The prohibition on torture has attained status as a peremptory norm of general international law. This gives rise to the obligation erga omnes to take action against those who torture. Despite this, most world states routinely conduct torture. Is there really a worldwide prohibition of torture? Argument is framed to demonstrate that the concept of a jus cogens peremptory norm, flowing erga omnes to all nations, is in practice unattainable, preventing any absolute and universal international law prohibition against torture. States cannot declare someone an enemy of all mankind, or bind all other states to that view. Jus cogens is a text writers’ municipal communis opinio, but held administratively to be based in customary international law. Any prohibition against torture appears to remain in municipal customary law form, breaches of which are proved as arguments based on fact, eliminating operation of any absolute peremptory governing norm.

Keywords
Torture, Jus Cogens, Erga Omnes, Enemy of All Mankind, Communis Opinio, Customary International Law
I. Introduction

After publishing apparently accepted moral and legal arguments in support of a worldwide ban on torture in 2016, our colleagues asked us to argue the opposite case. Posner had already argued that states had no moral obligation to any compliance with international law. Further, Guzman argued it was unlikely that international law could influence any decisions of fundamental state importance, with any repeatable regularity. In respect of international law touching the field of torture, Amnesty International made the following observation:

Between January 2009 and May 2013, Amnesty International received reports of torture and other ill-treatment committed by state officials in 141 countries, and from every world region. This only indicates cases reported to or known by the organization and does not necessarily reflect the full extent of torture worldwide. As these statistics err firmly on the side of caution, the actual prevalence of torture and other ill-treatment is probably even worse.

Having already published controversial arguments against a “rules-based order of international law,” this article’s objective is for us to assess critically the force of any worldwide prohibition of torture.

The right to freedom from torture is written in many human rights instruments. These instruments are said to protect all individuals from being intentionally subjected to severe physical or psychological distress by, or with the approval or acquiescence of, government agents acting for a specific purpose, including to inflict punishment or to obtain information. The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“UNCAT”) provides the most precise and widely-cited definition of torture under international law. It defines ‘torture’ as:

---

1 G. Lilienthal & N. Ahmad, Proscribing Torture: an Analysis in Indian and Ethical Contexts: (The 2010 Indian Prevention of Torture Bill), 42 COMMONWEALTH L. BULL. 38 (2016).
3 A. Guzman, A Compliance-Based Theory of International Law, 90 CALIF. L. REV. 1886 (2002).
4 AMNESTY INTERNATIONAL, TORTURE IN 2014: 30 YEARS OF BROKEN PROMISES 10 (2014).
6 UNCAT art. 1, 1465 U.N.T.S. 85.
7 Id.