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Defining Torture

BY GAIL H. MILLER

BENJAMIN N. CARDOZO SCHOOL OF LAW

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Defining Torture

BY GAIL H. MILLER*

Defining the boundaries of what constitutes torture has unfortunately emerged as a pressing legal issue. While most nations declare that torture must be prevented, prohibited, and condemned, the war on terror has highlighted just how narrowly and inconsistently nations define the torture they so condemn. Today, there are multiple legal definitions and interpretations of the term “torture.” Yet, agreeing upon a universal definition is critical if torture is to be eradicated.

While a difficult task, defining torture is vitally important for the following reasons. First, governments must be bound by a clear and constant standard that cannot be manipulated in times of crisis. Second, public officials need guidance as to the lawfulness of their tactics. Lastly, the international community must be able to hold governments accountable for torturous acts. Without a definition that is both clear and generally agreed upon, all three tasks are hampered.

This paper begins by discussing the reasons why defining torture is imperative. It continues by explaining that the absence of a unitary definition for torture does not result from a lack of imagination; to the contrary, research reveals a staggering number of legal definitions. Torture is defined internationally, nationally and locally through conventions, constitutions, statutes, regulations, and judicial interpretation. The most widely accepted definition of torture is found in the United Nations Convention Against Torture (“CAT”).¹ Utilizing this definition as a foundation for analysis, this paper will dissect each element of the CAT definition and identify ways in which jurisdictions differ with regard to particular elements. Information on various jurisdictions’ interpretations and definitions of torture has been gathered from the U.N. Committee on Torture State Reports submitted from 2000 to 2005 as well as cases from various international courts.² Lastly, this paper will review U.S. law defining torture. This paper analyzes the various legal definitions of torture found in international law and the laws of individual nations; it does not address the implementation and enforcement of the laws nor their success at preventing, prohibiting, and punishing acts of torture.³

I. WHY DEFINE TORTURE?

Torture is a universally condemned practice.⁴ Surprisingly, for an act that is so commonly condemned, there remains no clear understanding of what it actually is. When the abuse of detainees at Abu Ghraib was revealed, there was little doubt that the events amounted to torture. Most who saw the photographs of naked detainees, hooded, covered in feces, handcuffed to polls, crouching on boxes, forced to form human pyramids, threatened by dogs, and made to simulate oral sex, immediately labeled the actions as torture.⁵ Yet, the meaning of the term torture may not be as clear in the legal context as it is when used to indicate moral outrage.

The term torture is widely used in international conventions and treaties, as well as laws at the national and local levels. However, there persist many varied meanings and interpretations of the term.⁶ Disagreement among nations as to what constitutes torture may create obstacles to preventing and punishing torture, which may explain, in

part, why acts that many agree are torture continue to recur.⁷

Under customary international law, the prohibition of torture is *jus cogens*—a peremptory norm⁸ that is non-derogable under any circumstances.⁹ It is binding on all nations.¹⁰ This elevated status within international law places torture on par with slavery and genocide.¹¹ Nevertheless, without agreement as to how torture can be distinguished from other, permissible acts, the import of this special status is severely diminished.

For example, in 1999, the Israeli Supreme Court issued a pivotal decision, *Public Committee Against Torture in Israel v. Israel*, declaring a number of interrogation techniques to be illegal.¹² The Court studiously avoided calling these techniques torture. In fact, the word torture does not appear anywhere in the opinion. Rather, when evaluating the different interrogation methods, the Court described them in detail and then summarily proclaimed each to be unlawful. In its legal analysis, the Court simply provided conclusory statements in analyzing the methods, such as:

It harms the suspect's body. . . . [I]t surpasses that which is necessary . . . [and] does not serve any purpose inherent to interrogation. . . . [I]t is degrading and infringes upon an individual's human dignity. . . . [I]t degrades him. . . . [I]t causes the suspect suffering. . . . [T]hey impinge upon the suspect's dignity, his bodily integrity and his basic rights in an excessive manner (or beyond what is necessary).¹³

The Court also explained that the necessity defense would be available to an investigator applying physical interrogation methods.¹⁴ If the Court had deemed these acts torture, under the principle of *jus cogens*, such a defense would have been unavailable. The avoidance of labeling the illegal acts “torture” in this case illustrates the power of the term—reviled such that courts avoid using it and governments do not want to be guilty of torture even if it means evading a finding of torture without necessarily changing practices.¹⁵

Furthermore, pursuant to the *jus cogens* nature of the prohibition of torture, states have universal jurisdiction, and thus, are “entitled to investigate, prosecute and punish or extradite individuals accused of

torture, who are present in a territory under its jurisdiction.”¹⁶ In light of the universal criminality of torture, if a court reaches beyond its usual jurisdiction to hold a public official from another country accountable for acts of torture, the lack of a single definition of torture could cause confusion and disagreement.

The absence of a single, precise definition not only affects torture prevention, but bolsters the ability of nations to avoid consequences through dishonesty and hypocrisy. As the 1973 *Amnesty International Report on Torture* points out, “[g]iven that the word ‘torture’ conveys an idea repugnant to humanity, there is a strong tendency by torturers to call it by another name, such as ‘interrogation in depth’ or ‘civic therapy,’ and a tendency of victims to use the word too broadly.”¹⁷ As the term torture is infused with a sense of moral reprobation, countries are very reluctant to condone torture publicly. However, governments often push the limits of their authority as far as the law and international community will permit. In the absence of a universal definition, many governments narrowly define torture, enabling their agents to act however they see fit without crossing the definitional line.¹⁸ Governments are able to continue to condemn torture publicly while employing horrific methods of interrogation and punishment. For example, in 2002, the U.S. Department of Justice defined torture to exclude even extreme methods of interrogation so long as they did not result in impairment of bodily function or pain similar in intensity to organ failure.¹⁹ A single, clear definition of torture limited to the most severe acts, yet not diluted in force, would rein in the manipulation on each side of the spectrum—both the advocates who overuse the term and the governments who define it too narrowly—creating a space in which claims of torture are taken seriously.

Public officials must fully understand the lawful limits of their actions. Without a clear definition of torture, how can the public expect its public officials to stay within the lawful bounds of interrogation? In testimony before the Senate Armed Services Committee, Porter J. Goss, the Director of Central Intelligence, admitted that “there had been ‘some uncertainty’ in the past among C.I.A. officers about what interrogation techniques were specifically permitted and prohibited.”²⁰ Considering the grave nature of torture, such uncertainty is unacceptable. A well-understood definition of torture would assist both public officials

to carry out their duties, and the public to gain confidence that the government is acting properly.

Finally, a single definition would assist the international community in placing pressure on offending governments. U.N. Secretary-General Kofi Annan has explained that

[t]orture is an atrocious violation of human dignity. It dehumanizes both the victim and the perpetrator. The pain and terror deliberately inflicted by one human being upon another leave permanent scars. . . . Freedom from torture is a fundamental human right that must be protected under all circumstances. Growing awareness of international legal instruments and protection mechanisms gives hope that the wall of silence around this terrible practice is gradually being eroded.²¹

A uniform definition would infuse the international community's rhetoric condemning torture with meaning, holding countries to the standards claimed in their anti-torture pronouncements. International law, through customary norms but more importantly through the CAT, provides a definition. This definition, while useful, nevertheless includes ambiguous terms that must be clarified. Unfortunately, many individual nations ignore or misinterpret the CAT, employing individual definitions that are often too lax and allow too many horrific acts to escape the definition of torture. In the end, a definition of torture must be clear, uniform, adequately strict, and universally accepted.

II. THE CONVENTION AGAINST TORTURE

Myriad international declarations, agreements, and conventions, including Article 5 of the Universal Declaration on Human Rights, Article 7 of the International Covenant on Civil and Political Rights, the Convention on the Prevention and Punishment of Genocide, the European Convention on Human Rights, the American Convention on Human Rights, and the Vienna Declaration and Programme of Action, *prohibit* torture but fail to *define* it. On December 10, 1984, the U.N. General Assembly gave meaning to the term by adopting the CAT, which entered into force on June 26, 1987.²² With over 135 signatories,²³ the CAT contains the most commonly used and widely endorsed definition of

torture.²⁴ Explaining the international acceptance of the CAT, the International Criminal Tribunal for the Former Yugoslavia has stated that the CAT torture definition reflects “a consensus . . . representative of customary international law.”²⁵ The CAT defines 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 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.²⁶

The CAT’s definition thus comprises the following elements: (1) an act; (2) severe pain or suffering; (3) physical or mental pain; (4) intent; (5) particular purposes; (6) involvement of a public official; and (7) the absence of pain or suffering from lawful sanctions.

Article 2 of the CAT requires each country to establish its own internal legislation to prevent torture.²⁷ Signatories have complied with Article 2 by prohibiting torture through constitutional amendment or legislation.²⁸ In translating the CAT’s principles into national or local laws, many signatories have tinkered with the CAT’s definition of torture, redefining the term through slight alteration. Consequently, implementation of the CAT has resulted in the emergence of numerous definitions of torture, rather than a unitary, uniform definition.

This paper will consider each element of the CAT definition in turn, and examine how signatories have adopted or amended each element.²⁹

A. An Act

The CAT definition of torture requires an “act” that causes severe pain or suffering, whether physical or mental.³⁰ It is important to deter-

mine, then, what constitutes an act. If an act is limited to pro-active behavior, thereby excluding omissions that cause severe pain or suffering, the definition of torture would be substantially narrowed. For example, leaving a prisoner in a room for several days and neglecting to provide him with food or water would certainly cause severe pain or suffering, but may be considered an omission rather than an act. However, this restrictive interpretation runs contrary to the purpose of the CAT.³¹ Affording due weight to the CAT's objective of prohibiting conduct that inflicts severe pain and suffering, scholars have appropriately concluded that an act includes omissions.³²

In its definition of torture, the United Kingdom avoids any confusion on the issue by explicitly including both acts and omissions, stating that "it is immaterial whether the pain or suffering . . . is caused by an act or an omission."³³ Likewise, Canada defines torture as "any act or omission by which severe pain or suffering" occur, leaving no room for uncertainty with regards to the act requirement.³⁴

Some CAT signatories have enacted laws that do not require an "act" *per se* as a necessary element of torture. For instance, Colombia's law against torture requires no act, but rather stipulates that liability shall attach to "anyone who *subjects* another person to severe physical or mental pain or suffering."³⁵ Similarly, the Czech Republic avoids the term "act" in its torture definition: "He who shall *cause* to another person physical or mental suffering through torture . . . shall be imprisoned."³⁶ The use of a verb like "subject" or "cause," instead of the noun "act," may broaden the scope of behaviors that constitute torture, capturing intentional omissions, such as the failure to provide nutrients.

Greece uses the term "infliction" instead of "act." In addition, the Greek Penal Code states that in order to constitute torture, the infliction must be "systematic," a requirement unique to Greece.³⁷ Latvia's definition of torture based on the CAT definition, requires that the torturer inflict "multiple or prolonged acts" upon the victim.³⁸ The Latvian and Greek conceptions of torture provide an additional hurdle, since a single act may not be sufficient, regardless of severity. They also open the door for debate regarding what constitutes "systematic infliction" or a "prolonged act." For example, abuse lasting a few hours, or even intermittent abuse over a period of days, might arguably not be "prolonged"

enough to amount to torture. In the opinion *On Application of Criminal Laws in Cases of Infliction of Intentional Bodily Injuries*, the Latvian Supreme Court hypothesizes several acts that would certainly be considered torturous: “whipping with rods, pinching, influence by thermal factors, pricking with sharp objects, etc.”³⁹ This list begs the question whether whipping *once* with a rod, or whether one pinch (or two, or three), would constitute torture. Requiring more than an act, these definitions are fundamentally more complex than the CAT definition, which provides a very basic primary element, an act.

B. Severe Pain or Suffering

Under the CAT definition, the harm caused to the victim must be “severe pain or suffering” in order to amount to torture.⁴⁰ It is, of course, virtually impossible to quantify “severe pain and suffering” or to define it in absolute terms. The CAT itself does not elaborate or provide guidance on the key adjective, “severe.”

1. *Torture as an egregious type of cruel, inhuman or degrading treatment*

The CAT contemplates torture as falling at the extreme end of a spectrum of pain-inducing acts. This hierarchy of ill treatment originated in the *Greek Case*, a 1969 decision of the European Commission on Human Rights (“ECHR”).⁴¹ Fifty-three individuals, along with three governments on behalf of their citizens, alleged torture and ill-treatment during detention by the Greek government in Athens, Piraeus, Salonica and Crete.⁴² The complainants relied on the European Convention on Human Rights, which prohibits both torture and “inhuman or degrading treatment or punishment,” though without defining those terms.⁴³ In its decision in the case, the Commission elaborated on what distinguished “torture” from “inhuman or degrading treatment”:

It is plain that there may be treatment to which all these descriptions apply, for all torture must be inhuman and degrading treatment, and inhuman treatment also degrading. The notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical, which, in the partic-

ular situation, is unjustifiable. . . . The word “torture” is often used to describe inhuman treatment, which has a purpose, such as obtaining information or confessions, or the infliction of punishment, and it is generally an *aggravated form of inhuman treatment*.⁴⁴

This progression of severity – from degrading treatment, through inhuman treatment, to torture – creates a hierarchy of harms with torture as the most egregious.

Since the *Greek Case*, the ECHR has utilized this hierarchy concept in a number of decisions.⁴⁵ For example, in *The Republic of Ireland v. The United Kingdom*, the ECHR gave concrete meaning to the hierarchy, ruling that five interrogation techniques constituted inhumane and degrading treatment but did not rise to the level of torture.⁴⁶ The ECHR reasoned that “[t]he distinction between torture and inhuman or degrading treatment derived principally from a difference in the intensity of the suffering inflicted. . . . The term ‘torture’ attached a special stigma to deliberate inhuman treatment causing very serious and cruel suffering.”⁴⁷ The ECHR held that the five techniques “did not occasion suffering of the particular intensity and cruelty implied by the word torture.”⁴⁸

Unlike the European Convention, the CAT does define torture, but it too treats it as a particularly egregious subcategory of cruel, inhuman or degrading treatment.⁴⁹ The first draft of the CAT defined torture as an “aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.”⁵⁰ While this explicit statement of the hierarchical relationship between torture and other cruel, inhuman or degrading treatment was removed from the later versions, the concept remains. Article 16 of the CAT states:

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.⁵¹

Differentiating torture from other cruel, inhuman or degrading treatment carries legal repercussions as well as rhetorical ones.⁵² Under customary international law, torture is *jus cogens*— never permissible or justifiable under any circumstances. The CAT reaffirms this principle, providing that “no exceptional circumstances whatsoever . . . may be invoked as a justification of torture.”⁵³ Other ill-treatment does not hold this special legal status.⁵⁴

2. *A subjective standard*

The element of infliction of severe pain or suffering considers the impact of the act on the particular victim. Presumably, the same act could have different effects on different people depending on their natural susceptibility and threshold for pain. Thus, the victim’s physical or mental constitution will become relevant in cases where severity of the ultimate pain is at issue. The U.N. Special Rapporteur on Torture has pointed out that children and pregnant women are particularly vulnerable to torture. For example, children “may suffer graver consequences than similarly ill-treated adults.”⁵⁵ Going further towards subjectivity than the CAT definition, the ECHR has adopted an expressly subjective standard. The ECHR approaches the severity of the act within the context of the particular case, considering factors such as the physical and mental effects on the person experiencing the harm, the duration of the act, and the age, sex, and culture of the person experiencing the harm.⁵⁶

3. *Defining “severe”*

States and transnational bodies have differed in their approach to the severe pain or suffering element by interpreting the term severe in their own way or by replacing it with other terms. Some have attempted to limit the reach of the CAT through narrow interpretations of the “severe pain” element. For example, a recent U.S. Justice Department memorandum asserted that the term “severe pain” requires that “[t]he victim must experience intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in loss of significant body function will likely result.”⁵⁷ This analysis is

inconsistent with the negotiating history of the CAT, in which the U.S. clarified that “although conduct resulting in permanent impairment of physical or mental faculties is indicative of torture, it is not an essential element of the offense.”⁵⁸ After much negative press and harsh criticism, the Bush Administration repudiated this memorandum and withdrew its restrictive understanding of “severe pain.”⁵⁹ Nevertheless, the episode demonstrates the ways in which some countries have attempted to limit the reach of the CAT through narrow interpretation of the severe pain element.

In *The Republic of Ireland v. The United Kingdom*, the ECHR unanimously ruled that a combination of five interrogation techniques used by the British Security forces in Northern Ireland amounted to inhuman and degrading treatment but not torture under the European Convention on Human Rights.⁶⁰ The ECHR reasoned that “[t]he distinction between torture and inhuman or degrading treatment derived principally from a difference in the intensity of the suffering inflicted The term ‘torture’ attached a special stigma to deliberate inhuman treatment causing very serious and cruel suffering.”⁶¹ The ECHR held that the five techniques “did not occasion suffering of the particular intensity and cruelty implied by the word torture.”⁶²

By sharp contrast, in its State Report, Egypt states that its definition of torture “imposes no prerequisites concerning the degree or extent of pain or suffering.”⁶³ The absence of a minimum threshold of pain or suffering substantially broadens the definition of torture. The government of Latvia has taken yet another approach, requiring that the acts must “caus[e] *particular* pain or suffering to victims.”⁶⁴ Still other countries, such as Greece and Luxembourg, use the word “acute” instead of “severe.”⁶⁵ The exact significance of replacing “severe” with “particular” or “acute” is unclear, especially since the latter terms are translations, but all three terms seem roughly synonymous.

C. Physical or Mental

The CAT’s definition of torture extends to pain or suffering that is either mental or physical.⁶⁶ The CAT does not delineate what constitutes mental or physical pain, nor does it draw a boundary between the two.

If a torture victim experiences severe physical and mental pain as a result of a single act, such as rape, there is no need to parse out the particular types of pain. Yet, in naming both physical and mental, the CAT acknowledges a difference between the two types of pain or suffering.

The most detailed description of the mental harm element can be found in the U.S. definition of torture. As a condition for ratifying the CAT, the United States submitted formal understandings including a more precise definition of mental torture:

Mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) 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; (3) the threat of imminent death; or (4) 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.⁶⁷

This understanding defines mental pain and suffering by the source of the pain. Confining mental pain or suffering to a closed set of enumerated actions thereby narrows the definition. In addition, without guidance differentiating between transient mental harm and prolonged mental harm, the understandings' use of the word "prolonged" may prove to further narrow the definition. Must the harm be constant and enduring, or might periodic yet debilitating flashbacks suffice? Just as the word "prolonged" creates difficulties in Latvia's version of the act element, so too does it pose new confusions and hurdles here.⁶⁸

Croatia simply failed to prohibit mental torture at all, limiting its definition to physical torture⁶⁹ and thereby excluding many types of behavior from being considered torture. For instance, if a state official were to inform a prisoner that her family will be killed unless she reveals certain information, that act may qualify as torture under the CAT, but not in Croatia.

D. Intentionally Inflicted

The CAT definition of torture requires that severe pain and suffering be “intentionally inflicted” on a person.⁷⁰ In other words, were a victim to suffer severe pain at the hands of a state official, but the official did not intend to cause the severe pain, the act would not amount to torture. This might be the case if, for example, a prisoner experienced severe pain or suffering as a result of poor prison conditions but the officials did not intend the conditions to affect the prisoner so severely. The requisite intent might also be absent in cases where medical experiments are conducted on prisoners. If experimentation severely harms a prisoner, but the doctors had no intention to harm the prisoner, the state could argue that its behavior, while potentially criminal under other laws, does not amount to torture.

The ECHR has made the intent requirement easier to satisfy by shifting the burden of proof from the victim to the government. For example, in *Selmouni v. France*, the ECHR noted that “where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused.”⁷¹ Because no such explanation was offered, the ECHR found that the state tortured an individual even absent any evidence of intent or the identity of the perpetrator.⁷² The physical evidence of harm while in state custody and the testimony of the victim were sufficient to trigger a presumption of intent.

Under the American Convention on Human Rights, the perpetrators’ intent need not be established.⁷³ Thus, in *Paniagua Morales v. Guatemala*, the Inter-American Court of Human Rights found that the Guatemalan government tortured individuals in violation of Article 5 of the American Convention on Human Rights on the basis of autopsies which “reliably revealed signs of torture (tying, beating etc.)” that were proven to be imputable to the state.⁷⁴

Latvia substitutes awareness for intention in its definition of torture, defining torture as “actions that, committed by the guilty person, *being fully aware* of it, are characterized by multiple or prolonged acts, causing particular pain or suffering.”⁷⁵ This definition does not indicate – at least as translated – what awareness is necessary to constitute tor-

ture. Generally, awareness or knowledge may be evidence of intent but is the same as intention. Thus, this alternate phrasing may significantly change the definition.

Moreover, the intent element raises the general question: what must a torturer have had the intent to do? The CAT requires that the actor intend to *inflict* severe pain or suffering, not simply to intend to do an act that in turn cause such harm. The use of the phrase “intent to inflict” implies that the torturer must have intended both to act and to cause a particular harm.

Often, when analyzing the kind of intent required, lawyers turn to the terms “general intent” and “specific intent.” General intent is a less demanding standard, requiring merely that the actor intended to perform the conduct as opposed to intending to create a particular result in violation of the law. Specific intent requires acting with the intent to achieve a result or intending to commit a particular crime.⁷⁶ The text of the CAT itself does not expressly require either specific intent or general intent.⁷⁷ Regardless of whether the intent is characterized as specific or general, it is important to clarify what satisfies intent in this context.

The United States’ formal understandings at the time of ratification included adding the word “specifically” to the intent element.⁷⁸ Evidently the drafters of the U.S. understandings to the CAT, at least, were concerned that the CAT definition requires only general intent, as opposed to specific intent.

In memos on the definition of torture, the U.S. Department of Justice (“DOJ”) maintains that specific intent is required,⁷⁹ yet fails to define specific intent in this context. Rather, it merely describes the extreme scenarios of intent.⁸⁰ For instance, the DOJ says that the specific intent standard would be met if an act was performed with the conscious desire to inflict severe physical or mental pain or suffering. On the other hand, the standard would likely not be met if an individual acted in good faith and performed “reasonable investigation establishing that his conduct would not inflict severe physical or mental pain or suffering.”⁸¹ The DOJ memo thus leaves the middle ground vague and undefined.

The Third Circuit Court of Appeals has interpreted the CAT's intent element as not requiring specific intent (at least as generally understood in U.S. criminal law). In *Zubeda v. Ashcroft*, the court held that the intent requirement merely excludes accidental harm: the CAT “distinguishes between suffering that is the accidental result of an intended act, and suffering that is purposefully inflicted or the foreseeable consequence of deliberate conduct.”⁸² Relying on policy considerations, the court concluded that requiring individuals to establish the specific intent of their persecutors would impose an insuperable obstacle, rendering the CAT ineffective.⁸³ Recently, in *Auguste v. Ridge*, the Third Circuit found that the specific intent element under the U.S. understandings to the CAT does not require “proof of specific intent, as that term is used in American criminal prosecutions” but rather, “something more than an accidental consequence . . . to establish the probability of torture.”⁸⁴ Deeming intentional infliction to include harm that was the “foreseeable consequence of deliberate conduct” expands the potential reach of the term of torture.

Concurring with the Third Circuit's interpretation, Burgers and Danelius, the Swedish representatives who presented the first draft of the CAT to the U.N., explain that “where pain or suffering is the result of an accident or mere negligence, the criteria for regarding the act as torture are not fulfilled.”⁸⁵ They leave the necessary intent at that basic level—not requiring specific intent as commonly understood in U.S. criminal law.

E. For Such Purposes

The CAT definition includes a purpose limitation; a particular act constitutes torture only if performed for certain purposes. The act must have been undertaken for

such purposes as obtaining from [the victim] 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.⁸⁶

First, it is evident from the text that not just any purpose will do; oth-

erwise the reference to purpose would be meaningless. Indeed, examination of U.N. discussions in drafting the precursor to the CAT, the Declaration Against Torture, confirms that the drafters intended the list of purposes to be significant.⁸⁷ During the formal U.N. Congress sessions in 1976, a proposal to add the words “or for any other purpose” to the Declaration failed.⁸⁸

Second, the phrase “such purposes as” indicates that the ensuing list is illustrative, not comprehensive. Commenting on the first draft of the CAT, the U.S. explained that the list is “meant to be indicative rather than all-inclusive.”⁸⁹ By contrast, the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) takes the position that for an act to constitute torture, one of the enumerated purposes must exist. However, the Tribunal has noted that “there is no requirement that the conduct must be *solely* perpetrated for a prohibited purpose. Thus, in order for this requirement to be met, the prohibited purpose must simply be part of the motivation behind the conduct and need not be the predominating or sole purpose.”⁹⁰

Third, phrasing the element to require purposes “such as” those listed, rather than “or for any other purpose,” implies that relevant purposes not listed must have something in common with those specified. Some conclude that the common element is a relation between the purpose and state interests or policies.⁹¹ Infusing the common element of the list of purposes with state interests and policies is supported by the definition’s state actor requirement. Under this interpretation, if an official causes severe pain or suffering for purely sadistic reasons, that act would not constitute torture under the CAT definition.⁹² It is nearly impossible to imagine individual acts of pure sadism that comport with state policies. Regardless of the precise common element shared by all of the purposes, it is clear that the torturous activity must be performed for a separate purpose and cannot be an end in itself.

Fourth, the last listed purpose, “for any reason based on discrimination of any kind,” is both conceptually and grammatically distinct from the other purposes. Discrimination is more akin to a reason or motivation as opposed to a goal such as interrogation or punishment. Appropriately, this phrase is set apart from the other enumerated purposes by the phrase “or for.” It is thus not illustrative of the sorts of pur-

poses that bring an act within the CAT definition but rather a separate, alternative basis on which to ground a finding of torture.

Individual states have varied in implementing the purpose requirement. Some signatories specify particular purposes in their definitions of torture. These purposes do not always mirror the list of purposes set out in the CAT. Narrowing the definition by listing a closed set of purposes creates clear inconsistencies with the CAT. In Indonesia, for example, a torture case requires proof that the actor harmed the victim “in order to obtain a confession or information from someone or a third person, or in order to threaten or coerce that person or a third person, or for any discriminatory reason on any grounds.”⁹³ Abuse for punitive reasons, therefore, would not constitute torture under Indonesian law, no matter how extreme or disproportionate to the crime. Spain’s definition states that the pain-inducing act must be “for the purpose of obtaining a confession or information from any person or of punishing him for any act he has committed.”⁹⁴ Thus, if a prison guard inflicted severe pain for discriminatory reasons, such as racial or ethnic hatred, such an act would fall outside Spain’s definition of torture. In contrast, under the definitions in a handful of countries, including the U.S., the actor’s purposes are irrelevant or simply not mentioned.⁹⁵ It is unclear why some countries have decided to refer to specific purposes and others have not. Perhaps the purpose requirement is intended to be a means of contextualizing the crime to distinguish torture from other forms of abuse. On the other hand, lack of a purpose requirement may be an attempt to capture all potential forms of extreme violence by public officials.

F. Public Official

The CAT definition provides that the 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.”⁹⁶ Even the worst abuse or most inhuman treatment of a person will not be considered torture in violation of the CAT unless somehow the state is involved. Because private “torture” is generally criminal under national laws (some utilizing the term torture and some not), the CAT’s drafters considered an international convention for private torture unnecessary.⁹⁷

When a public official personally inflicts severe pain or suffering, the state action requirement is met in all but the exceptional circumstances when the official is acting for purely private reasons.⁹⁸ State involvement may also be remote and still satisfy the CAT definition, which reaches private acts consented to, acquiesced in, or instigated by a public official. Thus, state inaction in the face of private violence can constitute torture. The U.N. Special Rapporteur on Torture, Nigel S. Rodley, interprets the state action requirement to be met when public officials are “unable or unwilling to provide effective protection from ill-treatment (i.e. fail to prevent or remedy such acts), including ill-treatment by non-State actors.”⁹⁹ Rodley’s position seems the most expansive plausible reading of the public official requirement.

In *Z. v. The United Kingdom*, the ECHR adopted a similarly broad understanding of the acquiescence by a public official that would suffice for a violation of the European Convention on Human Rights.¹⁰⁰ Holding the government responsible for the inhuman and degrading treatment inflicted on four children by their parents, the ECHR found that states must take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals. These measures should provide effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge.¹⁰¹

The Court ruled that as the State knew or should have known that these children were at risk of severe abuse by their parents, the State had an affirmative obligation to prevent torture or inhuman or degrading treatment.¹⁰² Thus under the European Convention on Human Rights, torture may include actions taken by private individuals if the State has an obligation to protect the victims. Such an obligation may arise under domestic law, as was the case in *Z v. The United Kingdom*.¹⁰³ The definition of torture under the CAT has yet to be stretched to include (in)action by public officials that violate an obligation to protect.

A number of countries have adopted definitions of torture that stray from the CAT language with respect to the public official require-

ment. For an act to constitute torture in Guatemala, it must have been conducted “with the authorization, support or acquiescence of the state authorities” or have been “committed by the members of groups or organized gangs having terrorist, insurgent or subversive aims or any other wrongful purpose.”¹⁰⁴ In Croatia, the connection between the person acting and the government is stated slightly differently. Croatian torture requires an act by “an official or any other person who, acting with the encouragement or the express or tacit approval of an official person.”¹⁰⁵ In its torture definition, Iceland eliminated the state actor requirement altogether, simply stating that torture may occur in all situations regardless of whether the act was performed at the behest of a public official.¹⁰⁶ Variations on the public official requirement undoubtedly affect government accountability with regards to individual acts of torture, as well as the characterization of acts as torture.

The United States has taken a slightly different approach. In ratifying the CAT, the United States presented the following understandings concerning the public official requirement:

The definition of torture in article 1 is intended to apply only to acts directed against persons in the offender’s custody or physical control . . .

(d) That with reference to article 1 of the Convention, the United States understands that the term ‘acquiescence’ requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity.¹⁰⁷

While including a concept of custody or physical control, the U.S. understandings also add the new term “offender.” However, the understandings do not define the term offender. Therefore, it is unclear whether the offender refers to the person accused of torture or the public official merely involved in the torture. If the government is defined as the offender, the additional requirement that the offender must have custody or physical control of the victim may, in practice, require a closer nexus between the public official and the victim.¹⁰⁸

In *Zheng v. Ashcroft*, in which the petitioner sought relief from deportation on the basis that he was likely to be tortured if returned to

China, the petitioner claimed that the Chinese government acquiesced in his torture by third-party smugglers.¹⁰⁹ The Ninth Circuit adopted a liberal interpretation of the term “acquiescence,” holding that torture does not require that the acts be “willfully accepted” by government officials.¹¹⁰ The court found a sufficient nexus between the public officials and those who inflicted the harm because the officials were “aware” of the torturous acts.¹¹¹ Citing a report of the U.S. Senate Foreign Relations Committee, the court reasoned that “the purpose of requiring awareness, and not knowledge [in the understandings], ‘is to make it clear that both actual knowledge and ‘willful blindness’ fall within the definition of the term acquiescence.’”¹¹² As phrased by the Fifth Circuit, the test is whether the government “would turn a blind eye to torture.”¹¹³ This case exemplifies how terms used in the CAT definition, even if adopted in individual country laws, may be controversial upon interpretation.

G. Does Not Include Pain or Suffering from Lawful Sanctions

Finally, the CAT provides that “pain or suffering arising only from, inherent in or incidental to lawful sanctions” does not constitute torture.¹¹⁴ While the CAT prohibits acts that inflict severe harm, pursuant to this provision such acts are allowed and the severe harm deemed acceptable in the proper context. Interpreted broadly, this provision could constitute the exception that swallowed the rule—allowing a state to avoid the prohibition on torture simply by sanctioning methods of punishment that involve extremely harsh treatment.¹¹⁵ This possibility is currently largely hypothetical, as to date, no country has defended against charges of torture on the grounds that the actions were incidental to lawful sanctions. However, the lawful sanctions provision has, for example, precluded arguments that capital punishment constitutes torture.

The first draft of the CAT did not contain this potential loophole. The draft stated that torture “does not include pain or suffering arising only from, inherent in, or incidental to, lawful sanctions *to the extent consistent with the Standard Minimum Rules for the Treatment of*

Prisoners."¹¹⁶ A number of countries criticized this draft because the Standard Minimum Rules for the Treatment of Prisoners are not internationally legally binding and only concern prison conditions.¹¹⁷ Some argued the exception had to be broader than just prison conditions and should include other punishment practices. After debate within the Working Group, the provision of consistency with international standards was deleted rather than corrected. Burgers and Danelius note that during the drafting process there was a division between those who thought the CAT should be limited to acts of torture that were illegal under national law and those who wanted to criminalize sanctions authorized by national laws but that should nonetheless constitute torture.¹¹⁸ The final lawful sanctions exemption may be the result of political compromises intended to allow particular forms of punishment, such as the death penalty, without undermining the core principles of the CAT.¹¹⁹

Many signatories agree that the lawful sanctions language creates problematic ambiguities.¹²⁰ It diminishes the universality of the definition by infusing exceptions based on national law. As practices that may be lawful in one state may be unlawful in another, this provision undermines the effort to achieve a uniform definition of torture. Some states have attempted to solve this dilemma by eliminating or clarifying the exemption in their own torture definitions. For example, Croatia's definition of torture has no lawful sanctions exception whatsoever, thereby providing a stricter framework for defining torture.¹²¹ In its understanding, the United States attempted to clarify and cap the lawful sanctions exemption:

(c) That with reference to article 1 of the Convention, the United States understands that 'sanctions' includes judicially-imposed sanctions and other enforcement actions authorized by United States law or by judicial interpretation of such law. Nonetheless, the United States understands that a State Party could not through its domestic sanctions defeat the object and purpose of the Convention to prohibit torture.¹²²

This clarification endeavors to reconcile U.S. domestic laws, which allow particular practices that may otherwise be prohibited by the CAT, with the CAT's ultimate purpose to prohibit torture. However, it is unclear how in practice this understanding would be applied.

The U.N. Special Rapporteur on Torture, Nigel S. Rodley, recognized the potential slippery slope of the lawful sanctions exemption and has interpreted the provision so that differences in national laws would not effect the strength of the CAT.¹²³ Rodley concluded that the term “lawful sanctions” refers to practices that the international community widely accepts as permissible sanctions, such as imprisonment. He cited the Standard Minimum Rules for the Treatment of Prisoners as an example of international standards that may guide determinations of acceptable practices.¹²⁴ In particular, Rodley concluded that corporal punishment may amount to torture:

I 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.¹²⁵

Rodley’s interpretation reduces the probability that the exception will undermine the purpose of the CAT by defining lawful sanctions in the context of international practices rather than national laws. Under Rodley’s perspective, common international practices place restrictions on the potential loophole of the lawful sanctions exemption, likely keeping the exemption in check, thereby reducing the risk that the exemption would weaken the CAT beyond repair.

III. U.S. LAW

Since the release of reports of abuse of detainees at the Abu Ghraib prison in Baghdad in the spring of 2004, discussion of torture has primarily focused on U.S. detainee interrogation policies and practices. Like most nations, the United States officially denounces the use of torture.¹²⁶ However, condemnation of torture does not in itself reveal much. The devil is in the details. Once again, the critical question is:

what exactly does the government mean by the term “torture” in condemning it? The answer illuminates what conduct is actually prohibited and what conduct condoned or even encouraged.

Public officials involved in practices that have been criticized as torturous insist that their agencies do not use torture. In a Senate Committee hearing, Porter J. Goss, the Director of the Central Intelligence Agency, declared, “We don’t do torture.”¹²⁷ However, he also attempted to distinguish between what he defended as “professional interrogation” and torture. He claimed that professional interrogation techniques are important tools for fighting terrorism and, unlike torture, are perfectly lawful.¹²⁸ However, the clear distinction between the two categories immediately fell apart with his claim that waterboarding, an interrogation tactic currently employed by the CIA in which a prisoner is made to believe that he is drowning, falls in the category of lawful professional interrogation. One could easily reach the conclusion that waterboarding amounts to torture under the CAT definition.¹²⁹

Torturous acts may violate a number of criminal laws in the United States, including a handful of federal statutes and regulations that specifically refer to the act of “torture.”¹³⁰ Moreover, the judicial, legislative, and executive branches have also examined the meaning of torture in the context of U.N. convention reservations, immigration and extradition proceedings, tort claims, criminal sanctions, and military policies. Without establishing a single, clear torture definition, these decisions, statutes, rules, and regulations, taken together, depict a general trend as to what constitutes torture in the U.S.

A. U.S. Ratification of the CAT

The CAT opened for signature in 1985; on April 18, 1990, the United States signed the CAT; the Senate advised and consented to the ratification of the CAT on October 27 of the same year; and the ratifying documents were deposited to the U.N. on October 21, 1994.¹³¹ Thirty days later, the CAT entered into force in the U.S.¹³² The United States adopted the CAT subject to a number of understandings, many of which concern the definition of torture.¹³³ In particular, the U.S. understandings (1) add the term “specific” to the intent language, (2)

define mental harm, (3) apply the torture definition “only to acts directed against persons in the offender’s custody or physical control,” (4) define lawful sanctions, and (5) define acquiescence by a public official. These understandings are discussed more fully in Part II of this paper, analyzing the CAT torture definition. Generally, while clarifying vague concepts, the understandings serve to narrow the circumstances to which the definition might apply.

For example, unlike the CAT, the U.S. understandings define mental pain or suffering. While clarifying what may be considered too vague a term, this understanding limits what may constitute mental pain and suffering.¹³⁴ Furthermore, the definition is itself unclear. For example, the requirement that the harm be “prolonged” generates further uncertainty. Mental pain and suffering is defined in terms of the possible causes of the harm as opposed to the actual feeling that is created. While delineating acceptable causes may assist in detecting mental pain and suffering in the context of torture, it also adds a new potentially limiting factor. There may be instances in which an individual experiences severe mental pain or suffering but the harm did not arise from one of the stated causes. As such, the act would not be deemed torture under the U.S. understandings even though applying the CAT directly may have led to a finding of torture.

The U.S. understandings also require specific intent while the CAT does not use the word “specific.”¹³⁵ As discussed above, it is debatable whether the CAT requires specific or general intent. In order to fully comprehend the U.S. understandings and its practical application, it is essential to understand what is meant by specific intent. Must a torturer have intended to cause the exact harm that occurs? Or would it suffice if a torturer acted in a manner such that severe pain was a foreseeable result? To date, the U.S. understandings have not been analyzed or challenged in a torture case. However, interpretation of the understandings is a critical step towards comprehending the U.S. obligations under the CAT and other federal laws concerning torture.

B. Torture as Federal Crime

The CAT requires:

Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.... Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.¹³⁶

Federal law does not criminalize torture committed within the United States as such. The State Department has stated that legislation specifically criminalizing torture was unnecessary because “existing criminal law was determined to be adequate to fulfil [*sic*] the Convention’s [i.e., the CAT’s] prohibitory obligations, and in deference to the federal-state relationship.”¹³⁷ However, federal law does proscribe acts of torture *outside* the U.S.¹³⁸ Analysis of that provision, as well as other federal criminal statutes that proscribe conduct that may encompass acts of torture, follows.

1. 18 U.S.C. § 2340

To meet U.S. obligations under the CAT, in 1994 Congress criminalized acts of torture committed “outside the United States.”¹³⁹ For these purposes, “the United States” includes “the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States.”¹⁴⁰ The definition of torture in § 2340 is derived from the CAT¹⁴¹ and for the most part tracks the text of the CAT definition.¹⁴² Therefore, the common understanding of each of the CAT elements of torture would appear to apply to § 2340.¹⁴³ However, § 2340 incorporates the U.S. understanding to the CAT, specifying and restricting the meaning of mental pain and suffering and including the specific intent requirement. These U.S. distinctions are analyzed above in the discussion of the U.S. understandings to the CAT. In addition, § 2340 does not include the list of purposes necessary for the action to be considered torture. This silence potentially

broadens the reach of § 2340 to torturous acts the purpose of which is unknown or unconnected to the CAT's list.

The meaning of the term torture under § 2340 has become controversial as a result of recent DOJ memos. Over the last two years, the DOJ has twice prepared legal memoranda analyzing the definition of torture under § 2340. First, in August 2002, Jay S. Bybee and John Yoo of the Office of Legal Counsel, submitted a memorandum to Alberto Gonzales, then-Counsel to the President, regarding § 2340's definition of torture.¹⁴⁴ This memo adopted an exceedingly narrow definition of torture. Most notoriously, it concluded that the threshold for "severe pain" was extraordinarily high. In order for an act to amount to torture, "[t]he victim must experience intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant bodily function would likely result."¹⁴⁵ It also embraced a restrictive view of specific intent, requiring the torturer to act with the precise and express objective of inflicting severe pain.¹⁴⁶

Released to the public on June 22, 2004, the BybeeBybee Memo generated overwhelming criticism from the legal community.¹⁴⁷ In response, Bush Administration officials backed away from the memo, stating that it was overbroad and would be re-drafted.¹⁴⁸ On December 30, 2004, Daniel Levin, Acting Assistant Attorney General in the Office of Legal Counsel, submitted a new memorandum to James B. Comey, Deputy Attorney General ("Levin Memo").¹⁴⁹ The Levin Memo supercedes the Bybee Memo in its entirety. Undercutting its own importance, the Levin Memo notes that "we have reviewed this Office's prior opinions addressing issues involving treatment of detainees and do not believe that any of their conclusions would be different under the standards set forth in this memorandum."¹⁵⁰ The memo does, however, provide new, less restrictive interpretations of key terms of the definition of torture under § 2340: (1) severe; (2) severe physical pain or suffering; (3) prolonged mental pain; and (4) specific intent.¹⁵¹

First, the Levin Memo disagrees with the Bybee Memo's limitation of severe pain to "excruciating and agonizing" pain, or to pain "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death."¹⁵²

Rather, leaving the term relatively vague, the Levin Memo describes the severe pain necessary for torture as falling below the level of excruciating pain, but above the level of pain derived from cruel and inhuman treatment.¹⁵³

Second, according to the Levin Memo the term “severe physical pain or suffering” should be interpreted such that torture may involve *either* severe physical suffering or severe physical pain. Standard principles of statutory construction indicate that severe physical pain must be separate from severe physical suffering, otherwise the use of two separate terms is surplusage. The memo does not fully explain the distinction between “suffering” and “pain.”¹⁵⁴ It does, however, state that “severe suffering” must be extended in duration as well as intensity, whereas “severe pain” need only be the latter. The basis of this precise distinction is unclear.

While physical pain and suffering can be distinguished from one another, it is not easy to separate *mental* pain from mental suffering. Consistent with the U.S. understandings, § 2340 defines the two together, lumping them together as “prolonged mental harm.” As noted above, the requirement that mental harm be prolonged to constitute torture is extremely vague and potentially limiting. The Bybee Memo read “prolonged” to require “months or even years” of pain or suffering.¹⁵⁵ The Levin Memo merely opines that prolonged means of some “lasting duration,” leaving that phrase undefined.¹⁵⁶

Lastly, the Levin Memo reexamines the requirement that torturers must have acted with specific intent. The memo acknowledges that the term “specific intent” is ambiguous and its meaning unsettled. It retracts the Bybee Memo’s conclusion that the specific intent element requires severe pain to be the torturer’s “‘precise objective’ and that it was not enough” to “act with the knowledge that such pain ‘was reasonably likely to result from his actions’ . . . or ‘is certain to occur.’”¹⁵⁷ But it does not offer its own interpretation of the term. Rather, it merely states that “[i]n light of the President’s directive that the United States not engage in torture, it would not be appropriate to rely on parsing the specific intent element of the statute to approve as lawful conduct that might otherwise amount to torture.”¹⁵⁸ The sentiment that the DOJ should not draft a memo designed to immunize abuse through a hyper-technical, over

legalistic statutory construction is refreshing. Nevertheless, the failure of the Levin Memo to come to grips with the meaning of this essential statutory term is unsatisfying and leaves the definition uncertain.

2. *Other Federal Criminal Laws*

No federal law specifically criminalizes torture perpetrated within the United States. A handful of federal criminal statutes do refer to torture generally. While these statutes do not offer a definitive answer to the definition of torture under U.S. law, they nonetheless deserve attention.

First, the Federal Death Penalty Act (“FDPA”)¹⁵⁹ authorizes a sentencing jury to consider as an aggravating factor the fact that an offense was committed in an “especially heinous, cruel, or depraved manner in that it involved *torture* or serious physical abuse to the victim.”¹⁶⁰ Courts interpreting the FDPA have not relied on the § 2340 definition. For example, in *United States v. Sampson*, a U.S. District Court applied a definition from *Black’s Law Dictionary*, under which an act is “torture” only if committed with intent to punish, or with intent to exact a confession or information, or for sadistic pleasure.¹⁶¹ These purposes were found to be necessary under the FDPA even though § 2340 does not require specific purposes. Similarly, in *U.S. v. Chanthadara*, the U.S. Court of Appeals for the Tenth Circuit refused to apply the § 2340 torture definition in an FDPA case.¹⁶² The court reasoned that § 2340 does not apply because the FDPA is not part of the same chapter as § 2340 and, unlike § 2340, the FDPA is not limited to persons acting under color of law. Without explanation, the court held that the mental harm caused by torture under the FDPA need not be prolonged as required by § 2340.¹⁶³ With few cases interpreting torture under the FDPA, a clear trend as to whether the FDPA definition of torture is more or less restrictive than the § 2340 definition has yet to emerge. In fact, these cases do not lead to a firm conclusion as to what the FDPA definition of torture is. Nonetheless, they do show that courts do not necessarily apply the § 2340 torture definition in other contexts.

There is one narrow instance in which torture is itself a federal crime—where murder is perpetrated by torture against a child or children.¹⁶⁴ Here the statute incorporates § 2340 by reference, with the one important, and appropriate, exception that it applies to purely private conduct.¹⁶⁵

Finally, it is a federal crime to maim someone within the special maritime and territorial jurisdiction of the United States with the intent to torture.¹⁶⁶ The statute directly borrows the torture definition of § 2340:

Whoever, within the special maritime and territorial jurisdiction of the United States, and with the intent to torture (as defined in section 2340), maim, or disfigure, cuts, bites, or slits the nose, ear, or lip, or cuts out or disables the tongue, or puts out or destroys an eye, or cuts off or disables a limb or any member of another person; or Whoever . . . with like intent, throws or pours upon another person, any scalding water, corrosive acid or caustic substance—Shall be fined under this title or imprisoned not more than twenty years, or both.¹⁶⁷

There are no reported cases interpreting the definition of torture under this statute.

C. Federal Civil Liability for Torture

Three statutes affecting civil liability for torture deserve consideration. These are the Torture Victim Protection Act (“TVPA”), the Alien Tort Claims Act (“ATS”), and the Foreign Sovereign Immunities Act (“FSIA”).

1. TVPA

The TVPA, enacted in 1991, provides that “an individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to torture shall, in a civil action, be liable for damages to that individual.”¹⁶⁸ The TVPA uses a modified version of the CAT and § 2340 definitions of torture.¹⁶⁹ The TVPA definition is essentially the § 2340 definition, absent the words “specifically intended”

and including the CAT purpose requirement.¹⁷⁰ Case law interprets the TVPA definition of torture differently than that of § 2340. For example, the court in *Sinaltrainal v. Coca-Cola Co.* held that a corporation is a “person” and so can commit torture.¹⁷¹ Reasoning that the law often treats corporations as persons, “it is reasonable to conclude that had Congress intended to exclude corporations from liability under the TVPA, it could and would have expressly stated so.”¹⁷²

In *Xuncax v. Gramajo*, a federal district court deemed the combination of the following acts of abuse during interrogation by the Guatemalan military to be torture: blindfolding, repeated acts of rape, burning with cigarettes, beating, and lowering into a foul-smelling pit.¹⁷³ The case also analyzed the requirement that the victim be in the offender’s “custody or physical control.”¹⁷⁴ The defendant argued that the custody requirement was not met because the plaintiff was never actually in his “personal custody.”¹⁷⁵ Relying on the relevant Senate Report, the court found that, as “a higher official need not have personally performed or ordered the abuses in order to be held liable,” having the authority and discretion to order an individual’s release can establish “custody” for the purposes of defining torture.¹⁷⁶

Courts have applied the TVPA to particular fact patterns on a number of occasions without in-depth discussion of the definition of torture. In *Hilao v. Estate of Marcos*, the court without explanation identified the combination of the following as torture: interrogation coupled with blindfolding, beating while handcuffed and fettered, denial of sleep, threats of electric shock and death, shackling limbs to a cot while towel was placed over nose and mouth, and pouring water down nostrils to trigger a drowning sensation.¹⁷⁷ In *Mehinovic v. Vuckovic*, the court concluded that interrogations coupled with severe beatings on all parts of the body, including dislocating a finger and beating genitals constituted torture, and instilling fear of death during beatings and games of “Russian roulette” resulted in prolonged mental harm amounting to torture.¹⁷⁸ The court in *Daliberti v. Republic of Iraq* found that physical and mental harm from threats of death, cutting off fingers, pulling out fingernails, and electric shocks to the testicles constituted torture.¹⁷⁹ Because these cases represent abuse in the extreme,¹⁸⁰ they do little to help categorize cases involving less severe, yet still heinous, acts.

2. ATS

Passed in 1789, the ATS provides the federal courts with jurisdiction over “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”¹⁸¹ In 2004, in *Sosa v. Alvarez-Machain*, the Supreme Court ruled that the ATS is jurisdictional in nature and does not in itself provide a cause of action.¹⁸² However, the ATS may be used to create a new cause of action concerning a violation of a norm of customary international law “defined with a specificity comparable to the features of the 18th-century paradigms.”¹⁸³

While the ATS was only utilized once in its first 170 years, it has emerged as a popular tool for redress in U.S. courts of international human rights violations.¹⁸⁴ The rediscovery of the ATS began with the case of *Filartiga v. Peña-Irala*.¹⁸⁵ In *Filartiga*, the plaintiffs, a Paraguayan father and daughter, claimed that Paraguayan officials perpetrated acts of torture causing the death of plaintiffs’ son and brother. The court found it had jurisdiction over the ATS claims. Since *Filartiga*, courts have heard suits seeking redress for human rights violations such as torture, kidnapping, and extrajudicial killings.¹⁸⁶ The ATS does not in itself define or prohibit torture. Thus, an ATS case would likely utilize the CAT for a relevant definition of torture.¹⁸⁷

3. FSIA

The Foreign Sovereign Immunities Act (“FSIA”) was enacted in 1976 and amended in 1996 to include torture as an exception to jurisdictional immunity of a foreign state.¹⁸⁸ The FSIA denies foreign sovereigns immunity where

money damages are sought against a foreign state for personal injury or death that was caused by an act of *torture*, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources... for such an act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency....¹⁸⁹

The FSIA explicitly adopts the TVPA's definition of torture.¹⁹⁰ As with the TVPA, most of the FSIA cases do not provide much assistance in pinpointing the definition of torture in that they represent extreme cases of abuse that unquestionably qualify as torture. For example, in *Cicippio v. Islamic Republic of Iran*, the court held that plaintiffs were tortured by members of an Iranian paramilitary organization controlled by the government when they were taken hostage, interrogated, blindfolded, chained, given poor food, regularly beaten, threatened with castration and imminent death, shackled in stooped positions, and subjected to electric shock, causing severe depression and mental anguish.¹⁹¹

Courts have made clear that torture under the FSIA is a special term—"torture does not automatically result whenever individuals in official custody are subjected even to direct physical assault. Not *all* police brutality, not *every* instance of excessive force used against prisoners, is torture under the FSIA."¹⁹² Yet, courts have not specified how to draw this definitional line. In *Simpson v. Socialist People's Libyan Arab Jamahiriya*, the plaintiff was interrogated, held incommunicado, threatened with death, separated from her husband and unable to learn of her husband's welfare. The D.C. Circuit found that plaintiff was not tortured under the meaning of the FSIA.¹⁹³ Relying on various TVPA decisions, the court reasoned that although cruel, the acts were not "so unusually cruel or sufficiently extreme and outrageous as to constitute torture."¹⁹⁴ Thus, claims that do not involve extreme acts will not amount to torture under FSIA. In *Price v. Socialist People's Libyan Arab Jamahiriya*, the court required factual evidence as to the exact method of infliction of pain.¹⁹⁵ There, allegations of physical abuse were insufficient to withstand a motion to dismiss because they lacked details regarding the frequency and duration of beatings, parts of the body at which beatings were aimed, and weapons used to carry them out. Such information was deemed essential to determine if the acts were actually torture or just "police brutality that falls short of torture."¹⁹⁶

D. Torture and Deportation

In 1988, Congress enacted the Foreign Affairs Reform and Restructuring Act (the "FARR Act"), implementing the CAT directive

that signatories must ensure that individuals are not deported or extradited to countries where they are likely to be tortured.¹⁹⁷ In 1999, the INS promulgated implementing regulations, outlining procedures for handling cases in which aliens invoke their CAT rights.¹⁹⁸ These regulations include a definition of torture that is a compilation of the CAT definition and the U.S. understandings to the CAT, similar but not identical to the § 2340 definition.¹⁹⁹ In most of the cases involving the FARR Act, the discussion ends with a finding of insufficient evidence that the petitioner is likely to be tortured upon return to their country.²⁰⁰ Courts generally do not reach the question of what constitutes torture. Indeed, they rarely even reach the question of whether the prior experiences of the petitioner amounted to torture.

The few cases that do analyze whether the petitioner has been or will be subjected to torture tend to describe the details of the abuse and then summarily conclude that the acts do or do not amount to torture without explanation.²⁰¹ In *Sackie v. Ashcroft*, for example, the court held that Mr. Sackie was tortured during his conscription into the National Patriotic Front of Liberia and later a rebel army.²⁰² As a child soldier, he was frequently abused, threatened with imminent death, given mind-altering substances, suffered cuts to his back and arms, and forced to kill women and children. The court found that under the FARR Act, the resulting prolonged mental harm amounted to torture.²⁰³ On the other end of the spectrum, in *Quant v. Ashcroft*, the court held that verbal abuse and a push do not constitute torture under the FARR Act.²⁰⁴

E. Torture Victim Relief Act of 1998

The Torture Victim Relief Act of 1998 (“TVRA”) authorizes the President to provide grants for the “rehabilitation of victims of torture.”²⁰⁵ The TVRA’s findings include a descriptive definition of torture that is more colloquial in tone and substance: “Torture is the deliberate mental and physical damage caused by governments to individuals to destroy individual personality and terrorize society. The effects of torture are long term. Those effects can last a lifetime for the survivors and affect future generations.”²⁰⁶ These findings appear to incorporate the reason for assisting torture victims in the under-

standing of what constitutes torture.

The TVRA explicitly adopts the § 2340 torture definition, with one addition: “the use of rape and other forms of sexual violence by a person acting under color of law upon another person under his custody or physical control.”²⁰⁷ The addition of rape and other forms of sexual violence is seemingly unnecessary, as one could have easily interpreted § 2340 as already covering these forms of abuse. Read in tandem, however, these two statutes now call into question whether the § 2340 definition includes rape. Alternatively, the TVRA can be read simply to make explicit what the § 2340 definition already included.

F. Torture and Military Policy

In July 2003, the Department of Defense promulgated rules that provide guidance for crimes that may be tried by military commissions, including torture.²⁰⁸ This regulation employs a definition of torture similar to § 2340 with a few important distinctions. First, the conduct must have taken place “in the context of” and be “associated with armed conflict.”²⁰⁹ In addition to the lawful sanctions exemption, the regulation states that torture “does not include the incidental infliction of pain or suffering associated with the legitimate conduct of hostilities.”²¹⁰ The regulation does not define “incidental infliction” or “legitimate conduct of hostilities.” Like the CAT’s corresponding exemption for activities that are part of the imposition of lawful sanctions, this exemption could swallow the rule, since much of what the military does might be classified as an aspect of “legitimate conduct of hostilities.”

Importantly, unlike § 2340, the Department of Defense regulation defines the term “prolonged mental harm”—it is “harm of some sustained duration, though not necessarily permanent in nature, such as a clinically identifiable mental disorder.”²¹¹ While potentially useful to pinpoint the meaning of prolonged mental harm, this clarifying definition may unduly restrict the practical application of the crime of torture.

On May 11, 2005, President Bush signed a bill for Emergency Supplemental Appropriations for Defense, the Global War on Terror, and Tsunami Relief for the Fiscal Year Ending September 30, 2005.²¹² Section 6057(a) (1) of this new law provides that

None of the funds appropriated or otherwise made available by this Act shall be obligated or expended to subject any person in the custody or under physical control of the United States to torture or cruel, inhuman, or degrading treatment or punishment that is prohibited by the Constitution, laws, or treaties of the United States.

Section 6057(b)(1) further states that “the term ‘torture’ has the meaning given that term in section 2340(1) of title 18, United States Code.” By referencing an existing statutory definition, this statute consequently does not alter the U.S. definition of torture.

G. Overview of U.S. Torture Definition

The United States is a prime example of the lack of uniformity in the definition of torture, illustrating not only that the definition of torture differs among countries, but at times within a single country. Although each of the U.S. laws that involve torture are derived from the CAT (often including the U.S. understandings of the CAT), there remains much confusion as to the definition of torture in the United States. The Department of Justice’s recent change in position regarding the definition is a strong indication that clarity is needed. Even the Levin Memo leaves many elements of the definition of torture extremely vague. Clarifications to the definition of torture through understandings to the CAT, statutory definitions, and court decisions have either muddled or narrowed the definition.

Courts interpreting the FDPA, TVPA, and the FARR Act tend to summarily determine whether conduct is torture with little regard to the uncertainty of the definition. Given the universal condemnation of torture, it is startling that many U.S. courts gloss over the debate regarding the formal definition, choosing instead to take a page from the obscenity playbook—“I know it when I see it.”²¹³ Such informality and subjectivity is unacceptable given the seriousness of the issue. In times of crisis, when the government is most apt to exercise poor judgment, the lack of a precise definition of torture leaves government agents uncertain of the standard by which they are bound. This failure provides the space for justifying torturous conduct. It is exceptionally

disturbing that the executive branch has received such feeble guidance from the courts as to the definition of torture and thus the acceptable limits on interrogation. In light of allegations of torture perpetrated by U.S. officials, it is essential that the government close any potential loopholes for permitting torture.

IV. CONCLUSION

The universal condemnation of torture has gained *jus cogens* status. When the U.N. adopted the CAT, the international community took an important step towards eradicating torture. However, horrific events of the past few years, including detainee abuse at Abu Ghraib, demonstrate that much is yet to be done to accomplish this goal. Torture persists. What accounts for the continued prevalence of torture despite the unanimity of the international community's opposition? While remarkable events, including terrorism and September 11th, have certainly played a role, such pressures are likely to always exist. Under these circumstances, it is all the more essential that international agreements prohibiting torture are effective. A key reason that the CAT's potential to curb torture has remained unfulfilled is the lack of a clear definition.

As the Supreme Court of Israel has explained, successful interrogation requires a measure of discomfort and an unequal balance of power.²¹⁴ The challenge is to draw the line separating permissible levels of discomfort from unlawful acts. Richard Posner suggests that "torture" begins at "the point along a continuum at which the observer's queasiness turns to revulsion,"²¹⁵ a formulation that captures something important but which is, of course, hopelessly subjective, impossible to enforce, and useless as a guide to permissible conduct. This type of intuitive understanding of torture must be translated into a precise legal definition which will be accepted and adhered to universally.

The CAT creates a useful framework for defining torture. But the implementation of the CAT is flawed. First, there appears to be disagreement regarding the meanings of each element of the CAT definition. Consensus must be reached. The U.N. should play a more active role in clarifying inconsistent interpretations and applications of the

CAT. Torturers must not be placated by creating narrow definitions of torture, thereby undermining international agreement as to the universal prohibition on torture. Second, allowing states to employ their own language defining torture has created a plethora of definitions. Those countries that have ratified the CAT should agree to apply the CAT definition in their own laws, making the CAT definition binding.

The international legal community must not passively allow torture to continue in the guise of necessary interrogation practices. The impressive world-wide prohibition of torture must be honored rather than co-opted by legal sleight-of-hand. The term torture is more than legal jargon—it also carries the weight of humanity’s basic sense of morality. Consequently, when used by governments, its legal meaning must be precise, fair, and universal.

Endnotes

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¹ United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter “CAT”].

² See Appendix for a chart setting out the definitions of torture provided in the U.N. Committee on Torture State Reports.

³ The definition of “cruel, inhuman and degrading treatment” has also recently emerged as a critical human rights issue. While this paper focuses on torture, a clear definition of cruel, inhuman and degrading treatment is needed as well.

⁴ See Henry Shue, *Torture*, in *TORTURE: A COLLECTION* 47, 47 (Sanford Levinson ed., 2004); see also Jean Bethke Elshtain, *Reflection on the Problem of “Dirty Hands,”* in *TORTURE: A COLLECTION*, at 77.

⁵ For photographs and detailed accounts of the abuse, see http://en.wikipedia.org/wiki/Nature_of_Abu_Ghraib_abuse (last visited July 25, 2005).

⁶ Prosecutor v. Furundija, ICTFY, Case No.: IT-95-17/1-T, at 9 (Dec. 10, 1998).

⁷ See Henry Shue, in *TORTURE: A COLLECTION*, *supra* note 4, at 47.

⁸ Article 53 of the Vienna Convention on the Law of Treaties lists four criteria for peremptory norms: "(1) They are norms of general international law. (2) They have to be accepted by the international community of States as a whole. (3) They permit no derogation. (4) They can be modified only by new peremptory norms." LAURI HANNIKAINEN, *PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS* 3 (1988).

⁹ *Furundija*, at 9. The *jus cogens* nature of the prohibition of torture is widely accepted. See United Kingdom House of Lords: Regina Bartle and the Commissioner of Police for the Metropolitan and Other Ex Parte Pinoche, 38 I.L.M. 581, 589 (March 24, 1999) (opinion of Lord Browne-Wilkinson); Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 714-717 (9th Cir. 1992), *cert. denied*, 507 U.S. 1017 (1993); see also HANNIKAINEN, *supra* note 8, at 509, 718 (1988).

¹⁰ 45 Am. Jur. 2d Int'l Law § 1 (2004).

¹¹ *Id.*

¹² Public Committee Against Torture in Israel v. Israel, 38 L.L.M. 147, HCJ 5100/94 (1999). These techniques included subjecting individuals under interrogation to: (1) shaking, (2) crouching, (3) cuffing with particularly small hand and ankle cuffs, (4) the "Shabach" position (seating on low chair, tilted forward), (5) covering the head with an opaque sack, (6) powerfully loud music, and (7) the "Shabach" method (a combination of (4), (5), and (6)). In Office of the High Commissioner for Human Rights, *Conclusions and Recommendations of the Committee against Torture: Israel*, U.N. Doc. CAT/C/XXVII/Concl.5. (November 23, 2001), the U.N. suggested that these Israeli interrogation techniques amount to torture.

¹³ *Public Committee against Torture in Israel*, at ¶¶ 24-30.

¹⁴ *Id.* at ¶¶ 133-34.

¹⁵ Two years before this decision, the U.N. Committee against Torture advised Israel that many of its interrogation techniques constituted torture. Those methods included (1) painful restraining, (2) hooding under certain conditions, (3) playing loud music for prolonged periods, (4) sleep deprivation for prolonged periods, (5) threats, (6) violent shaking, and (7) using cold air to chill. See *Concluding Observations of the Committee Against Torture: Israel*, U.N. Doc. A/52/44, ¶¶ 253-260 (1997).

¹⁶ *Furundija*, ICTFY, Case No.: IT-95-17/1-T at ¶ 156. *But see* HANNIKAINEN, *supra* note 8, at 7. Some interpret the prohibition of derogation to be limited to provisions in international treaties as opposed to any act that violates the peremptory norm. Hannikainen is of the view that *jus cogens* must encompass any act that conflicts with a given norm, not simply acts which conflict with formal treaty language.

¹⁷ AMNESTY INTERNATIONAL, *REPORT ON TORTURE* 29-30 (1973).

¹⁸ The U.S. Department of Justice's reinterpretation of the legal definition of torture highlights both the unstable meaning of the term and the significance placed on defining torture. See Memorandum from Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel, to James B. Comey, Deputy Attorney General, *Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A* (December 30, 2004) [hereinafter "Levin Memo"]; Memorandum from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, *Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A* (August 1, 2002) [hereinafter "Bybee Memo"]. (Although the 2002 memo went out under Jay Bybee's name, it is universally understood to have been written primarily by Professor John Yoo of the University of California at Berkeley, then deputy assistant attorney general in the Office of Legal Counsel.) See also Department of Defense, *Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations* (April 4, 2003).

¹⁹ See Bybee Memo, *supra* note 18.

²⁰ See Douglas Jehl, *Questions Left By C.I.A. Chief On Torture Use*, N.Y. TIMES, March 18, 2005, at A1.

²¹ "Freedom from Torture 'Fundamental Right,' Says Secretary-General," SG/SM/7855, OBV/223 (June 26, 2001), available at www.unis.unvienna.org/unis/pressrels/2001/sgsm7855.html (last visited July 25, 2005).

²² In December 1975, the United Nations adopted the Declaration on the Protection of All Persons from Being Subjected to Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment, the precursor to the CAT. This declaration defined torture as

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners. . . . Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.

Earlier, in October 1975, the World Medical Assembly adopted the Declaration of Tokyo, Guidelines for Medical Doctors concerning Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in relation to Detention and Imprisonment, in which torture is defined as "the deliberate, systematic or wanton infliction of physical or mental suffering by one or more persons acting alone or on the orders of any authority, to force another person to yield information, to make a confession, or for any other reason." World Medical Association, 29th Assembly, Declaration of Tokyo, *Preamble to Guidelines for Medical Doctors concerning Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in relation to Detention and Imprisonment* (October 1975), available at www.cirp.org/library/ethics/tokyo (last visited July 25, 2005). Later, in 1985, the Inter-American Convention to Prevent and Punish Torture defined torture as "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 preventative 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 capabilities, even if they do not cause physical pain or

mental anguish.” Inter-American Convention to Prevent and Punish Torture (signed on December 9, 1985 by the General Session of the Organization of American States), Organization of American Treaty Series No. 67, Article 2.

²³ The Convention has been ratified or acceded to by the following 139 States: Afghanistan, Albania, Algeria, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahrain, Bangladesh, Belarus, Belgium, Belize, Benin, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Cape Verde, Chad, Chile, China, Colombia, Congo, Costa Rica, Côte d’Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Democratic Republic of the Congo, Denmark, Djibouti, Ecuador, Egypt, Equatorial Guinea, El Salvador, Estonia, Ethiopia, Finland, France, Gabon, Georgia, Germany, Ghana, Greece, Guatemala, Guinea, Guyana, Holy See, Honduras, Hungary, Iceland, Indonesia, Ireland, Israel, Italy, Japan, Jordan, Kazakhstan, Kenya, Kuwait, Kyrgyzstan, Latvia, Lebanon, Lesotho, Liberia, Libya, Liechtenstein, Lithuania, Luxembourg, Malawi, Maldives, Mali, Malta, Mauritius, Mauritania, Mexico, Moldova, Monaco, Mongolia, Morocco, Mozambique, Namibia, Nepal, Netherlands, New Zealand, Niger, Nigeria, Norway, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Romania, Russian Federation, Saint Vincent and the Grenadines, Saudi Arabia, Senegal, Serbia and Montenegro, Seychelles, Sierra Leone, Slovak Republic, Slovenia, Somalia, South Africa, Spain, Sri Lanka, Swaziland, Sweden, Switzerland, Syrian Arab Republic, Tajikistan, Timor Leste, The former Yugoslav Republic of Macedonia, Togo, Tunisia, Turkey, Turkmenistan, Uganda, Ukraine, United Kingdom, United States, Uruguay, Uzbekistan, Venezuela, Yemen and Zambia. See Press Release, U.N., Information Service, Committee Against Torture to Meet in Geneva, 2-20 May 2005 (April 28, 2005), *available at* www.un.org/News/Press/docs/2005/hr4831.doc.htm (last visited July 25, 2005).

²⁴ The United States ratified the CAT with reservations, understandings and declarations. *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Reservations, Understandings and Declarations Made by the United States of America*, available at <http://www.unhcr.ch/tbs/doc.nsf/0/5d7ce66547377b1f802567fd0056b533?OpenDocument> (last visited July 25, 2005) [hereinafter *U.S. Reservations, Understandings and Declarations*]. The text of the American understandings can be found at *infra* note 133; see generally *infra* § III.A.

²⁵ *Prosecutor v. Furundjija*, ICTFY, Case No.: IT-95-17/1-T, at ¶ 160 (Dec. 10, 1998).

²⁶ CAT, *supra* note 1, at Art. 1. The definition of torture in the Rome Statute of the International Criminal Court has elements in common with the CAT definition: “Torture means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.” Rome Statute of the International Criminal Court, Art. 7(2)(e) (July 1, 2002).

²⁷ “Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.” CAT, *supra* note 1, at Art. 2 § 1.

²⁸ The Appendix lists the definitions of torture submitted to the U.N. Committee on Torture from signatories to the CAT 2000 to 2005.

²⁹ Article 19 of the CAT requires each state to submit a report to the monitoring body, the U.N. Office of the High Commissioner for Human Rights, detailing the legislative and judicial steps taken to comply with the CAT to prevent torture and to ensure the individual’s right not to be tortured. CAT, *supra* note 1, at Art. 19. Reports are due one year after the CAT enters into force and every four years thereafter. This paper uses the State Reports as the source of information

for the laws of individual nations. See Appendix.

³⁰ CAT, *supra* note 1, at Art. 1.

³¹ See generally AHCENE BOULESBAA, *THE U.N. CONVENTION ON TORTURE AND THE PROSPECTS FOR ENFORCEMENT* 9-15 (Martinus Nijhoff Publishers 1999); *id.* at 15 (“The object and purpose of the Torture Convention are the regulation and prohibition of all governmental conduct that inflicts pain or suffering for the ends stated in Article 1, regardless of whether such conduct is affirmative or negative . . . negative acts may inflict as much physical and mental harm as positive acts and achieve the same inhuman ends.”).

³² See *id.* (“[a]n omission is an ‘act’ where there is a legal duty to act and, as the legal duty of States to act in this respect has been established in the previous international conventions, it would be absurd to conclude that the prohibition of torture in the context of Article 1 does not extend to conduct by way of omission.”); HERMAN J. 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 (Martinus Nijhoff Publishers 1988) (“[I]n special cases an omission should be assimilated to an act. The intentional failure to provide a prisoner with food or drink could be a case in point.”).

³³ See *Consideration of Reports Submitted By State Parties under Article 19 of the Convention*, United Kingdom, U.N. Doc. CAT/C/67/Add.2, at ¶ 39, available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CAT.C.67.Add.2.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CAT.C.67.Add.2.En?Opendocument) (last visited July 25, 2005).

³⁴ See *Consideration of Reports Submitted by State Parties under Article 19 of the Convention*, Canada, U.N. Doc. CAT/C/55/Add. 8, at ¶ 14, available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/93896f2f7b045cbdc125702a00364545?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/93896f2f7b045cbdc125702a00364545?Opendocument) (last visited July 25, 2005).

³⁵ *Consideration of Reports Submitted By State Parties under Article 19 of the Convention*, Committee against Torture, Colombia, U.N. Doc. CAT/C/39/Add.4, at ¶ 121 (emphasis added), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CAT.C.39.Add.4.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CAT.C.39.Add.4.En?Opendocument) (last visited July 25, 2005), citing PENAL CODE [PENAL C.] Art. 279. Spain’s Penal Code also prohibits public officials from “subject[ing a victim] to conditions or procedures which by their nature, duration or other circumstances cause him physical or mental suffering....” *Consideration of Reports Submitted By State Parties under Article 19 of the Convention*, Spain, U.N. Doc. CAT/C/55/Add.5, at ¶ 16, available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CAT.C.55.Add.5.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CAT.C.55.Add.5.En?Opendocument) (last visited July 25, 2005).

³⁶ *Consideration of Reports Submitted By State Parties under Article 19 of the Convention*, Czech Rep., U.N. Doc. CAT/C/60/Add.1, at ¶ 3 (emphasis added), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CAT.C.60.Add.1.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CAT.C.60.Add.1.En?OpenDocument) (last visited July 25, 2005), citing Act No. 141/1961 Coll.

³⁷ Under the Greek Penal Code, Art. 137(A)(2), torture is “(a) any systematic infliction of acute physical pain; (b) any systematic infliction of physical exhaustion endangering the health of a person; (c) any systematic infliction of mental suffering, which could lead to severe physical damage; (d) any illegal use of chemical, drugs or other natural or artificial means aiming at bending the victim’s will.” *Consideration of Reports Submitted By State Parties under Article 19 of the Convention*, Greece, U.N. Doc. CAT/C/61/Add.1, at ¶ 230, available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CAT.C.61.Add.1.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CAT.C.61.Add.1.En?Opendocument) (last visited July 25, 2005).

³⁸ *Consideration of Reports Submitted By State Parties under Article 19 of the Convention*, Lat., U.N. Doc. CAT/C/21/Add.4, at ¶ 6, citing Latvian Supreme Court, Decision: *On Application of Criminal Laws in Cases of Infliction of Intentional Bodily Injuries* (1993), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CAT.C.21.Add.4.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CAT.C.21.Add.4.En?OpenDocument) (last visited July 25, 2005).

³⁹ *Id.*

⁴⁰ CAT, *supra* note 1, at Art. 1, § 1.

⁴¹ The Greek Case, YEAR BOOK OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 12 (1969).

⁴² Three governments, Denmark, Norway, and Sweden, also alleged torture to political prisoners detained in Greece. *See id.*

⁴³ The European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, Art. 3 (November 4, 1950) (“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”).

⁴⁴ The Greek Case, YEAR BOOK OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 186 (1969) (emphasis added).

⁴⁵ *See, e.g., Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) 5, 66 (1978); *but see* Malcolm D. Evans, *Getting to Grips with Torture*, 51 ICLQ 365, 372-73 (2002) (“[I]f one scratches beneath the surface of most cases, it becomes apparent that the Commission and Court have never fully subscribed to the severity of suffering approach, despite their mantra-like espousal of it over the years. . . . [T]he court accepts openly that the severity of suffering is only one element of an increasingly complex matrix, saying [in *Keenan v. UK*]: ‘While it is true that the severity of suffering, physical or mental, attributable to a particular measure has been a significant consideration in many cases decided by the Court under Article 3, there are circumstances where proof of the actual effect on the person may not be a major factor.’”).

⁴⁶ Republic of Ireland v. The United Kingdom, 2 E.H.R.R. 25, 36 (1979-80). The five techniques were wall-standing, hooding, subjection to noise, deprivation of sleep, and deprivation of food and drink.

⁴⁷ *Id.* at 36.

⁴⁸ *Id.* at 36-37.

⁴⁹ Notably, the CAT does not define the term “cruel, inhuman or degrading treatment or punishment.”

⁵⁰ *Draft International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, submitted by Sweden, U.N. Doc. No. E/CN.4/1285, Article 1 (1978). The 1975 Declaration included this same language, *see supra* note 22. *See also* BURGERS & DANIELIUS, *supra* note 32, at 40-41 (discussing the legislative history of the provision defining torture in relation to cruel, inhuman or degrading treatment).

⁵¹ CAT, *supra* note 1, at Art. 16.

⁵² The full title of the CAT, The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, in itself reflects the concept that torture is a particular type of cruel, inhuman or degrading treatment. Interestingly, the United States’s ratification reservations stated that the United States will be bound by Article 16’s obligation to prevent

cruel, inhuman or degrading treatment only insofar as the term “means the cruel, unusual and inhuman treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.” However, the U.S. did not insist upon such a limitation on the definition of torture. See *U.S. Reservations, Understandings and Declarations*, *supra* note 24.

⁵³ CAT, *supra* note 1, at Art. 2, § 2. Unlike the CAT’s treatment of the term torture, the CAT does not provide a definition for cruel, inhuman or degrading treatment. CAT, *supra* note 1.

⁵⁴ However, the International Covenant on Civil and Political Rights does not allow for exception in emergency situations for either torture or cruel, inhuman or degrading treatment or punishment. ICCPR, Arts. 4 & 7, G.A. Res. 2200A(XXI), U.N. Doc. A/6316 (1996), 999 U.N.T.S. 171, *entered into force* March 23, 1976.

⁵⁵ Report of the Special Rapporteur, Sir Nigel S. Rodley, submitted pursuant to Commission on Human Rights Resolution 1995/37, E/CN.4/1995/34 at ¶ 10 (January 9, 1996); see Report of the Special Rapporteur, Sir Nigel S. Rodley, submitted pursuant to Commission on Human Rights Resolution 1992/32, E/CN.4/1996/35, at ¶ 21 (January 12, 1995).

⁵⁶ See *Z and Others v. United Kingdom*, 34 E.H.R.R.3, C90 (ECHR May 10, 2002) (ECHR found a heightened obligation to protect children from severe harm); see also Fionnuala Ní Aoiláin, *The European Convention on Human Rights and Its Prohibition on Torture*, in *TORTURE: A COLLECTION*, *supra* note 4, at 217.

⁵⁷ Bybee Memo, *supra* note 18.

⁵⁸ See *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, Summary Prepared by the Secretary-General in Accordance with Commission Resolution 18*, U.N. Doc. E/CN.4/1314, at 5 ¶ 27 (1978).

⁵⁹ See Levin Memo, *supra* note 18, at 2, 8; see generally *Bush Administration Documents on Interrogation*, WASH. POST, June 23, 2004, available at www.washingtonpost.com/wp-dyn/articles/A62516-2004Jun22.html (last visited July 25, 2005).

⁶⁰ *The Republic of Ireland v. The United Kingdom*, 2 E.H.R.R. 25 (1979-80).

⁶¹ *Id.* at 36.

⁶² *Id.* at 36-37.

⁶³ “The provisions of Egyptian law are broader and more general than those of the Convention, since article 1 of the latter defines torture as any act by which severe pain or suffering is inflicted, whereas Egyptian law imposes no prerequisites concerning the degree or extent of pain or suffering” *Consideration of Reports Submitted By State Parties under Article 19 of the Convention*, Egypt, U.N. Doc. CAT/C/34/Add.11, at ¶ 49, available at [www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CAT.C.34.Add.11.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CAT.C.34.Add.11.En?OpenDocument) (last visited July 25, 2005).

⁶⁴ *Consideration of Reports Submitted By State Parties under Article 19 of the Convention*, Lat., U.N. Doc. CAT/C/21/Add.4, at ¶ 6, available at [www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CAT.C.21.Add.4.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CAT.C.21.Add.4.En?OpenDocument) (emphasis added) (last visited July 25, 2005).

⁶⁵ *Consideration of Reports Submitted By State Parties under Article 19 of the Convention*, Greece, U.N. Doc. CAT/C/61/Add.2, at ¶ 230, available at [www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CAT.C.61.Add.1.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CAT.C.61.Add.1.En?OpenDocument) (last visited July 25, 2005); *Consideration of Reports Submitted By State Parties under Article 19 of the Convention*, Luxembourg, U.N. Doc. CAT/C/SR.517, at ¶ 7, available at [www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/4870d067077d49bac1256a26004c2298?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/4870d067077d49bac1256a26004c2298?OpenDocument) (last visited July 25, 2005).

⁶⁶ CAT, *supra* note 1, at Art. 1, § 1. During the drafting of the CAT, the country of Barbados suggested that the definition should be expanded to include torture methods where neither physical nor mental harm is apparent, such as truth serum. This suggestion was ultimately not included in the CAT. See *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, Summary Prepared by the Secretary-General in Accordance with Commission Resolution 18*, U.N. Doc. E/CN.4/1314, at 5 ¶ 24 (1978).

⁶⁷ *U.S. Reservations, Understandings and Declarations*, *supra* note 24. The full text of the understandings is set out at *infra* note 133. This definition of mental harm is also used in 18 U.S.C. § 2340 and 8 C.F.R. § 208.18.

⁶⁸ See *supra* § II.A.

⁶⁹ *Consideration of Reports Submitted By State Parties under Article 19 of the Convention*, Croat., U.N. Doc. CAT/C/54/Add.3, at ¶ 12, available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CAT.C.54.Add.3.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CAT.C.54.Add.3.En?OpenDocument) (last visited on July 25, 2005).

⁷⁰ CAT, *supra* note 1, at Art. 1, § 1. In the United States a number of states prohibit acts considered torture to animals. This paper does not address those animal rights laws.

⁷¹ *Selmouni v. France*, 29 E.H.R.R. 403, 426 (2000).

⁷² *Id.* at 426-27.

⁷³ See *Paniagua Morales v. Guatemala*, Judgment of March 8, 1998, Inter-Am. Ct. H.R. (Ser. C) NO.37 (1998), ¶ 134, available at <http://www.worldlii.org/int/cases/IACHR/1998/3.html> (last visited July 27, 2005). Article 5 of the American Convention on Human Rights states: "No one shall be subjected to torture or to cruel, inhuman, or degrading treatment." For an analysis of the Inter-American Court of Human Rights torture cases, see Julie Lantrip, *Torture and Cruel, Inhumane and Degrading Treatment in the Jurisprudence of the Inter-American Court of Human Rights*, 5 ILSA J. INT'L & COMP. L. 551 (1999).

⁷⁴ *Morales v. Guatemala*, Judgment of March 8, 1998, Inter-Am. Ct. H.R. (Ser. C) NO.37 (1998), ¶ 134.

⁷⁵ *Consideration of Reports Submitted By State Parties under Article 19 of the Convention*, Lat., U.N. Doc. CAT/C/21/Add.4, Latvia, at ¶ 6 (emphasis added), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CAT.C.21.Add.4.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CAT.C.21.Add.4.En?OpenDocument) (last visited July 25, 2005).

⁷⁶ In American law, a specific intent offense "is one in which the definition of the crime: (1) includes an intent to do some future act, or achieve some further consequence (i.e., a special motive for the conduct), *beyond the conduct or result that constitutes the actus reus of the offense*, or (2) provides that the actor must be aware of a statutory attendant circumstance." JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 119 (2d ed. 1995).

⁷⁷ The terms specific intent and general intent may prove to compound the difficulty in understanding the necessary intent, as there is much debate regarding the meaning of these terms in themselves.

⁷⁸ *U.S. Reservations, Understandings and Declarations*, *supra* note 24, at II(1)(a).

⁷⁹ The Department of Justice memo analyzes specific intent within the context of 18 U.S.C. § 2340, which includes the specific intent language added to the CAT by the U.S. understandings. *Id.*

⁸⁰ Levin Memo, *supra* note 18, at 16-17. The Levin Memo withdraws the DOJ's earlier pronouncement that the torturer must have acted with "express purpose of inflicting severe pain or suffering"; mere knowledge that severe pain is reasonably likely to result from their actions or is certain to occur is insufficient. However, the memo does not explicitly disagree with the Bybee Memo's analysis of specific intent, it simply refuses to define it. *Id.*, citing Bybee Memo, *supra* note 18, at 3-4. The Bybee Memo's stringent view of specific intent surprised many and conflicts with the drafting history of the CAT. Indeed, the U.S. suggestion that the intent requirement be formulated as deliberate and malicious was expressly rejected by the U.N. at the time the CAT was drafted. See BURGERS & DANIELIUS, *supra* note 32, at 41.

⁸¹ Levin Memo, *supra* note 18, at 17. Nevertheless, even the Bybee Memo notes that as a practical matter a jury may infer from the factual circumstances that when a defendant has knowledge that their actions will produce a particular result, specific intent exists. Bybee Memo, *supra* note 18, at 4.

⁸² *Zubeda v. Ashcroft*, 333 F.3d 463, 473 (3d Cir. 2003) (applying Immigration and Naturalization Service ("INS") regulations, 8 C.F.R. § 208.18, and interpreting the CAT to require general intent as opposed to specific intent). The INS regulation regarding asylum applications adds further language referring to the intent of the actor: "An act that results in unanticipated or unintended severity of pain and suffering is not torture." 8 C.F.R. § 208.18(a)(5). The INS regulations concern instances where individuals apply to stay in the U.S. on the grounds that they will likely be tortured if returned to their home country. See *infra* § III.D.

⁸³ See *Zubeda*, 333 F.3d at 474.

⁸⁴ *Auguste v. Ridge*, 395 F.3d 123, 144 (3d Cir. 2005) (denying Haitian national's request for relief from deportation under the CAT, holding that detainment in Haitian prison does not constitute torture because of lack of an act with the necessary intent).

⁸⁵ See BURGERS & DANIELIUS, *supra* note 32, at 41.

⁸⁶ CAT, *supra* note 1, at Art. 1, § 1.

⁸⁷ The legislative history of the U.N. Declaration Against Torture serves to illuminate the CAT definitions because the first draft of the CAT incorporated a great deal of the Declaration's exact language. See BURGERS & DANIELIUS, *supra* note 32, at 35.

⁸⁸ NIGELS S. RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* 29 (1987), citing *Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders Report*, U.N. Doc. A/CONF.56/10 (1976).

⁸⁹ *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, Summary Prepared by the Secretary-General in Accordance with Commission Resolution 18*, U.N. Doc. E/CN.4/1314 at 6, ¶ 28 (1978). The Swiss government concurred with this interpre-

tation. *Id.* at ¶ 37. The United Kingdom's suggestion to list the purposes rather than exemplify the purposes ultimately failed. *Id.*, Addendum I, ¶ 5 (1979).

⁹⁰ Prosecutor v. Delalic, ICTY, Case No. IT-96-21, Judgment ¶ 470 (Trial Chamber II, November 16, 1998) (emphasis added).

⁹¹ See BURGERS & DANIELIUS, *supra* note 32, at 118.

⁹² *But see* Foreign Affairs Reform and Restructuring Act of 1988 (FARR Act) § 2242, Pub. L. No. 105-277, 112 Stat. 2681, 2681-822 (Oct. 21, 1998), *codified at* 8 U.S.C. § 1231; BLACK'S LAW DICTIONARY 1335 (Spec. Deluxe 5th ed. 1979), *cited in* U.S. v. Sampson, 335 F. Supp.2d 166, 206 (D. Mass. 2004) (defining torture to mean the "inflict[ion of] intense pain to body or mind for the purposes of punishment, to extract a confession or information, or for sadistic pleasure"); *see generally infra* Part III.

⁹³ *Consideration of Reports Submitted By State Parties under Article 19 of the Convention*, Indon., U.N. Doc. CAT/C/47/Add.3, at ¶ 66, *available at* [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CAT.C.47.Add.3.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CAT.C.47.Add.3.En?Opendocument) (last visited July 25, 2005).

⁹⁴ *Consideration of Reports Submitted By State Parties under Article 19 of the Convention*, Spain, U.N. Doc. CAT/C/55/Add.5, at ¶ 16, *available at* [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CAT.C.55.Add.5.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CAT.C.55.Add.5.En?Opendocument) (last visited July 25, 2005), *citing* Spanish Penal Code, Art. 174.

⁹⁵ *See* 18 U.S.C. 2340(1) (2004) ("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.').

⁹⁶ CAT, *supra* note 1, at Art. 1, § 1.

⁹⁷ *Questions of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, Summary Prepared by the Secretary-General in Accordance with Commission Resolution 18*, U.N. Doc. E/CN.4/1314, at 6, ¶ 29 (1978). This paper does not address laws that pertain to acts by private individuals which may be called "torture" under the law. Feminist scholars have criticized the CAT torture definition for narrowing torture to acts committed in the male-dominated public sphere, ignoring the ways in which women often experience violence. *See* Lori A. Nessel, "Willful Blindness" to Gender-Based Violence Abroad: United States' Implementation of Article Three of the United Nations Convention Against Torture, 89 MINN. L. REV. 71, 114 (2004).

⁹⁸ *Khouzam v. Ashcroft*, 361 F.3d 161, 171 (2d Cir. 2004) (overturning an administrative decision denying immigration relief under the CAT, and holding that Khouzam was likely to be tortured if returned to Egypt).

⁹⁹ Office of the United Nations High Commissioner for Human Rights, *Human Rights Fact Sheet: No. 4 Combating Torture*, at 34 (May 2002).

¹⁰⁰ *Z v. The United Kingdom*, 34 E.H.R.R. 3 (ECHR 2001). *See also* *E. v. United Kingdom*, 36 E.H.R.R. 31, ¶ 88 (ECHR 2002) (holding that failure to protect children from sexual abuse by stepfather constituted violation of Article 3 of the ECHR). While the court in *Z v. The United Kingdom* found a violation of Art. 3 for inhuman or degrading treatment, its reasoning does not distinguish between torture and inhuman or degrading treatment and thus the accountability of public officials for the actions of private parties would extend to cases of torture as well.

¹⁰¹ *Z v. The United Kingdom*, at ¶ 73.

¹⁰² *Id.* at ¶¶ 69-75.

¹⁰³ *Id.* at ¶ 74.

¹⁰⁴ *Consideration of Reports Submitted By State Parties under Article 19 of the Convention*, Guatemala, U.N. Doc. CAT/C/49/Add.2, at ¶ 9, available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CAT.C.49.Add.2.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CAT.C.49.Add.2.En?Opendocument) (last visited July 25, 2005).

¹⁰⁵ *Consideration of Reports Submitted By State Parties under Article 19 of the Convention*, Croatia, U.N. Doc. CAT/C/54/Add.3, at ¶ 12, available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CAT.C.54.Add.3.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CAT.C.54.Add.3.En?Opendocument) (last visited July 25, 2005).

¹⁰⁶ *Consideration of Reports Submitted By State Parties under Article 19 of the Convention*, Iceland, U.N. Doc. CAT/C/59/Add.2, at ¶ 58, available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CAT.C.59.Add.2.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CAT.C.59.Add.2.En?Opendocument) (last visited July 25, 2005).

¹⁰⁷ *U.S. Reservations, Declarations and Understandings*, *supra* note 24. The first draft of understandings required the public official to have “knowledge” of such activity. However, the knowledge requirement was changed to mere “awareness” after the Senate Foreign Relations Committee expressed concern that the conditions “created the impression that the United States was not serious in its commitment to end torture worldwide.” *Khouzam*, 361 F.3d at 170, *citing* S. Exec. Rep. 101-30, at 4, 9 (1990).

¹⁰⁸ The U.S. Department of Justice explained that the requirement for custody or physical control “is intended to clarify the point that the convention does not apply to situations before custody is obtained.” *Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Treaty Doc. 100-20: Hearing Before the Senate Comm. on Foreign Relations*, 101st Cong. 14 (1990) (statement of Mark Richard, Deputy Assistant Attorney General, U.S. Department of Justice, Criminal Division). *But see* *Pascual-Garcia v. Ashcroft*, No. 02-71844, slip op. at 4 (9th Cir. Aug. 6, 2003) (unpublished opinion) (remanding petitioner’s claim for asylum relief and holding that “a CAT claim does not require that the torture would occur while the victim is in the custody or physical control of a public official”).

¹⁰⁹ *Zheng v. Ashcroft*, 332 F.3d 1186, 1194 (9th Cir. 2003).

¹¹⁰ *Id.* at 1196-97.

¹¹¹ *Id.* at 1189.

¹¹² *Id.* at 1194, *citing* Committee on Foreign Relations, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, S. Exec. Rep. 101-30, at 9 (1990).

¹¹³ *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 355 (5th Cir. 2002). This position was later adopted by the Second Circuit, which held that “[i]n terms of state action, torture requires only that government officials know of or remain willfully blind to an act and thereafter breach their legal responsibility to prevent it.” *Khouzam*, 361 F.3d at 170-71.

¹¹⁴ CAT, *supra* note 1, at Art. 1, § 1.

¹¹⁵ For analyses of the drafting history of the lawful sanctions exemption, see BOULESBAA, *supra* note 31, at 30-35; RODLEY, *supra* note 88, at 29-30.

¹¹⁶ *Draft International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, submitted by Sweden, U.N. Doc. E/CN.4/1285 (1978) (emphasis added). This language mirrored the definition of torture contained in the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. General Assembly Resolution 3452(XXX) (December 9, 1975). See also The First United Congress on the Prevention of Crime and the Treatment of Offenders adopted the Standard Minimum Rules for the Treatment of Prisoners on August 30, 1955 through U.N. Doc. A/CONF/611, annex I, Economic and Social Council Resolution 663 C, 24 U.N. ESCOR Supp. (No.10 at 11, U.N. Doc. E/3048 (1957), amended by Economic and Social Council Resolution 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5 988 (1977), Art. 31.

¹¹⁷ *Questions of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, Summary Prepared by the Secretary-General in Accordance with Commission Resolution 18*, U.N. Doc. E/CN.4/1314 at 9-10 (1978).

¹¹⁸ BURGERS & DANIELIUS, *supra* note 32, at 121-22.

¹¹⁹ *Id.* at 121.

¹²⁰ See BOULESBAA, *supra* note 31, at 31.

¹²¹ Both the Netherlands and the Grand Duchy of Luxembourg specifically define “lawful sanctions” to include sanctions that are lawful under national law as well as international law. Office of the United Nations Commissioner for Human Rights, *Declarations and Reservations*, available at <http://www.ohchr.org/english/law/cat-reserve.htm> (last visited July 25, 2005).

¹²² *U.S. Reservations, Declarations and Understandings*, *supra* note 24.

¹²³ Report of the Special Rapporteur, Sir Nigel S. Rodley, submitted pursuant to Commission On Human Rights Resolution 1995/37 B, *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*, E/CN.4/1997/7, ¶ 8 (1997) [hereinafter “Report of the Special Rapporteur”]. The Special Rapporteur on Torture examines questions relevant to torture with respect to all countries whether they have ratified the CAT or not. The Rapporteur’s mandate is to transmit urgent appeals on individuals at risk of torture, undertake fact-finding visits, and submit reports. See UN Commission on Human Rights, Resolution No. 1985/33.

¹²⁴ Report of the Special Rapporteur, *supra* note 123, at ¶ 85.

¹²⁵ *Id.* at ¶ 8; see also Office of the United Nations High Commissioner for Human Rights, *Human Rights Fact Sheet: No. 4 Combating Torture* 33 (May 2002), available at www.unhchr.ch/html/menu6/2/fs4rev1.pdf (last visited July 25, 2005).

¹²⁶ See Statement by President George W. Bush on United Nations International Day in Support of Victims of Torture, 40 WEEKLY COMP. PRES. DOC. 1167 (July 5, 2004) (“Freedom from torture is an inalienable human right.”). See also 22 U.S.C. § 2152 (2004) (Findings of the Torture Victim Relief Act of 1988) (“The American people abhor torture by any government or person. The existence of torture creates a climate of fear and international insecurity that affects all people.”); *Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, Treaty Doc. 100-20: Hearing Before the Senate Comm. on Foreign Relations, 101st Cong. 1 (1990) (statement of Sen. Helms) (“[N]obody is in favor of torture. Not anybody on this committee, not anybody in Congress, not anybody in Government. Nobody favors torture under any circumstances.”). The Second Circuit opined that “the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind.” *Filartiga v. Peña-Irala*, 630 F.2d 876, 890 (2d Cir. 1980).

¹²⁷ See Douglas Jehl, *Questions Left By C.I.A. Chief On Torture Use*, N.Y. TIMES, March 18, 2005, at A1.

¹²⁸ *Id.* Goss’s testimony was further clarified in a CIA press statement which reiterated that the CIA’s lawful interrogation techniques are not torture. *Statement by CIA Director of Public Affairs, Jennifer Millerwise*, March 18, 2005, available at http://www.cia.gov/cia/public_affairs/press_release/2005/pr03182005.html (last visited July 25, 2005).

¹²⁹ In fact, Human Rights First claims that waterboarding constitutes torture under both domestic and international law. See *CNN Report on DOD Memos Authorizing Torture*, June 21, 2004, available at www.humanrightsfirst.org/us_law/digest/digest-04/usls_digest04_070104.htm (last visited July 25, 2005).

¹³⁰ For useful analyses of the prohibition of torture pursuant to U.S. law, see Association of the Bar of the City of New York, *Supplement to the Committee’s Report of April 2004: Human Rights Standards Applicable to the United States’ Interrogation of Detainees* (June 4, 2004); Association of the Bar of the City of New York & The Center for Human Rights and Global Justice, *Torture By Proxy: International and Domestic Law Applicable to “Extraordinary Renditions”* (2004), available at www.abcnyc.org (last visited July 24, 2005).

¹³¹ See 136 Cong. Rec. S17, 486-501(daily ed. Oct. 27, 1990); U.N. Doc. 571 leg/SER.E/13.IV/9 (1995).

¹³² However, under the U.S. Declarations to the CAT, the provisions of the CAT are not self-executing. See *U.S. Reservations, Understandings and Declarations*, *supra* note 24, at ¶ III(1).

¹³³ The U.S. Understandings to the CAT regarding the definition of torture are:

II. The Senate’s advice and consent is subject to the following understandings, which shall apply to the obligations of the United States under this Convention:

(1)(a) That with reference to Article 1, the United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) 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; (3) the threat of imminent death; or (4) 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.

(b) That the United States understands that the definition of torture in Article 1 is intended to apply only to acts directed against persons in the offender's custody or physical control.

(c) That with reference to Article 1 of the Convention, the United States understands that "sanctions" includes judicially imposed sanctions and other enforcement actions authorized by United States law or by judicial interpretation of such law. Nonetheless, the United States understands that a State Party could not through its domestic sanctions defeat the object and purpose of the Convention to prohibit torture.

(d) That with reference to Article 1 of the Convention, the United States understands that the term "acquiescence" requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity.

(e) That with reference to Article 1 of the Convention, the United States understands that noncompliance with applicable legal procedural standards does not per se constitute torture.

U.S. Reservations, Understandings and Declarations, *supra* note 24. In addition, the United States ratified the CAT subject to reservations. However, the reservations do not address the definition of torture.

¹³⁴ See generally *supra* § II.C.

¹³⁵ See generally *supra* § II.D.

¹³⁶ CAT, *supra* note 1, at Arts. 2 & 4.

¹³⁷ *Consideration of Reports Submitted by State Parties Under Article 19 of the Convention*, U.N. Doc. CAT/C/28/Add.5 (U.S.) at 13, ¶ 48 (2000), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CAT.C.28.Add.5.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CAT.C.28.Add.5.En?Opendocument) (last visited July 25, 2005). While the U.N. Committee on Torture requests countries to affirmatively enact laws prohibiting torture, the U.S. is not alone in its conclusion that existing domestic law adequately fulfills their CAT obligations even though the laws do not address torture *per se*. See, e.g., *Consideration of Reports Submitted by State Parties Under Article 19 of the Convention*, U.N. Doc. CAT/C/55/Add.2 (Denmark) at ¶¶ 109, 115 (2000), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CAT.C.55.Add.2.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CAT.C.55.Add.2.En?Opendocument) (last visited July 25, 2005); *Consideration of Reports Submitted by State Parties Under Article 19 of the Convention*, U.N. Doc. CAT/C/67/Add.1 (Finland) at ¶ 93 (2000), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CAT.C.67.Add.1.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CAT.C.67.Add.1.En?Opendocument) (last visited July 25, 2005); *Consideration of Reports Submitted by State Parties Under Article 19 of the Convention*, U.N. Doc. CAT/C/55/Add.4 (Norway) at ¶ 75 (2000), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CAT.C.55.Add.4.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CAT.C.55.Add.4.En?Opendocument) (last visited July 25, 2005); *Consideration of Reports Submitted by State Parties Under Article 19 of the Convention*, U.N. Doc. CAT/C/55/Add.3 (Sweden) at ¶ 26 (2000), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CAT.C.55.Add.3.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CAT.C.55.Add.3.En?Opendocument) (last visited July 25, 2005).

¹³⁸ 18 U.S.C.A. § 2340 (Supp. 2005).

¹³⁹ See 18 U.S.C. § 2340A(a) (2000).

¹⁴⁰ 18 U.S.C.A. § 2340(3) (Supp. 2005 (as amended by Pub. L. No. 108-375, § 1089, 118 Stat. 1811 (2004))). The U.S. Department of Justice (“DOJ”) has identified Guantanamo Bay Naval Station (“GTMO”) as an area that falls outside the coverage of § 2340. See Bybee Memo, *supra* note 18, at III(A)(1). While arguing that GTMO is part of the U.S. for purposes of § 2340, the Bush Administration simultaneously argued that GTMO is under Cuban sovereignty and therefore outside the U.S. jurisdiction for the purposes of habeas challenges by aliens held at GTMO. See *Rasul v. Bush*, 542 U.S. 466 (2004) (holding that federal habeas statute confers federal court jurisdiction to hear challenges of aliens held at GTMO).

¹⁴¹ See FOREIGN RELATIONS AUTHORIZATION ACT, FISCAL YEARS 1994–1995, S. REP. NO. 103-107, at 53 (1993).

¹⁴² Section 2340 provides:

- (1) “torture” means an act committed by a person acting under 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....

18 U.S.C.A. § 2340 (Supp. 2005). The legislative history of § 2340 does not include a discussion or analysis of the definition of torture, merely a recognition that the definition of torture emanates directly from the CAT.

¹⁴³ See *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”).

¹⁴⁴ Bybee Memo, *supra* note 18. In addition, the Department of Defense drafted a legal memorandum analyzing U.S. law on detainee interrogations in which the analysis of the definition of torture reiterated that in the Bybee Memo. Department of Defense, *Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations* (April 4, 2003).

¹⁴⁵ Bybee Memo, *supra* note 18, at 13.

¹⁴⁶ *Id.* at 3-4.

¹⁴⁷ See e.g., Adam Liptak, *The Reach of War: Penal Law; Legal Scholars Criticize Memos on Torture*, N.Y. TIMES, June 25, 2004, at A14. See also Physicians for Human Rights, *Break Them Down: Systematic Use of Psychological Torture by US Forces* 15, 75-79 (2005), available at www.phrusa.org/research/torture/pdf/psych_torture.pdf (last visited July 25, 2005); see also Note By The Secretary-General, *Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, A/59/324, at ¶¶13-17 (2004) (clearly referring to the Bybee Memo, the Special Rapporteur

notes with concern that “attempts have been made to narrow the scope of the [CAT] definition of torture” and “stress[es] that the definition contained in the Convention cannot be altered by events or in accordance with the will or interest of States”), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N04/498/52/PDF/N0449852.pdf?OpenElement> (last visited July 25, 2005).

¹⁴⁸ *Bush Administration Documents on Interrogation*, WASH. POST, June 23, 2004, available at www.washingtonpost.com/wp-dyn/articles/A62516-2004Jun22.html (last visited July 25, 2005).

¹⁴⁹ Levin Memo, *supra* note 18. This new memorandum was submitted just days before White House Counsel Alberto Gonzalez, who is often held responsible for the Bybee Memo, testified before the U.S. Senate Committee on the Judiciary at a hearing on his nomination to be Attorney General. To date, it is still unclear whether any actual interrogation policies have changed since the redrafting of the legal opinion of torture.

¹⁵⁰ *Id.* at 2, n.8.

¹⁵¹ *Id.* at 2.

¹⁵² *Id.*, citing Bybee Memo, *supra* note 18, at 19, 1.

¹⁵³ *Id.* at 8-10.

¹⁵⁴ *Id.* at 12.

¹⁵⁵ Bybee Memo, *supra* note 18, at 5-6.

¹⁵⁶ Levin Memo, *supra* note 18, at 10-12, citing Bybee Memo, *supra* note 18, at 7.

¹⁵⁷ *Id.* at 16, n.27, citing Bybee Memo, *supra* note 18, at 3-5.

¹⁵⁸ *Id.* at 16-17.

¹⁵⁹ 18 U.S.C. §§ 3591 et seq. (2000).

¹⁶⁰ *Id.* § 3592(c)(6) (emphasis added).

¹⁶¹ *U.S. v. Sampson*, 335 F.Supp.2d 166, 206-07 (D. Mass 2004). The *Sampson* court specifically chose to ignore pattern jury instructions that utilize the § 2340 torture definition. The court used the 5th Edition of *Black’s Law Dictionary* because it was the most recent edition at the time the precursor to the FDPA, the Anti-Drug Abuse Act (also known as the Drug Kingpin Act), was drafted. The Drug Kingpin Act lists torture as an aggravating factor to be considered for imposing a death sentence on a federal crime. 18 U.S.C. § 848(n)(12) (2000).

¹⁶² *U.S. v. Chanthadara*, 230 F.3d 1237, 1262 (10th Cir. 2000).

¹⁶³ *Id.*

¹⁶⁴ 18 U.S.C. § 1111(c)(6) (2000) (defining torture as “conduct, whether or not committed under color of law, that otherwise satisfies the definition set forth [sic] in section 2340(1).”). While state courts have decided cases analyzing the meaning of killing by torture, federal courts have not. *See, e.g.*, *State v. Anderson*, 513 S.E.2d 296 (N.C. 1999); *State v. Pierce*, 488 S.E.2d 576 (N.C. 1997).

¹⁶⁵ 18 U.S.C. § 1111(c)(6) (2000).

¹⁶⁶ 18 U.S.C. § 114 (2000).

¹⁶⁷ *Id.*

¹⁶⁸ Torture Victim Protection Act of 1991, Pub.L. No. 102-256, 106 Stat. 73 (1992), *codified* at 28 U.S.C. § 1350 note. Unlike the ATS, the TVPA applies to actions by both citizens and non-citizens.

¹⁶⁹ Under the TVPA,

(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.

TVPA § 3(b), *codified* at 28 U.S.C. § 1350 note.

¹⁷⁰ Also, while § 2340 defines severe mental pain or suffering, the TVPA defines merely mental pain or suffering, dropping the word “severe” in this portion of the definition (although severe pain or suffering is still a necessary element). Although certainly debatable, one could argue that this definition was purposefully drafted to narrow the activities that count as torture since it implies that prolonged mental harm resulting from (A)-(D) are not per se examples of severe pain or suffering; only extreme forms of pain or suffering would amount to torture.

¹⁷¹ *Sinaltrainal v. Coca-Cola Co.*, 256 F.Supp.2d 1345 (S.D. Fla. 2003). To constitute torture, the corporation’s acts must still meet the other elements of § 2340, including that the corporation acted under color of law.

¹⁷² *Id.* at 1359.

¹⁷³ *Xuncax v. Gramajo*, 886 F.Supp. 162, 174, 178 (D. Mass. 1995).

¹⁷⁴ *Id.* at 178.

¹⁷⁵ *Id.* at 178, n.15.

¹⁷⁶ *Id.* at 178.

¹⁷⁷ *Hilao v. Estate of Marcos*, 103 F.3d 789, 790-91 (9th Cir. 1996).

¹⁷⁸ *Mehinovic v. Vuckovic*, 198 F.Supp.2d 1322 (N.D. Ga. 2002). However, while detailing the facts, the court casually referred to the individual act of dislocating a finger as torture. *Id.* at 1333.

¹⁷⁹ *Daliberti v. Republic of Iraq*, 146 F.Supp.2d 19, 22 (D.D.C. 2001).

¹⁸⁰ See Levin Memo, *supra* note 18, at 10.

¹⁸¹ 28 U.S.C. § 1350 (2000).

¹⁸² *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

¹⁸³ *Id.* See, e.g., *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) (finding jurisdiction for claims brought under the ATS for torture perpetrated in Paraguay where parties to the suit were Paraguayan citizens); *Mehinovic v. Vuckovic*, 198 F.Supp.2d 1322, 1344 (N.D. Ga. 2002) (successful claims by refugees from Bosnia Herzegovina under the ATS and TVPA against former Bosnian Serb police officer who committed acts of torture).

¹⁸⁴ See Lucky Vidmar, *The Alien Tort Statute: Analysis of Sosa v. Alvarez-Machain*, 33 COLO. LAW. 111, 111 (2004).

¹⁸⁵ 630 F.2d 876 (2d Cir. 1980).

¹⁸⁶ See 3C AM. JUR. 2D *Aliens and Citizens* § 2583 (2004).

¹⁸⁷ In *Filartiga*, which remains the most widely cited ATS torture case, the court did not use the CAT definition of torture as this case was decided prior to the U.S. ratification of the CAT.

¹⁸⁸ FSIA was understood to codify a tenet already established under customary international law.

¹⁸⁹ 28 U.S.C. § 1605(a)(7) (2000) (emphasis added).

¹⁹⁰ See *id.* § 1605(e)(1) (“[T]he terms ‘torture’ and ‘extrajudicial killing’ have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991.”).

¹⁹¹ *Cicippio v. Islamic Republic of Iran*, 18 F.Supp.2d 62 (D.D.C. 1998).

¹⁹² *Price v. Socialist People’s Libyan Arab Jamahiriya*, 294 F.3d 82, 93 (D.C. Cir. 2002).

¹⁹³ *Simpson v. Socialist People’s Libyan Arab Jamahiriya*, 326 F.3d 230, 234 (D.C. Cir. 2003).

¹⁹⁴ *Id.*

¹⁹⁵ *Price*, 294 F.3d at 93-94.

¹⁹⁶ *Id.*

¹⁹⁷ Foreign Affairs Reform and Restructuring Act of 1988, Pub. L. No. 105-277, 112 Stat. 2681, 2681-82 (Oct. 21, 1998), *codified at* 8 U.S.C. § 1231.

¹⁹⁸ 8 C.F.R. § 208.18 (2004).

¹⁹⁹ The regulations state:

The definitions in this subsection incorporate the definition of torture contained in Article 1 of the Convention Against Torture, subject to the reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention.

(1) Torture is defined 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.

(2) Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture.

(3) Torture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. 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.

(4) In order to constitute torture, mental pain or suffering must be prolonged mental harm caused by or resulting from:

(i) The intentional infliction or threatened infliction of severe physical pain or suffering;

(ii) 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;

(iii) The threat of imminent death; or

(iv) 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 sense or personality.

(5) In order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering. An act that results in unanticipated or unintended severity of pain and suffering is not torture.

(6) In order to constitute torture an act must be directed against a person in the offender's custody or physical control.

(7) Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.

(8) Noncompliance with applicable legal procedural standards does not per se constitute torture.

Id.

²⁰⁰ See, e.g., *Wang v. Ashcroft*, 320 F.3d 130 (3d Cir. 2001) (finding that the alien, a deserter from the Chinese army, failed to show that he was more likely than not to be tortured if deported to China); *Al Najjar v. Ashcroft*, 257 F.3d 1262 (7th Cir. 2001) (finding that alien failed to show that it was more likely than not that he would be subject to torture if deported to the United Arab Emirates).

²⁰¹ See, e.g., *Gui v. INS*, 280 F.3d 1217 (9th Cir. 2002) (holding that the phone tapping, hit-and-run car crashes, and government harassment in the form of unwarranted search and seizures and interrogation about political activities, do not amount to torture); *In Re G-A-*, 23 I.&N. Dec. 366, 370 (2002) (finding it was more likely than not that individual would be tortured if returned to Iran where "common methods of torture include 'suspension for long periods in contorted positions, burning with cigarettes, sleep deprivation, and most frequently, severe and repeated beatings with cables or other instruments on the back and soles of the feet'").

²⁰² *Sackie v. Ashcroft*, 270 F.Supp.2d 596 (E.D. Pa. 2003).

²⁰³ *Id.* at 602.

²⁰⁴ *Quant v. Ashcroft*, No. 02-70001 (9th Cir. April 4, 2003) (unpublished opinion).

²⁰⁵ Torture Victim Relief Act of 1998, Pub. L. No. 105-320, 112 Stat. 3017, *codified at* 22 U.S.C. § 2152 and note. In 2000, 16 four-year grants were awarded and in 2001 9 three-year grants were added. *See* U.S. Dep't of Health & Human Services, Admin. For Children & Families, *Support for Services for Torture Victims*, available at www.acf.hhs.gov/grants/open/HHS-2004-ACF-ORR-ZT-0002.html (last visited on July 25, 2005).

²⁰⁶ TVRA § 2(2), 22 U.S.C. § 2152 note (2000).

²⁰⁷ *Id.* § 3.

²⁰⁸ Dep't of Defense, *Crimes and Elements of Trials by Military Commission*, 68 F.R. 39381 (2003), *codified at* 32 C.F.R. Part 11.

²⁰⁹ 32 C.F.R. § 11.6(a)(11)(i)(D) (2004).

²¹⁰ *Id.* § 11.6(a)(11)(ii)(A).

²¹¹ *Id.* § 11.6(a)(11)(ii)(C).

²¹² Pub. L. No. 109-013 (2005).

²¹³ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

²¹⁴ Public Committee Against Torture in Israel v. Israel, 38 L.L.M. 147, HC 5100/94 at ¶ 22 (1999), available at www.derechos.org/human-rights/mena/doc/torture.html (last visited July 25, 2005).

²¹⁵ Richard A. Posner, *Torture, Terrorism, and Interrogation*, in *TORTURE: A COLLECTION*, *supra* note 4, at 291.