]

The Dutch legal scholar Johannes Voet at the turn of the seventeenth century argued that torture was a natural method of obtaining evidence by which criminals would convict themselves. For him simply because torture was at times misused or abused did not invalidate its practice within the criminal justice system. Voet urged the development of comprehensive rules for torture's application. These rules permitted torture only when there were "grave presumptions" against the accused and required that torture not cause death; that the youngest or most timid of a group be tortured first (presumably to reduce the need to torture the more strong-willed); and that an accused who confessed under torture not be tortured again, unless he or she recanted.[8] Such arguments ultimately led states to develop official handbooks that provided minutely detailed instruction on torture.

Criticism of torture largely limited itself to its misapplication and only very rarely advocated its prohibition. While there were undoubtedly those who genuinely wanted to strengthen judicial safeguards over increasingly abusive practices, the effect was to further legitimize a system whose consequences—death, mutilation, and false convictions—were widely known. For instance, Joost Damhouder, in his 1554 advice to the "Good Judge," impressed upon judges their critical role in ensuring that torture stayed within legal bounds: "Take no notice of the screams, cries, sighs, tremblings or pain of the accused; and all must be done with such care and moderation that the patient be neither driven mad, wounded, hurt nor unduly distressed."[9] And the Dutch lawyer Antonius Matthaeus II in 1644 provided an ostensibly complete list of objections to the practice of torture, including: the affront to natural justice by torturing an innocent; the possibility that the accused person's perception of truth would be skewed under torture; and the impossibil-

ity of ever learning the truth of guilt or innocence should the accused die.[10] For Matthaeus and many others, the problem was not torture per se but the danger that it could be used against the innocent.

In summarizing some five hundred years of legally sanctioned torture, it is worth noting one of the few justice systems in Europe that rejected it. In England, the common law banned the use of torture to compel confessions.[11] Jury trials permitted convictions based solely on circumstantial evidence, eliminating the pressure of civil law's strict evidentiary requirements to obtain confessions. That said, torture was used by the Star Chamber, the notorious royal court established in 1487, originally to try persons accused of treason. The Star Chamber acted on the extraordinary power of the Crown and wholly outside the common-law court system. Over time it expanded its jurisdiction and its ill-treatment of those before it: torture became permissible for obtaining the names of accomplices as well as confessions. The Star Chamber's abuse of power, though not specifically its resort to torture, led to its abolition in the 1640s.

The Inquisition and Great Witch Hunts

A parallel practice of torture developed under canon law, most notably during the Roman Catholic Church's far-reaching campaign against heresy—the Inquisition. In 1252, Pope Innocent IV formally authorized the use of torture against heretics. Heresy, essentially "treason against God," was treated just like a serious crime before the civil courts, requiring two witnesses or a confession. Since heresy was almost always a crime of conscience, confessions and the threat or use of torture to obtain them was common. Not unlike Rome's persecution of the early Christians, the Inquisitors first tortured suspected heretics to make them confess to the crime, and then tortured them again to force them to renounce their beliefs.

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both the Church and in the civil courts. The Papal Bull of Innocent VIII in 1484, and the *Malleus Maleficarum (Hammer of the Witches)* issued two years later, ushered in witch hunts throughout the continent that would claim from 200,000 to one million lives, mostly women, over the next two centuries. Witchcraft and sorcery had long been considered a civil crime subject to local retribution, but the imprimatur of the Church gave religious sanction to the persecution of suspected witches. Inquisitional methods of torture were applied to root out witches, and as the Inquisition faded into history, the civil courts took the lead in the witch hunts.

The need for denunciations rather than simple confessions was a central element of the witch hunts. Because witches were believed to take part in the "sabbat"—a nighttime assembly—it was not enough for the authorities to eliminate an individual witch; hunts required seeking out and destroying all the sect's members. Although witch hunts occurred sporadically and with some measure of isolation from one another, the practice of denunciation resulted in an exponential loss of life that could prove devastating in a particular locale. Frequently the torture and executions would stop only when the wives of the town councilors found themselves among those denounced.

Whereas any criticism of the Inquisition was likely to get one declared a heretic, it was possible to attack the use of torture in witchcraft cases. Virtually all who wrote on the subject accepted the reality of witches. The French jurist Jean Bodin in the late sixteenth century called for caution in the use of torture against witches—but only because witches had the power to render themselves impervious to pain—and urged torture to instead be used on "children and delicate persons."[12] Physician Johann Weyer, the most famous Protestant opponent of the witch hunts, was outspoken against torture:

> Those wretched women, whose minds have already been disturbed by the delusions and arts of the devil and are now upset by frequent torture, . . . and constantly dragged out to undergo atrocious torment until

they would gladly exchange at any moment this most bitter existence for death, are willing to confess whatever crimes are suggested to them rather than be thrust back into their hideous dungeon amid ever-recurring torture.[13]

Among the most forceful critics of the torture of accused witches was the Jesuit Friedrich von Spee, whose *Cautio Criminalis,* published in 1631, helped end the witch hunts in Germany. Spee invoked the general population's belief in witches to undercut the ill-treatment of those so accused: "It is assumed that a woman cannot endure two or three tortures unless she is a witch. . . . But this is to admit that the torture, as beyond human endurance, was excessive—and therefore illegal, and the accused [should] neither be tortured again nor condemned."[14]

Enlightenment and Reform

When Cesare Beccaria penned *On Crimes and Punishments* in 1764, the historical tide was already turning on torture. Enlightenment thinkers, such as Montesquieu and Voltaire, had emphasized the confluence of morality and rationality in which torture could play no part. As historian Malise Ruthven has written, "Beccaria was not a lone prophet crying in the wilderness. Many eighteenth-century writers considered it self-evident that torture was a horrible relic of barbarism, compounded of tyranny and superstition, and with the progress of reason and enlightenment destined to disappear from the face of the earth."[15]

Beccaria's arguments against torture were not novel. It was not so much what Beccaria said but the simple and direct language with which he said it. He considered torture to be both unjust and irrational. It was unjust because it betrayed the ideals of the social contract: "No man can be judged a criminal until he be found guilty; nor can society take from him the public protection, until it have been proved that he

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has violated the conditions on which it was granted." The irrationality of torture lay at the heart of Beccaria's denunciation. Should the suspect be guilty, he wrote, then "he should only suffer the punishment ordained by the laws, and torture becomes useless, as his confession is unnecessary. If he be not guilty, you torture the innocent; for in the eyes of the law, every man is innocent, whose crime has not been proved." Thus the guilty as well as the innocent must be spared from torture.

In the decades that followed, the great European legal codes had their detailed instructions on torture expunged. The revolutionaries in France might well have used the guillotine without qualms, but their victims were not tortured first. Changing practices in the criminal justice system certainly played a major part. Well before the appearance of *On Crimes and Punishments,* the civil-law rules of evidence had become less rigid. In the sixteenth and seventeenth centuries, incarceration and forced labor replaced execution and corporal punishment for many offenses, and discretionary sentences permitted judges greater use of circumstantial evidence. These developments weakened the demand on courts to obtain the formal full proof that had in practice perpetuated the use of torture. Taken altogether, Enlightenment morality and rationality, crucial changes in the law of evidence, and Beccaria's inspiring words brought about a widespread social movement that eliminated torture as a tool of criminal justice on the European continent.

The End of Torture—And Its Return

In 1874, Victor Hugo famously declared that "torture has ceased to exist." At least in Europe this was largely true, during wartime as well as peacetime. Prohibitions against the torture of prisoners of war were enshrined in treaties based upon the first modern codification of the laws of war, the Lieber Code, drafted in 1863 during the American Civil War. The Lieber Code banned torture under all circumstances: "Mili-

tary necessity does not admit of cruelty—that is, the infliction of . . . torture to extort confessions."[16]

However, torture continued to be practiced along the fringes of the criminal justice system, both within the state and outside of it. Torture was used against those deemed a threat to the government, notably revolutionaries in Italy and Austria after the cataclysms of 1848, and against opponents of the Tsarist regime in Russia. In Europe's colonies, the legal and social movement against torture had little impact. The British, for instance, made only superficial efforts to stop torture in India. The Congo under Belgian domination relied on torture for its slave-driven economy. And as the history of the French in Algeria during the 1960s made clear, torture remained part of colonial rule up to independence, and fueled practices in newly independent states that have been hard to extinguish.

Still, torture as an acceptable element of criminal justice was dead, and remains dead. But torture in the name of state security, never fully abandoned, was to return in the twentieth century with a vengeance.

The political maneuvering in Europe in the decades before the First World War saw the proliferation of foreign spies, *agents provocateurs,* and terrorists. When caught, they were viewed as actors outside the existing legal order, subject to treatment otherwise prohibited by the regular rules of justice. And increasing demand for actionable intelligence on the battlefield since the First World War has rendered the absolute legal ban on torture of prisoners—in practice, but not in law—far less than absolute.

Torture for an ostensibly higher purpose became legacies of the radical states of the Left and the Right that arose in the 1920s and '30s. Soviet Russia, Fascist Italy, and later Nazi Germany exacted total obedience from their populations: the opponents of the state were the new traitors, the new heretics. These states reacted to any and all perceived internal threats with torture. Torture was inflicted not

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just to generate confessions and denunciations but to instill terror in the population. Stalin's purges of the Communist Party during the 1930s used torture to "uncover" ever-widening circles of counterrevolutionaries where no real counterrevolution existed. Torture in the name of state security became a hallmark of the Khmer Rouge in Cambodia in the 1970s; the regime's bureaucratic abominations included a forty-two-page interrogation manual for use at its Tuol Sleng torture center.

The horrors of the Second World War were realized in many ways, but the Nazi torture chambers in particular left their mark on the drafters of the human rights and humanitarian law treaties of the postwar period. The 1948 Universal Declaration of Human Rights adopted an absolute ban on torture without controversy and recognized what has been described as the drafters' intention: "to eliminate the medieval methods of torture and cruel punishment which were practiced in the recent past by the Nazis and fascists."[17] The Geneva Conventions of 1949 ban all use of "mutilation, cruel treatment and torture" of prisoners of war and detained civilians during all armed conflicts.[18] The 1966 International Covenant on Civil and Political Rights prohibits torture even "during public emergencies that threaten the life of the nation."[19] And the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment states unequivocally: "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."[20] The prohibition against torture was complete.

The human rights treaties can be viewed as the culmination of a historical process recognizing the inviolability of the person. Today no justice system formally permits torture and no government openly considers it acceptable. Yet day in and day out, far too many people throughout the world suffer under a torturer's hands. Police officers ig-

nore local prohibitions to beat and break information out of criminal suspects. Judges convict on the basis of obviously coerced confessions. In many developing countries the lack of modern forensic tools makes torture an easy alternative to serious investigations. Police corruption and ineptitude are further factors. As Sir James Fitzjames Stephen observed in his 1883 analysis of the Madras Commission report on torture in colonial India, "It is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil's eyes than to go about in the sun hunting up evidence."[21] Whether in Shanghai or Chicago, it seems police will be tempted to use the "third degree" whenever they can get away with it.

Today's dedicated opponents of torture rest their case on the absolute prohibition found in international human rights law. But the popular moral outrage that for two centuries has rejected judicial torture is not so deeply embedded for torture carried out under the guise of state security. The September 11 attacks on the United States and the resulting "war on terrorism" have resurrected the previously unthinkable topic of the legitimacy of state torture. Interestingly, none of the officials or academics who have argued for the controlled application of torture have suggested that the information gained be admissible in court. In their view it is about security, not prosecutions. Although the powers sought for state security are in no way comparable to those of the tyrannical regimes of the past, they are philosophically akin to the authority invoked by Roman emperors to torture suspected traitors, the Inquisition's forcible unmasking of heretics to save all from eternal damnation, and even the totalitarian temptation to eliminate all dissent in the name of the Revolution.

The threat posed by those who use terrorism to achieve their ends is real. But as the history of torture demonstrates, once torture becomes acceptable, it ensnares an ever-widening circle of victims. It has been nearly 250 years since Cesare Beccaria's *On Crimes and Punishments*

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helped ignite a broad social movement whose message still resonates today. For too long the spiritual heirs of Beccaria have been complacent in the promise of international law to end all torture. More is needed to win the hearts and minds of the public and bring this sad history to an end.