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Euphemism and Jus Cogens

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Cover Page Footnote

I am grateful for the feedback I received on this paper from the University of Florida National Security Junior Scholars Workshop. I owe special thanks to Diane Marie Amann, Charles Dunlap, Neal Feigenson, and Janani Umamaheswar for their generosity in reviewing drafts of this paper and offering insights. Finally, I am indebted to Libby Carlson and Earl Austin Voss for their invaluable research assistance. All errors are my own.

EUPHEMISM AND *JUS COGENS*

G. Alex Sinha*

ABSTRACT—*Jus cogens* norms of international law encompass the most stringent prohibitions of the law of nations. They reflect a global—and typically moral—consensus about impermissible conduct so complete and forceful that no derogation is permissible under any circumstances. Yet states derogate nevertheless. Lacking any valid legal justification for violating *jus cogens* norms, derogating states instead seek to euphemize their unlawful conduct. Doing so appears at a glance to be a calculated choice that allows States to have their cake and eat it too—to acknowledge the peremptory norms that purportedly bind all sovereigns while acting freely in violation of those norms by describing away their own misconduct. Perhaps the most famous recent example of this phenomenon is the United States’ use of the term “enhanced interrogation” to describe its methods for torturing individuals detained in the early years of the War on Terror.

Through a case study of the CIA’s torture program, this essay explores the distinctive and underappreciated link between euphemism and *jus cogens*. It argues that the special legal-moral character of peremptory norms of international law creates an intrinsic connection between false denials of legal liability and misleading moral descriptions. Thus, far from reflecting an independent messaging decision, the State’s deployment of euphemism to soften perceptions of its conduct flows necessarily from any decision it takes to deny legal liability. Moreover, these euphemisms tend to reverse the moral valence of the conduct at issue, suggesting it is not inexcusable but rather both legal and essential. The consequences of such euphemisms—their influence on public opinion and on lower-level officials empowered to carry out violations—are therefore substantial, and arise independently of any specific incentive to produce such effects. Euphemism thus operates as a powerful and surprisingly sophisticated device to facilitate law-breaking, even as its use is entailed by the State’s legal denials. One primary effect of this dynamic is paradoxical: it tends to strengthen international recognition of relevant peremptory norms while simultaneously undermining the practical effect of those norms.

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INTRODUCTION

In January of 2020, James Mitchell and Bruce Jessen, the two architects of the CIA’s torture program,¹ testified under oath about the program’s genesis and particulars.² Mitchell and Jessen traveled to the U.S. naval base at Guantánamo Bay to provide information in the capital trial of certain War-on-Terror detainees that passed through their interrogation program years ago. It was the first time that the two psychologists have testified publicly

¹ At times, James Mitchell has resisted the notion that he was an “architect” of the program on the stated basis that, in developing it, he and Jessen were not “breaking new ground.” Mitchell Dep. Tr. at 342:1–5, Jan. 16, 2017, *Salim v. Mitchell*, 2:15-CV-286-JLQ, (E.D. Wash.) [hereinafter Mitchell Dep.]. Nevertheless, he and Jessen largely designed and implemented the program and the label is relatively common in media coverage of his role. See, e.g., Sheri Fink and James Risen, *Psychologists Open a Window on Brutal C.I.A. Interrogations*, N.Y. TIMES (June 21, 2017), <https://www.nytimes.com/interactive/2017/06/20/us/cia-torture.html> (utilizing the term “architect” to describe Mitchell and Jessen, and tracing the provenance of that moniker to unnamed CIA officials). See also Mitchell Dep. 322:21–22 (acknowledging that “they had called me [an architect of the program] a lot in the press”). Note that some refer to the CIA’s interrogation program as the “Rendition, Detention and Interrogation Program” (RDI Program). See, e.g., Steven M. Kleinman, *Reflecting on Torture After ‘The Report’*, LAWFARE (Dec. 16, 2019, 9:00AM), <https://www.lawfareblog.com/reflecting-torture-after-report> (adopting that term). The initial public debate about how to characterize the program has given way to a broad consensus that the program amounted to torture. See *infra* note 7, 19; Bob Egelko, *For first time, court calls U.S. “enhanced interrogation techniques” torture*, S.F. CHRONICLE (Sep. 18, 2019, 8:28 PM), <https://www.sfchronicle.com/nation/article/For-first-time-court-calls-U-S-enhanced-14451011.php>; Carol Rosenberg, *What the C.I.A.’s Torture Program Looked Like to the Tortured*, N.Y. TIMES (Dec. 4, 2019), <https://www.nytimes.com/2019/12/04/us/politics/cia-torture-drawings.html>.

² Carol Rosenberg, *Psychologist Who Waterboarded for C.I.A. to Testify at Guantánamo*, N.Y. TIMES (Jan. 24, 2020), <https://www.nytimes.com/2020/01/20/us/politics/911-trial-psychologists.html>.

about such matters,³ and it came approximately 18 years after they participated in the first brutal CIA interrogation of a detainee in the War on Terror in 2002.⁴ It also came 14 years after the pair had snowballed that initial interrogation into a long-term contractual relationship with the CIA, valued at over \$180 million, to construct and implement the torture program;⁵ eleven years after the CIA terminated the torture contract early (having paid out \$81 million);⁶ six years after President Obama conceded that Mitchell and Jessen’s program amounted to torture;⁷ and less than three years after

³ See Julian Borger, *Guantánamo: psychologists who designed CIA torture program to testify*, THE GUARDIAN (Jan. 20, 2020), <https://www.theguardian.com/us-news/2020/jan/20/guantanamo-psychologists-cia-torture-program-testify> (reporting, in advance of their appearance at Guantánamo, that Mitchell and Jessen were “due to give evidence in open court for the first time this week”). Both were also deposed as part of an earlier civil lawsuit brought against them by the ACLU, and those transcripts are now available online as well, although that testimony was not given before a public audience. See generally ACLU, *Salim v. Mitchell – James Mitchell Deposition Transcript*, TORTURE DATABASE (Jan. 16, 2017), https://www.thetorturedatabase.org/document/salim-v-mitchell-james-mitchell-deposition-transcript?search_url=search/apachesolr_search/deposition and ACLU, *Salim v. Mitchell – Bruce Jessen Deposition Transcript*, THE TORTURE DATABASE (Jan. 20, 2017), https://www.thetorturedatabase.org/document/salim-v-mitchell-bruce-jessen-deposition-transcript?search_url=search/apachesolr_search/deposition (providing the transcript for each psychologist’s deposition, which includes both their respective testimony and the identities of everyone in attendance when the depositions were taken). Note that, as a member of the relevant team at the ACLU in the first half of 2015, I was involved in the early stages of preparing the suit, but I departed before the complaint was filed.

⁴ Trial Tr. 30288:23–30289:6, *United States v. Khalid Shaikh Mohammad* (Jan. 21, 2020), [https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(TRANS21Jan2020-MERGED\).pdf](https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(TRANS21Jan2020-MERGED).pdf) [hereinafter KSM Transcript] (“Q. In April 2002, you attended the meeting. As a result of that meeting, you were engaged as a consultant in an interrogation of Abu Zubaydah; is that right? A. (James Mitchell): Correct. Q. Okay. And what was your role in that interrogation? A. It was to monitor the resistance to interrogation techniques that he employed and to suggest countermeasures.”); Jessen Dep. Tr. at 103:1–4, Jan. 20, 2017, *Salim v. Mitchell*, 2:15-CV-286-JLQ, (E.D. Wash.) [hereinafter Jessen Dep.] (noting that Jessen came to work with the CIA around July 2002).

⁵ Robert Windrem, *CIA Paid Torture Teachers More than \$80 Million*, NBC NEWS (Dec. 9, 2014, 12:32 PM), <https://www.nbcnews.com/storyline/cia-torture-report/cia-paid-torture-teachers-more-80-million-n264756> (reporting that, in 2006, the base value of Mitchell and Jessen’s contract had swelled to over \$180 million). See also S. Rep. No. 113-288, at 168 (2014) (Rep. on Central Intelligence Agency’s Detention and Interrogation Program) <https://www.intelligence.senate.gov/sites/default/files/publications/CRPT-113srpt288.pdf> (“By 2006, the value of the base contract for their company, with all options exercised, was in excess of \$180 million.”).

⁶ Windrem, *supra* note 5 (reporting that, when the contract for Mitchell and Jessen’s company was terminated in 2009, the CIA had paid out \$81 million).

⁷ See Josh Gerstein, *Obama: ‘We tortured some folks’*, POLITICO (Aug. 1, 2014, 3:38 PM), <https://www.politico.com/story/2014/08/john-brennan-torture-cia-109654> (quoting President Obama at a 2014 press conference as stating, “We tortured some folks. When we engaged in some of these enhanced interrogation techniques, techniques that I believe and I think any fair-minded person would believe were torture, we crossed a line. And that needs to be understood and accepted.”). Note that President Obama specifically referred to Enhanced Interrogation Techniques (EITs) as “torture.” *Id.* Those are the techniques that James Mitchell and Bruce Jessen organized into an interrogation program. See Mitchell Dep. at 317:20-23 (acknowledging that Mitchell recommended methods that became known as EITs);

Mitchell and Jessen settled a civil suit accusing them, through their work on the program, of violating several *jus cogens* norms of international law (including the prohibition on torture).⁸

Jus cogens is a popular subject of legal scholarship,⁹ although much of the debate about it borders on the metaphysical.¹⁰ The phrase “*jus cogens*” operates interchangeably with the term “peremptory norms,”¹¹ both of which

Jessen Dep. 114:20-115:11, Jan. 20, 2017 (describing how Mitchell and Jessen used a typewriter in a CIA cubicle to generate a list of techniques borrowed from SERE training). Significantly, President Obama’s comments did not refer to extreme techniques utilized by the CIA outside the legal approvals that attached to the formal EIT program, some of which drew objections even from James Mitchell. *See, e.g.*, Trial Tr. 30963:18-30964:1, Jan. 24, 2020 (in which Mitchell acknowledged witnessing a “bath” administered by interrogators “where they took a brush . . . and they would scrub the ass, scrub the balls, and then scrub the face of Mr. Nashiri,” as a result of which Mitchell submitted a complaint to an inspector general); *id.* at 31005:3-14 (Q. Sir, during the course of your testimony earlier in the week, you had an opportunity to recount in fairly graphic, harrowing detail the shackling and the kneeling and bending of Mr. al Nashiri. You described it as having two men actually hold him by the shoulders and forcibly force his back to the ground while he had a broomstick behind his knees and hearing him scream in agony. Do you recall that? A. (Mitchell). I do recall it. Q. Okay. And you were -- you were very upset by seeing that? A. (Mitchell). Yes.”

⁸ *See* Larry Siems, *CIA torture: lawsuit settled against psychologists who designed techniques*, THE GUARDIAN (Aug. 17, 2017, 2:31PM), <https://www.theguardian.com/us-news/2017/aug/17/cia-torture-lawsuit-settled-against-psychologists-who-designed-techniques> (reporting on the August 2017 settlement of the suit).

⁹ *See* Markus Petsche, *Jus Cogens as a Vision of the International Legal Order*, 29 PENN ST. INT’L L. REV. 233, 235–36 (2010) (reviewing the literature on *jus cogens*); *see also* Andrea Bianchi, *Human Rights and the Magic of Jus Cogens*, 19 EUR. J. INT’L L. 491 (2008); Georg Schwarzenberger, *International Jus Cogens?* 43 TEX. L. REV. 455 (1965); Egon Schwelb, *Some Aspects of International Jus Cogens as Formulated by the International Law Commission*, 61 AM. J. INT’L L. 946 (1967); A. Mark Weisburd, *The Emptiness of the Concept of Jus Cogens, As Illustrated by the War in Bosnia-Herzegovina*, 17 MICH. J. INT’L L. 1 (1995); Anthony D’Amato, *It’s a Bird, It’s a Plane, It’s Jus Cogens*, 6 CONN. J. INT’L L. 1 (1990); Gordon A. Christenson, *Jus Cogens: Guarding Interests Fundamental to International Society*, 28 VA. J. INT’L L. 585 (1988); Thomas Weatherall, *Lessons from the Alien Tort Statute: Jus Cogens as the Law of Nations*, 103 GEO. L.J. 1359, 1362–63 (2015); Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 YALE J. INT’L L. 331 (2009); M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 LAW & CONTEMP. PROBS. 63 (1996); David S. Mitchell, *The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine*, 15 DUKE J. COMP. & INT’L L. 219 (2005); Hilary Charlesworth & Christine Chinkin, *The Gender of Jus Cogens*, 15 HUM. RTS. Q. 63, 66 (1993); Gaela Normile, *The Non-Proliferation of Nuclear Weapons As Jus Cogens*, 124 PENN ST. L. REV. 277 (2019).

¹⁰ *See, e.g.*, Petsche, *supra* note 9, at 235–36 (summarizing the state of the literature on *jus cogens*). As recently as 2014, the International Law Commission’s Special Rapporteur on Peremptory Norm of General International Law (*Jus Cogens*), observed that it remained valuable for the ILC to provide commentary on “(a) the nature of *jus cogens*; (b) requirements for the identification of a norm as *jus cogens*; (c) an illustrative list of norms which have achieved the status of *jus cogens*; (d) consequences or effects of *jus cogens*.” Dire D. Tladi (Special Rapporteur on Peremptory Norm of General International Law (*Jus Cogens*)), *Int’l Law Comm’n, Rep. on the Work of Its Sixty-Sixth Session*, U.N. Doc. A/69/10, ¶ 93 (2014).

¹¹ Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT’L L. 291, 298 (2006) (“The terms *jus cogens* and peremptory norms are used interchangeably. Article 53 of the VCLT . . . is entitled ‘Treaties conflicting with a peremptory norm of general international law (*jus cogens*).’”) *See*

refer to the most stringent restrictions imposed under general international law: restrictions that apply universally and may never be transgressed lawfully.¹² Scholars and relevant experts, like the International Law Commission,¹³ have examined the nature of these norms at a high level of abstraction. For example, some have explored the links between the peremptory nature of *jus cogens* norms, their content, and their place at the top of the hierarchy of international law.¹⁴ Others have debated the proper relationship between *jus cogens* and sovereign immunity.¹⁵

There is a pressing need to gain a better understanding of how States approach their *jus cogens* obligations in practice, however—in part because, despite the primacy of peremptory norms in the hierarchy of international law, their violation is not all that rare.¹⁶ The striking tension between the theoretical nature of *jus cogens* obligations and the practical effect of those obligations cries out for explanation. This Essay explores the practical implications of peremptory norms’ unique features, focusing on the overwhelmingly moral character of *jus cogens* and its strict prohibition on derogation. In doing so, the Essay uncovers important connections between the nature of peremptory norms and the manner in which States respond to them.

Section I lays out some background to *jus cogens*. Section II argues that States face a peculiar configuration of pressures in contemplating compliance with *jus cogens* norms: high reputational costs for noncompliance paired with limited formal legal liability. The gaping chasm between immense informal pressure to uphold peremptory norms and weak

also Int’l Law Comm’n, Rep. on the Work of the Seventieth Session, Chapter VIII: Peremptory norms of general international law (*jus cogens*), U.N. Doc A/73/10, at 224 (2018) (“At its sixty-ninth session, following a proposal by the Special Rapporteur in his second report, the Commission decided to change the title of the topic from “*Jus cogens*” to “Peremptory norms of general international law (*jus cogens*)”).

¹² See *infra* notes 29–33.

¹³ The International Law Commission is a body of experts operating under the auspices of the United Nations with the purpose of “initiat[ing] studies and mak[ing] recommendations for the purpose of . . . encouraging the progressive development of international law and its codification.” *International Law Commission*, UNITED NATIONS, <https://legal.un.org/ilc/>.

¹⁴ See, e.g., Shelton, *supra* note 11, at 291–92 (exploring the hierarchy of international law, focusing on *jus cogens* norms at the top and on soft law at the bottom, and observing that “a review of the literature as well as the jurisprudence reveals confusion over the rationale for *jus cogens* norms and their source, content, and impact, as well as the interface of such norms with obligations *erga omnes* and international crimes.”).

¹⁵ See Petsche, *supra* note 9, at 236. See also Adam C. Belsky, et. al., *Implied Waiver Under the Fsia: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*, 77 CAL. L. REV. 365 (1989) (exploring the link between *jus cogens* and sovereign immunity); Sevrine Knuchel, *State Immunity and the Promise of Jus Cogens*, 9 NW. J. INT’L HUM. RTS. 149 (2011) (doing the same); Thomas Weatherall, *Jus Cogens and Sovereign Immunity: Reconciling Divergence in Contemporary Jurisprudence*, 46 GEO. J. INT’L L. 1151 (2015) (doing the same).

¹⁶ See *infra* note 41.

legal penalties for failure to do so¹⁷ incentivizes States to acknowledge the relevant norms while mis-describing—and more specifically, euphemizing—their own conduct, even when the descriptions offered are absurd on their face. The effect of this strategy is to reinforce the global consensus that a particular norm exists while chiseling away at the content of the norm, thereby undermining its practical effect. Section II also identifies a necessary connection between euphemism and *jus cogens*, arguing that the distinctively moral nature of the legal concepts implicated by peremptory norms ensures that, to deny an allegation that one has violated *jus cogens* is to defend one’s conduct both on a legal and on a moral level. In doing the latter, States must minimize the moral disapproval warranted by their conduct, using denials that are inherently euphemistic—often maximally so, leading to characterizations of their conduct as morally or legally obligatory rather than inexcusable.¹⁸

Finally, Section III argues that the consequences of the State’s endorsement of euphemistic descriptions iterate down the chain of command and then down to the public, greasing the wheels for more egregious violations of the applicable norms and anchoring public debate about the conduct in question in the State’s favor. To illustrate how that dynamic plays out in practice, Section III considers the interrogation program spearheaded by Mitchell and Jessen. For two primary reasons, that disturbing case presents a serendipitous window into the interplay of *jus cogens* prohibitions and State conduct. First, a subsequent U.S. administration has unequivocally conceded that the conduct in question violated *jus cogens*. That assessment aligns with the near-consensus of observers, independent news media, and domestic judges.¹⁹ Thus, for all the contemporaneous controversy

¹⁷ Stronger States arguably face lighter formal consequences for violating *jus cogens* than weaker States. For example, States with permanent seats on the Security Council, or States with strong or numerous allies, may be especially well positioned to avoid formal consequences for violations of peremptory norms.

¹⁸ For more on the applicable definition of “euphemism,” see *infra* note 44. Notably, others have also observed that States adopt misleading characterizations in connection with the commission of serious crimes. See, e.g., MICHAEL G. KEARNEY, *THE PROHIBITION OF PROPAGANDA FOR WAR IN INTERNATIONAL LAW* (2007) (“No state crimes, whether genocide, crimes against humanity or war crimes are ever committed without prior propaganda aimed at securing popular support for the proposed illegal actions.”).

¹⁹ See HUMAN RIGHTS WATCH, *GETTING AWAY WITH TORTURE* 55, (July 2011) (noting that “the UN High Commissioner for Human Rights, the Committee Against Torture, the UN special rapporteur on torture, and the UN special rapporteur on protecting human rights while countering terrorism” have all concluded that waterboarding is torture). Certain U.S. courts share that view. See *Court calls US “enhanced interrogation techniques” torture*, AP NEWS (Sept. 19, 2019), <https://apnews.com/2a4bc9d48a884cab8356e6a6c50f89ab>. It is now typical for news outlets to refer to “enhanced interrogation” as torture, even in straight news reporting. See, e.g., Borger, *Guantánamo: psychologists who designed CIA torture program to testify*, *supra* note 3; Carol Rosenberg, *What the*

surrounding the CIA’s program, history has rendered its judgment unequivocally and concluded that, at minimum, parts of the program inflicted torture on detainees.²⁰ Second, Mitchell and Jessen are perfectly positioned to provide testimony about the nature of the program, having played an essential role in shaping it and personally administering parts of it. They have provided such testimony in spades. In addition to Mitchell’s book and other public remarks on the subject, both Mitchell and Jessen were deposed for a relatively recent civil suit and the duo testified before a military commission for a period of roughly two weeks in early 2020, collectively generating hundreds of pages of new, rich data.²¹

The relationship between euphemism and *jus cogens* identified in this Essay is intrinsic; it holds regardless of which States or peremptory norms are at issue. The analysis provided below therefore illuminates dynamics at play whenever a State engages in conduct that infringes a peremptory norm of international law (or even a norm that approaches peremptory status).

I. BRIEF BACKGROUND TO *JUS COGENS*

As noted above, there is a vast literature on the history and various theoretical dimensions of *jus cogens*.²² Although its roots go back further,²³ the term formally entered the legal lexicon in 1969 through Article 53 of the Vienna Convention on the Law of Treaties (VCLT), which addresses “Treaties conflicting with a peremptory norm of general international law (‘jus cogens’).” According to the VCLT, *jus cogens* encompasses “norm[s] accepted and recognized by the international community of States as a whole

C.I.A.’s Torture Program Looked Like to the Tortured, N.Y. TIMES (Dec. 4, 2019), <https://www.nytimes.com/2019/12/04/us/politics/cia-torture-drawings.html>; Douglas A. Johnson, et. al., *The Strategic Costs of Torture*, FOREIGN AFFAIRS (Sept./Oct. 2016), <https://www.foreignaffairs.com/articles/united-states/strategic-costs-torture>; Sacha Pfeiffer, *CIA Used Prisoner As ‘Training Prop’ For Torture, Psychologist Testifies*, NATIONAL PUBLIC RADIO (Jan. 23, 2020, 11:59 PM), <https://www.npr.org/2020/01/23/799130233/psychologist-who-helped-create-interrogation-methods-says-cia-may-have-gone-too>; Michael Conte, *Newly released illustrations depict post-9/11 torture techniques*, CNN (Dec. 6, 2019, 3:12 PM), <https://www.cnn.com/2019/12/06/politics/torture-techniques-report/index.html>.

²⁰ There remain difficult definitional questions about what amounts to torture in violation of *jus cogens* or the Convention Against Torture. Considered in isolation or in the abstract, some of the techniques authorized by the CIA—the “facial grasp,” for example—may not rise to the level of torture. But such difficulties have not prevented the international community from coalescing around a consensus view of the program as a whole, which at points plainly (if only in retrospect for some) violated the norm prohibiting torture. *Supra* note 19.

²¹ Some of the (nominally) public testimony is redacted. *See, e.g.*, KSM Transcript at 30209–10, 30214, 30234, 30259–60 (Jan. 21, 2020).

²² *See supra* notes 9–10.

²³ Shelton, *supra* note 11, at 297–98 (“The notion of *jus cogens* . . . was discussed at length for the first time by Verdross in 1937.”).

as . . . norm[s] from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”²⁴ Originally, the concept operated exclusively “as a limitation on international freedom of contract.”²⁵ That limitation persists as one facet of *jus cogens*: Treaties that would otherwise be valid are void if, upon coming into force, they conflict with extant peremptory norms²⁶ or if a contradictory peremptory norm comes into effect after the treaty is concluded.²⁷ But the VCLT language makes plain that the concept operates more broadly than that. Whatever *jus cogens* encompasses, its violation is impermissible, full stop; there are no exceptions, justifications, or excuses that permit deviation from its requirements. Nor may States evade the reach of *jus cogens* by persistently objecting to its restrictions, an option available to States when resisting weaker forms of customary international law.²⁸

By and large, *jus cogens* norms prohibit conduct characterized by severe moral disapprobation.²⁹ Although the list of norms is fluid,³⁰ peremptory norms likely include prohibitions on (*inter alia*) piracy, slavery,

²⁴ Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331. For some background on the evolution of *jus cogens*, see Shelton, *supra* note 11, at 297–302 (detailing the rise of the concept of *jus cogens* and identifying some of its intellectual antecedents in international law); Petsche, *supra* note 9, at 238–41 (tracing the earliest theoretical discussions of the concept of *jus cogens* to the first half of the 20th century, but attributing the first formal recognition of it to the 1969 VCLT). See also Bianchi, *supra* note 9, at 493 (noting that *jus cogens* was not sanctioned by courts until the 1990s, before which it was developed largely through legal scholarship).

²⁵ Shelton, *supra* note 11, at 297.

²⁶ Vienna Convention, *supra* note 24, art. 53 (“A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.”).

²⁷ *Id.* art. 64 (“If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.”).

²⁸ See Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT’L L. 757, 765 (2001) (noting that “custom is generally binding except for the limited and contentious persistent objector rule” but that “substantive morality of *jus cogens* norms outweighs the procedural right of sovereign states to become persistent objectors to them”). See also Shelton, *supra* note 11, at 305 (noting that persistent objection to *jus cogens* norms “is likely to arise rarely because those norms most often identified as *jus cogens* are clearly accepted as customary international law and there are no persistent objectors.”).

²⁹ Roberts, *supra* note 28, at 765 (“[*Jus cogens* norms prohibit fundamentally immoral conduct [. . .]”); Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT’L L. 413, 424 (1983) (observing that “this normative differentiation [between peremptory norms and less elite or lower-ranking norms] is certainly inspired by unimpeachable moral concerns”). But see Weisburd, *supra* note 9, at 21–22 (noting an example “of a writer who, prior to World War II, argued that *jus cogens* forbade a state to surrender one of its nationals for war crimes trials, but who wrote after the war that the crimes described in the London Declaration had become a matter of *jus cogens*[.]” which, if correct, suggests the possibility of *jus cogens* norms bearing a murkier connection to moral injunctions.).

³⁰ Viktor Mayer-Schönberger & Teree E. Foster, *More Speech, Less Noise: Amplifying Content-Based Speech Regulations Through Binding International Law*, 18 B.C. INT’L & COMP. L. REV. 59, 95 (1995) (“Given the distinctive nature of *jus cogens* as a dynamic concept, no absolutely exact, concise list of *jus cogens* rules can exist.”).

genocide, military aggression, crimes against humanity, grave war crimes, systematic racial discrimination, and torture,³¹ in addition, arguably, to certain forms of human experimentation³² and cruel, inhuman or degrading treatment (CIDT).³³ Several of these crimes now fall within the jurisdiction of the International Criminal Court (ICC), although ICC jurisdiction is not a necessary condition for peremptory status.³⁴ Given the nature of the conduct they proscribe, *jus cogens* norms purportedly give rise not just to universal jurisdiction (empowering all States to prosecute violations) but also to stronger obligations *erga omnes* that *require* States to prosecute or extradite (and punish if convicted) those implicated in criminal violations of peremptory norms.³⁵

³¹ See M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81, 108 (2001) (identifying prohibitions on piracy, slavery, war crimes, crimes against humanity, genocide, apartheid, and torture as rising to the level of *jus cogens*); Mayer-Schönberger & Foster, *supra* note 30, at 100 (identifying “aggressive warfare” as another violation of peremptory norms). The Restatement (Third) of Foreign Relations Law rather tentatively provides a similar list. See Stephen C. McCaffrey, *The Restatement’s Treatment of Sources and Evidence of International Law*, 25 INT’L LAW. 311, 321 n. 53 (1991) (quoting the Restatement’s identification of norms that “might” be peremptory as those barring “genocide, slave trade and slavery, apartheid and other gross violations of human rights, and perhaps attacks on diplomats.”).

³² See Jordan J. Paust, *International Criminal Law Conventions and Their Penal Provisions*, 92 AM. J. INT’L L. 812, 813 (1998) (attributing to M. Cherif Bassiouni the view that “some unlawful human experimentation” rises to the level of *jus cogens* prohibitions). See also *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 187 (2d Cir. 2009) (finding that non-consensual human experimentation is at least prohibited with sufficient force and specificity under customary international law to form the basis for a viable cause of action under the Alien Tort Statute).

³³ Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 YALE J. INT’L L. 331, 368 (2009) (noting that the Restatement (Third) of Foreign Relations “has become an influential reference point when discussing well-established peremptory norms” and that it lists “cruel, inhuman, or degrading treatment or punishment.”). *But see* Christopher Romero, *Praying for Torture: Why the United Kingdom Should Ban Conversion Therapy*, 51 GEO. WASH. INT’L L. REV. 201, 215 (2019) (claiming that “torture is considered *jus cogens*, but CIDT is not”). As these contrasting opinions suggest, scholars and international authorities may disagree to some extent about precisely which norms constitute *jus cogens*, but an exact list of qualifying norms, and whether that list is relatively long or short, is not essential for the argument advanced here.

³⁴ Compare *How the Court works*, INT’L CRIMINAL COURT, (July 24, 2020), <https://www.icc-cpi.int/about/how-the-court-works> (identifying the “four main crimes” over which the ICC has jurisdiction as genocide, crimes against humanity, war crimes, and crimes of aggression) with Bassiouni, *supra* note 31, at 108 (further identifying piracy, slavery, apartheid, and torture as prohibited by peremptory law).

³⁵ Bassiouni, *supra* note 31, at 148–49. Obligations *erga omnes* are a special kind of obligation of universal concern to the international community. See *Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain)*, Judgment, 1970 I.C.J. 3, ¶¶ 33–34 (Feb. 5, 1970) (“By their very nature [obligations of a State towards the international community as a whole] are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.”)

As the foregoing implies, the content of *jus cogens* evolves over time. In the past several decades, a number of new prohibitions have crossed into the realm of peremptory norms.³⁶ At least theoretically, changes may occur in the other direction as well. First, a new peremptory norm might arise that trims, expands, or overturns an existing one.³⁷ Second, it is at least theoretically possible that a recognized *jus cogens* norm could organically lose favor among states, as a result of states ceasing to treat it as peremptory.³⁸ Although the difficulties associated with identifying the threshold between ordinary norms and super or peremptory norms have long been the subject of concern,³⁹ it is conceivable that moral disapproval for a particular type of act could erode sufficiently across the global community to result in the relegation of a particular norm. Third, States might pare back *jus cogens* norms—in substance, not in name—by acknowledging a peremptory limitation but interpreting it narrowly and persistently testing its

³⁶ See Bassiouni, *supra* note 31, at 108–26 (describing, in turn, how piracy, slavery, war crimes, crimes against humanity, genocide, apartheid, and torture joined the pantheon of peremptory norms). Prosper Weil famously described this phenomenon—and the attendant threat that the elite category of peremptory norms will soon become overcrowded—as “the destined proliferation of supernorms.” Weil, *supra* note 29, at 427.

³⁷ See Adil Haque (@AdHaque110), TWITTER (Apr. 29, 2020, 7:55 AM), <https://twitter.com/AdHaque110/status/1255465676283809803?s=20> (“Why do peremptory norms invalidate conflicting treaties? Because they are hierarchically superior. Says who? The ILC in its Fragmentation report (2006). (*That’s also why they can be modified only by subsequent peremptory norms, says me.*”) (emphasis added).

³⁸ Some might resist the possibility of norms dropping out of the category of *jus cogens* without being forced out by a new peremptory norm. See Haque, *supra* note 37 (suggesting that only a new peremptory norm can modify an existing one). But it is arguable that certain norms identified by early theorists of *jus cogens* have lost status in this way. See Weisburd, *supra* note 9, at 21–22 (“Certainly, scholars’ concepts of the list of *jus cogens* norms have changed over the decades Verdross’ 1937 views are hardly the only suggestions for *jus cogens* norms which have been made over the years that would seem suspect in 1995.”) Of course, such a change may not arise overnight, and it may not lie within the power of any single State to engineer such a result. See Joshua Ratner, *Back to the Future: Why a Return to the Approach of the Filartiga Court is Essential to Preserve the Legitimacy and Potential of the Alien Tort Claims Act*, 35 COLUM. J.L. & SOC. PROBS. 83, 114 (2002) (“There is no way for a State to garner the requisite international support for a modification of a *jus cogens* norm even if the State wants to do so.”)

³⁹ See, e.g., Weil, *supra* note 29, at 427 (noting that “a rule acquires superior normative density once its preeminence is accepted and recognized by ‘all the essential components of the international community.’ But since a state’s membership in this club of ‘essential components’ is not made conspicuous by any particular distinguishing marks—be they geographical, ideological, economic, or whatever—what must happen in the end is that a number of states (not necessarily in the majority) will usurp an exclusive right of membership and bar entry to the others, who will find themselves not only blackballed but forced to accept the supernormativity of rules they were perhaps not even prepared to recognize as ordinary norms”).

boundaries.⁴⁰ As the following Section explores, euphemism services this third form of change in particular.

II. THE INTRINSIC LINK BETWEEN EUPHEMISM AND *JUS COGENS*

Despite the purported normative force of *jus cogens* norms, violations are relatively common.⁴¹ That is a rather troubling fact. After all, the basis for elevating a norm to peremptory status supposedly turns in part on a nearly universal understanding that the conduct in question is entirely impermissible.⁴² Moreover, one would expect relatively routine violations to

⁴⁰ See, e.g., Bianchi, *supra* note 9, at 505 (“One overt attempt to challenge *jus cogens* has consisted of taking exception to the definition and the scope of application of particular norms. This is certainly the case for the prohibition of torture. As is known, the United States has endeavoured to provide a restrictive interpretation of torture for the purpose of allowing the use of particularly harsh interrogation techniques on terrorist suspects and providing broad defences to exempt state officials from criminal liability.”).

⁴¹ Beyond the CIA’s treatment of War-on-Terror detainees, there are a number of prominent examples from the past 30 years, including several situations that remain ongoing today. See, e.g., David B. Kopel, Paul Gallant & Joanne D. Eisen, *Is Resisting Genocide a Human Right?*, 81 NOTRE DAME L. REV. 1275 (2006) (discussing the genocide in Darfur that began in 2003); Owen Bowcott & Rebecca Ratcliffe, *UN’s top court orders Myanmar to protect Rohingya from Genocide*, THE GUARDIAN (Jan. 23, 2020, 5:12 PM), <https://www.theguardian.com/world/2020/jan/23/international-court-to-rule-on-rohingya-genocide-safeguards> (describing an order from the International Court of Justice requiring Myanmar to “respect the requirements of the 1948 genocide convention” and protect the Rohingya, a minority group within the country that has been the target of state violence for several years); The Associated Press, *Central African Republic Armed Groups Reach Peace Deal*, N.Y. TIMES (Feb. 2, 2019), <https://www.nytimes.com/2019/02/02/world/africa/central-african-republic-peace-deal.html> (reporting on a 2019 peace deal in the Central African Republic, which paused a six-year conflict that “carried the high risk of genocide” and has resulted so far in two people being sent to the ICC to face charges for certain violations of *jus cogens*); Mei Fong, *China’s Xinjiang Policy: Less About Births, More about Control*, THE ATLANTIC (July 11, 2020), <https://www.theatlantic.com/international/archive/2020/07/china-xinjiang-one-child-birth-control/614014/> (reporting on China’s treatment of its Uighur minority, including its use of internment camps and forced sterilization, and referring to the government’s program against the Uighurs as “genocide”); *About the ICTY*, U.N. INT’L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA <https://www.icty.org/en/about> (last visited July 24, 2020) (summarizing the work of the International Criminal Tribunal for the former Yugoslavia (ICTY), which was established in 1993 to deal “with war crimes that took place in the Balkans in the 1990’s” and which has rendered decisions involving “genocide, war crimes and crimes against humanity”); *The ICTR in Brief*, U.N. INT’L RESIDUAL MECHANISM FOR CRIM. TRIB., <https://unictr.irmct.org/en/tribunal> (last visited July 24, 2020) (summarizing the work of the International Criminal Tribunal for Rwanda (“ICTR”), which was established by the U.N. Security Council to “prosecute persons responsible for genocide and other serious violations of international humanitarian law committed [in 1994] in the territory of Rwanda and neighbouring States,” and which pursued indictments against “high-ranking military and government officials,” among others); Charlie Cooper, *Britain would veto Russia’s return to G-7*, POLITICO (June 1, 2020, 10:34 AM), <https://www.politico.com/news/2020/06/01/uk-would-veto-russias-return-to-g7-293826> (describing Boris Johnson’s opposition to readmitting Russia to the G7, from which Russia was expelled in 2014 when it invaded and annexed Crimea). Some have explicitly argued that Russia’s annexation of Crimea violated *jus cogens*. See *infra* note 66.

⁴² The better guide to peremptory norms may simply be the list of actions States generally refuse to acknowledge they have undertaken, regardless of the accuracy of their own labels or descriptions. See

wear away at any particular norm.⁴³ But there is an organic explanation for the persistence of these norms, and the explanation implicates the use of euphemism by States accused of violating them.⁴⁴

A. Jus Cogens Norms are Simultaneously Self-Reinforcing and Self-Undermining

Fundamentally, tangible penalties for violating *jus cogens* norms are neither strong enough nor certain enough to hold down violations at a level commensurate with their ostensible weight. Although peremptory norms purport to bind States that never consented to them, the absence of State consent forecloses most avenues for legal accountability—notwithstanding the *erga omnes* nature of *jus cogens* obligations.⁴⁵ Generally speaking, States retain sovereign immunity from suits alleging violations of even the hardest peremptory norms.⁴⁶ Further, States control their own domestic criminal

Filartiga v. Pena-Irala, 630 F.2d 876, 884 (2d Cir. 1980) (citing Memorandum of the United States as Amicus Curiae at 16 n.34) (“In exchanges between United States embassies and all foreign states with which the United States maintains relations, it has been the Department of State’s general experience that no government has asserted a right to torture its own nationals. Where reports of torture elicit some credence, a state usually responds by denial or, less frequently, by asserting that the conduct was unauthorized or constituted rough treatment short of torture.”)

⁴³ One might be tempted to conclude that *jus cogens* “has faded into near irrelevance.” Sue S. Guan, *Jus Cogens: To Revise A Narrative*, 26 MINN. J. INT’L L. 461, 461 (2017). Below I argue for a more nuanced conclusion.

⁴⁴ A representative definition of “euphemism” is “the substitution of a mild, indirect, or vague expression for one thought to be offensive, harsh, or blunt.” *Euphemism*, DICTIONARY.COM, <https://www.dictionary.com/browse/euphemism?s=t> (last visited July 27, 2020). I will focus on a subset of uses of the term, where the “mild, indirect, or vague” expression functions in a misleading way to blunt what are specifically the *moral* implications of a more appropriate description. In my usage, therefore, euphemistic terms or phrases will serve to whitewash the moral condemnation that an accurate description of particular conduct invites. This Section explores a distinctive link between moral descriptions and *jus cogens*, which provides the basis for focusing on that specific form of euphemism. Nevertheless, I do not mean to imply that the harshest available moral description of someone’s conduct is always appropriate, nor that it is necessarily simple to discern the most accurate description (from a moral standpoint) of any given program or policy. The very fact that it can be genuinely difficult to calibrate the proper level of moral condemnation for someone’s conduct facilitates the use of euphemism; it empowers States to select phrases with limited moral implications and defend those phrases as arguably appropriate.

⁴⁵ This Essay focuses on the relationship of *States* to their *jus cogens* obligations. A somewhat different analysis may apply to non-state actors.

⁴⁶ See Petsche, *supra* note 9, at 254–57 (summarizing the debate over whether sovereign immunity should yield to allegations that a state has violated peremptory norms, but noting only two courts—one in Italy and one in Greece—that have abrogated sovereign immunity for such a purpose). See also Guan, *supra* note 43, at 480 (“However, even as courts may theoretically endorse the concept of *jus cogens* (or concepts like it, such as obligations *erga omnes*), difficulties arise when courts are faced with the actual application of such norms to the rights of parties in resolving a concrete dispute. This is especially true because upholding *jus cogens* norms often appears to come at a high price: that of chipping away at accepted notions of state sovereignty—which courts, not unreasonably, have proven especially reluctant to do.”). Guan’s article details the reluctance of international courts to strip sovereign immunity from States accused of *jus cogens* violations, as well as minor equivocation in various State courts. *Id.* at

prosecution of bad actors, and may face self-interested or political pressures against undertaking such prosecutions.⁴⁷ And whether addressed specifically by a treaty or not, compulsory jurisdiction rarely arises for States that commit violations.⁴⁸ More typically, States must consent to the jurisdiction of a particular international court.⁴⁹

The ICC is the most notable exception, albeit a limited one. Although it only tries violations of certain *jus cogens* crimes,⁵⁰ it may exercise jurisdiction “even over nationals of states that are not parties to the Treaty and have not otherwise consented to the court’s jurisdiction”—specifically “when crimes within the court’s subject-matter jurisdiction are committed on the territory of a state that is a party to the treaty or that consents to ICC jurisdiction for that case.”⁵¹ Additionally, the UN Security Council may refer crimes to the ICC regardless of whether those crimes implicate States that

480–82. *But see Al Shimari v. CACI Premier Technology, Inc.*, 368 F. Supp. 3d 935 (2019) (considering, as a matter of first impression, whether the United States has waived sovereign immunity for violations of *jus cogens* norms, and finding that it has).

⁴⁷ When there is a change in political administration, the political demands to excuse criminal conduct of past administrations may win out. *See, e.g.*, David Johnston & Charlie Savage, *Obama Reluctant to Look Into Bush Programs*, N.Y. TIMES (Jan. 11, 2009), <https://www.nytimes.com/2009/01/12/us/politics/12inquire.html> (reporting on President-elect Obama’s reluctance to pursue a significant inquiry into Bush administration abuses in the War on Terror, citing his “belief that we need to look forward as opposed to looking backward”). *See also* Scott Shane, *No Charges Filed on Harsh Tactics Used by the C.I.A.*, N.Y. TIMES (Aug. 20, 2012), <https://www.nytimes.com/2012/08/31/us/holder-rules-out-prosecutions-in-cia-interrogations.html> (reporting that Attorney General Eric Holder “had already ruled out any charges related to the use of waterboarding and other methods that most human rights experts consider to be torture,” and reporting further that, in August of 2012, the Department of Justice decided not to bring charges in the deaths of two detainees in the War on Terror, meaning “that the Obama administration’s limited effort to scrutinize the counterterrorism programs carried out under President George W. Bush has come to an end”).

⁴⁸ Both the Convention Against Torture and the Genocide Convention, for example, give States substantial power over their own exposure to accountability mechanisms. *See* United Nations Convention on the Prevention and Punishment of the Crime of Genocide art. 6, Dec. 9, 1948, 78 U.N.T.S. 277; United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 22, Dec. 10, 1984, 1465 U.N.T.S. 85.

⁴⁹ Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, 64 L. & CONTEMP. PROBS. 13, 18 (2001) (“All existing international courts have contentious jurisdiction only over disputes involving states that are parties to treaties providing for their jurisdiction”).

⁵⁰ *See* Paust, *supra* note 32, at 813.

⁵¹ Morris, *supra* note 49, at 13. The United States has objected that, “by purporting to confer upon the court jurisdiction over the nationals of non-consenting non-party states, the [ICC Treaty] would bind non-parties in contravention of the law of treaties.” *Id.* at 14. Although the U.S. is not a party to the ICC Treaty, in March of 2020, the ICC authorized its prosecutor to pursue an investigation into war crimes committed in recent years in Afghanistan, including those that may have been committed by American forces, leading to an angry response from the United States. Elian Peltier & Fatima Faizi, *I.C.C. Allows Afghanistan War Crimes Inquiry to Proceed, Angering U.S.*, N.Y. TIMES (Mar. 5, 2020), <https://www.nytimes.com/2020/03/05/world/europe/afghanistan-war-crimes-icc.html>.

have consented to ICC jurisdiction.⁵² Nevertheless, State consent to ICC jurisdiction remains important because it expands the geographic reach of the ICC, and because the prosecutor for the ICC cannot expect cooperation without it.⁵³

Moreover, violations of preemptory norms by one State will rarely directly aggrieve another State that has the power and political incentive to bring suit.⁵⁴ Eventually, the international community may convene special tribunals in some of the most egregious cases, especially against weaker States or States that have lost major conflicts, but that is rare and brings with it mixed results.⁵⁵ Recent or ongoing violations of preemptory norms by permanent members of the Security Council are especially unlikely to be

⁵² *How the Court Works*, INTERNATIONAL CRIMINAL COURT, <https://www.icc-cpi.int/about/how-the-court-works> (last visited Jan. 9, 2020).

⁵³ See Michelle Nichols, *ICC complains of lack of cooperation, wants more U.N. support*, REUTERS (Oct. 17, 2012, 3:44 PM), <https://www.reuters.com/article/us-crime-un-icc/icc-complains-of-lack-of-cooperation-wants-more-u-n-support-idUSBRE89G1M720121017> (reporting that the president of the ICC “pleaded for stronger support from the U.N. Security Council” following a refusal of States—including members of the ICC, such as Kenya and Chad—to cooperate with the ICC’s attempts to prosecute Sudanese president Omar al-Bashir for war crimes allegedly committed in Darfur). Note that States may also withdraw their consent once they have given it. See *African Union backs mass withdrawal from ICC*, BBC NEWS (Feb. 1, 2017), <https://www.bbc.com/news/world-africa-38826073>.

⁵⁴ One interesting, partial exception is the recent case that The Gambia has brought against Myanmar before the International Court of Justice (ICJ). As noted above, Myanmar is accused of violating multiple *jus cogens* norms in its treatment of the Rohingya. Although Myanmar has not consented to the jurisdiction of the ICJ, many Rohingya have fled Myanmar for Bangladesh, and it is through Bangladesh’s consent that the ICJ claims to have jurisdiction over the matter. *Myanmar Rohingya: What you need to know about the crisis*, BBC NEWS (Jan. 23, 2020), <https://www.bbc.com/news/world-asia-41566561>. Even here, The Gambia is not *directly* aggrieved by Myanmar’s treatment of its own people, but, as a Muslim-majority nation, it shares a religious affinity with the Rohingya. See Michelle Ostrove et al., *Genocide Case Against Myanmar in the ICJ*, DLA PIPER (Jan. 24, 2020), <https://www.dlapiper.com/en/northamerica/insights/publications/2019/12/genocide-case-against-myanmar>. More generally, although any State may in theory assert universal jurisdiction over officials accused of *jus cogens* violations, such prosecutions “remain uncommon.” DUNOFF ET AL., *INTERNATIONAL LAW: NORMS, ACTORS, PROCESS—A PROBLEM ORIENTED APPROACH* 481 (Wolters Kluwer), 5th ed. 2020.

⁵⁵ See, e.g., R. John Pritchard, *The International Military Tribunal for the Far East and Its Contemporary Resonances*, 149 MIL. L. REV. 25, 25 (1995) (providing background information on both the Nuremberg Trials and the Tokyo Trials); Seth Mydans, *11 Years, \$300 Million and 3 Convictions. Was the Khmer Rouge Tribunal Worth It?*, N.Y. TIMES (Apr. 10, 2017), <https://www.nytimes.com/2017/04/10/world/asia/cambodia-khmer-rouge-united-nations-tribunal.html> (detailing the limited successes of the UN-backed tribunals that prosecuted crimes committed by the Khmer Rouge in Cambodia); *supra* note 41 (providing information on the ICTR and ICTY).

punished in any meaningful way.⁵⁶ It does not help matters that even widely-accepted peremptory norms are relatively poorly defined.⁵⁷

On the other hand, in virtue of their substance, peremptory norms bear significant and distinctive moral power. First, there are no justifications, excuses, or mitigating factors for becoming a slaver, a torturer, or a genocidaire, and there is no serious basis on which to dispute the moral depravity implied by those labels. A State that accepts such a description for its ongoing conduct embraces its barbarism, communicating that, in a meaningful sense, it is not a civilized nation. The reputational cost of openly flouting such norms is nearly insuperable.⁵⁸ Indeed, in light of the expressive force of such terms, States rarely have an incentive to concede violations,⁵⁹ no matter how egregious. It is rational (albeit cynical) for States to acknowledge that peremptory norms exist, or to impliedly concede that the accusations are serious while simply denying that their own conduct even approaches illegality. Doing so allows States to test the substance of the norms while maintaining their membership in the moral community of nations.

For example, after the Bush Administration initiated the CIA torture program, its officials publicly maintained that “this government does not torture people.”⁶⁰ Having impliedly acknowledged the seriousness of torture, the United States could not concede that the program incorporates it; instead, the United States described the program as “enhanced interrogation.”⁶¹ High-

⁵⁶ That has certainly proven true in the United States, which has essentially closed the book on the torture it inflicted on detainees during the first few years of the War on Terror. *See supra* note 47. More generally, permanent members of the Security Council retain special influence over certain international proceedings related to *jus cogens* violations. For example, the UN Security Council holds the power both to refer and to halt investigations of the ICC. *See* DUNOFF ET AL., *supra* note 54, at 486–89.

⁵⁷ *See supra* note 20.

⁵⁸ Less robust international norms, such as those that permit derogation or those that do not apply universally, plainly lack the same sort of force because States have excuses for violating them without inviting stigma. *See also supra* note 28.

⁵⁹ The main exception is a limited one: it is possible that later administrations may face sufficient pressure to acknowledge the crimes of previous political leadership, as President Obama did when he conceded that the CIA program initiated under President Bush amounted to torture. *See supra* note 7. That acknowledgment renders the case particularly useful for analytic purposes, even if it is rare. Having acknowledged that serious crimes were committed, President Obama eliminated any acceptable excuse for declining investigations and prosecutions; but the mere acknowledgment helped to restore consensus about the breadth of the norm against torture.

⁶⁰ *See CIA tactics: What is ‘enhanced interrogation’?*, BBC NEWS (Dec. 10, 2014), <https://www.bbc.com/news/world-us-canada-11723189> (attributing that quote to President Bush). *See also* Ann Gearan, *Rice Signals Shift in Interrogation Policy*, AP ONLINE REGIONAL—EUROPE (Dec. 8, 2005) (“In an interview last week on ABC’s ‘Good Morning America,’ CIA Director Porter Goss said, ‘What we do does not come close to torture.’”).

⁶¹ *See Rules for interrogating terrorists? Yes. Torture? No.*, USA TODAY, Sept. 19, 2006, 2006 WLNR 16264875 (“No one in the administration uses the word torture. They refer instead to

level officials also repeatedly insisted the program was integral to national security and that it saved many American lives.⁶² Vice President Cheney was a particularly committed defender of EITs. Like President Bush, he also rejected the notion that “enhanced interrogation” amounted to torture.⁶³ In fact, in 2018, former Vice President Cheney suggested that the United States should resume the CIA program.⁶⁴

Similarly, in 2014, Russia annexed the Crimean Peninsula from Ukraine, triggering widespread condemnation from other nations.⁶⁵ Some scholars regard Russia’s actions as a violation of peremptory norms,⁶⁶ an appropriate conclusion if those actions amount to military aggression.

“enhanced interrogation methods.”); *See also* Scott Shane, *Backing C.I.A., Cheney Revisits Torture Debate From Bush Era*, N.Y. TIMES (Dec. 14, 2014), <https://www.nytimes.com/2014/12/15/us/politics/cheney-senate-report-on-torture.html> (quoting former Vice President Dick Cheney as using the term “enhanced interrogation” to describe CIA interrogation practices as recently as 2014). Interestingly, James Mitchell expressed recognition of the euphemistic character of the term “enhanced interrogation techniques.” In describing a phenomenon known as “abusive drift,” he testified that sometimes interrogators “start to use euphemisms for coercive pressure.” KSM Transcript at 30383:8–20 (Jan. 21, 2020). It was in that context that Mitchell made clear that he “didn’t come up with the term ‘enhanced interrogation techniques’” and that, instead, he had suggested a label he considered more apt, “coercive physical pressure.” *Id.* “But,” he added, “someone at the [CIA] decided it was enhanced interrogation techniques, and that’s what it was.” *Id.*

⁶² *See CIA tactics: What is ‘enhanced interrogation’?*, *supra* note 60. *See also* Bill Sammon, *Cheney: Enhanced Interrogations ‘Essential’ in Saving American Lives*, FOX NEWS (Aug. 30, 2009), <https://www.foxnews.com/politics/cheney-enhanced-interrogations-essential-in-saving-american-lives> (quoting Vice President Dick Cheney as stating, in 2009, that “enhanced interrogation techniques were absolutely essential in saving thousands of American lives and preventing further attacks against the United States, and giving us the intelligence we needed to go find Al Qaeda, to find their camps, to find out how they were being financed.”)

⁶³ *See* Shane, *supra* note 61 (quoting an interview with Vice President Dick Cheney in which he rejected the notion that the CIA’s program constituted torture, and said he “would do it again in a minute . . . Torture is what the Al Qaeda terrorists did to 3,000 Americans on 9/11. There is no comparison between that and what we did with respect to enhanced interrogation.”).

⁶⁴ *See* Eli Okun, *Dick Cheney: Restart enhanced interrogation programs*, POLITICO (May 10, 2018, 11:20 AM), <https://www.politico.com/story/2018/05/10/dick-cheney-enhanced-interrogation-579910> (articulating Cheney’s view on the torture program).

⁶⁵ *See* Gerard Toal et. al., *Six years and \$20 billion in Russian investment later, Crimeans are happy with Russian annexation*, WASH. POST (Mar. 18, 2020, 6:00 AM), <https://www.washingtonpost.com/politics/2020/03/18/six-years-20-billion-russian-investment-later-crimeans-are-happy-with-russian-annexation/> (describing the “Russian annexation,” including the “hastily organized and deeply contentious referendum on March 16, 2014, following Russia’s military occupation of the peninsula,” and the “avalanche of international criticism that followed.”).

⁶⁶ *See, e.g.*, Patrick Dumberry, *Requiem for Crimea: Why Tribunals Should Have Declined Jurisdiction over the Claims of Ukrainian Investors against Russia under the Ukraine–Russia BIT*, 9 J. INT’L DISP. SETTLEMENT 506, 511 (2018) (describing the annexation as a violation of a *jus cogens* norm prohibiting certain uses of force); Juergen Bering, *The Prohibition on Annexation: Lessons from Crimea*, 49 N.Y.U. J. INT’L L. & POL. 747, 758 (2017) (“Thus, annexation does constitute a per se illegal form of the acquisition of territory. This prohibition does not only stem from the U.N. Charter, but is also considered customary international law, arguably even *jus cogens*, a peremptory rule.”) (citations omitted).

Russian President Vladimir Putin rejects characterizations of Russia's actions as an expression of military aggression, however, and instead claims Russia had an *obligation* to assume control of Crimea to protect the democratic will of the people there.⁶⁷

A similar pattern emerges from the ongoing situation in Myanmar in which the government has been accused of carrying out a genocide of its Rohingya population, leading to an unusual case brought by The Gambia before the ICJ.⁶⁸ Rather than minimizing the seriousness of genocide, Myanmar describes its conduct in a radically different way—persistently characterizing its program as a series of “clearance operations” aimed at “terrorists.”⁶⁹

Chinese officials have taken the same approach in response to allegations over their ongoing treatment of the Uighurs.⁷⁰ In July 2020, the Chinese ambassador to the United Kingdom gave an interview with the BBC where he was confronted with aerial footage apparently showing a large number of people in Xinjiang kneeling on a train platform while handcuffed and blindfolded.⁷¹ The interviewer claimed that Western intelligence agencies had authenticated the footage, determining that it shows Uighurs being loaded en masse and by force onto trains.⁷² In response, the ambassador eventually acknowledged the allegations of ethnic cleansing against China, but, rather than dismiss the seriousness of the allegation, attempted to claim that the allegation was implausible given putative population growth in that particular region of China.⁷³ Indeed, the Chinese government has elsewhere defended its treatment of the Uighurs as part of a successful effort to fight terrorism.⁷⁴

⁶⁷ See Vladimir Putin, President of Russia, Address by President of the Russian Federation at the Kremlin (Mar. 18, 2014), (transcript available at <http://en.kremlin.ru/events/president/news/20603>) (providing text of a speech given by President Putin in connection with the annexation, in which he stated: “A referendum was held in Crimea on March 16 in full compliance with democratic procedures and international norms Naturally, we could not leave this plea [from “residents of Crimea and Sevastopol” for help from Russia] unheeded; we could not abandon Crimea and its residents in distress. This would have been betrayal on our part.”).

⁶⁸ See Bowcott & Ratcliffe, *supra* note 41; Ostrove et al., *supra* note 54.

⁶⁹ *Thousands in western Myanmar flee as army plans operations, monitors say*, REUTERS (June 27, 2020, 12:50 PM), <https://www.reuters.com/article/us-myanmar-rakhine/thousands-in-western-myanmar-flee-as-army-plans-operations-monitors-say-idUSKBN23Y0Q1>.

⁷⁰ See Fong, *supra* note 41.

⁷¹ See BBC Politics (@BBCPolitics), TWITTER (Jul. 19, 2020, 5:39 AM), <https://twitter.com/bbcpolitics/status/1284784810200838145?s=21>.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ See Steven Lee Myers, *China Defends Crackdown on Muslims, and Criticizes Times Article*, N.Y. TIMES (Nov. 18, 2019), <https://www.nytimes.com/2019/11/18/world/asia/china-xinjiang-muslims-leak.html?auth=login-email&login=email>.

The point is not that all of these official statements are factually incorrect or, even if they are, that they are all *lies*.⁷⁵ Sometimes States will properly deny allegations that they have violated *jus cogens*, and sometimes their officials will genuinely believe the allegations are false even when they are true. The point is rather that talk is cheap yet also quite important. States have substantial reputational reasons to deny true allegations, and the optimal way to do so is by acknowledging the seriousness of the allegation while reclassifying their own conduct—often, instead, as praiseworthy conduct that is in fact morally or legally *obligatory*.

B. Misleading Moral Descriptions are Inherent to the False Denial of Jus Cogens Violations

The foregoing suggests that we should be especially sensitive to the possibility that States will falsely deny allegations that they have breached peremptory norms, as well as cognizant of the form that false denials are likely to take. This subsection argues further, however, that when States proffer such denials, the moral judgment implicitly associated with the violation of *jus cogens* norms ensures that characterizations of conduct meant to elude such norms are *euphemistic* in a strong sense,⁷⁶ generating significant and far-reaching consequences.⁷⁷

Many legal prohibitions piggyback on a moral judgment that the prohibition is appropriate. To deny that one has violated such a prohibition will necessarily involve a denial that one has violated some sort of applicable legal standard—say, a denial that one’s conduct meets the elements of a criminal offense. Quite frequently, however, that legalistic denial will also involve a re-description of one’s conduct in a morally favorable manner, such as by offering a morally (as well as legally) exculpatory reason for actions that would otherwise be criminal. When these re-descriptions are inaccurate, they are euphemistic in the precise sense defined above, for they function to blunt the moral disapproval that would otherwise accompany a violation one has (*ex hypothesi*) committed. The more moral content is packed into any given legal denial, the more salient the moral misdescription of any false denial becomes.

But in the case of *jus cogens*, this euphemistic character of false denials is both essential and distinctively important. First, as noted above, because

⁷⁵ Given the overwhelming consensus about the CIA’s program, I take it as settled that President Bush and Vice President Cheney are at minimum *incorrect* in insisting that the government did not engage in torture. I do not take any position, however, on whether their statements faithfully reflect their own personal views.

⁷⁶ See *supra* note 44.

⁷⁷ See discussion *infra* Section III.

States often defend themselves against charges of *jus cogens* violations in the court of public opinion rather than before formal tribunals, the moral characterization of their conduct often matters more than the legal characterization, and thus bears greater emphasis. But second, and more importantly, it is the extreme immorality of conduct that renders its prohibition peremptory, so any legal standard built into the attendant norm will be tailored (however well or poorly) to that near-universal and overwhelming moral judgment. The norm prohibits conduct *because* it is so morally objectionable; to deny the allegation *is* to describe one's conduct in a more morally favorable manner.

Moreover, and third, there is no legal excuse for violating a peremptory norm, so a false denial requires an *affirmative* re-description of the conduct, not just the articulation of an excuse for conduct that would otherwise be problematic. As noted above, States often justify policies that yield *jus cogens* violations by appealing to national security considerations or fundamental political principles like the importance of self-governance.⁷⁸ But those justifications cannot serve as excuses for *jus cogens* violations because there is no such thing. Instead, States are likely to proffer overwhelming necessity for conduct that they have affirmatively re-described in a manner that does not violate a norm at all: instead of torturing, for example, they engage in enhanced interrogation in the interest of national security. The tendency to re-characterize violations as not only falling short of the norm but also reflecting a crucial state priority sets up the widest possible chasm between the conduct as described in the allegations and the conduct as described by the State. The euphemistic description therefore conveys a particularly misleading moral valence, shifting the judgment from morally *appalling* to morally *essential*.

Compare that to a prohibition that may carry some moral weight but does not approach peremptory status. For example, before its recent withdrawal from the International Convention on the Regulation of Whaling, Japan had characterized its continued hunting of whales (ordinarily a violation of the treaty) as falling within the convention's narrow carve-out for scientific research.⁷⁹ Assuming that description was misleading, it may

⁷⁸ See *supra* notes 60–74 and accompanying text. The pressing needs cited by States (for conduct that they claim is lawful anyway) would tend to reveal their awareness that they have approached, or even crossed, a red line. As explored in more detail below, the heft of such considerations—the worry that they will bear responsibility for failing to stop a terrorist attack, for example—naturally imposes significant pressure on lower-level officials to follow orders that may not be lawful. See *infra* notes 96–98 and accompanying text.

⁷⁹ Simon Denyer, *Japan to leave International Whaling Commission, resume commercial hunting*, WASH. POST (Dec. 26, 2018, 11:22 AM), <https://www.washingtonpost.com/world/japan-to-leave->

have been euphemistic because it suggested that Japan had a reason for engaging in whaling that was more morally acceptable to observers.⁸⁰ But the moral description is less salient in this case than the legal denial, and less consequential. After all, Japan did not have to deny that it engaged in whaling altogether; it cited a legally acceptable excuse for doing so. And ultimately, even if the prohibition on whaling reflects an adverse judgment about the morality of the practice, Japan withdrew from the treaty and resumed commercial whaling, dropping any pretense of engaging in scientific research and biting the bullet on any moral disapproval that followed.⁸¹

Even traditional criminal law prohibitions on *malum in se* offenses, such as murder, theft, rape, and so forth, fall far short of *jus cogens* in carving out a meaningful role for euphemism.⁸² For one, few traditional criminal offenses bear the moral opprobrium of *jus cogens* crimes; and, even to the extent they may still carry substantial moral weight, a defendant can invoke mitigating factors to blunt some or all of the typical moral and legal consequences of the offense. A denial can therefore concede the underlying conduct while also providing additional exculpatory information. But private offenses introduce a new and important consideration: even leaving aside the possibility of mitigation, a private defendant's position on whether his conduct meets certain legal elements or whether it was as morally bad as prosecutors allege does not generally carry the propensity to shape the content of the law itself, or to move debates over public policy. The potency of the euphemism is especially great when the entity accused of violating such a legal prohibition has significant persuasive power—when, as in the case of a State actor, its own description of the conduct carries legal and public policy significance.⁸³

international-whaling-commission-resume-commercial-hunt/2018/12/26/2c32fb20-08c9-11e9-892d-3373d7422f60_story.html.

⁸⁰ Of course, some States might oppose whaling both for commercial purposes and for scientific research. See Grant Wyeth, *Australia Unhappy About Japan's Return to Whaling*, THE DIPLOMAT (July 3, 2019), <https://thediplomat.com/2019/07/australia-unhappy-about-japans-return-to-whaling/> (describing Australia's history of tension with Japan over its whaling practices and noting Australia's opposition to whaling for any purpose).

⁸¹ Denyer, *supra* note 79.

⁸² See Avi Samuel Garbow, *The Federal Environmental Crimes Program: The Lorax and Economics 101*, 20 VA. ENVTL. L.J. 47, 51 n.18 (2001) (citing Black's Law Dictionary to define a *malum in se* offense as one that is wrong in itself, not wrong because it is prohibited by law).

⁸³ See G. Alex Sinha, *Lies, Gaslighting and Propaganda*, 68 BUFF. L. REV. 1037, 1076–87 (2020) (arguing that certain manipulative communications rise to the level of propaganda in part because of the persuasive power of the communicator, and identifying the sophistication and resources of sovereign governments as key bases of persuasive power). A major factor behind sovereign persuasive power is that media platforms often amplify the representations of governments even when those representations are inaccurate.

In short, the prevailing incentives push States to acknowledge the seriousness of allegations that implicate *jus cogens* while re-describing their own conduct in a manner that eludes those norms. When States offer false denials, they will have no choice but to mis-describe their conduct in a manner that whitewashes the moral disapproval warranted by their violations, and specifically *to reverse* the critical moral assessment that accompanies those violations. The effect is to reinforce the bare existence of the norms while eroding their reach—narrowing the scope of applicable norms by creating an international disagreement about whether *this* specific conduct qualifies,⁸⁴ and introducing deeply misleading euphemisms in the process.

As noted above, the criteria for elevating a norm to peremptory status are elusive.⁸⁵ But it is more difficult still to identify the precise boundaries of any norm,⁸⁶ and, to the extent that particularly widespread agreement about the status of a norm underlies its elevation, agreement about its scope is similarly important, at least in the first instance.⁸⁷ It is therefore especially significant to observe that States face incentives to use euphemism to

⁸⁴ In taking the position that the CIA's interrogation practices did not rise to the level of torture, the U.S. government also generated a dispute about the definition of the word "torture," and the mere existence of that dispute carried legal consequences under domestic law. High-level government actors are well aware of that effect. See, e.g., Okun, *supra* note 64 (quoting former Vice President Dick Cheney as saying that the U.S. should *reinstate* its torture program, observing: "I think the techniques we used were not torture. A lot of people try to call it that, but *it wasn't deemed torture at the time*. People want to go back and try to rewrite history, but if it were my call, I'd do it again.") (emphasis added). This "debate" was enough to immunize certain government officials from some forms of legal liability. See, e.g., *Padilla v. Yoo*, 678 F.3d 748, 750, 768 (9th Cir. 2012) (granting qualified immunity to John Yoo, an author of the torture memos, in a suit brought by a detainee alleging torture, in part because whether his treatment amounted to torture "was not clearly established in 2001-03," a "time [of] considerable debate, both in and out of government, over the definition of torture as applied to specific interrogation techniques"). See also Steve Vladeck, *Why Padilla Should Bother You (if Not Yoo)*, LAWFARE (May 2, 2012, 7:44 PM), <https://www.lawfareblog.com/why-padilla-should-bother-you-if-not-yoo> (critiquing that decision).

⁸⁵ See *supra* Section I.

⁸⁶ Some peremptory norms—especially those that are the subject of dedicated treaties—present natural starting points for articulated definitions. The norm barring torture is one of these. See Convention Against Torture, *supra* note 48. But even such definitions leave room for interpretation or manipulation. See U.S. DEP'T OF JUSTICE, OFFICE OF LEGAL COUNSEL, MEMORANDUM FOR WILLIAM J. HAYNES II, GENERAL COUNSEL OF THE DEP'T OF DEFENSE, RE: MILITARY INTERROGATION OF ALIEN UNLAWFUL COMBATANTS HELD OUTSIDE THE UNITED STATES 36-49 (Mar. 14, 2003) (analyzing the term "torture"—as defined in certain federal statutes and the Convention Against Torture—in a manner that did not encompass EITs).

⁸⁷ There is an undeniably uneasy relationship between State consent and peremptory norms. Until enough States agreed that torture, for example, is always impermissible, the ban on torture did not rise to the level of a peremptory norm. Once a critical mass of States agreed on that, however, later (isolated) dissent from the prevailing view became irrelevant to the force of the norm. Derogation is now impermissible. Yet that could change, in theory, if dissent too reaches a critical mass sufficient to relegate the norm. The individual views of States therefore matter until they do not; they matter in clumps.

generate disagreement specifically about the scope of peremptory norms even as they feel pressured to reaffirm the weight of those norms. Moreover, as the next Section explores, the euphemistic character of false denials carries significant additional implications.

III. DOWNSTREAM IMPLICATIONS OF EUPHEMISM: THE CIA TORTURE PROGRAM AS A CASE STUDY

States stand in a privileged position vis-à-vis the individuals they comprise and vis-à-vis the law itself. Through their statements, governments direct the conduct of their officials, shape public opinion, and mold both the content of the law and the historical record. In other words, States possess a peculiar capacity to influence because of the special power of sovereign speech. The manner in which States exercise that capacity is a matter of public concern in general, but State messaging takes on particular significance in the context of *jus cogens*. As the foregoing suggests, this is because States face a specific incentive to manipulate the description of their conduct in a manner that completely reverses the moral judgment that would otherwise attach, and because the nature of those descriptions allows states to slide subtly between making legal and moral claims. In adopting euphemistic descriptions, States therefore create a cascading effect of unique public significance.

A. *Euphemism Anchors Public Debate in the State's Favor*

Once they become part of the government's language for describing unlawful conduct, euphemisms further distort the public debate over the policies at issue and become part of the historical record. Elsewhere I have argued that euphemisms can operate as propaganda,⁸⁸ but their propensity to do so is especially high in the context of *jus cogens*. The moral force of peremptory norms is bound up inextricably with their substantive content; that is an essential feature of their peremptory status. As a result, a description that misleadingly moves the moral window for assessing a given policy by definition impedes the public's understanding of it. That is not to say that all members of the public would uniformly agree that a particular violation of *jus cogens* is morally terrible (even though near uniformity around the globe on that issue is presumed at the State level). Rather, such euphemisms operate to prime the debate in favor of the government. Moreover, that effect can be substantial because of the power of sovereign speech and because of the sheer distance between the competing characterizations of the conduct at issue.

⁸⁸ See Sinha, *supra* note 83, at 1111–12.

This priming effect appeared in the debate over the United States' interrogation practices. For instance, during the years of its operation and even long afterward, much (although far from all) of the media's discussion of the CIA program accepted the government's "enhanced interrogation" framing, whether out of agreement, deference, or simply an interest in avoiding seemingly semantic disputes.⁸⁹ Additionally, even those who resisted that term at times allowed it to anchor the debate. One salient alternative phrase utilized in political debates about U.S. detention practices in the War on Terror was "torture-lite." That phrase appeared in commentary and news coverage that grasped for a label to capture divergent perspectives on the program in question.⁹⁰ "Torture-lite" offers a midpoint between legal, morally essential conduct on one hand and absolutely impermissible conduct on the other. The word "lite" often appears on commercial packaging to denote products featuring fewer calories than comparable products, or less of some other undesirable substance.⁹¹ As part of the phrase "torture lite," the word "lite" therefore implies less torturous torture, and it does so in an inherently frivolous way.

But there is no such thing as "torture-lite." It is certainly not a legal concept; indeed, there already exists a legal term for mistreatment of detainees that falls short of torture: cruel, inhuman and degrading treatment, or CIDT.⁹² Although the legal analysis for CIDT is different from the legal analysis for torture,⁹³ there is no particularly interesting debate to be had

⁸⁹ See, e.g., 'The Report' Looks At Investigation Into CIA's Enhanced Interrogation Program, NAT'L PUB. RADIO (Nov. 13, 2019, 4:51 PM), <https://www.npr.org/2019/11/13/779015054/the-report-looks-at-investigation-into-cias-enhanced-interrogation-program> (adopting the government's terminology); Wolf Blitzer Hosts CNN's Late Edition, CNN (Jan. 15, 2006), <http://transcripts.cnn.com/TRANSCRIPTS/060115/le.01.html>; Dana Priest, *Ex-CIA Official Defends Detention Policies: Careful Vetting, Approval Cited*, WASH. POST (Oct. 27, 2004), <https://www.washingtonpost.com/archive/politics/2004/10/27/ex-cia-official-defends-detention-policies/4a6d9556-cc4a-44a5-b682-baca7c042879/> ("The chairman and vice chairman of the House and Senate committees were briefed, without staff members present, on the new enhanced interrogation techniques being employed by the CIA against selected terrorist suspects soon after the Sept. 11, 2001, attacks.")

⁹⁰ See, e.g., M. Gregg Bloche, *Torture-lite: It's wrong, and it might work*, WASH. POST (May 27, 2011), https://www.washingtonpost.com/opinions/torture-lite-its-wrong-and-it-might-work/2011/05/19/AGWIVzCH_story.html (using the term); Duncan Campbell, *US interrogators turn to 'torture lite'*, GUARDIAN (Jan. 24, 2003, 7:35 PM), <https://www.theguardian.com/world/2003/jan/25/usa.alqaida> (also using the term).

⁹¹ See Lite, DICTIONARY.COM, <https://www.dictionary.com/browse/lite?s=t> (last visited Feb 6, 2021). See also, e.g., MILLER LITE: OUR BEER, <https://www.millerlite.com/our-beer> (last visited Feb 6, 2021); SPAM LITE, <https://www.spam.com/varieties/spam-lite> (last visited Feb 6, 2021).

⁹² See Convention Against Torture, *supra* note 48, art. 1(1), 16.

⁹³ See, e.g., Manfred Nowak, *What Practices Constitute Torture?: US and UN Standards*, 28 HUM. RTS. Q. 809, 836 (2006) (the United States ratified the Convention Against Torture on the understanding that the treaty's stipulations about CIDT align with prohibitions contained in the U.S. Constitution).

asked to implement, operating under assurances that they are undertaking vital and lawful work even as they may well recognize that those assurances are questionable. In this context, when the State's characterization is incorrect, its choice of euphemism facilitates further violations of peremptory norms, and forms the basis for the creation of an entirely new euphemistic vocabulary utilized by the officials who put the program into action. The testimony given by Mitchell and Jessen offers a window into this phenomenon.

On one hand, the government's story about the nature and need for the CIA's interrogation program ensured that Mitchell and Jessen felt heavy pressure to extract information from detainees to stop another imminent (and possibly catastrophic) terrorist attack.⁹⁶ They faced appeals to their patriotism, and they were assured that lawyers had signed off on their interrogation program (which implied that the techniques fell short of torture morally as well).⁹⁷ Mitchell and Jessen's testimony reveals resentment at being sued over the interrogations; they claim they reasonably attempted to follow legal guidance and they believe that, unlike certain other officials, they did not step outside the authority they were given.⁹⁸

⁹⁶ See Mitchell Dep. at 219:19–220:8 (describing the nuclear threat used to pressure Mitchell to assist in the initial interrogation of Abu Zubaydah); Jessen Dep. at 105:19–109:2 (relating a similar story, and noting how little time Jessen was given to decide whether to assist). See also KSM Transcript at 30429:20–30430:1 (Jan. 22, 2020), [https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(TRANS22Jan2020-AM-MERGED\).pdf](https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(TRANS22Jan2020-AM-MERGED).pdf)

(documenting Mitchell's testimony that, when the duo sought to dial back the use of EITs on Abu Zubaydah, CIA officials accused the two of being "pussies" who "had lost [their] spine[s]," reminded them of the threat of another terrorist attack, and claimed Mitchell and Jessen "would have the blood of dead Americans on [their] hands.").

⁹⁷ Mitchell Dep. at 150:15–20 (noting that he perceived a "patriotic duty" to participate in the "campaign against al-Qaeda,"); KSM Transcript at 31663:4–9 (Jan. 28, 2020), [https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(TRANS28Jan2020-PM-MERGED\)_Part2.pdf](https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(TRANS28Jan2020-PM-MERGED)_Part2.pdf) (reflecting Mitchell's view that it was an "honor to be part of the fight,"); KSM Transcript at 31648:11–18 (Jan. 28, 2020), [https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(TRANS28Jan2020-PM-MERGED\)_Part2.pdf](https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(TRANS28Jan2020-PM-MERGED)_Part2.pdf) (documenting Mitchell's testimony that he relied on the representations of the President and other high-ranking officials (as well as lawyers) that the techniques were lawful); KSM Transcript at 30968:22–969:4 (Jan. 24, 2020), [https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(TRANS24Jan2020-MERGED\).pdf](https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(TRANS24Jan2020-MERGED).pdf)

(capturing Mitchell's rejection of the notion that the "use of EITs [w]as torture because [they] had been approved by the President, briefed to the National Security Council, judged by the OLC of the Department of Justice to be legal, approved by the Director of the CIA, carefully monitored by medical physicians when these things were occurring."); KSM Transcript at 31199:3–10 (Jan. 27, 2020), [https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(TRANS27Jan2020-MERGED\)_Part2.pdf](https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(TRANS27Jan2020-MERGED)_Part2.pdf) (claiming that Mitchell had "every reason to believe [the program] was legal," and "wouldn't have done it" if it were not.).

⁹⁸ See Jessen Dep. at 185:3–186:7 ("[Unlike other officials, w]e didn't string people up by their arms, we didn't short chain them to walls until they froze to death, we didn't threaten them with drills and guns. We did exactly – we did due diligence. We said, This is tough work, and we will do it for our country,

At the same time, as the historical consensus suggests, even parts of the program administered by Mitchell and Jessen were objectively atrocious and amounted to violations of *jus cogens*. The testimony shows the pair recognized the moral problems with their conduct at some level; they struggled to reconcile these divergent assessments, lurching between acknowledging and minimizing the brutality of EITs. For example, at times, Mitchell describes waterboarding in particularly graphic terms.⁹⁹ In testimony, he acknowledges that it is “horrible,”¹⁰⁰ and, in an interview, he once suggested that most people would prefer to have their leg broken to being waterboarded.¹⁰¹ Jessen testified that he and Mitchell even sought input from the very first CIA detainee on a replacement technique because neither of them wanted to waterboard future detainees.¹⁰² Yet Mitchell has also insisted that waterboarding is merely “uncomfortable” and “distressing,” and that, although “it sucks,” he does not “know that it’s painful.”¹⁰³ Mitchell pointed out that he had been waterboarded multiple times (though not, as the CIA detainees had been, without consent while detained by foreign power).¹⁰⁴

Similarly, Mitchell acknowledged that “walling”—the controlled slamming of detainees against a wall—was among the most powerful EITs the CIA utilized, and one that potentially lends itself to abuse.¹⁰⁵ At the same

but it has to be legal and it has to be within the bounds that’s (sic) acceptable to our nation and our government, and we were told, Yes, it is, here it is. This is what you can do, this is how you can do it. If you decide you want to do anything else, you ask us. Which we did. Every single time, meticulously”; *see also* KSM Transcript at 30429:20-30430:7 (Jan. 22, 2020), [https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(TRANS22Jan2020-AM-MERGED\).pdf](https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(TRANS22Jan2020-AM-MERGED).pdf) (recording Mitchell’s testimony to the effect that, when he and Jessen resisted continued application of EITs to Abu Zubaydah, the CIA pushed back and implied “that if we weren’t willing to carry their water, that they would send someone else who would do it . . . and that they may be harsher.”). *See also* Mitchell Dep. at 344:3-11 (noting that Mitchell and Jessen became more involved in the training of interrogators after a previous chief interrogator was fired for “once again using an unapproved technique.”).

⁹⁹ *See* JAMES E. MITCHELL & BILL HARLOW, ENHANCED INTERROGATION 73 (Crown Publishing Group 2016) (noting the “intensity” of witnessing waterboarding in person as opposed to the “sterile” experience of watching it on a monitor, and vividly describing how the former allows one to “hear [the subject], smell the smells, and feel the spray of the water and snot when [the subject] cleared his sinuses.”) According to Mitchell, one waterboarding session of Abu Zubaydah, administered purely for demonstrative purposes, “left everyone, even those observing, tearful.” *Id.* at 75.

¹⁰⁰ KSM Transcript at 30459:9 (Jan. 22, 2020), [https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(TRANS22Jan2020-AM-MERGED\).pdf](https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(TRANS22Jan2020-AM-MERGED).pdf).

¹⁰¹ *See* Mitchell Dep. at 291:20-292:23.

¹⁰² *See* Jessen Dep. at 251:10-13.

¹⁰³ Mitchell Dep. at 291:7-17.

¹⁰⁴ *See* KSM Transcript at 31351:14-17 (Jan. 27, 2020) [https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(TRANS27Jan2020-MERGED\)_Part4.pdf](https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(TRANS27Jan2020-MERGED)_Part4.pdf). *See also* Jessen Dep. at 126:4-9 (making the same point.).

¹⁰⁵ *See* KSM Transcript at 31883:10-20 (Jan. 29, 2020), [https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(TRANS29Jan2020-MERGED\).pdf](https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(TRANS29Jan2020-MERGED).pdf).

time, Mitchell testified that walling is one of two techniques that he encouraged the CIA to focus on deploying;¹⁰⁶ and he refused to concede that it is painful or even unpleasant, sparring with an attorney who characterized it as such and eventually accepting the description of it as “disorienting” and “mildly aversive.”¹⁰⁷ Elsewhere he has referred to it as “discombobulating,” insisting that, “if it’s painful, you’re doing it wrong”; and, echoing his discussion of waterboarding, he claimed he had been walled “hundreds, maybe thousands of times.”¹⁰⁸

These contradictory statements reveal that Mitchell and Jessen were not fully sold on the government’s assurances about the propriety of their project. Other segments of testimony reinforce that conclusion. For example, Mitchell found it “in retrospect distasteful”¹⁰⁹ that he once threatened to “cut [Khalid Shaikh Mohammed’s] son’s throat,” even though he testified that he carefully constructed the threat in conditional form so that (per an unnamed lawyer’s guidance) the threat would not amount to torture.¹¹⁰ More revealing still, while he was applying EITs to Abu Zubaydah in the early days of the program, the prospect of future accountability made Mitchell so uncomfortable about being captured on videotape administering the techniques that he sought to have a high-ranking CIA official appear on interrogation tapes as well.¹¹¹ Similarly, after watching those tapes, he advocated for their destruction because they were “ugly.”¹¹² But the assurances issued by the government, which history has proved false and euphemistic, were sufficient to ensure Mitchell and Jessen’s continued participation in the program.

¹⁰⁶ Mitchell Dep. at 331:10-15.

¹⁰⁷ See KSM Transcript at 31883:10-20 (Jan. 29, 2020), [https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(TRANS29Jan2020-MERGED\).pdf](https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(TRANS29Jan2020-MERGED).pdf).

¹⁰⁸ Mitchell Dep. at 360:11-12, 361:1-9.

¹⁰⁹ KSM Transcript at 31362:19-20 (Jan. 27, 2020), [https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(TRANS27Jan2020-MERGED\)_Part4.pdf](https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(TRANS27Jan2020-MERGED)_Part4.pdf).

¹¹⁰ See KSM Transcript at 31361:13-362:20 (Jan. 27, 2020), [https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(TRANS27Jan2020-MERGED\)_Part4.pdf](https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(TRANS27Jan2020-MERGED)_Part4.pdf).

¹¹¹ KSM Transcript at 30432:14-20 (Jan. 22, 2020), [https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(TRANS22Jan2020-AM-MERGED\).pdf](https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(TRANS22Jan2020-AM-MERGED).pdf)

(Q: Because the tape [of the interrogations] is running, and you wanted somebody more senior if accountability ever came down the pike? A. I mean, I wish that wasn’t (sic) true, but my mental calculus on it at the time was Dr. Jessen and I were the only two people on that tape, you know, other than the guards who were, you know, covered; and that if they were going to try to force us to continue to (sic) this, I wanted other CIA officers on that tape.”)

¹¹² Mitchell Dep. at 386:6-387:6. The CIA ultimately destroyed the tapes on the order of National Clandestine Service director Jose Rodriguez. Tabassum Zakaria, *Ex-CIA official says tapes destroyed to prevent al Qaeda reprisals*, REUTERS (Apr. 30, 2012), <https://www.reuters.com/article/us-usa-security-interrogation/ex-cia-official-says-tapes-destroyed-to-prevent-al-qaeda-reprisals-idUSBRE84003D20120501>.

Trapped between the personal experience of subjecting detainees to egregious mistreatment and the government's promises that the treatment both fell short of torture and was necessary for national security, Mitchell and Jessen introduced a whole new vocabulary of euphemisms to describe the nature of their program.¹¹³ As Mitchell himself observed, the construction of euphemism is a common development among abusive interrogators, even in training settings.¹¹⁴ Yet, in their testimony, neither Mitchell nor Jessen betray awareness that they, too, adopted obviously misleading and morally sanitized descriptions of their roles.

Some of those euphemisms concerned the conditions of the detainees themselves. For instance, Mitchell described the initial period of Khalid Shaikh Mohammed's detention as "tea and treats,"¹¹⁵ and summarized the totality of Mohammed's detention as comprising "21 days of enhanced interrogation. And then after that, he got 1,287 days of rubbing his belly and . . . bringing him things to keep him working with us."¹¹⁶ (Even when he was not being waterboarded, walled, deprived of sleep, or otherwise subjected to EITs, significant portions of Mohammed's detention by the CIA were characterized by isolation from other detainees, the presence of bright lights and loud noise 24 hours per day, and forced nudity, with a bucket for a toilet or, in the alternative, an adult diaper.)¹¹⁷ Other descriptions adopted by the interrogators sanitize their own roles. For example, Mitchell referred to certain sessions with detainees for evaluating the detainees' psychological responses to being interrogated—sessions that did not involve the application of EITs—as "fireside chats,"¹¹⁸ deliberately evoking the comforting presidential addresses given by President Franklin Roosevelt.¹¹⁹

¹¹³ See Margot Williams, *At Guantánamo Bay, Torture Apologists Take Refuge in Empty Code Words and Euphemisms*, THE INTERCEPT (Jan. 29, 2020, 6:00 AM), <https://theintercept.com/2020/01/29/guantanamo-9-11-forever-trials/> (noting James Mitchell's use of euphemism during his testimony in the 9/11 case).

¹¹⁴ See *supra* note 61.

¹¹⁵ KSM Transcript at 31258:4-13 (Jan. 27, 2020), [https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(TRANS27Jan2020-MERGED\)_Part3.pdf](https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(TRANS27Jan2020-MERGED)_Part3.pdf).

¹¹⁶ *Id.* at 31218:2-6.

¹¹⁷ See KSM Transcript at 31280:3-31285:23 (Jan. 27, 2020), [https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(TRANS27Jan2020-MERGED\)_Part3.pdf](https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(TRANS27Jan2020-MERGED)_Part3.pdf) (describing some of these conditions). According to Mitchell, Mohammed's conditions of confinement changed substantially over time, though it is unclear exactly what configuration of conditions he experienced for much of his time in CIA custody. See *id.* at 31291:4:-31293:8 (discussing the extent of Mohammed's solitary confinement in general terms).

¹¹⁸ See KSM Transcript at 30866:3-868:7 (Jan. 23, 2020), [https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(TRANS23Jan2020-MERGED\).pdf](https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(TRANS23Jan2020-MERGED).pdf).

¹¹⁹ See KSM Transcript at 31566:14-567:11 (Jan. 28, 2020), [https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(TRANS28Jan2020-PM-MERGED\)_Part1.pdf](https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(TRANS28Jan2020-PM-MERGED)_Part1.pdf).

Additionally, when asked about his role in confronting detainees who had ceased to be cooperative, Mitchell likened himself to an “ombudsman,” stating that “most of the time we sided with the detainees.”¹²⁰ Yet if detainees ceased cooperating, Mitchell and Jessen would threaten them with “going back to hard times”—a return to “enhanced interrogation.”¹²¹

In fact, the CIA’s torture program was not just named euphemistically; it sprung from a euphemism as well. Mitchell and Jessen recommended interrogation techniques that ultimately came to form the backbone of the CIA’s program—the “EITs”¹²²—after Mitchell attended a meeting in which he was told that “the gloves were off” for handling certain detainees¹²³ in the War on Terror.¹²⁴ Mitchell interpreted that phrase to mean that the CIA had already resolved to use coercion against detainees, and thus he suggested techniques that he believed would suit that purpose.¹²⁵ As noted above, Mitchell himself found “enhanced interrogation” to be a euphemistic label for those techniques,¹²⁶ yet he nevertheless adopted that exact phrase as the title of his memoir about the program.¹²⁷

CONCLUSION

This essay argues that the distinctive nature of *jus cogens* norms translates into underappreciated patterns in State conduct. For one, the special moral nature of peremptory norms creates specific incentives for States in interacting with them—incentives that render the norms simultaneously self-reinforcing in name and self-undermining in scope.

¹²⁰ KSM Transcript at 31145:12-21 (Jan. 27, 2020), [https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(TRANS27Jan2020-MERGED\)_Part1.pdf](https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(TRANS27Jan2020-MERGED)_Part1.pdf).

¹²¹ *Id.* at 31148:18-149:17.

¹²² *See supra* note 58.

¹²³ KSM Transcript at 30291:1-292:16 (Jan. 21, 2020), [https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(TRANS21Jan2020-MERGED\).pdf](https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(TRANS21Jan2020-MERGED).pdf); KSM Transcript at 31750:13-21 (Jan. 29, 2020), [https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(TRANS29Jan2020-MERGED\).pdf](https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(TRANS29Jan2020-MERGED).pdf). *See also* MITCHELL & HARLOW, *supra* note 99, at 12 (reporting the same). The “enhanced interrogation techniques” adopted by the CIA for its program derive from the U.S. military’s SERE (“Survive, Evade, Resist, Escape”) Program, which subjects certain members of the U.S. armed forces to controlled doses of mistreatment to prepare them for the possibility of similar treatment if they are ever captured by hostile powers. Mitchell Dep. at 185:11-187:3. Mitchell and Jessen each spent time working at “SERE school” before contracting to assist the CIA. Mitchell Dep. at 43:17-44:14; Jessen Dep. at 37:7-38:19.

¹²⁴ Haim Abraham has plausibly pointed out to me that the term “War on Terror” is itself euphemistic.

¹²⁵ *See* Mitchell Dep. at 192:6-19 (describing Mitchell’s basis for concluding that the CIA sought harsh interrogation techniques); Mitchell Dep. at 280:19-281:3 (claiming Mitchell suggested SERE techniques under the circumstances because they have been used safely for decades by the U.S. military).

¹²⁶ *See* KSM Transcript, *supra* note 461.

¹²⁷ *See* MITCHELL & HARLOW, *supra* note 99.

Moreover, although it may be prudent and predictable for States to be strategic in selecting the language they use to shape public opinion—and unsurprising if those efforts at times include the use of misleading or manipulative descriptions and labels—the link between euphemism and *jus cogens* is intrinsic. In contexts where a State’s conduct implicates a peremptory norm (or something close to it), the use of misleading description is a necessary feature of its (false) denial of liability. And given the purportedly inviolable nature of peremptory norms, those misleading descriptions are likely to be maximally euphemistic—casting the conduct in question as morally obligatory rather than abhorrent. Such characterizations are deeply distortive; they threaten significant downstream consequences for multiple audiences, including the public at large and the government officials who operate within the government’s chosen linguistic framework. All these ostensibly disparate phenomena trace back to the peculiar moral nature of *jus cogens*.