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## Defining Torture and Cruel, Inhuman, and Degrading Treatment

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## Defining Torture and Cruel, Inhuman, and Degrading Treatment

David Weissbrodt† & Cheryl Heilman††

### Abstract

*Declaring a “war against terror,” the United States has detained foreign nationals suspected of terrorist activities and has interrogated them at various locations outside the United States. As the United States seeks to bring charges against the detainees, serious questions have arisen regarding the interrogation methods used to obtain evidence. Federal laws enacted to meet the United States’ obligations under treaties prohibit the use of evidence obtained through torture or through cruel, inhuman, or degrading treatment. What legal standards should be applied to determine whether interrogation methods or conditions of confinement constitute torture or cruel, inhuman, or degrading treatment? Is there an international consensus on how to determine when interrogation methods and conditions of confinement constitute torture or cruel, inhuman, or degrading treatment?*

*Beginning with the United Nations Charter and the Universal Declaration of Human Rights, this Article surveys the provisions of international agreements, customary international law, and federal laws in the United States pertaining to torture and cruel, inhuman, or degrading treatment or punishment. The Article describes the cases decided by international bodies charged with implementing and interpreting the prohibition against torture and other forms of ill-treatment and identifies the common elements considered in these cases to determine whether specific conduct is prohibited under international law. Noting that the United States has obligations arising both from jus cogens and customary international law and from its obligations as a party to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punish-*

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ment, the Article argues that the precedents and standards applied by international bodies such as the United Nations' Human Rights Committee, the European Court of Human Rights, and international criminal tribunals established by the United Nations should inform the standards applied by the United States in determining whether conduct falls within the prohibition against torture and other cruel, inhuman, or degrading treatment or punishment.

## Table of Contents

Introduction.....	345
I. Sources of International Law Related to the Prohibition and Prevention of Torture and Cruel, Inhuman, or Degrading Treatment or Punishment.....	347
A. United Nations Charter and Universal Declaration of Human Rights.....	348
B. Geneva Conventions for the Protection of Victims of Armed Conflict.....	349
C. International Covenant on Civil and Political Rights.....	351
D. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.....	353
E. Regional Agreements.....	355
1. American Declaration and Conventions of the Organization of American States.....	355
2. European Convention for the Protection of Human Rights and Fundamental Freedoms.....	357
3. African Charter on Human and Peoples' Rights.....	359
F. International Criminal Tribunals.....	360
G. Customary International Law and <i>Jus Cogens</i> .....	361
II. Domestic Law Related to the Prohibition of Torture and Cruel, Inhuman, or Degrading Treatment or Punishment.....	363
A. Torture.....	363
B. Cruel, Inhuman, or Degrading Treatment.....	366
C. International Law Standards Provide Important Context.....	370
III. Elements of Torture and Cruel, Inhuman, or Degrading Treatment...	373
A. Nature of the Acts.....	377
B. Nature of the Harm.....	382
C. Purpose and Intent.....	386
D. Responsibility of Individuals and Public Officials.....	388
E. Not Arising from Lawful Sanctions.....	391
Conclusion.....	393

## Introduction

On August 1, 2002, the Office of Legal Counsel (OLC) of the United States Department of Justice issued two memoranda interpreting the criminal sanctions for and prohibition against torture set forth in 18 U.S.C. §§ 2340–2340A, the federal law known as the Torture Statute.<sup>1</sup> The memos were intended as guidance for interrogations of detainees held outside the United States, including those persons held by the government at Guantánamo Bay, Cuba. In December 2004, the OLC issued a replacement memorandum for one of the August 2002 Torture Statute memos.<sup>2</sup> Although the OLC memos acknowledge that the federal Torture Statute was enacted to comply with the United States' obligations under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,<sup>3</sup> the memos contain very little discussion of international law.<sup>4</sup>

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1. Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 506, 108 Stat. 382 (codified at 18 U.S.C. §§ 2340–2340B (2006)). One of the August 2002 memos interpreted the legal standards contained in the Torture Statute. The other memo analyzed the proposed interrogation of a specific individual. Initially kept secret, both August 2002 memos have now been released to the public. See Memorandum from Office of Legal Counsel to Alberto R. Gonzales, Counsel to the President, Regarding Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A (Aug. 1, 2002) [hereinafter August 2002 Interrogation Standards Memorandum], available at <http://www.justice.gov/olc/docs/memo-gonzales-aug1.pdf>; Memorandum from Office of Legal Counsel to John Rizzo, Acting Gen. Counsel of the Cent. Intelligence Agency, Regarding Interrogation of al Qaeda Operative (Aug. 1, 2002), available at [http://luxmedia.com.edgesuite.net/aclu/olc\\_08012002\\_bybee.pdf](http://luxmedia.com.edgesuite.net/aclu/olc_08012002_bybee.pdf). The memoranda are also available in THE TORTURE MEMOS: RATIONALIZING THE UNTHINKABLE 41–127 (David Cole ed., 2009).

2. In 2004, the August 2002 Interrogation Standards Memorandum was withdrawn and replaced. Memorandum from Office of Legal Counsel to James B. Comey, Deputy Attorney Gen., Regarding Legal Standards Applicable Under 18 U.S.C. §§ 2430–2430A (Dec. 30, 2004) [hereinafter December 2004 Standards Memorandum], available at <http://www.aclu.org/files/torturefoia/released/082409/olcremand/2004olc96.pdf>.

3. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987) [hereinafter Convention Against Torture], available at <http://www1.umn.edu/humanrts/instree/h2catoc.htm>.

4. The August 2002 Interrogation Standards Memorandum cited two decisions based on international law: one by the European Court of Human Rights and one by the Supreme Court of Israel. August 2002 Interrogation Standards Memorandum, *supra* note 1, at Part IV, International Decisions. The December 2004 memorandum referenced the European Convention for the Protection of Human Rights and Fundamental Freedoms and a decision by the International Criminal Tribunal for the former Yugoslavia. December 2004 Standards Memorandum, *supra* note 1, n.14. The legal analysis in the memoranda has been widely criticized. See, e.g., Jens David Ohlin, *The Torture Lawyers*, 51 HARV. INT'L

The use of “enhanced” interrogation techniques, such as those described in the OLC memos, continues to be a subject of national and international debate.<sup>5</sup> During 2009, Congress responded to the debate by enacting amendments to the Military Commissions Act that prohibit the use of statements obtained through torture and other forms of ill-treatment.<sup>6</sup> Recent decisions by military commissions and U.S. federal judges have confronted questions concerning the admissibility of statements made by detainees who have been held for many years and who, in some cases, have been subjected to harsh interrogation methods.<sup>7</sup> In researching questions posed to the University of Minnesota Human Rights Center about the treatment of detainees at Guantánamo, it became apparent that there was an important connection between the rights of the detainees and the United States’ human rights commitments and obligations to the international community.<sup>8</sup> In fact, there is an extensive and increasingly cohesive international consensus on the elements that define the universal prohibition against torture and other forms of ill-treatment.

Beginning with a summary of the sources of international law that prohibit torture and cruel, inhuman, or degrading treatment, this Article identifies the principal international bodies that monitor compliance and accountability for observing the prohibition. The Article next reviews laws enacted by the United

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L.J. 193, 199–207, 214–15 (2010).

5. See, e.g., Claire Finkelstein & Michael Lewis, *Should Bush Administration Lawyers Be Prosecuted for Authorizing Torture?*, 158 U. PA. L. REV. PENUMBRA 195 (2010); Manfred Nowak, *What Practices Constitute Torture?: US and UN Standards*, 28 HUM. RTS. Q. 809 (2006).

6. The Military Commissions Act of 2006 was enacted to provide for military commissions to try detainees as unlawful enemy combatants. See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, amended by Military Commissions Act of 2009, Title XVIII, Pub. L. No. 111-84, §§ 1801–07, 123 Stat. 2190 (to be codified at 10 U.S.C. §§ 948a–950t).

7. See, e.g., *United States v. Ghailani*, 2010 U.S. Dist. LEXIS 107830 (S.D.N.Y. Oct. 5, 2010) (excluding statements as the product of coercion); *United States v. Ghailani*, 2010 U.S. Dist. LEXIS 109690 (S.D.N.Y. Oct. 6, 2010) (same); *Mohammed v. Obama*, 704 F. Supp. 2d 1, 28–29 (D.D.C. 2009) (excluding statements as tainted by the physical and psychological effects of prior torture); *United States v. Khadr*, Suppression Motions Ruling (U.S. Military Commission, Aug. 18, 2010), available at <http://www.defense.gov/news/D94-D111.pdf> (admitting statements as voluntary and not the product of torture or mistreatment).

8. See INT’L COMM. OF THE RED CROSS (ICRC), ICRC REPORT ON THE TREATMENT OF FOURTEEN “HIGH VALUE DETAINEES” IN CIA CUSTODY (2007) [hereinafter ICRC REPORT], available at <http://www.nybooks.com/icrc-report.pdf>. The February 2007 review of detainee treatment by the ICRC concluded that the treatment and interrogation techniques described by fourteen Guantánamo detainees constituted torture and/or cruel, inhuman, or degrading treatment under international law. *Id.* at 24, 26.

States to fulfill its international obligations, including the federal Torture Statute, noting the connection between federal law and the international treaties the United States has agreed to obey. The Article then analyzes the primary elements international bodies have considered in making the determination that interrogation methods or conditions of confinement violate the prohibition against torture and cruel, inhuman, or degrading treatment. The Article concludes with a summary of the relevance of international jurisprudence in assessing whether detainees held by the United States in Guantánamo, Afghanistan, or Iraq have been subjected to torture or cruel, inhuman, or degrading treatment.

### **I. Sources of International Law Related to the Prohibition and Prevention of Torture and Cruel, Inhuman, or Degrading Treatment or Punishment**

International sources of law pertaining to torture and cruel, inhuman, or degrading treatment have been accepted by most of the nations of the world. Worldwide agreements reflecting the international prohibition of torture and ill-treatment include the Universal Declaration of Human Rights;<sup>9</sup> the Geneva Conventions;<sup>10</sup> the International Covenant on Civil and Political Rights;<sup>11</sup> and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>12</sup> In addition to these worldwide agreements, there are regional agreements, adopted by countries in the Americas, Europe, and Africa, which prohibit torture and other forms of ill-treatment.<sup>13</sup> International criminal law,

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9. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc A/810, at 71 (Dec. 10, 1948) [hereinafter Universal Declaration], available at <http://www1.umn.edu/humanrts/instree/bludhr.htm>.

10. The "Geneva Conventions" include four conventions. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (entered into force Oct. 21, 1950) [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (entered into force Oct. 21, 1950) [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950) [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950) [hereinafter Geneva Convention IV].

11. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR], available at <http://www1.umn.edu/humanrts/instree/b3ccpr.htm>.

12. Convention Against Torture, *supra* note 3.

13. See American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978), reprinted in Basic Documents

set forth in the Rome Statute of the International Criminal Court and in cases from international criminal tribunals, such as those established for Rwanda and the former Yugoslavia, provide additional standards.<sup>14</sup> Finally, principles of *jus cogens*, or customary international law, reflect the absolute prohibition in international law against torture and cruel, inhuman, or degrading treatment or punishment.<sup>15</sup> These agreements provide a legal framework for defining torture and other prohibited forms of ill-treatment.

#### A. *United Nations Charter and Universal Declaration of Human Rights*

Following the close of hostilities in World War II and the Holocaust, the United States and Britain met with the Soviet Union (and later with China) to formulate a proposal for the establishment of a general international organization to help ensure the protection of human rights.<sup>16</sup> The meetings led to the creation of the United Nations.<sup>17</sup> On August 8, 1945, the United States became the first State to ratify the U.N. Charter.<sup>18</sup> The

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Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc. 6 rev.1 at 25 (1992) [hereinafter American Convention], available at <http://www1.umn.edu/humanrts/oasinstr/zoas3con.htm>; Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953), amended by Protocols Nos. 3, 5, 8, & 11 (which entered into force Sept. 21, 1970, Dec. 20, 1971, Jan. 1, 1990, and Nov. 1, 1998, respectively) [hereinafter European Convention], available at <http://www1.umn.edu/humanrts/instreet/z17euroco.html>; African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev.5, 21 I.L.M. 58 (1982) (entered into force Oct. 21, 1986) [hereinafter African Charter], available at <http://www1.umn.edu/humanrts/instreet/z1afchar.htm>.

14. See Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute], available at [http://www1.umn.edu/humanrts/instreet/Rome\\_Statute\\_ICC/Rome\\_ICC\\_toc.html](http://www1.umn.edu/humanrts/instreet/Rome_Statute_ICC/Rome_ICC_toc.html); Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute], available at <http://www1.umn.edu/humanrts/instreet/rwandatrib-statute1994.html>; Statute of the International Criminal Tribunal for the Former Yugoslavia art. 1, S.C. Res. 827, U.N. Doc. S/Res/827 (May 25, 1993) (as amended on May 13, 1998 by S.C. Res. 1166; on Nov. 30, 2000 by S.C. Res. 1329; on May 17, 2002 by S.C. Res. 1411; on Aug. 14, 2002 by S.C. Res. 1481; on Apr. 20, 2005 by S.C. Res. 1597; on Feb. 28, 2006 by S.C. Res. 1660; and on Sept. 29, 2008 by S.C. Res. 1837) [hereinafter ICTY Statute], available at <http://www1.umn.edu/humanrts/icty/statute.html>.

15. See Oren Gross, *The Prohibition on Torture and the Limits of the Law*, in *TORTURE: A COLLECTION* 229 (Sanford Levison ed., 2004).

16. See Anthony Clark Arend, *The United Nations, Regional Organizations, and Military Operations: The Past and the Present*, 7 *DUKE J. COMP. & INT'L L.* 3, 7 (1996).

17. *Id.* at 7–9.

18. *This Day in History*: Aug. 8, 1945: Truman Signs United Nations Charter, HISTORY.COM, <http://www.history.com/this-day-in-history/truman-signs-united-nations-charter> (describing how the United States was the first nation to complete

U.N. Charter requires member States to take action to promote “universal respect for, and observance of, human rights and fundamental freedoms for all.”<sup>19</sup>

Three years later, in 1948, the U.N. General Assembly adopted the Universal Declaration of Human Rights.<sup>20</sup> The United States participated actively in drafting the Universal Declaration, which serves as a “common standard of achievement for all peoples and all nations.”<sup>21</sup>

Article 5 of the Universal Declaration proclaims:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.<sup>22</sup>

The Universal Declaration serves as a contemporaneous interpretation of the obligations of U.N. member States to “take joint and separate action” to promote “universal respect for, and observance of, human rights.”<sup>23</sup> A total of 192 U.N. member States have agreed to be bound by the Charter and the Universal Declaration, including the United States.<sup>24</sup>

#### *B. Geneva Conventions for the Protection of Victims of Armed Conflict*

The four Geneva Conventions for the Protection of Victims of Armed Conflict<sup>25</sup> were promulgated in 1949, the year after the United Nations adopted the Universal Declaration. The Third Geneva Convention relates to the protection of prisoners of war. In relation to international armed conflicts, Article 17 of the Third Geneva Convention declares:

No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.<sup>26</sup>

The Fourth Geneva Convention pertains to the protection of civilian persons. Article 32 of the Fourth Geneva Convention

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the ratification process of the U.N. Charter); see U.N. Charter, available at <http://www1.umn.edu/humanrts/instree/aunchart.htm>.

19. U.N. Charter, *supra* note 18, at art. 55.

20. See Universal Declaration, *supra* note 9.

21. *Id.* at pmb1.; see LOUIS HENKIN, *THE AGE OF RIGHTS* 66 (1990).

22. Universal Declaration, *supra* note 9, at art. 5.

23. U.N. Charter, *supra* note 18, at arts. 56, 55.

24. For more information about the Charter, the Universal Declaration, and the members of the United Nations, see *UN at a Glance*, UNITED NATIONS, <http://www.un.org/en/aboutun/index.shtml>.

25. See *supra* note 10.

26. Geneva Convention III, *supra* note 10, at art. 17.



provides that during periods of international armed conflicts, including periods of military occupation, no measure can be taken

of such a character as to cause the physical suffering or extermination of protected persons . . . . This prohibition applies not only to murder, torture, corporal punishment, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality whether applied by civilian or military agents.<sup>27</sup>

Torture or inhuman treatment willfully causing great suffering or serious injury to body or health constitutes a grave breach under the Third and Fourth Geneva Conventions.<sup>28</sup>

Article 3, common to all four Geneva Conventions (Common Article 3), provides additional protections during armed conflict not involving military action between States parties.<sup>29</sup> Common Article 3 pertains to persons taking no active part in the hostilities and contains prohibitions against torture and humiliating or degrading treatment:

[T]he following acts are and shall remain prohibited at any time and in any place whatsoever . . . : violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture [and] outrages upon personal dignity, in particular humiliating and degrading treatment . . . .<sup>30</sup>

The United States ratified the Geneva Conventions in 1955.<sup>31</sup> Enforcement is the responsibility of each member State; persons alleged to have committed, or to have ordered to be committed, grave breaches of the Conventions (including the prohibitions against torture and willfully causing great suffering or serious injury) must be brought before a member State's own courts.<sup>32</sup>

27. Geneva Convention IV, *supra* note 10, at art. 32.

28. Geneva Convention III, *supra* note 10, at art. 130; Geneva Convention IV, *supra* note 10, at art. 147 (labeling the following acts as grave breaches: "willfully killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial . . . , taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly").

29. Geneva Convention I, *supra* note 10, at art. 3; Geneva Convention II, *supra* note 10, at art. 3; Geneva Convention III, *supra* note 10, at art. 3; Geneva Convention IV, *supra* note 10, at art. 3.

30. Geneva Convention I, *supra* note 10, at art. 3; Geneva Convention II, *supra* note 10, at art. 3; Geneva Convention III, *supra* note 10, at art. 3; Geneva Convention IV, *supra* note 10, at art. 3.

31. See *Geneva Conventions of 12 August 1949*, INT'L COMM. OF THE RED CROSS, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P>.

32. Geneva Convention III, *supra* note 10, at art. 129; Geneva Convention IV,

In 1978, the prohibition against torture and ill-treatment was expanded to cover all persons, regardless of their status in international armed conflicts, pursuant to Article 75 of Additional Protocol I to the Geneva Conventions.<sup>33</sup> Article 75 of Additional Protocol I bans torture “at any time and in any place whatsoever” during international conflict.<sup>34</sup> Article 75 further prohibits “[o]utrages upon personal dignity, in particular humiliating and degrading treatment.”<sup>35</sup> Although the United States has not yet ratified Additional Protocol I,<sup>36</sup> Article 75 is nonetheless widely accepted around the world as reflecting fundamental minimum standards of treatment for all persons who do not benefit from more favorable treatment under the Geneva Conventions.<sup>37</sup>

### C. *International Covenant on Civil and Political Rights*

The United Nations’ Universal Declaration of Human Rights was transposed into treaty obligations by the International Covenant on Civil and Political Rights of 1966.<sup>38</sup> Article 7 of the Civil and Political Covenant repeated precisely Article 3 of the Universal Declaration, but then added one further prohibition deriving from the trial of the Nazi doctors at Nuremberg.<sup>39</sup>

Article 7 of the Covenant provides:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or

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*supra* note 10, at art. 146.

33. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978) [hereinafter Protocol I], available at <http://www1.umn.edu/humanrts/instreet/y5pagc.htm>.

34. *Id.* at art. 75.

35. *Id.*

36. David Luban, *Opting out of the Law of War: Comments on Withdrawing from International Custom*, 120 YALE L.J. ONLINE 151, 165 (2010).

37. Cf. 1 INT’L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 315–19 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter CUSTOMARY INTERNATIONAL HUMANITARIAN LAW] (discussing the customary international norm prohibiting torture, cruel, or inhuman treatment and outrages upon personal dignity).

38. See ICCPR, *supra* note 11. The Covenant was drafted by the U.N. Commission on Human Rights and was adopted by the General Assembly as part of the International Bill of Human Rights, which contains both the Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. CHRISTIAN TOMUSCHAT, UNITED NATIONS AUDIOVISUAL LIBRARY OF INT’L LAW, INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 1 (2008), [http://untreaty.un.org/cod/avl/pdf/ha/iccpr/iccpr\\_e.pdf](http://untreaty.un.org/cod/avl/pdf/ha/iccpr/iccpr_e.pdf).

39. George J. Annas, *Human Rights Outlaws: Nuremberg, Geneva, and the Global War on Terror*, 87 B.U. L. REV. 427, 434 (2006).

scientific experimentation.<sup>40</sup>

The Covenant states that while some rights may be the subject of derogation during a “time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed,” the provisions of Article 7 prohibiting torture and ill-treatment are not subject to derogation.<sup>41</sup> In addition to Article 7’s prohibition against torture and ill-treatment, Article 10 of the Covenant requires that “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”<sup>42</sup>

The United States ratified the Covenant in 1992.<sup>43</sup> The U.N. Human Rights Committee, a body of independent experts, monitors implementation of the Covenant.<sup>44</sup> The Human Rights Committee issues general comments on country compliance and reports.<sup>45</sup> The Committee also interprets the Covenant, including Article 7, in individual cases.<sup>46</sup> In considering individual cases involving Article 7 violations, the Committee has often found it unnecessary to draw a distinction between conduct constituting torture and conduct constituting cruel, inhuman, or degrading treatment.<sup>47</sup> Both types of conduct constitute violations of Article 7.<sup>48</sup> In some cases, however, the Committee has explicitly found

40. ICCPR, *supra* note 11, at art. 7.

41. *Id.* at art. 4.

42. *Id.* at art. 10.

43. The United States ratified the Covenant on Civil and Political Rights on June 8, 1992, with reservations, understandings, declarations, and a proviso. *See* U.S. Ratification of the International Covenant on Civil and Political Rights, June 8, 1992, 1676 U.N.T.S. 543, 545. Among other reservations, the United States limited the proscription of “cruel, inhuman or degrading treatment or punishment” to the equivalent of the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution. *See* 138 CONG. REC. S4781–01 (daily ed., April 2, 1992), *available at* <http://www1.umn.edu/humanrts/usdocs/civilres.html> (U.S. reservations, declarations, and understandings on the International Covenant on Civil and Political Rights).

44. *See Human Rights Committee, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS*, <http://www2.ohchr.org/english/bodies/hrc/>.

45. *See id.*

46. ICCPR, *supra* note 11, at arts. 40–42.

47. *See* NIGEL RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* 83 (3d ed. 2009) (explaining how the Human Rights Committee “has tended generally to speak of ‘violations of article 7’ of the International Covenant on Civil and Political Rights” without distinguishing between the two types of conduct).

48. *See, e.g., Torres-Ramirez v. Uruguay*, Communication No. 4/1977, U.N. Doc. CCPR/C/OP/1 at 49, ¶ 18 (U.N. Human Rights Comm. 1980) (finding violations of both article 7 (prohibiting torture and cruel, inhuman or degrading treatment) and 10 (requiring persons to be treated with humanity and respect for the dignity of the human person) where a detainee was beaten, blindfolded, and deprived of food and clothing, had his head pushed into water until he was nearly asphyxiated, hung from his arms for thirty-six hours, and was forced to stand for four days).

that torture was committed.<sup>49</sup>

*D. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture or CAT) was adopted by the United Nations in 1984.<sup>50</sup> The Convention Against Torture imposes specific obligations to prevent and enforce the prohibition against torture and cruel, inhuman, or degrading treatment.<sup>51</sup> Among other obligations, States parties that have adopted the Convention Against Torture must ensure that “any statement which is established to have been made as a result of torture . . . not be invoked as evidence in any proceedings.”<sup>52</sup> As with the Covenant, the Convention Against Torture provides that the prohibition against torture is a non-derogable obligation,<sup>53</sup> and no order from a superior officer or a public authority may be invoked as a justification of torture.<sup>54</sup>

Article 1 of the Convention Against Torture is widely

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49. See, e.g., *Estrella v. Uruguay*, Communication No. 74/1980, U.N. Doc. CCPR/C/OP/2 at 15, ¶¶ 1.6, 8.3–8.5, 9.3, 10 (U.N. Human Rights Comm. 1990) (finding torture where a detainee was forced to remain standing with legs apart and arms raised for up to twenty hours; was subjected to electric shocks; had his head pushed into water until he was nearly asphyxiated; was threatened with a mock execution and a mock amputation of his hands with an electric saw; and was repeatedly beaten, punched, and kicked).

50. Convention Against Torture, *supra* note 3.

51. Article 3 of the CAT provides that no person shall be expelled, returned, or extradited to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. *Id.* at art. 3. Article 4 requires States to establish criminal responsibility for “all acts of torture,” as well as for attempts to commit torture and complicity in torture. *Id.* at art. 4. Articles 5 to 9 call for criminal jurisdiction over nationals who are alleged to have committed torture as well as acts of torture committed in the territory of a State party. *Id.* at arts. 5–9. Article 10 calls for the training of law enforcement personnel, civil or military, medical personnel, and public officials with regard to the prohibition of torture and ill-treatment. *Id.* at art. 10. Article 11 requires systematic review of interrogation rules, instructions, methods and practices as well as arrangements for the custody of persons under arrest, detention, or imprisonment with a view to preventing torture and ill-treatment. *Id.* at art. 11. Articles 12 and 13 call for prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture or ill-treatment has been committed, as well as for procedures whereby victims may assert complaints and have their cases “promptly and impartially” investigated. *Id.* at arts. 12–13. Article 14 requires States parties to establish means for compensation and other redress for torture victims. *Id.* at art. 14.

52. *Id.* at art. 15.

53. *Id.* at art 2(2) (“No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”).

54. *Id.* at art. 2(3).

referenced by international bodies and has been deemed the de facto "first port of call" for those seeking a definition of torture.<sup>55</sup>

Article 1 defines torture as follows:

For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.<sup>56</sup>

Article 16 of the Convention Against Torture prohibits cruel, inhuman, or degrading treatment. Article 16 provides in part:

Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.<sup>57</sup>

The Convention Against Torture has been ratified by 147 nations, including the United States.<sup>58</sup> Implementation of the Convention Against Torture is monitored by a body of independent experts, the Committee Against Torture.<sup>59</sup> The Committee reviews reports on the measures taken by States parties to implement the Convention and considers communications from or on behalf of individuals who claim to be victims of a violation of the Convention's provisions.<sup>60</sup> In November 2007, the Committee adopted

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55. RODLEY, *supra* note 47, at 84.

56. Convention Against Torture, *supra* note 3, at art. 1.

57. *Id.* at art. 16.

58. See *Treaty Collection*, UNITED NATIONS, <http://treaties.un.org/Home.aspx?lang=en> for current information on the ratification of U.N. treaties. The United States ratified the Convention Against Torture with certain reservations, declarations, and understandings, including an understanding to the definition of torture as well as a reservation that cruel, inhuman, or degrading treatment means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution. See 136 CONG. REC. S17486-01 (daily ed., Oct. 27, 1990), available at <http://www1.umn.edu/humanrts/usdocs/tortres.html> (presenting U.S. reservations, declarations, and understandings to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

59. See Convention Against Torture, *supra* note 3, at art. 17.

60. See MANFRED NOWAK & ELIZABETH MCARTHUR, *THE UNITED NATIONS CONVENTION AGAINST TORTURE: A COMMENTARY* 28-66 (2008) for an overview of the history of Article 1 and its application.

General Comment 2, which emphasizes, in the aftermath of the attacks of September 11, 2001, “that the obligations in articles 2 (whereby ‘no exceptional circumstances whatsoever . . . may be invoked as a justification of torture’), 15 (prohibiting confessions extorted by torture being admitted in evidence, except against the torturer), and 16 (prohibiting cruel, inhuman or degrading treatment or punishment)” are absolute, non-derogable, and “must be observed in all circumstances.”<sup>61</sup>

### *E. Regional Agreements*

Regional international bodies in the Americas, Europe, and Africa have adopted declarations and conventions on human rights. Like the Universal Declaration, the Geneva Conventions, the Covenant on Civil and Political Rights, and the Convention Against Torture, these regional agreements prohibit torture and cruel, inhuman, or degrading treatment.

#### 1. American Declaration and Conventions of the Organization of American States

As a member of the Organization of American States (OAS),<sup>62</sup> the United States was involved in the adoption of the first international declaration to address human rights, the American Declaration of the Rights and Duties of Man.<sup>63</sup> The American

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61. Comm. Against Torture, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: General Comment No. 2: Implementation of Article 2 by States Parties, ¶ 6, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008) (citing Rep. of the Comm. Against Torture, 27th & 28th Sessions, Nov. 12–23, 2001, Apr. 29–May 17, 2002, U.N. Doc. A/57/44, ¶ 17) [hereinafter General Comment 2], available at [http://www1.umn.edu/humanrts/cat/general\\_comments/cat-gencom2.html](http://www1.umn.edu/humanrts/cat/general_comments/cat-gencom2.html). General Comment 2 also emphasizes that a State party’s obligations under CAT extend to any territory subject to the de jure or de facto control of a State party and to any person or persons who act, de jure or de facto, in the name of, in conjunction with, or at the behest of the State party. *Id.* ¶ 7; see Felice Gaer, *Opening Remarks: General Comment No. 2*, 11 N.Y. CITY L. REV. 187, 188–89, 191 (2008).

62. The OAS was created in 1948, when twenty-one nations met in Bogotá, Colombia to adopt the OAS Charter. *About the OAS: Who We Are*, ORG. OF AM. STATES, [http://www.oas.org/en/about/who\\_we\\_are.asp](http://www.oas.org/en/about/who_we_are.asp). Thirty-five independent countries of the Americas are now members of the OAS. See *About the OAS: Our History*, ORG. OF AM. STATES, [http://www.oas.org/en/about/our\\_history.asp](http://www.oas.org/en/about/our_history.asp); *About the OAS: Member States*, ORG. OF AM. STATES, [http://www.oas.org/en/member\\_states/default.asp](http://www.oas.org/en/member_states/default.asp).

63. See *About the OAS: Our History*, *supra* note 62; American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States, Bogotá, Colombia (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc. 6 rev.1 ¶ 17 (1992) [hereinafter American Declaration], available at <http://www1.umn.edu/humanrts/oasinstr/zoas2dec.htm>.

Declaration was adopted during the Ninth International Conference of American States held in May 1948, several months before the United Nations adopted the Universal Declaration.<sup>64</sup> Article 26 of the American Declaration provides that every person accused of an offense has the right "not to receive cruel, infamous or unusual punishment."<sup>65</sup>

In 1969, the OAS adopted the American Convention on Human Rights, which took effect in 1978.<sup>66</sup> Article 5 of the American Convention provides:

No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.<sup>67</sup>

The American Convention on Human Rights is applied and interpreted by the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights.<sup>68</sup> The Commission has initiated studies on countries in response to complaints of human rights violations, and the Inter-American Court has issued advisory opinions concerning the meaning of the American Convention.<sup>69</sup> The Inter-American Court has also rendered decisions in cases brought against States parties for alleged violations of the Convention.<sup>70</sup>

In 1987, the OAS adopted the Inter-American Convention to Prevent and Punish Torture (Inter-American Torture Convention).<sup>71</sup> Articles 1 and 6 of the Inter-American Torture Convention

64. *About the OAS: Our History*, *supra* note 62.

65. American Declaration, *supra* note 63, at art. 26.

66. *About the OAS: Our History*, *supra* note 62; see American Convention, *supra* note 13.

67. American Convention, *supra* note 13, at art. 5, cl. 2. Article 5, clause 1 states "Every person has the right to have his physical, mental, and moral integrity respected." *Id.* at art 5, cl. 1. This language is frequently applied by the Inter-American Court of Human Rights in conjunction with the prohibition against torture and cruel, inhuman, or degrading treatment or punishment. See, e.g., *Loayza-Tamayo v. Peru*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 33, ¶ 57 (Sept. 17, 1997) ("The violation of the right to physical and psychological integrity of persons is a category of violation that has several gradations and embraces treatment ranging from torture to other types of humiliation or cruel, inhuman or degrading treatment with varying degrees of physical and psychological effects caused by endogenous and exogenous factors which must be proven in each specific situation.").

68. *What Is the IACHR?*, INTER-AM. COMM'N ON HUMAN RIGHTS, <http://www.cidh.oas.org/what.htm>.

69. See Cecilia Medina, *The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: Reflections on a Joint Venture*, 12 HUM. RTS. Q. 439, 443-44 (1990).

70. See *id.* at 444.

71. Inter-American Convention to Prevent and Punish Torture, Dec. 9, 1985,

require States to prevent and punish torture and other cruel, inhuman, or degrading treatment or punishment within their jurisdiction.<sup>72</sup> Article 10 excludes from evidence any statement that was obtained through torture.<sup>73</sup> Article 2 defines torture as follows:

any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.<sup>74</sup>

The Inter-American Court of Human Rights and the Inter-American Commission on Human Rights have looked to other international sources of law and other international bodies, including the Human Rights Committee, the European Court of Human Rights, and the U.N. Special Rapporteur on Torture in determining whether conduct constitutes a violation of Article 5 of the American Convention.<sup>75</sup> The Court and the Commission will often find a violation without considering specifically whether the conduct at issue constitutes torture or cruel, inhuman, or degrading treatment.<sup>76</sup>

## 2. European Convention for the Protection of Human Rights and Fundamental Freedoms

The European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention)<sup>77</sup> was adopted by the Council of Europe in 1950. The Council was

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O.A.S.T.S. No. 67, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82, doc. 6 rev. ¶1, 83 (1992) [hereinafter Inter-American Torture Convention], available at <http://www1.umn.edu/humanrts/oasinstr/zoas9tor.htm>.

72. *Id.* at arts. 1, 6.

73. *Id.* at art. 10.

74. *Id.* at art. 2. Article 2 excludes from torture such physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures. *Id.*

75. See, e.g., Inter-Am. Comm'n on H.R., Report on Terrorism and Human Rights, OEA/SER.L/V/II.116, ¶¶ 150–67 (Oct. 22, 2002) [hereinafter Inter-American Report on Terrorism and Human Rights]; Cantoral-Benavides v. Peru, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 69, ¶¶ 86, 97–102 (Aug. 18, 2000).

76. The Inter-American Commission has also distinguished the standards it applies from those applied by the other international tribunals. For example, the Inter-American Commission does not use the term “severe” in concert with “physical or mental pain or anguish” in defining torture. See *Cabrera v. Dominican Republic*, Case 10.832, Inter-Am. Comm'n. H. R., Report No. 35/96, OEA/Ser.L/V/II.95, doc. 7 rev. ¶¶ 81–83 (1997).

77. European Convention, *supra* note 13.



created in 1949 to protect democracy and human rights in post-war Europe,<sup>78</sup> and the European Convention is its most important tool for doing so. Article 3 of the European Convention declares that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.”<sup>79</sup>

There are forty-seven States parties to the European Convention.<sup>80</sup> The Convention is enforced by the European Court of Human Rights, which is authorized to resolve claims by States parties against other States parties or by individuals against States parties.<sup>81</sup> The European Court has decided numerous cases involving torture and ill-treatment,<sup>82</sup> and decisions of the Court have had significant influence in shaping international norms.<sup>83</sup> Several notable decisions of the European Court have considered the difference between torture and cruel, inhuman, or degrading treatment.<sup>84</sup> While acknowledging that a special stigma is reserved for conduct constituting torture, the European Court has stated that an evolving standard should be used to assess conduct in light of present-day conditions and human rights norms.<sup>85</sup>

In addition to the European Convention, there is another European treaty for the prevention of torture, the European Convention for the Prevention of Torture and Inhuman or

78. The Council of Europe “seeks to develop throughout Europe common and democratic principles based on the European Convention on Human Rights and other reference texts on the protection of individuals.” *Who We Are*, COUNCIL OF EUR., <http://www.coe.int/aboutCoe/index.asp?page=quisommesnous&l=en>.

79. European Convention, *supra* note 13, at art. 3.

80. *See Who we Are*, COUNCIL OF EUR., *supra* note 78.

81. European Convention, *supra* note 13, at arts. 33–34.

82. *See Fionnuala Ní Aoláin, The European Convention on Human Rights and Its Prohibition on Torture*, in *TORTURE: A COLLECTION*, *supra* note 15, at 213–28.

83. For example, a 2005 Congressional Research Service report suggests that international sources may be consulted to “inform deliberations” and it specifically referred to the jurisprudence of the European Court. MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL 32438, U.N. CONVENTION AGAINST TORTURE (CAT): OVERVIEW AND APPLICATION TO INTERROGATION TECHNIQUES (2005), *available at* <http://www.fpc.state.gov/fpc/43739.htm>.

84. *See, e.g., Selmouni v. France*, 1999-V Eur. Ct. H.R. 149, 182–83 (discussing whether a particular act constituted torture rather than cruel, inhuman, or degrading treatment); *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) at 66 (1978) (“[I]t was the intention that the Convention, with its distinction between ‘torture’ and ‘inhuman or degrading treatment’, should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering.”).

85. For example, the Court has observed that an increasingly high standard is required in the area of the protection of human rights and fundamental liberties, which “correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.” *Dikme v. Turkey*, 2000-VIII Eur. Ct. H.R. 223, 254–55 (finding that particular conduct, taken as a whole and having regard to its purpose and duration, amounted to torture).

Degrading Treatment or Punishment.<sup>86</sup> This treaty is monitored by the European Committee for the Prevention of Torture.<sup>87</sup>

### 3. African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights was adopted by the Organization of African Unity (OAU) in 1982 and entered into force in 1986.<sup>88</sup> Article 5 of the African Charter provides:

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.<sup>89</sup>

There are fifty-three States parties to the African Charter.<sup>90</sup> The Charter is enforced by the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights.<sup>91</sup> In addition to deciding cases brought under the Charter,

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86. European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Nov. 26, 1987, 1561 U.N.T.S. 27161 (entered into force Feb. 1, 1989) [hereinafter European Torture Convention], *available at* <http://www1.umn.edu/humanrts/euro/z34eurotort.html>.

87. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment conducts visits to member states and issues reports regarding its activities and observations. *See* COUNCIL OF EUR., 20 YEARS OF COMBATING TORTURE, 19TH GENERAL REPORT OF THE COMMITTEE FOR THE PREVENTION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (2009), *available at* <http://www.cpt.coe.int/en/annual/rep-19.pdf>.

88. African Charter, *supra* note 13. The OAU is a regional intergovernmental organization that brings together governments of the African continent and its surrounding islands. Nsongurua J. Udombana, *Toward the African Court on Human and Peoples' Rights: Better Late than Never*, 3 YALE HUM. RTS. & DEV. L.J. 45, 55–56, (2000). The Charter of the OAU was adopted in 1963. *Id.* The OAU was replaced by the African Union in 2002.

89. African Charter, *supra* note 13, at art. 5. The African Charter on the Rights and Welfare of the Child and the Protocol on the Rights of Women in Africa also contain prohibitions against torture and ill-treatment. *See* African Charter on the Rights and Welfare of the Child, arts. 16–17, OAU Doc. CAB/LEG/24.9/49 (1990) (entered into force Nov. 29, 1999), *available at* <http://www1.umn.edu/humanrts/africa/afchild.htm>; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, art. 4, July 11, 2003, OAU Doc. CAB/LEG/66.6 (entered into force Nov. 25, 2005), *reprinted in* Martin Semalulu Nsibirwa, *A Brief Analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women*, 1 AFR. HUM. RTS. L.J. 40 (2001), *available at* <http://www1.umn.edu/humanrts/africa/protocol-women2003.html>.

90. AFRICAN UNION, LIST OF COUNTRIES WHICH HAVE SIGNED, RATIFIED/ACCEDED TO THE AFRICAN UNION CONVENTION ON AFRICAN CHARTER ON HUMAN AND PEOPLE'S [sic] RIGHTS (2007), *available at* [http://www.achpr.org/english/ratifications/ratification\\_african%20charter.pdf](http://www.achpr.org/english/ratifications/ratification_african%20charter.pdf).

91. *See* African Charter, *supra* note 13, at art. 30 (establishing the African Commission on Human and Peoples' Rights); Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human

the Commission has issued guidelines which endorse provisions of the Convention Against Torture, including a requirement that States adopt the definition of torture in Article 1 of the Convention Against Torture.<sup>92</sup> The Charter has been noted for establishing most convincingly the link between the right to human dignity and the absolute prohibition against both torture and slavery.<sup>93</sup>

### F. International Criminal Tribunals

International criminal tribunals provide yet another source of international law regarding torture and ill-treatment. In 1993, the U. N. Security Council authorized the creation of the International Criminal Tribunal for the former Yugoslavia (ICTY)<sup>94</sup> to prosecute persons responsible for serious violations of international humanitarian law and crimes against humanity committed in the former Yugoslavia.<sup>95</sup> Following widespread killings in Rwanda during April 1994, the U.N. Security Council established a second tribunal, the International Criminal Tribunal for Rwanda (ICTR), using the same basic approach as for the former Yugoslavia.<sup>96</sup> A permanent International Criminal Court (ICC) was established by the Rome Statute on July 17, 1998.<sup>97</sup> The Rome Statute governs the ICC, which has jurisdiction over crimes of genocide, war crimes, and crimes against humanity.<sup>98</sup> The Elements of Crimes for the ICC expressly define "torture" and "inhuman treatment."<sup>99</sup> In signing the treaty establishing the

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and Peoples' Rights, June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III), available at <http://www1.umn.edu/humanrts/africa/courtprotocol2004.html>.

92. See African Comm'n on Human and Peoples' Rights, Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines), 32d Sess. (2002) [hereinafter Robben Island Guidelines], available at <http://www1.umn.edu/humanrts/achpr/tortguidelines.html>.

93. Nowak, *supra* note 5, at 832 ("Both torture and slavery can be described as direct and brutal attacks on the core of human dignity and personality.").

94. ICTY Statute, *supra* note 14. The ICTY is located in The Hague, Netherlands. *About the ICTY*, INT'L CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/sections/AbouttheICTY>.

95. See ICTY Statute, *supra* note 14.

96. ICTR Statute, *supra* note 14, at art. 1.

97. Rome Statute, *supra* note 14.

98. *Id.* As of October 2010, 114 states were party to the Rome Statute. A *Universal Court with Global Support: Ratification and Implementation: Ratification of the Rome Statute*, COAL. OF THE INT'L CRIMINAL COURT, <http://www.iccnw.org/?mod=romeratification>.

99. See Int'l Criminal Court, Assembly of States Parties to the Rome Statute of the International Criminal Court, Sept. 1-3, 2002, U.N. Doc. ICC-ASP/1/3, at 108-55 (2002) [hereinafter Elements of Crimes] (outlining the elements of genocide, crimes against humanity, and war crimes). The States parties have defined the

ICC, the United States reiterated its commitment to the principle of international accountability, an action President Bill Clinton deemed consistent with U.S. leadership in the efforts to establish the ICTY and ICTR.<sup>100</sup>

While the statutes governing the three bodies differ as to the specific crimes with which persons may be charged,<sup>101</sup> both the ICTY and the ICTR have issued decisions in cases that consider whether persons charged with crimes have committed acts constituting torture or other cruel or inhumane treatment.<sup>102</sup>

### G. Customary International Law and Jus Cogens

In addition to the international agreements which have been adopted by the United States and other nations of the world, the prohibition against torture and cruel, inhuman, or degrading treatment is a norm of customary international law. Customary international law arises from the general and consistent practice of States, when the practice is followed from a sense of legal obligation.<sup>103</sup> A customary norm binds all governments, unless they have expressly and persistently objected to its development.<sup>104</sup>

war crime of “torture” as the infliction of “severe physical or mental pain or suffering” for purposes such as “obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind.” See *id.* at 126. The war crime of “inhuman treatment” is defined as the infliction of “severe physical or mental pain or suffering.” See *id.*

100. See Statement on Signature of the International Criminal Court Treaty, 37 Weekly Comp. Pres. Doc. 4 (Dec. 31, 2000). Although it signed the Rome Treaty, the United States has indicated that it does not intend to become a party to the Rome Statute, while still engaging the ICC. See *US to Resume Engagement with ICC*, BBC NEWS, Nov. 16, 2009, <http://news.bbc.co.uk/2/hi/8363282.stm>.

101. See Rome Statute, *supra* note 14, at arts. 5–8 (for crimes including genocide, crimes against humanity, war crimes, and the crime of aggression); ICTY Statute, *supra* note 14, at arts. 2–5 (for crimes including grave breaches of the Geneva Conventions, violations of the laws or customs of war, genocide, and crimes against humanity); ICTR Statute, *supra* note 14, at arts. 2–4 (for crimes including genocide, crimes against humanity, and violations of Article 3 Common to the Geneva Conventions).

102. As of April 2011, the ICTY had concluded proceedings for 125 accused, and the ICTR had completed fifty-two cases, some of which remain pending on appeal. INT’L CRIMINAL TRIBUNAL FOR THE FORMER OF YUGOSLAVIA, <http://www.icty.org/> (see news ticker); *Status of Detainees*, INT’L CRIMINAL TRIBUNAL FOR RWANDA, <http://www.unictcr.org> (follow “Cases” hyperlink). Both bodies had additional cases in progress. As of March 2011, the Prosecutor of the ICC had initiated investigations into situations in Uganda, the Democratic Republic of the Congo, the Central African Republic, Darfur, Sudan, and Kenya. *Cases and Situations*, COAL FOR THE INT’L CRIMINAL COURT, <http://www.iccnw.org/?mod=casessituations>. As of March 2011, several ICC trials were ongoing. *Id.*

103. RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (3d ed. 1987).

104. *Id.* § 102, cmt. d. For a listing of the international treaties and other

Federal courts in the United States have recognized the prohibition against torture as a norm of customary international law.<sup>105</sup> The Restatement of the Foreign Relations Law of the United States declares that international law is violated if, as a matter of State policy, a State practices, encourages, or condones torture or other cruel, inhuman, or degrading treatment or punishment.<sup>106</sup>

In fact, the prohibition against torture and other ill-treatment qualifies as a matter of *jus cogens*, that is, a peremptory norm of international law that trumps even treaty obligations.<sup>107</sup> *Jus cogens* embraces customary laws that are so universal and are derived from values so fundamental to the international community that they are considered binding on all nations, irrespective of a State's consent.<sup>108</sup> The status of torture and other forms of ill-treatment as a *jus cogens* violation of international law has been affirmed by courts in the United States, as well as by international courts.<sup>109</sup>

Hence, the United States has obligations arising both from *jus cogens* and customary international law and from its obligations as a party to the U.N. Charter (which includes, by reference, the Universal Declaration of Human Rights), the

instruments adopted by countries around the world regarding the prohibition against torture and other forms of ill-treatment, see 2 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 37, at 2106–40.

105. See *Filartiga v. Peña-Irala*, 630 F.2d 876, 884 (2d Cir. 1980) (finding universal acceptance of the view that all persons have the right to be free from torture and holding that the prohibition against torture is “clear and unambiguous, and admits of no distinction between treatment of aliens and citizens”).

106. RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 103, § 702(d).

107. As defined in the Vienna Convention on the Law of Treaties, a *jus cogens* norm, also known as a peremptory norm of international law, “is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted.” Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 331; see 2 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 37, at 2145–47 (discussing international case law regarding Common Article 3 of the Geneva Conventions and customary international law).

108. Vienna Convention on the Law of Treaties, *supra* note 107, at arts. 53, 64.

109. *Siderman de Blake v. Argentina*, 965 F.2d 699, 717 (9th Cir. 1992), *cert. denied*, 507 U.S. 1017 (1993) (reviewing authorities and concluding that torture is one of a handful of acts that constitute violations of *jus cogens*); see also *Urritia v. Guatemala*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 103, ¶ 92 (Nov. 27, 2003) (“The absolute prohibition of torture, in all its forms, is now part of international *jus cogens*.”); *Al-Adsani v. United Kingdom*, 2001-XI Eur. Ct. H.R. 80, 100–03 (accepting that the prohibition against torture has achieved a status of a peremptory norm in international law); *Prosecutor v. Furundzija*, Case No. IT-95-17/L-T, Judgment, ¶ 144 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998) (“[T]he prohibition on torture is a peremptory norm or *jus cogens*.”).

Geneva Conventions, the Civil and Political Covenant, and the Convention Against Torture. To satisfy the obligations arising out of each of these sources, the United States has adopted laws that parallel, in many respects, the international prohibitions against torture and cruel, inhuman, or degrading treatment.

## II. Domestic Law Related to the Prohibition of Torture and Cruel, Inhuman, or Degrading Treatment or Punishment

Both the U.S. Constitution and federal statutory laws prohibit torture and ill-treatment. Numerous federal laws, including the federal Torture Statute,<sup>110</sup> the Torture Victim Protection Act of 1991 (Torture Victim Act),<sup>111</sup> the Alien Tort Claims Act,<sup>112</sup> the Foreign Affairs Reform and Restructuring Act of 1998,<sup>113</sup> the Detainee Treatment Act of 2005,<sup>114</sup> and the Military Commissions Act of 2009 (MCA),<sup>115</sup> contain provisions which codify or relate to the United States' obligations under the Convention Against Torture. There is, in other words, a direct link between U.S. domestic law and international sources of law prohibiting torture and other forms of ill-treatment.

### A. Torture

The United States is obligated under the Convention Against Torture to prosecute acts of torture occurring within U.S. jurisdiction.<sup>116</sup> Federal and state criminal statutes covering murder, battery, and assault may be used to fulfill this treaty obligation. The United States also adopted the criminal prohibition against torture in the Torture Statute<sup>117</sup> to comply with the Convention Against Torture.<sup>118</sup>

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110. Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 506, 108 Stat. 382 (codified at 18 U.S.C. §§ 2340–2340B (2006)).

111. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (codified at 28 U.S.C. § 1350 note (2006)).

112. Alien Tort Claims Act, 28 U.S.C. § 1350 (2006).

113. Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242(a), 112 Stat. 2681 (codified at 8 U.S.C. § 1231 (2006)).

114. Detainee Treatment Act of 2005, Pub. L. No. 109-148 §§ 1001–1006, 119 Stat. 2739 (codified at 42 U.S.C. § 2000dd (2006)).

115. Military Commissions Act of 2009, Pub. L. No. 111-84, § 1802, 123 Stat. 2190, 2608 (to be codified at 10 U.S.C. § 950t(11)).

116. See Convention Against Torture, *supra* note 3, at art. 2.

117. 18 U.S.C. §§ 2340–2340B (2006).

118. Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Addendum to the Second Periodic Reports of States Parties Due in 1999, United States of America, U.N. Doc.

Section 2340 of the Torture Statute defines “torture” and “severe mental pain or suffering” as follows:

- (1) “torture” means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;
- (2) “severe mental pain or suffering” means the prolonged mental harm caused by or resulting from—
  - (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
  - (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
  - (C) the threat of imminent death; or
  - (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality . . . .<sup>119</sup>

The MCA definition of torture in the context of a criminal offense closely parallels the definition of torture in the Torture Statute and references the Torture Statute in defining “severe mental pain or suffering.”<sup>120</sup>

The Torture Victim Act<sup>121</sup> and the Alien Tort Claims Act<sup>122</sup>

CAT/C/48/Add.3/Rev.1 (Jan. 13, 2006). For a summary of the United States’ ratification of the Convention and the limits placed on the definition of torture, see JOHN PARRY, UNDERSTANDING TORTURE: LAW, VIOLENCE, AND POLITICAL IDENTITY 55–61 (2010).

119. 18 U.S.C. § 2340.

120. See Military Commissions Act of 2009 § 950t. Section 950t(11) defines the offense of torture as follows:

- (A) Offense. Any person subject to this chapter who commits an act specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control for the purpose of obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind, shall be punished . . . .
- (B) Severe mental pain or suffering defined. In this paragraph, the term “severe mental pain or suffering” has the meaning given that term in section 2340(2) of title 18.

*Id.*

121. Section 2 of the Torture Victim Act provides a cause of action for claims brought by any individual for acts of torture and extrajudicial killings committed by public officials, providing as follows:

- (a) Liability. An individual who, under actual or apparent authority, or color of law, of any *foreign* nation—
  - (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
  - (2) subjects an individual to extrajudicial killing shall, in a civil

allow civil suits to be brought for acts of torture. The Torture Victim Act defines torture in a manner that reflects U.S. reservations, declarations, and understandings to the Convention Against Torture.<sup>123</sup> Because the Alien Tort Claims Act looks to the law of nations for a cause of action, courts have used the definition of torture in the Convention Against Torture without reference to U.S. reservations, declarations, and understandings.<sup>124</sup>

In 1998, the United States enacted the Foreign Affairs Reform and Restructuring Act (FARRA) in order to comply with the Convention Against Torture prohibitions regarding the expulsion or removal of individuals when there are substantial grounds for believing the individual would be in danger of being subjected to torture.<sup>125</sup> With regard to issues of immigration and

action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

28 U.S.C. § 1350 note.

122. Originally enacted by the Judiciary Act of 1789, the Alien Tort Claims Act provides federal court jurisdiction over civil claims brought by non-citizens for violations of international law. See 28 U.S.C. § 1350.

123. The Torture Victim Act defines torture as follows:

(1) the term "torture" means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and

(2) mental pain or suffering refers to prolonged mental harm caused by or resulting from—

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

*Id.* § 1350 note § 3(b)(1).

124. *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1251 (11th Cir. 2005) ("When courts seek to define torture in international law, they often look to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment . . . . Accordingly, we, for [Alien Tort Claims Act] purposes, too look to the Convention when deciding what constitutes torture according to the laws of nations.").

125. Section 2242(a) of FARRA requires all appropriate U.S. agencies to prescribe regulations to implement the Convention Against Torture. See Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242(a), 112



asylum, current federal regulations protect an alien from removal if it is more likely than not that the person would be tortured if removed to the proposed country of removal.<sup>126</sup> Immigration regulations define torture as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.<sup>127</sup>

Both the Board of Immigration Appeals and the U.S. Courts of Appeals have issued decisions in cases in which aliens challenge their deportation under the Convention Against Torture regulations.<sup>128</sup>

### B. Cruel, Inhuman, or Degrading Treatment

In its ratification of the Convention Against Torture, the United States interposed a reservation to the provisions on cruel, inhuman, or degrading treatment or punishment. The reservation defines cruel, inhuman, or degrading treatment or punishment as

Stat. 2681 (codified at 8 U.S.C. § 1231 (2006)); 8 U.S.C.A. § 1231 notes (West 2011).

126. 8 C.F.R. § 208.16(c)(4) (2010).

127. *Id.* § 208.18(a)(1). The regulations distinguish torture as “an extreme form of cruel and inhuman treatment” that does not include “lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture.” *Id.* § 208.18(a)(2). The regulations provide further that “torture does not include pain or suffering arising from, inherent in or incidental to lawful sanctions.” *Id.* § 208.18(a)(3). “Lawful sanctions include judicially imposed sanctions and other enforcement actions authorized by law, including the death penalty, but do not include sanctions that defeat the object and purpose of the Convention Against Torture to prohibit torture.” *Id.* The regulations define mental pain or suffering in terms identical to the Torture Victim Act, 28 U.S.C. § 1350 note. 8 C.F.R. § 208.18(a)(4). In addition, “[i]n order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain” and “must be directed against a person in the offender’s custody or physical control.” *Id.* § 208.18(a)(5), (6). Finally, the regulations state that for an official to acquiesce in acts of torture, the official must have awareness of the activity prior to its occurrence and must thereafter breach a legal responsibility to intervene to prevent such activity. *Id.* § 208.18(a)(7). “Noncompliance with applicable legal procedure standards does not *per se* constitute torture.” *Id.* § 208.18(a)(8).

128. *See, e.g.,* Zheng v. Ashcroft, 332 F.3d 1186, 1188 (9th Cir. 2003) (remanding a petition brought by a Chinese native and citizen who alleged that if he was returned to China, he would be tortured and killed by smugglers with the acquiescence of Chinese officials); *In re J-E*, 23 I. & N. Dec. 291, 292 (B.I.A. 2002) (denying a petition brought by a Haitian native and citizen who alleged that if he was returned to Haiti he would be tortured in Haitian prison).

“the cruel, unusual, and inhuman treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.”<sup>129</sup>

The Detainee Treatment Act of 2005<sup>130</sup> also prohibits cruel, inhuman, or degrading treatment, as defined by reference to the Fifth, Eighth, and Fourteenth Amendments and the U.S. reservations to the Convention Against Torture. The Detainee Treatment Act of 2005 provides:

No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.<sup>131</sup>

Section 950t(12) of the MCA defines cruel and inhuman conduct in the criminal context by reference to Common Article 3 of the Geneva Conventions.<sup>132</sup> The MCA, as amended in 2009, prohibits the use of statements made as a result of cruel, inhuman, or degrading treatment, and permits the use of statements only if they are voluntary.<sup>133</sup> Federal courts have adopted standards for determining whether statements are voluntary and whether treatment is cruel, inhuman, or degrading based on the requirements of the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution.<sup>134</sup>

129. See 136 CONG. REC. S17486-01 (daily ed., Oct. 27, 1990), available at <http://www1.umn.edu/humanrts/usdocs/tortres.html> (presenting U.S. reservations, declarations, and understandings to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

130. 42 U.S.C. § 2000dd (2006).

131. *Id.*

132. Section 950t(12) of the Military Commissions Act of 2009 defines the offense of cruel or inhuman treatment as follows:

Any person subject to this chapter who subjects another person in their custody or under their physical control, regardless of nationality or physical location, to cruel or inhuman treatment that constitutes a grave breach of common Article 3 of the Geneva Conventions shall be punished

Pub. L. No. 111-84, § 1802, 123 Stat. 2190, 2609 (to be codified at 10 U.S.C. § 950t(12)).

133. The 2009 amendments to the MCA expressly prohibit the use of all statements obtained through torture and through cruel, inhuman, or degrading treatment. Military Commissions Act of 2009, Pub. L. No. 111-84, § 1802, 123 Stat. 2190, 2579 (to be codified at 10 U.S.C. § 948r). Prior to enactment of the 2009 amendments, the MCA permitted the use of statements obtained through cruel, inhuman, or degrading treatment under certain circumstances. See 10 U.S.C. § 948r(c) (2006) (permitting the admission of statements obtained prior to enactment of the Detainee Treatment Act of 2005 if the military judge found that (1) the totality of the circumstances rendered the statement reliable and possessing sufficient probative value; and (2) the interests of justice would best be served by admission of the statement into evidence).

134. See MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RS 22312,

The Fifth and Fourteenth Amendments to the Constitution prohibit the government from depriving any person of life, liberty, or property without due process of law.<sup>135</sup> Due process cases relating to cruel, inhuman, and degrading treatment arise most often in the context of the admissibility of evidence in criminal cases.<sup>136</sup> The Supreme Court has long held that due process prohibits the use of evidence obtained in violation of “those canons of decency and fairness which express the notions of justice of English-speaking peoples *even toward those charged with the most heinous offenses*.”<sup>137</sup> In ruling that evidence obtained in violation of due process must be excluded, the Supreme Court has observed:

Use of involuntary verbal confessions . . . is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true. Coerced confessions offend the community’s sense of fair play and decency. [T]o sanction . . . brutal conduct . . . would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby to brutalize the temper of a society.<sup>138</sup>

Confessions obtained by threats or violence have been deemed involuntary, and the Supreme Court has ruled that use of such confessions violates due process.<sup>139</sup> Interrogation techniques may also violate due process if the methods “shock the conscience.”<sup>140</sup> A confession is involuntary and thus must be excluded from evidence under the Due Process Clause when the confession is induced by such duress or coercion, express or implied, that the accused’s “will has been overborne and his

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INTERROGATION OF DETAINEES: OVERVIEW OF THE MCCAIN AMENDMENT CRS-3 (2006), available at <http://www.fas.org/sgp/crs/intel/RS22312.pdf>.

135. U.S. CONST. amends. V, XIV.

136. Cf. Juliana Murray, *Assessing Allegations: Judicial Evaluation of Testimonial Evidence in International Tribunals*, 10 CHI. J. INT’L L. 769, 796 (2010) (“Challenges to the voluntariness of statements and confessions offered as evidence often arise in criminal trials . . .”).

137. *Rochin v. California*, 342 U.S. 165, 172 (1952) (emphasis added).

138. *Id.* at 173–74.

139. *Hutto v. Ross*, 429 U.S. 28, 30 (1976); see *Chambers v. Florida*, 309 U.S. 227, 240 (1940) (finding coercion where defendants were questioned for six days straight in an environment that included “haunting fear” of mob violence); *Brown v. Mississippi*, 297 U.S. 278, 282 (1936) (finding coercion where defendants were laid on chairs, their backs cut to pieces with a leather strap with buckles on it, and they were made to understand whipping would continue if they did not confess).

140. See *United States v. Karake*, 443 F. Supp. 2d 8, 49–54 (D.D.C. 2006) (discussing cases applying the voluntariness standard and “shock the conscience” standard and concluding that, irrespective of how the issue was framed, the court’s task was to determine whether statements were the product of coercion in violation of the Due Process Clause).

capacity for self-determination critically impaired.”<sup>141</sup> A finding of coercion need not depend upon actual physical violence.<sup>142</sup> Less “traditional” forms of coercion, including psychological torture and the conditions of confinement, have been considered by courts in their assessment of the voluntariness of statements.<sup>143</sup>

The Eighth Amendment prohibits cruel and unusual punishment.<sup>144</sup> The primary concern of the drafters of the Eighth Amendment “was to proscribe ‘torture[s]’ and other ‘barbar[ous]’ methods of punishment,”<sup>145</sup> and the basic concepts underlying the Amendment can be traced back to the Magna Carta and the English Bill of Rights of 1689.<sup>146</sup> While the concepts embodied in the Amendment are thus rooted in history, the Supreme Court has emphasized that the scope of the Amendment is not static, and the terms “cruel” and “unusual” must be interpreted in accordance with “evolving standards of decency that mark the progress of a maturing society.”<sup>147</sup> Recent federal cases concerning statements made by detainees at Guantánamo Bay have applied a “totality of the circumstances” test to determine whether statements were

141. *Schneckloth v. Bustamonte*, 412 U.S. 218, 225–26 (1973).

142. *See United States v. Kozminski*, 487 U.S. 931, 955 (1988) (explaining that coercion is not limited to pressures exerted by “physical or legal means,” but can also be effected by “psychological, economic, [or] social means”).

143. *See Karake*, 443 F. Supp. 2d at 94 (holding that due process demands that guilt cannot be established through statements obtained through coercion). Under the 2009 amendments to the Military Commissions Act, statements may be admitted into evidence if a military judge finds they are voluntary after considering the totality of the circumstances. In determining the voluntariness of a statement, the MCA advises consideration of factors such as:

- (1) The details of the taking of the statement, accounting for the circumstances of the conduct of military and intelligence operations during hostilities.
- (2) The characteristics of the accused, such as military training, age, and education level.
- (3) The lapse of time, change of place, or change in identity of the questioners between the statement sought to be admitted and any prior questioning of the accused.

Pub. L. No. 111-84, § 1802, 123 Stat. 2190, 2580 (to be codified at 10 U.S.C. § 948r).

144. U.S. CONST. amend. VIII.

145. *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (citing Anthony F. Granucci, “Nor Cruel and Unusual Punishments Inflicted:” *The Original Meaning*, 57 CAL. L. REV. 839, 842 (1969)). *See generally* *Weems v. United States*, 217 U.S. 349 (1910) (reviewing the history of the Eighth Amendment).

146. *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

147. *Id.* at 101, 116 (holding that loss of citizenship as punishment for desertion violates Eighth Amendment); *see Estelle*, 429 U.S. at 103 (and cases cited therein); *id.* at 102 (holding that deliberate indifference to medical needs constitutes cruel and unusual punishment); *Furman v. Georgia*, 408 U.S. 238, 242 (1972) (holding that imposition of the death penalty under certain circumstances violates Eighth Amendment).

voluntarily made, observing that “resort to coercive tactics . . . renders the information less likely to be true.”<sup>148</sup> In at least one of these cases, the court expressly cited the United States’ obligations under the Convention Against Torture.<sup>149</sup>

### C. International Law Standards Provide Important Context

While not binding on the United States, the cases decided by international bodies, including the Human Rights Committee,<sup>150</sup> the Committee Against Torture,<sup>151</sup> the African Commission on Human and Peoples’ Rights,<sup>152</sup> the European Court of Human Rights,<sup>153</sup> the European Committee for the Prevention of Torture,<sup>154</sup> and the International Criminal Tribunals for Rwanda

148. *Mohammed v. Obama*, 704 F. Supp. 2d 1, 24–25 (D.D.C. 2009); *see also* *Anam v. Obama*, 696 F. Supp. 2d 1, 5–9 (D.D.C. 2010).

149. *Mohammed*, 704 F. Supp. 2d at 24 (“[The Convention Against Torture] requires that governments which are a party to it ‘ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture . . . .’”) (quoting Convention Against Torture, *supra* note 3, at art. 15)).

150. The Human Rights Committee monitors the implementation of the Covenant on Civil and Political Rights. Article 7 of the Covenant mandates: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” ICCPR, *supra* note 11, at art. 7. Article 10 states that: “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.” *Id.* at art. 10(1).

151. The Committee Against Torture monitors the implementation of the Convention Against Torture. *Monitoring the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, OFFICE OF THE U.N. HIGH COMM’R FOR HUMAN RIGHTS, COMM. AGAINST TORTURE, <http://www2.ohchr.org/english/bodies/cat/>. Article 1 of the Convention Against Torture sets forth a widely accepted definition of torture. Convention Against Torture, *supra* note 3, at art. 1. Article 3 provides that no person shall be expelled, returned, or extradited to another State where there are “substantial grounds for believing that he would be in danger of being subjected to torture.” *Id.* at art. 3. Article 4 requires States to establish criminal responsibility for “all acts of torture,” as well as for attempts to commit torture and complicity in torture. *Id.* at art. 4. Article 15 forbids the admissibility of evidence obtained by torture. *Id.* at art. 15.

152. The African Commission enforces the African Charter on Human and Peoples’ Rights, which prohibits “[a]ll forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment.” African Charter, *supra* note 13, at art. 5. The African Commission has adopted the definition of torture contained in Article 1 of the Convention Against Torture. *See Robben Island Guidelines*, *supra* note 92, at Part I.C, ¶ 4 (requiring member States to adopt Article 1 of the Convention Against Torture).

153. The European Court of Human Rights enforces the European Convention on Human Rights. Article 3 of the European Convention mandates “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.” European Convention, *supra* note 13, at art. 3.

154. The European Committee for the Prevention of Torture monitors compliance with the European Convention for the Prevention of Torture through visits and reports regarding member countries. European Torture Convention, *supra* note 86, at art. 1; *see* COUNCIL OF EUR., 20 YEARS OF COMBATING TORTURE:

(ICTR) and for the former Yugoslavia (ICTY)<sup>155</sup> provide important context for understanding the United States' treaty obligations.<sup>156</sup> These cases also illustrate the approach that has been used under international law to determine when circumstances merit a finding of torture and when they merit a finding of cruel, inhuman, or degrading treatment.

Cases come before the international tribunals in several different ways. International criminal tribunals such as the ICTY and ICTR assess conduct in the context of charges, guilty pleas, and sentencing. The charges brought before the ICTR principally arise from the violence against Tutsis that erupted in Rwanda in 1994.<sup>157</sup> The charges brought before the ICTY arise from the armed conflict and ethnic cleansing that occurred when various parts of the former Yugoslavia declared their independence.<sup>158</sup> Most of these cases involving torture include charges of grave breaches of the Geneva Conventions or crimes against humanity.<sup>159</sup> Because they are focused on criminal responsibility, international criminal tribunals consider not only whether the prosecution has submitted evidence of acts constituting torture or

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19TH GENERAL REPORT OF THE COMMITTEE FOR THE PREVENTION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 15 (2009), available at <http://www.cpt.coe.int/en/annual/rep-19.pdf> (describing how the Committee for the Prevention of Torture conducts periodic visits, as well as ad hoc visits "required by the circumstances").

155. Decisions rendered by the ICTR and the ICTY consider whether prosecutors have proven beyond a reasonable doubt that individuals are guilty of criminal offenses that involve allegations of torture and allegations of inhumane treatment. The decisions have identified a definition of torture and have discussed the standards of international law regarding the prohibition against torture and cruel or inhuman treatment. See, e.g., *Prosecutor v. Delalic*, IT-96-21-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001); *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998).

156. Justice Ruth Bader Ginsburg, "A Decent Respect to the Opinions of [Human]kind": The Value of a Comparative Perspective in Constitutional Adjudication, Address Before the International Academy of Comparative Law, American University (July 30, 2010), available at [http://www.supremecourt.gov/publicinfo/speeches/view speeches.aspx?Filename=sp\\_07\\_30\\_10.html](http://www.supremecourt.gov/publicinfo/speeches/view speeches.aspx?Filename=sp_07_30_10.html) (discussing the importance of incorporating human rights charters into U.S. judicial decisions).

157. See, e.g., *Akayesu*, Case No. ICTR-96-4-T, at ¶¶ 78–111.

158. See, e.g., *Prosecutor v. Tadic*, IT-94-1-T, Judgment, ¶¶ 55–126 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997).

159. Cf. Vienna Colucci, *Torture and the Law*, AMNESTY INT'L (Nov. 2001), <http://www.amnestyusa.org/counter-terror-with-justice/reports-statements-and-issue-briefs/torture-and-the-law/page.do?id=1107981> ("In times of international armed conflict, ill treatment (described as 'inhuman treatment' and 'willfully causing great suffering, or serious injury to body or health' in the Geneva Conventions) are [sic] prohibited and criminalized as grave breaches of the Geneva Conventions. These grave breaches are also incorporated in the jurisdiction of the Yugoslavia Tribunal and of the International Criminal Court.").

other forms of ill-treatment, but also whether individuals should be held criminally responsible for those acts.<sup>160</sup>

Cases come before international regional bodies, such as the European Court of Human Rights and the African Commission on Human and Peoples' Rights, through complaints brought by member States or by individuals.<sup>161</sup> Cases from the European Court of Human Rights were among the first to establish precedent for distinguishing between torture and other forms of ill-treatment.<sup>162</sup> More recent complaints alleging torture and ill-treatment under the European Convention have been brought as a result of conduct by Russian soldiers during hostilities in Chechnya and Moldova,<sup>163</sup> and as a result of widespread disturbances in the southeast of Turkey between security forces and members of the PKK, the Workers' Party of Kurdistan.<sup>164</sup> Complaints by individuals to the African Commission on Human and Peoples' Rights have arisen in a number of different contexts, including cases involving the detention of opponents to the governments in Sudan and Mauritania.<sup>165</sup>

The Human Rights Committee and the Committee Against Torture consider individual complaints from individuals.<sup>166</sup> In

160. *See, e.g.*, Prosecutor v. Brdjanin, IT-99-36-5, Judgment, ¶¶ 258–85, 535–38 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 1, 2004) (considering elements of individual criminal responsibility and finding the accused aided and abetted members of the Bosnian Serb forces in the commission of crimes amounting to torture); Prosecutor v. Kunarac, Case Nos. IT-96-23-T & IT-96-23/IT, ¶¶ 482, 496 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001) (noting that the definition of torture in the Convention Against Torture must only be applied in the context of that Convention and finding that, under humanitarian law, "the presence of a state official or of any other authority-wielding person in the torture process is not necessary for the offence to be regarded as torture").

161. EUROPEAN COURT OF HUMAN RIGHTS, THE ECHR IN 50 QUESTIONS 7 (2010), available at <http://www.echr.coe.int/NR/rdonlyres/5C53ADA4-80F8-42CB-B8BD-CBBB781F42C8/0/FAQenglish.pdf>; *Project on International Courts and Tribunals*, AFRICAN COURT OF HUMAN AND PEOPLES' RIGHTS, <http://www.pict-pcti.org/courts/ACHPR.html>.

162. *See* Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) at 66 (1978).

163. *See, e.g.*, Ilaşcu v. Moldova and Russia, 6 Eur. Ct. H.R. 1030, 1042–58 (2004).

164. *See, e.g.*, Aydin v. Turkey, App. No. 57/1996/676/866, 25 Eur. H.R. Rep. 251, 258–65 (1997) (referencing U.N. reports on widespread torture and ill-treatment by Turkish police); *see also* Akkoç v. Turkey, 2000-X Eur. Ct. H.R. 391, 410 (recounting visits by the European Committee for the Prevention of Torture).

165. *See* Amnesty Int'l v. Sudan, African Comm'n on Human and Peoples' Rights, 13th Annual Activity Report, Comm'n No. 48/90, (2000), available at [http://www1.umn.edu/humanrts/africa/comcases/48-90\\_50-91\\_52-91\\_89-93.html](http://www1.umn.edu/humanrts/africa/comcases/48-90_50-91_52-91_89-93.html); Achuthan (on behalf of Aleke Banda) v. Malawi, African Comm'n on Human and Peoples' Rights, 8th Annual Activity Report, Comm'n No. 64/92 (1995), available at <http://www1.umn.edu/humanrts/africa/comcases/64-92b.html>.

166. *See* EUROPEAN COURT OF HUMAN RIGHTS, *supra* note 161, at 7.

some cases, the Human Rights Committee has considered whether individual complainants have suffered torture in violation of Article 7 of the International Covenant on Civil and Political Rights.<sup>167</sup> In other cases, the Committee Against Torture has considered whether an individual had previously experienced torture and whether there are substantial grounds for believing that the individual would be in danger of being subjected to torture if deported.<sup>168</sup>

While the specific provisions and circumstances considered by each of the international bodies may differ, there are common elements in all of the cases in which there have been findings of torture or of cruel, inhuman, or degrading treatment. These common elements under international law provide a framework for assessing the methods of interrogation and conditions of confinement of the detainees held by the United States at Guantánamo Bay and in Afghanistan and Iraq.

### III. Elements of Torture and Cruel, Inhuman, or Degrading Treatment

Article 2 of the Convention Against Torture prohibits torture and cruel, inhuman, or degrading treatment or punishment.<sup>169</sup> Article 1 defines torture<sup>170</sup> and has been widely interpreted and applied by international bodies. Article 3 of the European Convention, Article 5 of the African Charter, and Article 5 of the American Convention on Human Rights contain similar prohibitions

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167. See, e.g., *Estrella v. Uruguay*, Commc'n No. 74/1980, U.N. Doc. CCPR/C/OP/2 at 93, ¶ 10 (U.N. Human Rights Comm. 1990) (finding a violation of the Covenant on Civil and Political Rights because Estrella was subjected to torture and was detained under inhuman prison conditions); *Muteba v. Zaire*, Commc'n No. 124/1982, U.N. Doc. A/39/40, ¶ 2.3 (U.N. Human Rights Comm. 1984) (finding violations of the Covenant because Muteba was subjected to torture and was not treated in prison with humanity and with respect for the inherent dignity of the human person).

168. See, e.g., *Comm. Against Torture, Dadar v. Canada*, Commc'n No. 258/2004, U.N. Doc. CAT/C/35/D/258/2004, ¶ 1.1 (U.N. Comm. Against Torture 2005) (deportation of a former member of the Iranian Air Force to Iran would amount to a breach of the Convention Against Torture); *Comm. Against Torture, T.A. v. Sweden*, Commc'n No. 226/2003, U.N. Doc. CAT/C/34/D/226/2003, ¶ 1.1 (U.N. Comm. Against Torture 2005) (deportation of a woman and her daughter to Bangladesh would amount to a breach of the Convention Against Torture). Article 3 of the Convention Against Torture provides that no person shall be expelled, returned, or extradited to another State where "there are substantial grounds for believing that he [or she] would be in danger of being subjected to torture." Convention Against Torture, *supra* note 3, at art. 3.

169. Convention Against Torture, *supra* note 3, at art. 2.

170. *Id.* at art. 1.



against torture and cruel, inhuman, or degrading treatment.<sup>171</sup>

The European Commission on Human Rights and the European Court of Human Rights were among the first international bodies to analyze whether conduct constituted torture or inhuman or degrading treatment.<sup>172</sup> Distinguishing between acts prohibited by Article 3 of the European Convention<sup>173</sup> and what could be characterized as “a certain roughness of treatment,”<sup>174</sup> the European Commission has observed that whether an interrogation technique or a combination of techniques constituted torture or inhuman treatment “depend[s] on the circumstances and the purpose and [is] largely . . . a question of degree.”<sup>175</sup>

In the First Greek Case, decided in 1969, the Commission observed that “all torture must be inhuman and degrading treatment,” but the term torture was generally reserved for aggravated forms of “inhuman treatment, which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment.”<sup>176</sup> The Commission further observed that “inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable,” while “degrading” treatment “grossly humiliates [an individual] before others or drives [the individual] to act against [the individual’s] will or conscience.”<sup>177</sup> The Commission’s approach in the Greek Case has

171. European Convention, *supra* note 13, at art. 3 (prohibiting “torture [and] inhuman or degrading treatment or punishment”); African Charter, *supra* note 13, at art. 5 (prohibiting “torture [and] cruel, inhuman or degrading punishment and treatment”); American Convention, *supra* note 13, at art. 5. The terms “torture” and “inhuman treatment” are also defined in the Elements of Crimes for the International Criminal Court. See Elements of Crimes, *supra* note 99, at 126 (defining torture and inhuman treatment as war crimes); Rome Statute, *supra* note 14, at art. 8(2)(a)(ii), (c)(i).

172. Cf. Paolo Carozza, President, Inter-Am. Comm’n on Human Rights, Remarks at “Fifty Years of the European Court of Human Rights Viewed by Its Fellow International Courts” (Jan. 30, 2009), available at [http://www.echr.coe.int/NR/rdonlyres/3B662702-FFDB-4187-AAC5-6B926725DF35/0/30012009PresidentCarozzaSeminar\\_eng\\_.pdf](http://www.echr.coe.int/NR/rdonlyres/3B662702-FFDB-4187-AAC5-6B926725DF35/0/30012009PresidentCarozzaSeminar_eng_.pdf) (commenting briefly on the history of human rights courts and stating that the European Court of Human Rights came into existence prior to other human rights courts).

173. European Convention, *supra* note 13, at art. 3 (“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”).

174. Greek Case, App. Nos. 3321/67, 3322/67, 3323/67 & 3344/67, 1969 Y.B. Eur. Conv. on H.R. at 501 (Eur. Comm’n on H.R.).

175. Ireland v. United Kingdom, App. No. 5310/71, 1976 Y.B. Eur. Conv. on H.R. 512, 792 (Eur. Comm’n on H.R.).

176. *Greek Case*, 1969 Y.B. Eur. Conv. on H.R. at 186.

177. *Id.* The ICTY trial chamber has also compared the definitions of torture and cruel and inhuman treatment, finding that the offense of torture is included within the broader concepts of cruel and inhuman treatment. See, e.g., Prosecutor

been interpreted as establishing a hierarchy of conduct.<sup>178</sup> The hierarchy begins with degrading treatment; the next step is inhuman treatment; and the final step is torture.<sup>179</sup> Under this framework, torture is an aggravated form of inhuman treatment, inflicted for certain purposes.<sup>180</sup>

Considering the nature and effects of five interrogation techniques used in combination by British officials to interrogate detainees from Northern Ireland who were suspected terrorists,<sup>181</sup> the European Commission concluded that

the systematic application of the techniques for the purpose of inducing a person to give information shows a clear resemblance to those methods of systematic torture which have been known over the ages. Although the five techniques—also called “disorientation” or “sensory deprivation” techniques—might not necessarily cause any severe after-effects the Commission sees in them a modern system of torture falling into the same category as those systems which have been applied in previous times as a means of obtaining information and confessions.<sup>182</sup>

After the Commission issued its report, the Irish government referred the case to the European Court of Human Rights.<sup>183</sup> In deciding that the techniques employed by British officials constituted inhuman and degrading treatment, but did not constitute torture, the European Court reiterated the proposition that “torture constitutes an *aggravated* and deliberate form of cruel, inhuman, or degrading treatment or punishment.”<sup>184</sup> The Court observed:

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v. Delalic, Case No. IT-96-36-T, Trial Chamber Judgment, ¶¶ 511, 543–44, 552 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998).

178. See RODLEY, *supra* note 47, at 86.

179. *Id.* (“So, in the Commission’s analysis, for torture to occur, a scale of criteria had to be climbed. First, the behavior had to be degrading treatment; second, it had to be inhuman treatment; and third, it had to be an aggravated form of inhuman treatment, inflicted for certain purposes.”).

180. *Id.*

181. The Commission found that the detainees suffered weight loss, physical pain, and feelings of anxiety and fear as a result of being subjected to four or possibly five days of the following treatment: (1) prolonged periods of wall-standing; (2) hooding during periods of detention except during interrogation; (3) being held in a room pending interrogation where there was a continuous loud and hissing noise; (4) deprivation of sleep for an unspecified period of time; and (5) deprivation of food and drink, although it was not possible to establish to what extent detainees were deprived of nourishment. Ireland v. United Kingdom, App. No. 5310/71, 1976 Y.B. Eur. Conv. on H.R. 512, 784–88 (Eur. Comm’n on H.R.).

182. *Id.* at 794.

183. See Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) (1978).

184. *Id.* at 65–67 (citing G.A. Res. 3452 (XXX), art. 1, U.N. Doc. A/1034 (Dec. 9, 1975)).

In order to determine whether [certain acts] should also be qualified as torture, the Court must have regard to the distinction, embodied in Article 3, between this notion and that of inhuman or degrading treatment. . . . [I]t was the intention that the Convention, with its distinction between "torture" and "inhuman or degrading treatment", should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering.<sup>185</sup>

The European Court of Human Rights has subsequently adopted an evolving standard for determining when acts constitute torture, a standard that takes into account present-day conditions and human rights norms.<sup>186</sup> Emphasizing that the prohibition against torture "enshrines one of the most fundamental values of democratic societies" that must be respected "[e]ven in the most difficult circumstances,"<sup>187</sup> the European Court has sought to protect human rights and fundamental liberties, which "correspondingly and inevitably requires greater firmness in addressing breaches of the fundamental values of democratic societies."<sup>188</sup> Observing that the European Convention is a "living document," the Court has expressly stated that "certain acts which were classified in the past as 'inhuman and degrading treatment' as opposed to 'torture' could be classified differently in the future."<sup>189</sup>

The decisions of the European Court and the European Commission are widely referenced by other international bodies, as the standards are applied to acts and conditions of detention in countries throughout the world.<sup>190</sup> In making a determination regarding whether torture or cruel, inhuman, or degrading treatment has occurred, international bodies have considered (1) the nature of the act or acts involved;<sup>191</sup> (2) the severity of the physical and/or mental harm suffered as a result of the acts;<sup>192</sup> (3) the purpose of

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185. *Id.* at 66.

186. *See* *Dikme v. Turkey*, App. No. 20869/92, 2000-VIII Eur. Ct. H.R. 223, 254-55.

187. *Id.* at 254; *see* *Aydin v. Turkey*, App. No. 23178/94, 25 Eur. H.R. Rep. 251, 295 (1997); *Aksoy v. Turkey* (No. 26), 1996-VI Eur. Ct. H.R. 2260, 2279.

188. *Selmouni v. France*, App. No. 25803/94, 1999-V Eur. Ct. H.R. 149, 183.

189. *Id.*

190. *See, e.g.,* *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Trial Chamber Judgment, ¶ 181 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 15, 2002) ("In that respect, the Trial Chamber regards the general reasoning and criteria used by the European Court of Human Rights in order to assess the gravity of the act of torture, as well as its relationship with other less serious offences, as sufficiently compelling as to warrant adopting it in the present case.")

191. *See infra* Part III.A.

192. *See infra* Part III.B.

the actor;<sup>193</sup> (4) the official status and/or individual responsibility of the actor;<sup>194</sup> and (5) whether the harm resulted from an otherwise lawful sanction.<sup>195</sup> International human rights scholars have also analyzed these elements and have offered commentary on how they should be applied to distinguish torture and inhuman or degrading conduct.<sup>196</sup> These five elements, and the jurisprudence that has interpreted them, are discussed more fully below.

#### A. *Nature of the Acts*

Several notable efforts have been made to catalog or define those acts which violate international law standards. In 1985, shortly after the United Nations adopted the Convention Against Torture, the U.N. Commission on Human Rights appointed a special rapporteur to examine questions relevant to torture.<sup>197</sup> The Special Rapporteur's mandate has been regularly extended and includes fact-finding country visits, annual expert reports, and communications to U.N. member States with regard to individual cases.<sup>198</sup> The Special Rapporteur's 1986 report describes the conditions under which torture often occurs, including practices such as incommunicado detention and states of emergency, where "preventative detention" or detention without procedural safeguards to protect the rights of detainees has led to circumstances where torture can become psychologically and institutionally accepted.<sup>199</sup> The Special Rapporteur's report includes a listing of the types of actions that constitute torture. Some of the acts on the list are acts of commission, such as beating,<sup>200</sup> burning,<sup>201</sup>

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193. See *infra* Part III.C.

194. See *infra* Part III.D.

195. See *infra* Part III.E.

196. See NOWAK & MCARTHUR, *supra* note 60, at 66–84 (discussing approaches by countries, tribunals, and scholars to defining torture, inhuman, or degrading treatment).

197. See *Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, OFFICE OF THE UNITED NATIONS HIGH COMM'R FOR HUMAN RIGHTS, <http://www2.ohchr.org/english/issues/torture/rapporteur/>.

198. See *id.*

199. Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Comm'n on Human Rights, 42d Sess., U.N. Doc. E/CN.4/1986/15, ¶¶ 106–17 (Feb. 16, 1986) (by P. Kooijmans) [hereinafter Special Rapporteur's Report on Torture].

200. See *id.* ¶ 119 (including "blows to the feet[, b]lows with rifle-butt or bludgeons[,] lashing that cause wounds, internal bleeding, fractures, [or] cranial traumatism[, and] 'Falanga' or 'falaga', that consists of hitting the feet with a stick or metal instrument").

201. See *id.* (including "[c]igarette burns[, e]lectrical burns[,] 'Parilla', that

suspension,<sup>202</sup> suffocation, such as by near-drowning in water,<sup>203</sup> and exposure to excessive light or noise.<sup>204</sup> There are also acts of omission, such as prolonged denial of rest, sleep, food, sufficient hygiene, or medical assistance, and prolonged isolation and sensory deprivation.<sup>205</sup> Acts of torture may also involve “threats to kill or torture relatives [and] simulated executions,” which are specifically included in the report as examples of acts constituting torture.<sup>206</sup>

In 2002, the Inter-American Commission on Human Rights issued a Report on Terrorism and Human Rights, which surveys international jurisprudence regarding torture and cruel, inhuman, and degrading treatment.<sup>207</sup> Focusing on Inter-American jurisprudence, the Report on Terrorism lists the acts which have been found to constitute prohibited conduct in the context of interrogation and detention.<sup>208</sup> The list includes

- prolonged incommunicado detention;
- keeping detainees hooded and naked in cells and interrogating them under the drug pentothal;
- imposing a restricted diet leading to malnutrition;
- applying electric shocks to a person;
- holding a person’s head in water until the point of drowning;
- standing or walking on top of individuals;
- beating, cutting with pieces of broken glass, putting a hood over a person’s head and burning him or her with lighted cigarettes;
- rape;
- mock burials, mock executions, beatings, deprivation of food and water;
- threats of a behavior that would constitute inhumane treatment; threats of removal of body parts, exposure to the torture of other victims; [and]
- death threats.<sup>209</sup>

#### Jurisprudence from the European Court of Human Rights

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consists of the attachment of the prisoner to a grill of burning coal[, b]urns by wax or boiling oil[, and b]urns by cotton impregnated with petrol placed between the toes and then ignited”).

202. *See id.* (including “[s]uspension by the feet, hands or testicles[, and s]uspension on iron bars”).

203. *See id.*

204. *See id.*

205. *Id.*

206. *Id.*

207. *See* Inter-American Report on Terrorism and Human Rights, *supra* note 75, ¶¶ 147–80.

208. *See id.* ¶ 161.

209. *Id.* (citations omitted).

reveals similar types of prohibited conduct. In cases challenging conduct by Russian and Turkish officials, for example, the European Court has found acts constituting torture where authorities employed a combination of acts, omissions, and threats, including the use of water, nakedness, hooding, physical beatings, forced standing, prolonged use of light and loud noises, deprivation of food, limited access to hygiene and medical care, mock executions or death threats, and threats of harm to family members.<sup>210</sup>

In cases where the European Court has declined to characterize interrogation methods or conditions of confinement as torture, the Court has often found detainees suffered inhuman or degrading treatment. Conduct deemed inhuman under the European Convention has included interrogation methods such as “wall-standing,” hooding, subjection to noise, deprivation of sleep and food, beatings, sensory isolation or solitary confinement, denial of access to appropriate medical care, the disproportionate use of restraints, and the threat of severe physical pain.<sup>211</sup> The European Court has also found conduct degrading where, for example, a fifteen-year-old was subject to birching by police

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210. Although the combination of acts in each case differed, the European Court expressly concluded in each case that detainees had been subjected to torture. *See* Chitayev v. Russia, App. No. 59334/00, ¶¶ 19, 23–27, 156–59 (Eur. Ct. H.R. January 18, 2007) (describing numerous acts including the use of electric shocks, multiple beatings, forced standing, death threats, and non-fatal strangling, among others); *Ilaşcu v. Moldova & Russia*, App. No. 48787/99, 40 Eur. H.R. Rep. 1030, 1071, 1073, 1082 (2004) (describing beatings, mock executions, and deprivation of light and water, among other acts); *Akkoç v. Turkey*, App. Nos. 22947/93 & 22948/93, 2000-X Eur. Ct. H.R. 391, 402, 426–27 (describing how a female detainee was repeatedly stripped naked, doused with hot and cold water, and forced to sit in a floodlit cell with loud music playing); *Dikme v. Turkey*, App. No. 20869/92, 2000-VIII Eur. Ct. H.R. 223, 249–52, 255 (describing electric shocks applied to a detainee’s genitals, mock executions, and “Palestinian hangings,” by which the detainee was “suspended by his arms for long periods of time with his hands tied behind his back”); *Aydın v. Turkey*, App. No. 23178/94, 25 Eur. H.R. Rep. 251, 259, 295–96 (1997) (describing a female detainee being “sprayed with cold water from high-pressured jets,” beaten, and brutally raped); *Aksoy v. Turkey*, 1996-VI Eur. Ct. H.R. 2260, 2281 (describing “Palestinian hangings”). *See generally* Inter-American Report on Terrorism and Human Rights, *supra* note 75, ¶¶ 157–59, 163–65 (citing European Commission and European Court of Human Rights precedent).

211. *See* *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) at 66 (1978) (reviewing standards for determining cruel and inhuman conduct and finding combination of interrogation methods cruel and inhuman); *see also* *Gäfgen v. Germany*, App. No. 22978/05, ¶¶ 15–16, 26, 40, 120–21 (Eur. Ct. H.R. June 1, 2010) (describing threats of torture and findings of ill-treatment); *Said v. Netherlands*, 2005-VI Eur. Ct. H.R. 275, 290–91 (describing acts determined to be inhuman conduct); *Ilaşcu*, 40 Eur. H.R. Rep. at 1121–22, 1125–26; *Henaf v. France*, App. No. 65436/01, 40 Eur. H.R. Rep. 990, 1000 (2003); *Kuznetsov v. Ukraine*, App. No. 39042/97, ¶ 125 (Eur. Ct. H.R. April 29, 2003) (describing conditions of confinement which violated Article 3 of the Convention); *Kaya v. Turkey*, 2000-III Eur. Ct. H.R. 149, 184–85 (finding “inhuman and degrading treatment”).

officers on a "bare posterior," as a form of corporal punishment.<sup>212</sup>

Other international bodies have noted the difficulty of drawing a precise line between acts that constitute torture and acts that constitute cruel, inhuman, or degrading treatment or punishment. The ICTY has stated, for example, that while solitary confinement or the deprivation of food "is not, in and of itself, a form of torture," depending on the severity, duration, and purpose, these acts may constitute torture.<sup>213</sup> The ICTY has also ruled that acts of violence and threats of violence may constitute torture,<sup>214</sup> yet many ICTY cases find beatings,<sup>215</sup> head-banging,<sup>216</sup> and the use of restraints and stress positions to constitute cruel and inhuman treatment.<sup>217</sup> ICTY rulings cite a range of other detention conditions to support findings of cruel, inhuman, or degrading treat-

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212. See *Tyrer v. United Kingdom*, 26 Eur. Ct. H.R. (ser. A) at 6–7, 16–17 (1978) (finding the element of humiliation attained the level of "degrading treatment" where student offender was "treated as an object in the power of the authorities"); see also *Peers v. Greece*, App. No. 28524/95, 33 Eur. H.R. Rep. 1192, 1215–16, 1218–19 (2001) (finding degrading treatment where detainees were forced to use the toilet in front of others, lacked adequate bedding, and were kept in nearly twenty-four-hour confinement in a cell with no window).

213. See *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Trial Chamber Judgment, ¶ 183 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 15, 2002) (stating that, to the extent that the confinement or other deprivation is for a particular prohibited purpose and has caused severe physical or mental pain or suffering, keeping someone in solitary confinement or depriving them of food may constitute torture).

214. See *Prosecutor v. Naletilic*, Case No. IT-98-34-A, Appeals Chamber Judgment, ¶¶ 289–98 (Int'l Crim. Trib. for the Former Yugoslavia May 3, 2006); *Prosecutor v. Naletilic*, Case No. IT-98-34-T, Trial Chamber Judgment, ¶¶ 366–68 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 31, 2003) (finding acts of sufficient severity to constitute torture where detainees were threatened with death and with further beatings).

215. See, e.g., *Prosecutor v. Delic*, Case No. IT-04-83-T, Trial Chamber Judgment, ¶¶ 315–19 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 15, 2008) (finding cruel treatment where women were beaten with fists, metal sticks, rifle butts, and kicks); *Prosecutor v. Oric*, Case No. IT-03-68-T, Trial Chamber Judgment, ¶¶ 414–74 (Int'l Crim. Trib. for the Former Yugoslavia June 30, 2006) (finding cruel treatment on the same standards as inhuman treatment where detainees were kicked, stomped on, beaten with fists, sticks, logs, shoes, rifle butts, metal rods, knives, and baseball bats).

216. *Oric*, Case No. IT-03-68-T, at ¶¶ 443, 469 (describing how a detainee's head was banged against a radiator, causing him to lose consciousness, and finding that such actions, among others, constituted cruel and inhuman treatment).

217. *Delic*, Case No. IT-04-83-T, at ¶¶ 255–58 (finding cruel and inhuman treatment where, *inter alia*, detainees were "strung up by their ankles, with their torsos resting on the ground and their hands tied behind the back" and spent the whole night in restraints "so tight [one detainee said] it felt like it would cut his feet off"). Other case examples include beatings of detainees who were blindfolded, and holding detainees in a shed for two days, blindfolded, with hands and legs tied, and without any food or water. See *Prosecutor v. Boskoski*, Case No. IT-04-82-T, Trial Chamber Judgment, ¶¶ 383, 385 (Int'l Crim. Trib. for the Former Yugoslavia July 10, 2008); *Delic*, Case No. IT-04-83-T, at ¶¶ 257, 270, 273, 315–19.

ment, including cramped quarters or exposure to the elements;<sup>218</sup> the absence of or insufficient sleeping arrangements;<sup>219</sup> lack of, insufficient, or unhygienic facilities;<sup>220</sup> and little or no medical attention.<sup>221</sup> The African Commission on Human and Peoples' Rights and the United Nations Human Rights Committee have rendered decisions in similar cases involving findings of torture and/or cruel, inhuman, or degrading treatment or punishment.<sup>222</sup>

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218. See *Prosecutor v. Simic*, Case No. IT-95-9-T, Trial Chamber Judgment, ¶¶ 737–45, 773 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 17, 2003) (describing overcrowded cells, sometimes with not enough room to sit); *Krnjelac*, Case No. IT-97-25-T, Trial Chamber Judgment, ¶¶ 135–38 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 15, 2002) (where, in addition to being crowded together, the little available bedding was never washed, detainees were punished for attempting to make winter clothes from the few blankets available, windows were left open in the winter, and broken windows were neither repaired nor covered).

219. See *Prosecutor v. Stakic*, Case No. IT-97-24-T, Trial Chamber Judgment, ¶¶ 163, 167, 790, (Int'l Crim. Trib. for the Former Yugoslavia July 31, 2003) (where no sleeping arrangements were provided and detainees slept on wooden pallets, bare concrete, or on top of each other); *Prosecutor v. Delalic*, Case No. IT-96-21-T, Trial Chamber Judgment, ¶¶ 1106–08, 1114 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998) (reporting inadequate sleeping arrangements with few blankets, detainees having to sleep on concrete floors, in buildings where rainwater leaked in, or packed so tightly together that the detainees could not change position without requiring others to shift their positions).

220. See *Stakic*, Case No. IT-97-24-T, at ¶¶ 168, 790, 863 (reporting no facilities for detainees to wash themselves, blocked toilets, garbage, human waste, and flies everywhere); *Krnjelac*, Case No. IT-97-25-T, at ¶¶ 133–39 (finding inhuman treatment for “brutal and deplorable living conditions” including cramped and unhygienic conditions and inadequate food).

221. See *Prosecutor v. Kvočka*, Case No. IT-98-30/1-T, Trial Chamber Judgment, ¶¶ 61–67 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 2, 2001) (reporting woefully inadequate medical assistance, detainees suffering from parasites, skin disorders, and diarrhea); *Delalic*, Case No. IT-96-21-T, at ¶¶ 1101–05 (finding medical care was callously denied with excuses such as “you have to die anyway, so sit down,” and when medical care was provided it was by doctors who were themselves detainees who were hampered by insufficient supplies, denied discretion as to whom to treat and when to treat them, and unable to transfer them to a hospital).

222. See, e.g., *Achuthan* (on behalf of Aleke Banda) v. Malawi, African Comm'n on Human and Peoples' Rights, 8th Annual Activity Report, Comm'n No. 64/92, ¶ 7 (1995), available at <http://www1.umn.edu/humanrts/africa/comcases/64-92b.html>. (finding violation of Article 5 of the African Charter, which prohibits “torture, cruel, inhuman or degrading punishment and treatment,” due to conditions of overcrowding, acts of beating, excessive solitary confinement, shackling within a cell, extremely poor quality of food, and denial of access to adequate medical care); *Mika Miha v. Equatorial Guinea*, Comm'n No. 414/1990, U.N. Doc. CCPR/C/51/D/414/1990, ¶ 6.4 (U.N. Human Rights Comm. 1994) (finding detainee who was subjected to torture for two days was then subjected to cruel and inhuman treatment as a result of being deprived of adequate medical care, food and water); *Ouko v. Kenya*, African Comm'n on Human & Peoples' Rights, Comm'n No. 232/99, ¶¶ 23, 26 (2000) (finding detainee who was confined in a six-square-meter cell with continuous light and no access to bathroom facilities was not subjected to torture but was subjected to inhuman and degrading treatment); *Osbourne v. Jamaica*, Judgment U.N. Human Rights Comm., No. 759/1997, U.N. Doc. CCPR/C/68/D/759/1997, ¶¶ 3.3, 9.1 (2000) (finding “cruel, inhuman, and degrading



Case-by-case determinations have repeatedly emphasized the importance of considering the totality of the circumstances and the cumulative effects of treatment and/or conditions in reaching a conclusion regarding whether acts violate international law.<sup>223</sup>

### B. Nature of the Harm

One of the primary factors some international bodies have used in distinguishing forms of ill-treatment that are prohibited from those that are not prohibited involves the severity of the resulting harm. In an approach that originated with the European Commission and Court of Human Rights, international bodies have held that the harm suffered must attain a minimum level of severity to constitute torture or inhuman or degrading treatment. Where acts cause little or no physical or mental harm, for example, international bodies have declined to find any form of prohibited treatment.<sup>224</sup>

The minimum level of severity is relative, depending on the circumstances of the case.<sup>225</sup> Both the African Commission on Human and Peoples' Rights and the Inter-American Commission have adopted the European Court of Human Rights' conclusion that the minimum level of severity "depends on all the circumstances of the case, such as the duration of the treatment, its physical and/or mental effects and, in some cases, the victim's age, sex and state of health."<sup>226</sup> The ICTY has agreed, adding other factors to be considered as well:

In assessing the seriousness of any mistreatment, the objective severity of the harm inflicted must be considered, including the nature, purpose and consistency of the acts committed. Subjective criteria, such as the physical or mental condition of the victim, the effect of the treatment and, in some cases, factors such as the victim's age, sex, state of

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treatment or punishment" where detainee had his pants removed and was flogged in front of correctional officers).

223. See *Gäfgen v. Germany*, App. No. 22978/05, ¶¶ 88–91, 101–08 (Eur. Ct. H.R. June 1, 2010) (reviewing criteria for inhuman or degrading treatment under Article 3 of the European Convention); YUVAL GINBAR, WHY NOT TORTURE TERRORISTS? 288–94 (2008) (reviewing authorities regarding both physical and mental torture); RODLEY, *supra* note 47, at 125–43 (reviewing authorities regarding cruel and inhuman or degrading treatment).

224. See, e.g., *Raninen v. Finland*, 1997-VIII Eur. Ct. H.R. 2804, 2822 (finding that treatment was not prohibited where there was a lack of intent to humiliate the person detained, as well as no physical or mental harm caused by the act).

225. See *Prosecutor v. Brđjanin*, Case No. IT-99-36-T, Trial Chamber Judgment, ¶ 484 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 1, 2004).

226. *Dikme v. Turkey*, App. No. 20869/92, 2000-VIII Eur. Ct. H.R. 223, 255; see *Huri-Laws v. Nigeria*, African Comm'n on Human and Peoples' Rights, 14th Annual Activity Report, Commc'n No. 225/98, ¶ 41 (2000).

health and position of inferiority will also be relevant in assessing the gravity of the harm.<sup>227</sup>

A number of tribunals have also used the degree of suffering to distinguish between conduct constituting torture and that constituting cruel, inhuman, or degrading treatment or punishment. To constitute torture, according to these tribunals, conduct must result in severe physical or mental pain or suffering. Indeed, for some, “[t]he seriousness of the pain or suffering sets torture apart from other forms of mistreatment.”<sup>228</sup> Severe harm may be either physical or mental, and in many cases, both types of harm are alleged and supported by medical or other corroborating evidence. Typical findings of the harm caused by acts of torture refer to evidence of “a large number of serious lesions and bruises,” and include findings that the detainee suffered “a permanent state of physical pain and anxiety,” owing to the detainee’s uncertainty about his fate and to the blows repeatedly inflicted upon him during the interrogation sessions.<sup>229</sup> Other cases make similar note of the evidence of serious physical and/or psychological harm.<sup>230</sup> In some cases, the acts are so egregious that a finding of severe harm is presumed<sup>231</sup> or inferred based upon the nature of the acts.<sup>232</sup>

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227. *Brdjanin*, Case No. IT-99-36-T, at ¶ 484.

228. *Id.* ¶ 483; see also *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) at 66 (1978) (stating that the distinction between torture and inhuman or degrading treatment “derives principally from a difference in the intensity of the suffering inflicted”).

229. *Dikme*, App. No. 20869/92, at 223, 253–55; see also *Chitayev v. Russia*, App. No. 59334/00, ¶¶ 150, 155 (Eur. Ct. H.R. January 18, 2007) (noting medical documents corroborating injuries to detainees’ heads, bodies, and extremities).

230. See, e.g., *Garcia Lanza de Netto v. Uruguay*, Commc’n No. 8/1977, U.N. Doc. CCPR/C/9/D/8/1977, ¶¶ 9, 11 (U.N. Human Rights Comm. 1980) (noting health problems such as permanent trembling in a detainee’s right arm and loss of memory due to brain damage, corroborating medical reports and photographs confirming scars, a continued tremor in the detainee’s right hand, and symptoms of mental depression); *T.A. v. Sweden*, Commc’n No. 226/2003, U.N. Doc. CAT/C/34/D/226/2003, ¶ 2.5 (U.N. Comm. Against Torture 2005) (noting medical reports corroborating harms that were both physical, such as “several cigarette burns over her right thigh and hand, bruises over her wrist . . . a bluish mark over the back, and bleeding,” and mental, such as “insomnia, nausea, vomiting, cold sweat, difficulties in concentrating and talking, febleness . . . [and] post-traumatic stress disorder syndrome accompanied by nightmares, flashbacks and severe corporal symptoms”).

231. See *Brdjanin*, Case No. IT-99-36-T, at ¶ 485 (concluding that severe pain and suffering has been “established once rape has been proved, since the act of rape necessarily implies such pain and suffering”).

232. *Amnesty Int’l v. Sudan*, African Comm’n on Human and Peoples’ Rights, 13th Annual Activity Report, Commc’n No. 48/90, ¶¶ 54, 57 (2000) (concluding proof of acts of physical abuse was adequate to establish a violation of Article 5 of the African Charter); *Malawi African Ass’n v. Mauritania*, African Comm. on

In many international cases, however, a finding of "torture" is reserved for "the most serious abuses upon physical or mental integrity."<sup>233</sup> Human rights scholars have questioned the validity of distinguishing between "more than severe" and "severe" pain and suffering, arguing that the severity of the pain or suffering, while constituting an element of the definition of torture, should not be a criterion for distinguishing torture from cruel and inhuman treatment.<sup>234</sup> These scholars advocate a distinction based primarily on the purpose of the treatment, not on the severity of the harm.<sup>235</sup> While some international bodies continue to rely on the severity of the harm as distinguishing torture from other forms of ill-treatment, others have rejected this approach. For example, the Inter-American Commission does not use the term "severe" in concert with "mental or physical anguish" in defining torture. The Commission instead considers the seriousness or intensity of the act or practice, in distinguishing torture from other forms of ill-treatment. The Commission has observed:

The Inter-American Convention to Prevent and Punish Torture does not use as a criterion in defining torture the intensity or degree of physical or mental suffering experienced by the victim. . . . The Commission considers that both the American Convention and the Inter-American Convention to Prevent and Punish Torture give it certain latitude to assess

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Human and Peoples' Rights, Commc'n Nos. 54/91, 61/91, 98/93, 164/97, 196/97 & 210/98, ¶¶ 116–17 (2000) (findings recount plunging detainees' "heads into water to the point of provoking suffocation"; use of chains; beatings; sexual assaults; the use of the "Jaguar" position; lack of food, hygiene and medical care; detention in "small, dark, underground cells which got very cold at night"; and electrical shocks).

233. *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Trial Chamber Judgment, ¶¶ 219–20 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 15, 2002) (finding cruel and inhuman treatment did not rise to the level of torture and holding that "[a]lthough the losing of teeth and the bruising of the body constitute a serious infringement upon the victim's well-being, they do not, in the circumstances of this case, reach the degree of severity implicit in the definition of torture").

234. See NOWAK & MCARTHUR, *supra* note 60, at 66–73; RODLEY, *supra* note 47, at 99–117.

235. Nigel Rodley suggests two alternative approaches: one that posits a common threshold of severe pain and suffering for torture and cruel or inhuman treatment, distinguishing torture based on the purpose of the acts rather than the severity of the harm (the "purpose only" approach), and another that applies a threshold of simple severe pain and suffering for torture, with substantially less severe pain and suffering required for cruel and inhuman treatment (the "severeminus" approach). RODLEY, *supra* note 47, at 99–117. Manfred Nowak and Elizabeth McArthur also advocate distinguishing torture from cruel or inhuman treatment based on criteria other than the severity of the harm, noting: "In principle, every form of cruel and inhuman treatment (including torture) requires the infliction of severe pain or suffering. Only in the case of particularly humiliating treatment might the infliction of non-severe pain or suffering reach the level of degrading treatment or punishment in violation of Article 16 [of the Convention Against Torture]." NOWAK & MCARTHUR, *supra* note 60, at 69.

whether, in view of its seriousness or intensity, an act or practice constitutes torture or inhuman or degrading punishment or treatment. The Commission considers that such classification should be done on a case-by-case basis, taking into account the peculiarities thereof, the duration of the suffering, the physical and mental effects on each specific victim, and the personal circumstances of the victim.<sup>236</sup>

Hence, it appears that even those tribunals that do not distinguish the nature of the harm required for acts to constitute torture and cruel or inhuman treatment nonetheless still consider the nature of the harm suffered in evaluating conduct. Cases finding cruel and inhuman or degrading treatment rely on findings of both physical and psychological harm.<sup>237</sup> In cases involving a lack of appropriate medical treatment, for example, the deterioration of the detainee's health is often cited in support of a finding that the treatment at issue is inhuman or degrading.<sup>238</sup> Cruel and inhuman treatment has also included both "psychologically exhausting" regimes<sup>239</sup> and "psychological violence."<sup>240</sup> In evaluating the extent and degree of harm, international bodies often consider personal circumstances and the degree of vulnerability of the person who is detained.<sup>241</sup> The torture or ill-treatment of children, in particular, has been evaluated taking into account

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236. *Cabrera v. Dominican Republic*, Case 10.832, Inter-Am. Comm'n H.R., Report No. 35/96, OEA/Ser.L/V/II.95, doc. 7 rev. ¶¶ 81–83 (1998).

237. *See, e.g., Ozkan v. Turkey*, App. No. 21689/93, ¶¶ 1, 5, 250, 278, 337, 354 (Eur. Ct. H.R. Apr. 6, 2004) (finding inhuman and degrading treatment where detainees reported broken bones, including one man who believed his back had been broken and who "was obliged to lie on the floor for about 20 days before he was able to move"); *Loayza-Tamayo v. Peru*, Merits, Inter-Am. Ct. H.R. (ser. C) No. 33, ¶ 57 (Sept. 17, 1997) (citing with approval the European Court of Human Rights' declaration that, even in the absence of physical injuries, psychological and moral suffering may be deemed inhuman treatment).

238. *Bitiyeva v. Russia*, Case Nos. 57953/00 & 37392/03, ¶ 107 (Eur. Ct. H.R. June 21, 2007) (noting a "deterioration of [the detainee's] health, compounded by the poor detention conditions and the lack of adequate medical care, entailed a level of suffering which amounted to inhuman and degrading treatment").

239. *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Trial Chamber Judgment, ¶ 142 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 15, 2002).

240. *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-T, Trial Chamber Judgment, ¶¶ 187–90, 226–28 (Int'l Crim. Trib. for the Former Yugoslavia June 25, 1999).

241. *See Rosario Congo v. Ecuador*, Case 11.427, Inter-Am. Comm'n H.R., Report No. 63/99, OEA/Ser.L/V/II.95, doc. 7 rev. ¶ 82 (1998) (citing with approval the European Court of Human Rights finding that the state of health of a detainee is an important factor in determining whether he or she has been subjected to inhumane or degrading punishment or treatment and finding that an individual with a mental disability was subjected to inhuman and degrading treatment as a result of his death while in solitary confinement); Inter-American Report on Terrorism and Human Rights, *supra* note 75, ¶¶ 157, 159 (noting that the effects of certain treatment can be exacerbated by the vulnerability of the person detained and that the sex, age, and health of the detainee may, in some cases, be relevant).

the status of the detainee as a minor.<sup>242</sup>

### C. Purpose and Intent

An actor's purpose or intent often will affect whether conduct is deemed torture or cruel, inhuman, or degrading conduct. The Special Rapporteur of the U.N. Commission on Human Rights has indicated that "the requirement of specific purpose seems to be the most decisive criterion which distinguishes torture from cruel or inhuman treatment."<sup>243</sup> In order to constitute torture, an act must have been committed deliberately and for a prohibited purpose.<sup>244</sup> The Convention Against Torture lists illustrative examples of the types of purposes indicative of acts constituting torture, including:

- [1] obtaining from [a detainee] or a third person information or a confession, or
- [2] punishing him for an act he or a third person has committed or is suspected of having committed, or
- [3] intimidating or coercing [a detainee] or a third person, or
- [4] for any reason based on discrimination of any kind.<sup>245</sup>

The requirement of a "prohibited" purpose does not mean that the purpose in question must be illegitimate. At least one of the purposes listed in the Convention Against Torture—obtaining information or a confession—can be legitimate if the appropriate means are used to achieve the purpose.<sup>246</sup> Nonetheless, the purpose requirement sets torture apart from other forms of ill-treatment. As the ICTY has explained:

Torture as a criminal offence is not a gratuitous act of violence; it aims, through the infliction of severe mental or physical pain, to attain a certain result or purpose. Thus, in the absence of such purpose or goal, even very severe infliction

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242. Inter-American Report on Terrorism and Human Rights, *supra* note 75, ¶¶ 169–72 (noting provisions relating to the treatment of children in detention and indicating the "particularly grave" status of children who are subject to torture or other prohibited forms of ill-treatment).

243. Nowak, *supra* note 5, at 830.

244. *Krnjelac*, Case No. IT-97-25-T, ¶¶ 180, 184.

245. Convention Against Torture, *supra* note 3, at art. 1; General Comment 2, *supra* note 61 ("In particular, the Committee emphasizes that elements of intent and purpose in article 1 do not involve a subjective inquiry into the motivations of the perpetrators, but rather must be objective determinations under the circumstances. It is essential to investigate and establish the responsibility of persons in the chain of command as well as that of the direct perpetrator(s)."); see Rhonda Copelon, *Gender Violence as Torture: The Contribution of CAT General Comment No. 2*, 11 N.Y. CITY L. REV. 229, 249–53 (2008) (arguing that the list of purposes in the Convention is not exhaustive and that, pursuant to General Comment 2, gender and sexual violence can fall under the umbrella of torture as "discrimination of any kind").

246. *Krnjelac*, Case No. IT-97-25-T, ¶ 184.

of pain would not qualify as torture . . . .<sup>247</sup>

In many cases involving findings of torture, the goal of the actors is to obtain information or a confession.<sup>248</sup> When presented with evidence of considerable suffering inflicted on a detainee by government officials, the European Court of Human Rights has inferred that acts were undertaken deliberately and for a prohibited purpose. For example, the Court has observed:

In the instant case the [detainee] undeniably lived in a permanent state of physical pain and anxiety owing to his uncertainty about his fate and to the blows repeatedly inflicted upon him during the lengthy interrogation sessions to which he was subjected throughout his time in police custody.

The Court considers that such treatment was intentionally meted out to the [detainee] by agents of the State in the performance of their duties, with the aim of extracting a confession or information about the offences of which he was suspected.<sup>249</sup>

In considering whether the evidence is sufficient to establish a prohibited purpose, international bodies do not require proof that a prohibited purpose is the exclusive or even predominant motivation. "It is sufficient that a prohibited purpose is one of the results sought to be achieved."<sup>250</sup> In addition, although the list of purposes in the Convention Against Torture is "meant to be indicative rather than exhaustive," it is likely that not every purpose is sufficient to constitute torture, but "only a purpose which has 'something in common with the purposes expressly listed.'"<sup>251</sup> In cases where the evidence fails to show that an act was committed to achieve any particular purpose, the treatment may be deemed cruel or inhuman, but it will not constitute torture.<sup>252</sup>

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247. *Id.* ¶ 180.

248. See *Cantoral-Benavides v. Peru*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 69, ¶ 104 (Aug. 18, 2000) (finding that the purpose of acts constituting torture was initially to wear down a detainee's psychological resistance and force him to incriminate himself and then, after his conviction, the purpose was to punish him); *Estrella v. Uruguay*, Comm'n No. 74/1980, U.N. Doc. CCPR/C/OP/2 at 93, ¶ 1.6 (U.N. Human Rights Comm. 1990) (detainee was interrogated for the purpose of forcing him to admit that he had been involved in plans to carry out armed operations in Uruguay and Argentina).

249. *Dikme v. Turkey*, App. No. 20869/92, 2000-VIII Eur. Ct. H.R. 223, 255; see *Chitayev v. Russia*, App. No. 59334/00, ¶ 158 (Eur. Ct. H.R. Jan. 18, 2007).

250. *Krnjelac*, Case No. IT-97-25-T, ¶ 241.

251. NOWAK & MCARTHUR, *supra* note 60, at 75 (quoting HERMAN BURGERS & HANS DANIELIUS, *THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT* 118 (1988)).

252. See, e.g., *Krnjelac*, Case No. IT-97-25-T, ¶ 252 (noting a lack of evidence regarding the purpose of beatings and other abuse, and holding that acts that are

To constitute torture, acts must also be undertaken deliberately. The United States ratified the Convention Against Torture subject to the understanding that in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering.<sup>253</sup> When harm is the accidental result of conduct or the result of poverty, neglect, or incompetence, acts inflicting the harm will not constitute torture.<sup>254</sup> The intent or purpose requirement for torture sets torture apart from other prohibited ill-treatment and, for some, should constitute the “dominant element distinguishing torture from cruel or inhuman treatment.”<sup>255</sup>

#### D. Responsibility of Individuals and Public Officials

The Convention Against Torture provides that to constitute torture, an act must be “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”<sup>256</sup> Applying these standards, international bodies have held that for acts to constitute torture, the actions must be taken by government officials or with the consent or acquiescence of government officials.<sup>257</sup>

For example, the African Commission on Human and Peoples’ Rights relies upon the definition of torture in Article 1 of

“purely arbitrary” constituted cruel and inhumane treatment, but not torture). In contrast, where the evidence permitted a finding that acts were undertaken for the purpose of obtaining information or of punishment, the ICTY concluded that torture had been established. *Id.* ¶ 282.

253. The Torture Statute and the Military Commissions Act contain a similar requirement. See 18 U.S.C. § 2340(1) (2006) (“[T]orture’ means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering . . . .”); Military Commissions Act of 2009, Pub. L. No. 111-84, § 1802, 123 Stat. 2190, 2608 (to be codified at 10 U.S.C. § 950t(11)) (defining torture as an act committed by a public official specifically intended to inflict severe physical or mental pain or suffering, other than pain or suffering incidental to lawful sanctions, upon another person within his custody or control).

254. See *Pierre v. Gonzales*, 502 F.3d 109, 121 (2d Cir. 2007); *Francois v. Gonzales*, 448 F.3d 645, 651 (3d Cir. 2006); *Cadet v. Bulger*, 377 F.3d 1173, 1187 (11th Cir. 2004).

255. RODLEY, *supra* note 47, at 123; see NOWAK & MCARTHUR, *supra* note 60, at 74–77 (arguing that “the requirement of a specific purpose seems to be the most decisive criterion which distinguishes torture from cruel or inhuman treatment” and further that “[t]he powerlessness of the victim is the essential criterion which the drafters of the Convention had in mind when they introduced the legal distinction between torture and other forms of ill-treatment”).

256. Convention Against Torture, *supra* note 3, at art. 1.

257. See, e.g., Inter-American Report on Terrorism and Human Rights, *supra* note 75, ¶ 154 (“Under the Inter-American Torture Convention regime, torture refers to acts committed by state agents or persons acting under the orders or instigation of state agents.”).

the Convention Against Torture in determining whether torture has occurred under the African Charter. In *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, the Commission found insufficient evidence that acts taken by members of two non-State groups, the Zimbabwe ruling party, ZANU, and its military wing, the Zimbabwe Liberation War Veterans Association, had been taken with the consent or acquiescence of an official of the government of Zimbabwe.<sup>258</sup> Finding no evidence of connivance between the State and the two groups, the Commission noted that in fact the government of Zimbabwe had “investigated allegations brought to its attention” regarding acts that otherwise would be deemed torture.<sup>259</sup>

Courts in the United States have interpreted the extent of official involvement required to constitute “acquiescence” in a case involving allegations of torture by a group of Chinese smugglers. In *Zheng v. Ashcroft*, an individual brought by smugglers from China to the United States feared he would be tortured and killed by the smugglers for his cooperation with police if he were forced to return to China.<sup>260</sup> In remanding the case for further consideration of whether the government of China acquiesced in the smugglers’ activities, the Ninth Circuit Court of Appeals reviewed the history of the United States’ ratification and understandings of the Convention Against Torture.<sup>261</sup> The Court noted that under the understandings adopted by the Senate, a public official need only awareness of the acts constituting torture to “acquiesce” in the torture committed by third parties.<sup>262</sup> The Court emphasized that the purpose of requiring awareness and not knowledge “is to make it clear that both actual knowledge and ‘willful blindness’ fall within the definition of the term ‘acquiescence.’”<sup>263</sup> Government officials who inflict, instigate, consent to, or are

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258. African Comm’n on Human and Peoples’ Rights, 21st Activity Report, Commc’n No. 245/2002, ¶¶ 137–41 (2006).

259. *Id.* ¶ 183.

260. 332 F.3d 1186, 1188 (9th Cir. 2003).

261. *Id.* at 1192–93. When the Convention Against Torture initially was transmitted to the Senate in 1988, the Reagan administration proposed an understanding that “acquiescence” by a public official requires prior knowledge of the activity that constituted torture. COMM. ON FOREIGN RELATIONS, CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, S. EXEC. REP. 101-30, at 15 (1990). In January 1990, the Bush administration submitted a revised understanding that no longer required knowledge of torture by a public official; rather, the official need only an awareness of torture. *Id.* at 9, 30.

262. *Zheng*, 332 F.3d at 1194.

263. *Id.* at 1193 (quoting COMM. ON FOREIGN RELATIONS, *supra* note 261, at 9) (internal quotation marks omitted).



aware of acts by third parties will meet the requirements of Article 1 of the Convention Against Torture.<sup>264</sup>

Hence, while there is no doubt that the Convention Against Torture is aimed at the acts of public officials or those persons acting in an official capacity, tribunals have applied the Convention to establish responsibility not only for those public officials who directly commit acts of torture and cruel, inhuman, or degrading treatment, but also those who "turn a blind eye" to acts committed by agents or others acting on behalf of the government.<sup>265</sup> Moreover, in countries such as Somalia, where warring factions exercise prerogatives ordinarily associated with legitimate governments, the Human Rights Committee has concluded that members of a faction "can fall, for the purposes of the application of the Convention, within the phrase 'public officials or other persons acting in an official capacity.'"<sup>266</sup>

International criminal tribunals may apply different standards for the determination of responsibility for acts of torture and other forms of prohibited treatment. The ICTY has expressly ruled that even though the Convention Against Torture requires that acts be committed "with the consent or the acquiescence of a public official or a person acting in an official capacity," the Convention relies on the notion of human rights, which is largely built on the premise that human rights are violated by governments.<sup>267</sup> There is a longstanding rule of customary international law regarding individual criminal responsibility, which is included in the statutes for the ICC and ICTY.<sup>268</sup> For purposes of international criminal law, which deals with the criminal responsibility of an individual, the ICTY has concluded that individuals can bear criminal responsibility for acts of torture even if the perpetrators are not public officials and even if the crime was not committed in the presence of a public official.<sup>269</sup>

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264. See *id.* at 1194–95; see also Convention Against Torture, *supra* note 3, at art. 1.

265. See NOWAK & MCARTHUR, *supra* note 60, at 77–79; RODLEY, *supra* note 47, at 88–89 (discussing the status of the perpetrator required under international human rights law).

266. NOWAK & MCARTHUR, *supra* note 60, at 79 (citing *Elmi v. Australia*, Comm'n No. 120/1998, U.N. Doc. CAT/C/22/D/120/1998, ¶ 6.5 (U.N. Comm. Against Torture 1998)).

267. See *Prosecutor v. Furundzija*, Case No. IT-95-17/I-T, Judgment, ¶¶ 140–42 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

268. See *Rome Statute*, *supra* note 14, at art. 25; *ICTY Statute*, *supra* note 14, at art. 7.

269. See *Prosecutor v. Tadic*, Case No. IT-94-1-T, Trial Chamber Judgment, ¶¶ 661–69 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997) (noting history

*E. Not Arising from Lawful Sanctions*

The Convention Against Torture provides that “pain or suffering arising only from, inherent in or incidental to lawful sanctions” does not constitute torture.<sup>270</sup> Both the U.N. Special Rapporteur and international bodies have recognized the need to interpret “lawful sanctions” in the context of international human rights law. The Special Rapporteur on Torture has explained:

The Special Rapporteur cannot accept the notion that the administration of such punishments as stoning to death, flogging and amputation—acts which would be unquestionably unlawful in, say, the context of custodial interrogation—can be deemed lawful simply because the punishment has been authorized in a procedurally legitimate manner, i.e. through the sanction of legislation, administrative rules or judicial order. To accept this view would be to accept that any physical punishment, no matter how torturous and cruel, can be considered lawful, as long as the punishment has been duly promulgated under the domestic law of a State.<sup>271</sup>

The African Commission on Human and Peoples’ Rights adopted a consistent view in a case involving the application of Sudanese law. A Sudanese court had convicted eight students, five of whom were girls, for “kissing, wearing trousers, dancing with men, crossing legs with men, sitting with boys and sitting and talking with boys.”<sup>272</sup> The sentence of “fines and between 25 and 40 lashes” was executed in “public on the bare backs of the

of the law of war and the concept of individual criminal responsibility). While the ICTY considers individual criminal responsibility without regard to the individual’s official status, the ICTR has required the participation or acquiescence of a public official when assessing whether an individual has committed a crime against humanity. *Prosecutor v. Akayesu*, Case No. ICTR-96-4, Judgment, ¶¶ 593–94, 681 (Sept. 2, 1998) (defining torture in accordance with the definition of torture in the Convention Against Torture); *id.* ¶¶ 676–80, 682 (finding acts constituting torture were committed by the accused or by others in his presence, at his instigation, or with his consent or acquiescence). Tribunals apply other limitations on liability for a crime against humanity, for example that the acts be committed as part of an armed conflict or knowingly or intentionally as part of a widespread or systematic attack on a civilian population. Another limitation requires that the victim of torture be in the custody or under the control of the actor, whether or not the actor is a public official. See RODLEY, *supra* note 47, at 89–91 (discussing individual criminal responsibility for the crime against humanity of torture).

270. Convention Against Torture, *supra* note 3, at art. 1.

271. Special Rapporteur on Torture, *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in Particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Comm’n on Human Rights, U.N. Doc. E/CN.4/1997/7, ¶ 8 (Jan. 10, 1997) (by Nigel S. Rodley).

272. *Doebbler v. Sudan*, African Comm’n on Human and Peoples’ Rights, 16th Annual Activity Report, Comm’n No. 236/2000, ¶¶ 2, 3 (2003), available at <http://www1.umn.edu/humanrts/africa/comcases/236-2000.html>.

women using a wire and plastic whip."<sup>273</sup> Sudan, in its defense, informed the Commission that the "lashings were justified because the authors of the petition committed acts found to be criminal according to the laws in force in the country."<sup>274</sup> Urging an interpretation of the African Charter on Human and Peoples' Rights that encompasses "the widest possible array of physical and mental abuses," the Commission rejected the narrow application of the concept of lawful sanctions. It held that:

There is no right for individuals, and particularly the government of a country to apply physical violence to individuals for offences. Such a right would be tantamount to sanctioning State sponsored torture under the Charter and contrary to the very nature of this human rights treaty.<sup>275</sup>

The "lawful sanctions" element often is considered in relation to conditions of detention. For example, the European Court of Human Rights has held that to constitute torture or inhuman or degrading treatment, the suffering and humiliation involved must "go beyond the inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment."<sup>276</sup> Moreover, the Court has found conditions resulting from a detainee's own conduct or security risks fall within "lawful sanctions."<sup>277</sup> Noting that depriving a person of his liberty usually results in some suffering or humiliation, the Court has ruled that the European Convention

requires the State to ensure that every prisoner is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent

273. *Id.* ¶ 30. The lashes caused permanent scars on the women. *Id.*

274. *Id.* ¶ 34. Article 152 of Sudan's Criminal Procedural Code is based on an extreme interpretation of *Sharia* law, in which the quest for chastity limits public contact of the two sexes and prescribes harsh punishment for violators. The Commission declined to assess *Sharia* law's compatibility with the African Charter on the ground that this question was not before it. *Id.* ¶ 41. For a more comprehensive discussion of *Sharia* law punishment and human rights, see Mahmoud Fadlallah, *Islam and Human Rights*, in DAVID WEISSBRODT ET AL., INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS 238-45 (4th ed. 2009).

275. *Doebbler*, Commc'n No. 236/2000, ¶ 42.

276. *Ilaşcu v. Moldova & Russia*, App. No. 48787/99, 40 Eur. H.R. Rep. 1030, 1121 (2004).

277. See *Ramirez Sanchez v. France*, App. No. 59450/00, 45 Eur. H.R. Rep. 49, 1150 (2006) (finding no prohibited ill-treatment where detainee was kept in solitary confinement, because the government had a well-founded fear that he was a security risk and a well-founded desire to keep him from communicating with other detainees); *Herczegfalvy v. Austria*, App. No. 10533/83, 15 Eur. H.R. Rep. 437, 445-46, 484 (1992) (finding no inhuman or degrading treatment where the use of restraints was necessitated by the detainee's own conduct).

in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured.<sup>278</sup>

The “lawful sanctions” clause continues to be a subject of interpretation and debate,<sup>279</sup> but it remains as a relevant consideration in assessing whether conduct violates the international prohibition against torture and cruel, inhuman, or degrading treatment or punishment.

### Conclusion

The United States has been a leader in the formulation and ratification of international treaties respecting human rights and prohibiting torture and cruel, inhuman, or degrading treatment or punishment.<sup>280</sup> These international agreements, along with regional agreements in Europe, Africa, and the Americas and the creation of international criminal tribunals, have led to an increasingly cohesive body of international law on questions of torture and cruel, inhuman, or degrading treatment or punishment.<sup>281</sup>

As the cases reviewed in this Article demonstrate, there is a robust and broadly developing international case law on the standards for determining whether interrogation methods and conditions of confinement constitute torture or cruel, inhuman, or degrading treatment. The Convention Against Torture has been cited in numerous cases by a variety of international bodies in deciding whether conduct rises to the level of torture. Decisions of the European Court of Human Rights interpreting the prohibition on torture and inhuman or degrading treatment in the European

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278. *Ilaşcu*, App. No. 48787/99, 40 Eur. H.R. Rep. at 1121.

279. See Convention Against Torture, *supra* note 3, at art. 1(1) (“[Torture] does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”); NOWAK & MCARTHUR, *supra* note 60, at 79–84 (noting various interpretations of the clause to include both international and national standards).

280. Cf. Anu Bradford & Eric A. Posner, *Universal Exceptionalism in International Law*, 52 HARV. INT’L L.J. 1, 9 (2011) (“[T]he United States has been the leader in advancing human rights around the world since 1945, and yet at the same time it has both violated human rights itself and coddled tyrants who violate rights. The United States led the way with the Universal Declaration of Human Rights, the United Nations, and the International Covenant for Civil and Political Rights . . . , and has put economic and military pressure on human-rights violating states—far more than any other state has.”).

281. See Winston P. Nagan & Lucie Atkins, *The International Law of Torture: From Universal Proscription to Effective Application and Enforcement*, 14 HARV. HUM. RTS. J. 87, 95–97, 112 (2001) (noting that the Universal Declaration of Human Rights, the Civil and Political Covenant, the European Convention, the African Charter, the American Convention on Human Rights, and the Geneva Conventions all indicate a “clear consensus in favor of outlawing torture” that is defended and enforced through international criminal tribunals).

Convention have been cited with approval by the ICTY, the Inter-American Court of Human Rights, and the African Commission on Human and Peoples' Rights.<sup>282</sup>

International bodies uniformly consider factors such as the nature of the acts, the degree of mental or physical harm, the purpose and intent of the interrogators, and the acquiescence or participation of public officials in assessing whether conduct constitutes torture or inhuman or degrading treatment. While some of these factors may be difficult to define precisely, the reasoning and analysis of international bodies illuminate, in a real-world setting, how these factors have been applied to distinguish prohibited conduct from lawful interrogation. Whether a detainee is tried in a U.S. federal court or by a military commission, the results of cases throughout the world should be considered in determining whether evidence was obtained through torture or cruel, inhuman, or degrading treatment. By considering the international jurisprudence and emerging consensus on standards of treatment, the United States can ensure that detainee trials and any resulting convictions are obtained in full compliance with both the U.S. system of justice and the United States' treaty obligations.

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282. See, e.g., Prosecutor v. Krnojelac, Case No. IT-97-25-T, Trial Chamber Judgment, ¶ 181 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 15, 2002) ("[T]he Trial Chamber regards the general reasoning and criteria used by the European Court of Human Rights in order to assess the gravity of the act of torture."); Cabrera v. Dominican Republic, Case 10.832, Inter-Am. Comm'n H.R., Report No. 35/96, OEA/Ser.L/V/II.95, doc. 7 rev. ¶¶ 77-80 (1998); Zimbabwe Human Rights NGO Forum v. Zimbabwe, African Comm'n on Human and Peoples' Rights, 21st Activity Report, Commc'n No. 245/2002, ¶ 153 (2006).