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U.N. Convention Against Torture (CAT): Overview and Application to Interrogation Techniques

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Michael John Garcia
Legislative Attorney
American Law Division

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Summary

The United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT) requires signatory parties to take measures to end torture within their territorial jurisdiction and to criminalize all acts of torture. Unlike many other international agreements and declarations prohibiting torture, CAT provides a general definition of the term. CAT generally defines torture as the infliction of severe physical and/or mental suffering committed under the color of law. CAT allows for no circumstances or emergencies where torture could be permitted.

The United States ratified CAT, subject to certain declarations, reservations, and understandings, including that the Convention was not self-executing and therefore required domestic implementing legislation to be enforced by U.S. courts. In order to ensure U.S. compliance with CAT obligations to criminalize all acts of torture, the United States enacted §§ 2340 and 2340A of the United States Criminal Code, which prohibit torture occurring *outside* the United States (torture occurring inside the United States was already prohibited under several federal and state statutes of general application prohibiting acts such as assault, battery, and murder). The applicability and scope of these statutes were the subject of widely-reported memorandums by the Department of Defense and Department of Justice in 2002. In late 2004, the Department of Justice released a memorandum superseding its earlier memo and modifying some of its conclusions.

Assuming for the purposes of discussion that a U.S. body had to review a harsh interrogation method to determine whether it constituted torture under either CAT or applicable U.S. law, it might examine international jurisprudence as to whether certain interrogation methods constituted torture. Although these decisions are not binding precedent for the United States, they may inform deliberations here.

Congress has approved additional, CAT-referencing guidelines concerning the treatment of detainees. The Detainee Treatment Act (DTA), which was enacted pursuant to both the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006 (P.L. 109-148), and the National Defense Authorization Act for FY2006 (P.L. 109-163), contained a provision prohibiting the "cruel, inhuman and degrading treatment or punishment of persons under the detention, custody, or control of the United States Government" (this provision is commonly referred to as the McCain Amendment). The Military Commissions Act of 2006 (P.L. 109-366) contained an identical measure and also required the President to establish administrative rules and procedures implementing this standard. These Acts are discussed briefly in this report and in greater detail in CRS Report RS22312, *Interrogation of Detainees: Overview of the McCain Amendment*, by Michael John Garcia.

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U.N. Convention Against Torture (CAT): Overview and Application to Interrogation Techniques

Overview of the Convention against Torture

Over the past several decades, a number of international agreements and declarations has condemned and/or sought to prohibit the practice of torture by public officials,[1] leading some to conclude that torture is now prohibited under customary international law.[2] Perhaps the most notable international agreement prohibiting torture is the United Nations Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Convention or CAT),[3] signed by the United States and over 140 other countries.

Definition of "Torture" under CAT

Whereas a number of prior international agreements and declarations condemned and/or prohibited torture, CAT appears to be the first international agreement to actually attempt to define the term. CAT Article 1 specifies that, for purposes of the Convention, "torture" refers to:

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[1] *See, e.g.,* U.N. CHARTER art. 55 (calling upon U.N. member countries to promote "universal respect for, and observance of, human rights and fundamental freedoms for all...."); Universal Declaration on Human Rights, UN GAOR, Supp. No. 16, at 52, UN Doc. A/6316, at art. 5 (1948) (providing that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"); International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 3rd Comm., 21st Sess., 1496th plen. mtg. at 49, U.N. Doc. A/RES/ 2200A (XXI), at art. 7 (1966) (providing that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment").

[2] *See, e.g.,* Filartiga v. Pena-Irala, 630 F2d 876, 880-85 (2nd Cir. 1980) (listing numerous sources, including the opinion of the State Department, supporting the proposition that torture is prohibited by customary international law, and noting that despite continued practice of torture by many countries, virtually all have renounced the practice publically, including through international declarations and agreements); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702, Reporters note 5(d) (1987). *But see* A. Mark Weisbard, *Customary International Law and Torture: The Case of India*, 2 CHI. J. INT'L. L. 81 (Spring 2001) (arguing that widespread use of torture by States in certain circumstances and general indifference of other States to the practice, despite existence of numerous international agreements and declarations condemning torture, indicate that the prohibition on torture has not reached the status of customary international law).

[3] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51 (1984) [*hereinafter* "CAT"].

> 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.

Importantly, this definition specifies that both physical and mental suffering can constitute torture, and that for such suffering to constitute torture, it must be purposefully inflicted. Further, acts of torture covered under the Convention must be committed by someone acting under the color of law. Thus, for example, if a private individual causes intense suffering to another, absent the instigation, consent, or acquiescence of a public official, such action does not constitute "torture" for purposes of CAT.

The Convention's definition of "torture" does not include all acts of mistreatment causing mental or physical suffering, but only those of a severe nature. According to the State Department's section-by-section analysis of CAT included in President Reagan's transmittal of the Convention to the Senate for its advice and consent, the Convention's definition of torture was intended to be interpreted in a "relatively limited fashion, corresponding to the common understanding of torture as an *extreme* practice which is universally condemned."[4] For example, the State Department suggested that rough treatment falling into the category of police brutality, "while deplorable, does not amount to 'torture'" for purposes of the Convention, which is "usually reserved for extreme, deliberate, and unusually cruel practices ... [such as] sustained systematic beating, application of electric currents to sensitive parts of the body, and tying up or hanging in positions that cause extreme pain."[5] This understanding of torture as a severe form of mistreatment is further made clear by CAT Article 16, which obligates Convention parties to "prevent in any territory under [their] jurisdiction other acts of cruel, inhuman, or degrading treatment or punishment which do not amount to acts of torture,"[6] thereby indicating that not all forms of inhumane treatment constitute torture.

In general, Convention parties are obligated to take "effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory

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[4] President's Message to Congress Transmitting the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Summary and Analysis of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, May 23, 1988, S. TREATY DOC. NO. 100-20, *reprinted in* 13857 U.S. Cong. Serial Set at 3 (1990) [*hereinafter* "State Dept. Summary"] (emphasis added).

[5] *Id.* at 4. Presumably, police brutality of extreme severity could rise to the level of "torture."

[6] CAT at art. 16(2).

under [their] jurisdiction."[7] They are also forbidden from expelling, returning, or extraditing a person to another State where there are "substantial grounds" for believing that he would be in danger of being subjected to torture.[8]

CAT Requirements Concerning the Criminalization of Torture

A central objective of CAT was to criminalize all instances of torture. CAT Article 4 requires States to ensure that all acts of torture are criminal offenses, subject to appropriate penalties given their "grave nature." State parties are also required to apply similar criminal penalties to attempts to commit and complicity or participation in torture.[9] Accordingly, it appears that even though CAT requires States to take "effective measures" to prevent torture only within their territorial jurisdiction, this does not mean that States are therefore permitted to engage in torture in territories not under their jurisdiction. Although a State might not be required to take proactive measures to prevent acts of torture beyond its territorial jurisdiction, it nevertheless has an obligation to criminalize such extraterritorial acts and impose appropriate penalties.

CAT Article 5 establishes minimum jurisdictional measures that each State party must take with respect to offenses described in CAT Article 4. Pursuant to CAT Article 5, a State party must establish jurisdiction over CAT Article 4 offenses when

> (1) The offenses are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
> (2) The alleged offender is a national of that State;
> (3) The victim was a national of that State if that State considers it appropriate; and
> (4) The alleged offender is present in any territory under its jurisdiction and the State does not extradite him in accordance with CAT Article 8, which makes torture an extraditable offense.

CAT's prohibition of torture is absolute: "No exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture."[10] According to the State Department, this blanket prohibition was viewed by the drafters of CAT as "necessary if the Convention is to have significant effect, as public emergencies are commonly invoked as a source of extraordinary powers or as a justification for limiting fundamental rights and freedoms."[11]

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[7] CAT at art. 2(1).

[8] For a more detailed overview of CAT Article 3 and U.S. implementing laws and regulations, see CRS Report RL32276, *The U.N. Convention Against Torture: Overview of U.S. Implementation Policy Concerning the Removal of Aliens,* by Michael Garcia.

[9] CAT at art. 4(1).

[10] *Id.* at art. 2(2).

[11] State Dept. Summary, *supra* note 4, at 5.

CAT Requirements Concerning the Availability of Civil Redress for Victims of Torture

CAT Article 14 provides that signatory States must ensure that their legal systems provide victims of torture (or their dependents, in cases where the victim has died as a result of torture) with the ability to obtain civil redress in the form of "fair and adequate compensation including the means for as full rehabilitation as possible." According to the State Department, Article 14 was adopted with an express reference to this treaty obligation extending only to "the victim of an act of torture *committed in any territory under* [a signatory State's] *jurisdiction*," but this limiting clause was "deleted by mistake."[12]

CAT Requirements Prohibiting Cruel, Inhuman, or Degrading Treatment or Punishment

CAT Article 16 requires signatory States to take preventative measures to prevent "cruel, inhuman, or degrading treatment or punishment" within any territory under their jurisdiction when such acts are committed under the color of law. CAT does not define these terms, and the State Department suggested that the requirements of Article 16 concerning "degrading" treatment or punishment potentially include treatment "that would probably not be prohibited by the U.S. Constitution."[13] Unlike in the case of torture, however, CAT does not expressly require States to criminalize acts of cruel, inhuman, or degrading treatment or punishment that occur within or outside their territorial jurisdiction.

CAT Enforcement and Monitoring Measures

CAT also established a Committee against Torture (Committee), composed of ten experts of recognized competence in the field of human rights who are elected to biannual terms by State parties.[14] Each party is required to submit, within a year of the Convention entering into force for it, a report to the Committee detailing the measures it has taken to give effect to the provisions of CAT, as well supplementary reports every four years on any new measures taken, in addition to any other reports the Committee may request.[15] The Committee monitors State compliance with

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[12] *Id.* at 13-14.

[13] *Id.* at 15. The State Department noted, for instance, that the European Commission on Human Rights once concluded that the refusal of German authorities to give formal recognition to an individual's sex change might constitute "degrading" treatment.

[14] CAT at arts. 17-18.

[15] *Id.* at art. 19(1). According the United Nations Office of the High Commissioner for Human Rights, the United States first report under CAT was due on Nov. 15, 1995, and was submitted on Oct. 15, 1999. *See* Office of the United Nations High Commissioner on Human Rights, Convention Reporting Status, *at* [http://www.unhchr.ch/tbs/doc.nsf/RepStatfrset?OpenFrameSet]. A second report, due on Nov. 19, 2001, was submitted to the Committee on May 6, 2005. Second Periodic Report of the United States of America to the Committee Against Torture, May 6, 2005, *available at* [http://www.state.gov/g/drl/rls/

(continued...)

Convention obligations,[16] investigates allegations of systematic CAT violations by State parties and makes recommendations for improving compliance,[17] and submits annual reports to CAT parties and the U.N. General Assembly.[18]

CAT Article 30 provides that disputes between two or more signatory parties concerning the interpretation and application of the Convention can be submitted to arbitration upon request.[19] If, within six months of the date of request for arbitration, the parties are unable to agree upon the organization of the arbitration, any of the parties may refer the dispute to the International Court of Justice.[20] Article 30 contains an "opt-out" provision, however, that enabled States (including the United States) to make a reservation at the time of CAT ratification declaring that they do not consider themselves to be bound by Article 30.[21]

Implementation of the Convention Against Torture in the United States

The United States signed CAT on April 18, 1988, and ratified the Convention on October 21, 1994, subject to certain declarations, reservations, and understandings.[22] Perhaps most significantly, the United States included a declaration in its instruments of ratification that CAT Articles 1 through 16 were not self-executing.[23] The following sections will discuss relevant declarations,

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[15] (...continued)
45738.htm]. The Committee's conclusions and recommendations in response to this report were issued on July 25, 2006. Conclusions and Recommendations of the Committee against Torture regarding the United States of America, July 25, 2006, *available from the United Nations website at* [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/e2d4f5b2dccc0a4cc12571ee00290ce0/$FILE/G0643225.pdf] [*hereinafter* "Committee Recommendations"].

[16] CAT at arts. 19-23.

[17] *Id.* at arts. 20-23.

[18] *Id.* at art. 24.

[19] *Id.* at art. 30(1).

[20] CAT at art. 30(1).

[21] *Id.* at art. 30(2).

[22] *See* SEN. EXEC. RPT. 101-30, Resolution of Advice and Consent to Ratification, (1990) [*hereinafter* "Sen. Resolution"].

[23] *Id.* at III.(2). U.S. courts hearing cases concerning the removal of aliens have regularly interpreted CAT provisions prohibiting alien removal to countries where an alien would likely face torture to be non-self executing and judicially unenforceable except to the extent permitted under domestic implementing legislation. *See, e.g.*, Castellano-Chacon v. I.N.S., 341 F.3d 533 (6th Cir. 2003) (applicant for withholding of removal could not invoke CAT directly, but could rely upon implementing regulations); Akhtar v. Reno, 123 F.Supp.2d 191 (S.D.N.Y. 2000) (rejecting challenge made by criminal alien to removal pursuant to CAT, (continued...)

reservations, and understandings made by the United States to CAT, and U.S. laws implementing CAT Article 4 requirements to criminalize torture.

Relevant Declarations, Reservations, and Understandings Conditioning U.S. Ratification of the Convention Against Torture

As previously mentioned, the Senate's advice and consent to CAT ratification was subject to the declaration that the Convention was not self-executing,[24] meaning that implementing legislation was required to fulfill U.S. international obligations under CAT, and such implementing legislation was necessary for CAT to be given effect domestically.[25] In providing its advice and consent to CAT, the Senate also provided a detailed list of understandings concerning the scope of the Convention's definition of torture. With respect to mental torture, a practice not specifically defined by CAT, the United States understands such actions to refer to prolonged mental harm caused or resulting from (1) the intentional infliction or threatened infliction of severe physical pain and suffering; (2) the administration of mind-altering substances or procedures to disrupt the victim's senses; (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.[26]

The Convention's definition of torture includes not only acts committed by public officials, but also those acts to which they acquiesced.[27] As expressed in a U.S. understanding on this point, for a public official to acquiesce to an act of torture, that official must, "prior to the activity constituting torture, have *awareness* of such activity and thereafter breach his or her legal responsibility to intervene to prevent

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[23] (...continued)
and stating that "[g]iven the apparent intent of the United States that the Convention not be self-executing, this Court joins the numerous other courts that have concluded that the Convention is not self-executing"). Pursuant to the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), P.L. 105-277 at § 2242, the United States implemented certain provisions of CAT by announcing a policy not to expel, extradite, or otherwise effect the involuntary removal of any person to a country where there are substantial grounds for believing that the person would be in danger of being subjected to torture. Regulations adopted pursuant to this legislation are codified at 8 C.F.R. §§ 208.16-18, 1208.16-18, and 22 C.F.R. § 95.2.

[24] Sen. Resolution, *supra* note 22, at III.(2).

[25] *See* RESTATEMENT, *supra* note 2, § 111 (" a 'non-self- executing' agreement will not be given effect as law in the absence of necessary implementation"). The United States nevertheless has an international obligation to adjust its laws as necessary to give legal effect to international agreements. *Id.* at comment h. *See generally* CRS Report RL32528, *International Law and Agreements: Their Effect Upon U.S. Law*, by Michael Garcia and Arthur Traldi.

[26] Sen. Resolution, *supra* note 22, at II.(1)(a) (emphasis added).

[27] CAT at Art. 1.

such activity."[28] U.S. implementing regulations barring the removal of aliens to countries where they would more likely than not face torture reflect this understanding.[29] Subsequent jurisprudence and administrative decisions concerning the removal of aliens to countries where they may face torture have recognized that "willful blindness" by officials to torture may constitute "acquiescence,"[30] but acquiescence does not occur when a government or public official is aware of third-party torture but unable to stop it.[31] In addition, mere noncompliance with applicable legal procedural standards does not *per se* constitute torture.[32]

With regard to Article 14 of the Convention, obligating States to make civil redress available to victims of torture, the Senate's advice and consent was based on the understanding that a State was only obligated for provide a private right of action for acts of torture committed in territory under the State's jurisdiction.[33]

With respect to Article 16 of the Convention, the Senate's advice and consent was based on the reservation that the United States considered itself bound to Article 16 to the extent that such cruel, unusual, and inhuman treatment or punishment was prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the U.S. Constitution.[34] These Amendments apply in different contexts. The Eighth Amendment bars the use of "cruel and unusual punishment" as a form of criminal penalty.[35] The constitutional restraint of persons in other areas, such as pre-trial

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[28] Sen. Resolution, *supra* note 22, at II.(1)(d).

[29] 8 C.F.R. § 1208.18(a)(7).

[30] *See, e.g.*, Zheng v. Ashcroft, 332 F.3d 1186 (9th Cir. 2003) (declaring that the correct inquiry in deciding whether a Chinese immigrant was entitled to relief from removal from U.S. under CAT was not whether Chinese officials would commit torture against him, but whether public officials would turn a blind eye to the immigrant's torture by specified individuals); Ontunez-Turios v. Ashcroft, 303 F.3d 341 (5th Cir. 2002) (upholding Board of Immigration Appeals' deportation order, but noting that "willful blindness" constitutes acquiescence under CAT); Bullies v. Nye, 239 F. Supp.2d 518 (M.D. Pa. 2003) (under CAT-implementing regulations, acquiescence by government to torture by non-governmental agents requires either willful acceptance by government officials or at least turning a blind eye); *see also* Pascual-Garcia v. Ashcroft, 73 Fed.Appx. 232 (9th Cir. 2003) (holding that relief under CAT does not require that torture will occur while victim is in the custody or physical control of a public official).

[31] *See*, e.g., Moshud v. Blackman, 68 Fed. Appx. 328 (3rd Cir. 2003) (denying alien's claim to reopen removal proceedings to assert a CAT claim based on her fear of female genital mutilation in Ghana: although the practice was widespread, the Ghanian government had not acquiesced to the practice because it had been made illegal and public officials had condemned the practice); Matter of S-V-, 22 I&N Dec. 1306 (BIA 2000) (holding that protection under CAT does not extend to persons fearing entities that a government is unable to control).

[32] Sen. Resolution, *supra* note 22, at II.(1)(e).

[33] *Id.* at II.(3).

[34] *Id.* at I.(2).

[35] Ingraham v. Wright, 430 U.S. 651 (1977). Whether treatment by public officials (continued...)

interrogation, is found in the Due Process Clauses of the Fifth Amendment (concerning obligations owed by the U.S. Federal Government) and Fourteenth Amendment (concerning duties owed by U.S. state governments). These due process rights protect persons from executive abuses that "shock the conscience."[36] The Fourteenth Amendment's Due Process Clause has also been interpreted to incorporate the Eighth Amendment's prohibition on "cruel and unusual punishment" at the state level.[37]

The United States has also opted out of the dispute-settlement provisions of CAT Article 30,[38] but it has reserved the right to specifically agree to follow its provisions or any other arbitration procedure to resolve particular disputes concerning CAT application.

Criminalization of Torture Occurring Outside the United States

To implement CAT Articles 4 and 5, Congress did not enact a new provision to criminalize acts of torture committed within the jurisdiction of the United States: It was presumed that such acts would "be covered by existing applicable federal and state statutes,"[39] such as those criminalizing assault, manslaughter, and murder. However, the United States did add §§ 2340 and 2340A of the United States Criminal Code, which criminalize acts of torture that occur *outside* of the United States. "Torture" is defined as "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."[40] Section 2340 further defines "severe mental pain and suffering" as prolonged mental harm caused by

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[35] (...continued)
constitutes "cruel and unusual" treatment that is prohibited by the Constitution is assessed using a two-prong test. *See* Farmer v. Brennan, 511 U.S. 825, 834 (1994). First, it must be determined whether the individual who has been mistreated was denied "the minimal civilized measures of life's necessities." Rhodes v. Chapman, 452 U.S. 337, 347 (1981). This standard may change over time to reflect evolving societal standards of decency. *Id.* at 346. Secondly, the offending individual must have a "sufficiently culpable state of mind," indicating that the infliction of pain was "wanton" or, in the context of general prison conditions, reflected "deliberate indifference to inmate health or safety." Wilson v. Seiter, 501 U.S. 294, 297 (1991).

[36] *See, e.g,* Rochin v. California, 342 U.S. 165 (1952).

[37] *E.g.,* Robinson v. California, 370 U.S. 660 (1962).

[38] *See* Sen. Resolution, *supra* note 22, at I.(3).

[39] S.Rept. 103-107, at 59 (1993) (discussing legislation implementing CAT Articles 4 and 5).

[40] 18 U.S.C. § 2340(1).

> (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.[41]

Pursuant to § 2340A, any person who commits or attempts to commit an act of torture outside the United States is generally subject to a fine and/or imprisonment for up to 20 years.[42] In cases where death results from the prohibited conduct, the offender may be subject to life imprisonment or the death penalty.[43] A person who conspires to commit an act of torture committed or attempted outside the United States is generally subject to the same penalties faced by someone who commits or attempts to commit acts of torture outside the United States, except that he cannot receive the death penalty for such an offense.[44] Because § 2340A also criminalizes conspiracies to commit torture outside the United States, it arguably could also apply in situations where a U.S. national conspired to transfer an individual "outside the United States" so that the individual may be tortured.

Until 2004, for purposes of the federal torture statute, the term "United States" referred to all areas under the jurisdiction of the United States, including those falling within its special maritime and territorial jurisdiction, such as military bases and buildings abroad when an offense was committed by or against a U.S. national.[45] Accordingly, the federal torture statute would not appear to have applied to cases of torture that might have occurred in such facilities, because they were not considered to be "outside the United States." However, pursuant to § 1089 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (P.L. 108-375), the torture statute was amended so that, for purposes of the statute, "United States" now refers to the several states of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States. Accordingly, the federal torture statute would now cover alleged acts of torture that might occur at U.S. facilities abroad. The United States claims jurisdiction over actions criminalized

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[41] 18 U.S.C. § 2340(2).

[42] 18 U.S.C. § 2340A(a).

[43] *Id.*

[44] *Id.*

[45] *See* 18 U.S.C. § 2340(3) (2003). With respect to offenses committed by or against U.S. citizens, the special territorial jurisdiction of the United States includes (1) the premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States, including the buildings, parts of buildings, and land appurtenant or ancillary thereto or used for purposes of those missions or entities, irrespective of ownership; and (2) residences in foreign States and the land appurtenant or ancillary thereto, irrespective of ownership, used for purposes of those missions or entities or used by United States personnel assigned to those missions or entities. 18 U.S.C. § 7(9).

under the federal torture statute when (1) the alleged offender is a national of the United States or (2) the alleged offender is present in the United States, irrespective of the nationality of the victim or offender.[46]

In addition, a number of federal criminal statutes explicitly cover actions that are committed outside of the territorial boundaries of the United States, but nevertheless occur within the special maritime or territorial jurisdiction of the United States,[47] including statutes criminalizing assault,[48] maiming with the intent to torture,[49] manslaughter,[50] and murder,[51] as well as conspiracies to commit such crimes.[52] Additionally, persons within the jurisdiction of the United States who conspire to kill, maim, or injure persons outside the United States are subject to criminal penalties.[53] "Grave breaches" of the 1949 Geneva Conventions, including the torture or inhumane treatment of detained combatants and civilians in armed conflicts,[54] are criminalized under the War Crimes Act (18 U.S.C. § 2441), and

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[46] 18 U.S.C. § 2340A(b).

[47] U.S. special maritime and territorial jurisdiction covers specified areas within and outside of U.S. territorial boundaries, including territory within U.S. territorial boundaries under federal control, such as military bases. 18 U.S.C. § 7(3).

[48] 18 U.S.C. § 113

[49] 18 U.S.C. § 114. For purposes of the statute, "torture" is defined by 18 U.S.C. § 2340.

[50] 18 U.S.C. § 1112(b).

[51] 18 U.S.C. § 1111(b).

[52] 18 U.S.C. § 371.

[53] 18 U.S.C. § 956(a).

[54] The 1949 Geneva Conventions establish standards of conduct by High Contracting Parties toward specified categories of vulnerable persons (e.g., civilians, prisoners of war) during armed conflicts between States. It is considered a "grave breach" of Convention requirements to subject such persons to "torture or inhuman treatment ... wilfully causing great suffering or serious injury to body or health." *See* Geneva Convention (First) for the Amelioration of the Condition of the Wounded and the Sick in the Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3314, 75 U.N.T.S. 31, at art. 50; Geneva Convention (Second) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85, at art. 51; Geneva Convention (Third) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, at art. 130; Geneva Convention (Fourth) Relative to the Protection of Civilian Persons in Times of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, at art. 147. In conflicts "not of an international character," Article 3 of each of the 1949 Geneva Conventions (Common Article 3) establishes base protections for all persons taking no active part in hostilities, including those who have laid down their arms or been incapacitated by capture or injury. Such persons are to be treated humanely and protected from certain treatment, including "violence to life and person," "cruel treatment and torture," and "outrages upon personal dignity, in particular, humiliating and degrading treatment." The U.S. Supreme Court has interpreted Common Article 3 to apply to the conflict with Al Qaeda, according captured Al Qaeda suspects and other "unlawful combatants" with minimal protections. Hamdan v. Rumsfeld, 126 S.Ct. 2749 (2006). Although the Geneva Conventions do not list violations of Common Article 3 as a "grave breach" of Convention requirements, under U.S.

(continued...)

persons convicted for an offense under the Act may be sentenced to life imprisonment or, if death results from the breach, be executed.[55] U.S. military law provides further restrictions on the treatment of individuals detained by the military.[56]

Some of the criminal statutes described above, including § 2340A, provide that the specific intent of the actor is a necessary component of the criminal offense.[57] Specific intent is "the intent to accomplish the precise criminal act that one is later charged with."[58] This state of mind can be differentiated from that found in criminal offenses that only require an actor to possess a general intent with respect to the offense. General intent usually "takes the form of recklessness (involving actual awareness of a risk and the culpable taking of that risk) or negligence (involving blameworthy inadvertence)."[59]

Two memorandums produced by the Department of Defense and the Department of Justice in 2002 discussed the distinction between general and specific intent with respect to § 2340A, and suggested that "knowledge alone that a particular result is certain to occur does not constitute specific intent."[60] However, both memorandums made clear that this is "a theoretical matter,"and note that juries may infer from factual circumstances that specific intent is present.[61] Accordingly, "when a defendant knows that his actions will produce the prohibited result, a jury will in

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[54] (...continued)
law, violations of Common Article 3 of similar severity as "grave breaches" of Convention requirements are subject to the same criminal penalties. *See* 18 U.S.C. § 2441 (criminalizing "grave breaches" of both the 1949 Geneva Conventions and Common Article 3).

[55] For additional background on the War Crimes Act, see CRS Report RL33662, *The War Crimes Act: Current Issues*, by Michael John Garcia.

[56] For a more comprehensive discussion of U.S. laws applicable to the treatment of prisoners of war, see CRS Report RL32395, *U.S. Treatment of Prisoners in Iraq: Selected Legal Issues*, by Jennifer Elsea.

[57] *See* 18 U.S.C. § 2340 (defining torture as "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering").

[58] BLACK'S LAW DICTIONARY 814 (7th ed. 1999)

[59] *Id.* at 813.

[60] *See* Department of Defense, Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations (Mar. 6, 2003), *available at* [http://www.defenselink.mil/news/Jun2004/d20040622doc8.pdf] [*hereinafter* "DOD Memo"] at 9; Memorandum from the Office of Legal Counsel, Department of Justice, to Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002), on the Washington Post website, available at [http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf] [*hereinafter* "2002 DOJ Memo"] at 4.

[61] DOD Memo, *supra* note 60, at 9; 2002 DOJ Memo, *supra* note 60, at 4.

all likelihood conclude that the defendant acted with specific intent."[62] In late 2004, the Department of Justice released a memorandum superseding its earlier memo and modifying some of its conclusions.[63] The 2004 DOJ memo stated 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."[64] Nevertheless, the 2004 DOJ memo alleged that it was unlikely that a person who "acted in good faith, and only after reasonable investigation establishing that his conduct would not inflict severe physical or mental pain or suffering," would possess the specific intent required to violate the federal torture statute.[65] The 2004 DOJ memo also distinguished intent to commit an offense from the motive behind committing an offense, stating that "a defendant's motive (to protect national security, for example) is not relevant to the question whether he has acted with the requisite specific intent under the statute."[66]

Although § 2340A provides the United States with a wide jurisdictional grant to prosecute acts of torture, it does not appear that this authority has ever been used. A legal search by CRS did not reveal any cases in which the DOJ has relied on § 2340A to prosecute acts of torture occurring outside of the United States.

Availability of Civil Redress for Acts of Torture Occurring Outside the United States

Although the United States attached an understanding to its ratification of CAT expressing its view that CAT Article 14 did not require States to recognize a private right of action for victims of torture occurring outside their territorial jurisdiction, the United States nevertheless created in the Torture Victims Protection Act of 1991 (TVPA) a private right of action for victims of torture committed under actual or

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[62] DOD Memo, *supra* note 60, at 9; 2002 DOJ Memo, *supra* note 60, at 4.

[63] Memorandum from the Office of Legal Counsel, Department of Justice, to James B. Comey, Deputy Attorney General, Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A (Dec. 30, 2004), *available at* [http://www.usdoj.gov/olc/dagmemo.pdf] [*hereinafter* "2004 DOJ Memo"].

[64] *Id.* at 16-17. The memo cited to declarations made by President George W. Bush in 2003 and 2004 describing freedom from torture as "an inalienable human right" and that "[t]orture anywhere is an affront to human dignity everywhere." *Id.* at n.4.

[65] *Id.* at 17. The 2002 DOJ and DOD memorandums suggested that defenses of necessity (i.e., taking unlawful conduct the actor believes is necessary to avoid the occurrence of a greater harm or evil) or self-defense might in some cases justify violations of the federal criminal torture statute and potentially eliminate criminal liability. DOD Memo, *supra* note 60, at 25-31; 2002 DOJ Memo, *supra* note 60, at 39-46. The 2004 DOJ Memo does not directly address these potential defenses, though it does note that there is "no exception under the statute permitting torture to be used for a 'good reason.'" 2004 DOJ Memo, *supra* note 63, at 17.

[66] 2004 DOJ Memo, *supra* note 63, at 17.

apparent authority, or color of law, of any *foreign* nation.[67] For purposes of the TVPA, "torture" is defined in a similar manner to the definition found in the federal statute criminalizing torture.[68] A claim under the TVPA must be commenced within 10 years after the cause of action arose, and a claimant must exhaust all adequate and available remedies in the country where the alleged torture occurred before a U.S. court can hear the claim.[69]

If an act of torture occurs within the United States, a tort claim could be brought by a person seeking redress under applicable state, federal statutory, or constitutional tort law.[70]

Prohibition on Cruel, Inhuman, and Degrading Treatment

Following ratification of CAT, Congress did not adopt implementing legislation with respect to CAT Article 16, which requires each CAT party to prohibit cruel, inhuman, and degrading treatment or punishment in "any territory under its jurisdiction." There has recently been debate over whether Congress's failure to pass legislation implementing CAT Article 16 was due to an oversight or whether Congress believed that the United States agreed to bind itself to CAT Article 16 only to the extent that it was already required to refrain from cruel, inhuman, and degrading treatment or punishment under the U.S. Constitution and any existing statutes covering such offenses.

As previously mentioned, the Senate made its advice and consent to CAT ratification contingent upon the reservation that the cruel, inhuman, and degrading treatment or punishment prohibited by CAT 16 covered only those forms of treatment or punishment prohibited under the U.S. Constitution. Given this understanding, U.S. obligations under Article 16 can be interpreted in one of two ways.

One way is to interpret the United States as having agreed to bind itself to CAT Article 16 only to the extent that cruel, inhuman, or degrading treatment is constitutionally prohibited. Although the U.S. Supreme Court has held that the

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[67] P.L. 102-256.

[68] For purposes of the TVPA, "torture" describes "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." *Id.* at § 3(b)(1).

[69] *Id.* at §§ 2(b)-(c).

[70] *See, e.g.*, 22 U.S.C. § 1350 (providing that an alien may bring a civil action for a tort only for a violation of the law of nations or a treaty of the United States); 28 U.S.C. §§ 1346, 2674 (providing federal jurisdiction over certain constitutional and federal statutory claims, and U.S. tort liability); 42 U.S.C. §§ 1982-1988 (providing civil right of action for violation of civil rights).

Constitution applies to U.S. citizens abroad, thereby protecting them from the extraterritorial infliction by U.S. officials of treatment or punishment prohibited under the Constitution,[71] non-citizens arguably only receive constitutional protections after they have effected entry into the United States.[72] Under this interpretation, CAT Article 16, as agreed to by the United States, would not necessarily prohibit the U.S. from subjecting certain non-U.S. citizens to "cruel, inhuman, and degrading treatment or punishment" at locations outside U.S. territorial boundaries where the U.S. nonetheless asserts territorial jurisdiction (e.g., on the premises of U.S. missions in foreign States). The DOJ has taken this position in arguing that CAT Article 16, as agreed to by the U.S., does not cover aliens detained overseas.[73]

On the other hand, others have argued that CAT Article 16, as agreed to by the U.S., requires the U.S. to prohibit cruel, inhuman, and degrading treatment or punishment in any territory under its jurisdiction if such treatment would be deemed unconstitutional if it occurred in the United States. This view holds that the purpose of the U.S. reservation to CAT Article 16 was to more clearly define types of treatment that were "cruel, inhuman, and degrading" rather than to limit the geographic scope of U.S. obligations under CAT Article 16. At least one former State Department official involved in CAT's negotiation and ratification process has

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[71] *See, e.g.*, Reid v. Covert, 354 U.S. 1, 6 (1957) ("When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.").

[72] *See, e.g.*, Verdugo-Urquidez v. United States, 494 U.S. 259, 270-71 (1990) ("aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with the country"). *But see* Rasul v. Bush, 124 S.Ct. 2686, n.15 (2004) (noting in dicta that petitioners' allegations that they had been held in detention at Guantanamo Bay for more than two years "in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing — unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States'") (*citing* federal habeas statute 28 U.S.C. § 2241(c)(3), under which petitioners challenged their detention). Whether the *Rasul* ruling meant only that federal habeas jurisdiction extended to Guantanamo, or more broadly found that non-citizens detained at Guantanamo possessed constitutional rights, has been subject to conflicting rulings by district courts. *Compare* Hamdan v. Rumsfeld, 2006 U.S. Dist. LEXIS 89933 (D.D.C. Dec. 13, 2006) (finding that non-U.S. residents held at Guantanamo did not have a constitutional right to habeas); Khalid v. Bush, 355 F. Supp.2d 311 (D.D.C. 2005) (holding that while federal habeas statute covers Guantanamo detainees, non-U.S. residents detained there do not receive constitutional protections) *with* In re Guantanamo Detainees, 355 F. Supp.2d 443 (D.D.C. 2005) (reading *Rasul* to mean that persons detained at Guantanamo are owed constitutional protections). For further information, see CRS Report RS22173; *Detainees at Guantánamo Bay*, by Jennifer Elsea.

[73] The Department of Justice has taken the position that CAT Article 16, as read in light of U.S. reservations, (1) does not cover acts overseas that are not under U.S. jurisdiction, and (2) does not impose any new obligations upon the U.S. beyond those already required under the U.S. Constitution. It has also argued that the Constitution does not cover non-citizens held outside the United States. *See* Letter from Asst. Attorney General William E. Moschella to Sen. Patrick Leahy, Apr. 4, 2005, *available at* [http://www.scotusblog.com/movabletype/archives/CAT%20Article%2016.Leahy-Feinstein-Feingold%20Letters.pdf].

endorsed this interpretation as the correct one.[74] The Committee against Torture has also urged the United States to ensure that CAT Article 16 is applied to "all persons under the effective control of U.S. authorities, of whichever type, wherever located in the world."[75]

Partially in light of this controversy, Congress passed additional guidelines concerning the treatment of detainees via the Detainee Treatment Act (DTA), which was enacted pursuant to both the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006 (P.L. 109-148), and the National Defense Authorization Act for FY2006 (P.L. 109-163), and prohibits the "cruel, inhuman and degrading treatment or punishment of persons under the detention, custody, or control of the United States Government."[76] These provisions of the DTA, which were first introduced by Senator John McCain, have popularly been referred to as the "McCain Amendment." The Military Commissions Act of 2006 (P.L. 109-366) contained an identical measure and also required the President to establish administrative rules and procedures implementing this standard. These provisions are discussed in greater detail in CRS Report RS22312, *Interrogation of Detainees: Overview of the McCain Amendment*, by Michael John Garcia.

When signing the DTA into law, President Bush issued a signing statement claiming he would construe the McCain Amendment "in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief ... which will assist in achieving the shared objective of the Congress and the President ... of protecting the American people from further terrorist attacks."[77] This statement has been interpreted as meaning that the President believes he may waive congressional restrictions on interrogation techniques in certain circumstances involving national security, pursuant to his constitutional authority as Commander in Chief.[78] However, no similar signing statement was made when the President signed the Military Commissions Act, even though it contained an identical provision barring "cruel, inhuman, and degrading treatment."

The McCain Amendment does not directly impose criminal or civil penalties on U.S. personnel who might engage in cruel, inhuman, or degrading treatment or punishment of detainees, though such persons could potentially be criminally liable

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[74] Letter from Abraham Sofaer to Senator Patrick J. Leahy, Jan. 21, 2005, *reprinted in* CONG. REC. S12382-12383 (Nov. 4, 2005).

[75] Committee Recommendations, *supra* note 15, at ¶ 15.

[76] P.L. 109-148, Title X, § 1004; P.L. 109-163, Title XIV, § 1404.

[77] President's Statement on Signing of H.R. 2863, the "Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006," Dec. 30 2005, *available at* [http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html].

[78] *See generally* Charlie Savage, *Bush Could Bypass New Torture Ban*, BOSTON GLOBE, Jan. 4, 2006, at A1(quoting a senior White House official under condition of anonymity and several legal scholars as to the meaning of the signing statement).

for such conduct under other statutes.[79] It does, however, provide an express legal defense to U.S. personnel in any civil or criminal action brought against them on account of their participation in the authorized interrogation of suspected foreign terrorists. The McCain Amendment specifies that a legal defense exists to civil action or criminal prosecution when the U.S. agent "did not know that the [interrogation] practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful."[80] A good faith reliance on the advice of counsel is specified to be "an important factor, among others, to consider in assessing whether a person of ordinary sense and understanding would have known the practices to be unlawful."[81]

On September 6, 2006, the Department of Defense implemented the requirements of the McCain Amendment by amending the Army Field Manual to prohibit the "cruel, inhuman, or degrading treatment" of any person in the custody or control of the U.S. military. Eight techniques are expressly prohibited from being used in conjunction with intelligence interrogations:

- forcing the detainee to be naked, perform sexual acts, or pose in a sexual manner;
- placing hoods or sacks over the head of a detainee; using duct tape over the eyes;
- applying beatings, electric shock, burns, or other forms of physical pain;
- waterboarding;
- using military working dogs;
- inducing hypothermia or heat injury;
- conducting mock executions; and
- depriving the detainee of necessary food, water, or medical care.[82]

In addition, the Manual restricts the use of certain other interrogation techniques, but these restrictions may be due to other legal obligations besides those imposed by the McCain Amendment.[83]

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[79] *See supra* pp. 10-11.

[80] P.L. 109-148, Title X, § 1004; P.L. 109-163, Title XIV, § 1404.

[81] P.L. 109-148, Title X, § 1004; P.L. 109-163, Title XIV, § 1404.

[82] Department of the Army Field Manual 34-52, Human Intelligence Collector Operations, at 5-75 (2006), *available at* [http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/dod/armyfm2223humanintel.pdf].

[83] The Manual provides that three interrogation techniques may only be used with higher-level approval: (1) "Mutt and Jeff", a good-cop, bad-cop interrogation tactic where a detainee is made to identify with the more friendly interrogator; (2) "false flag," where a detainee is made to believe he is being held by another country known to subject prisoners to harsh interrogation; and (3) separation, by which detainees are separated so that they cannot coordinate their stories. Separation may not be used against "lawful combatants," as this tactic is prohibited under the 1949 Geneva Convention Relative to the Treatment of Prisoners of War, but is permitted in some circumstances against unlawful combatants. *Id.*

(continued...)

Application of CAT and Its Implementing Legislation in Armed Conflicts

In recent years, there has been some controversy regarding the application of CAT by the United States towards persons captured in Iraq, Afghanistan, and elsewhere in the context of the "war on terror" and how that application relates to the standards owed under the 1949 Geneva Conventions concerning the protections of civilians and prisoners of war during armed conflicts. The rule of *lex specialis* provides that when two different legal standards may be applied to the same subject-matter, the more specific standard controls.[84] Accordingly, the Geneva Conventions, which proscribe specific rules for the treatment of detainees during armed conflicts, establish the primary legal duties owed by the United States towards battlefield detainees rather than CAT, which is more general in scope.

There is some debate whether the rule of *lex specialis* means that the laws of war are the singular international standard governing the treatment of persons during armed conflict or whether human rights treaties such as CAT may impose complementary duties.[85] The current position of the U.S. executive branch appears to be that CAT does not apply to armed conflicts. In a 2006 hearing before the Committee against Torture, representatives of the U.S. State Department argued that CAT did not apply to detainee operations in Afghanistan, Iraq, and Guantánamo, which were controlled by the laws of armed conflict.[86] In support of this position, the U.S. argued that CAT's negotiating history revealed an understanding by the negotiating parties that the treaty was intended to cover domestic obligations owed by parties and was not meant to overlap with different treaties governing the standards owed in armed conflicts.[87] The Committee against Torture disagreed with this view and recommended that the United States "should recognize and ensure that the Convention applies at all times, whether in peace, war or armed conflict, in any territory under its jurisdiction."[88]

Regardless of whether CAT itself applies during armed conflicts, certain legislation enacted by the United States to implement CAT requirements does. As mentioned previously, the Federal Torture Statute criminalizes torture anywhere

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[83] (...continued)
at Appendix M.

[84] *See* Robert M. Chesney, *Leaving Guantánamo: the Law of International Detainee Transfers*, 40 U. RICH. L. REV. 657 (2006) (describing *lex specialis* rule and its application to CAT).

[85] *See generally* Heike Krieger, *A Conflict of Norms: the Relationship Between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study*, 11 J. CONFLICT & SECURITY L. 265 (2006).

[86] Committee against Torture, Consideration of Reports Submitted by States Parties under Article 19 of the Convention (United States), Summary Record, CAT/C/SR.703 (May 12, 2006).

[87] *Id.*

[88] Committee Recommendations, *supra* note 15, at ¶ 14.

outside the United States, without regard to whether such conduct occurred in the context of an armed conflict. Both the McCain Amendment and Military Commissions Act prohibit cruel, inhuman, and degrading treatment of persons in U.S. custody, regardless of where they are held or for what purpose.

Decisions by Non-U.S. Bodies Concerning Whether Certain Interrogation Techniques Rise to the Level of Torture

Although U.S. courts and administrative bodies have found that severe beatings, maiming, sexual assault, rape, and (in certain circumstances) death threats may constitute "torture" for purposes of either CAT or the TVPA,[89] there is little U.S. jurisprudence concerning whether harsh yet sophisticated interrogation techniques of lesser severity constitute "torture" under either CAT or U.S. implementing legislation. "Severe" pain or suffering constituting torture is not defined by either CAT or the federal torture statute.[90] Although few, if any, U.S. courts have had the

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[89] *See, e.g,* Zubeda v. Ashcroft, 333 F.3d 46 (3rd Cir. 2003) ("[r]ape can constitute torture"); Al-Saher v. I.N.S., 268 F.3d 1143 (9th Cir. 2001) (finding that regular, severe beatings and cigarette burns inflicted upon an Iraqi alien by prison guards entitled him to relief under CAT Article 3 from removal to Iraq); Matter of Kuna, A76491421 (BIA July 12, 2001) (unpublished) (Board of Immigration Appeals decision concluding that rape and sexual assault may constitute torture for purposes of CAT). For purposes of the Torture Victims Relief Act, 22 U.S.C. § 2152 note, torture is defined as including "the use of rape and other forms of sexual violence by a person acting under the color of law...." As noted by the 2004 DOJ Memo, U.S. courts have reached differing conclusions as to whether death threats constitute mental torture, with such findings largely dependent on whether the person threatened suffered prolonged mental harm. *See* 2004 DOJ Memo, *supra* note 63, at 14-15, *citing* Sackie v. Ashcroft, 270 F. Supp. 2d 596 (E.D. Pa. 2003) (finding that individual forcibly recruited as child soldier and forced to take narcotics and threatened with imminent death during a three to four year period had suffered prolonged mental harm constituting torture during this period); Villeda Aldana v. Fresh Del Monte Produce, Inc., 305 F. Supp. 2d 1285 (S.D. Fla. 2003) (rejecting a torture claim under the Torture Victims Protection Act brought by persons who had been held at gunpoint overnight and repeatedly threatened with death, when they had failed to show that they had suffered any longstanding mental harm as a result); Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322 (N.D. Ga. 2002) (finding that plaintiffs had been victims of mental torture when they were forced to play Russian roulette and suffered "long-term psychological harm" as a result).

[90] Although "severe ... pain or suffering" is not specifically defined anywhere in the United States Code, the War Crimes Act, as amended by the Military Commissions Act of 2006, describes "serious physical pain or suffering" as bodily injury that involves (1) a substantial risk of death; (2) extreme physical pain; (3) a burn or physical disfigurement of a serious nature (other than cuts, abrasions, or bruises); or (4) significant loss or impairment of the function of a bodily member, organ, or mental faculty. 18 U.S.C. § 2441(d)(2). It is unclear whether a reviewing court would view "severe ... pain and suffering" as having to be of greater intensity than the type of pain and suffering labeled "serious" under the War Crimes Act. The kinds of pain and suffering labeled "serious" under the War Crimes Act have previously been found to be of sufficient severity to constitute torture. *See Al-Saher,* 268 F.3d at 1143 (regular, severe beatings and cigarette burns constituted "torture"); *Mehinovic,* 198 F. Supp. 2d at 1322 (acts of brutality including tooth-pulling and severe beatings resulting in broken bones and disfigurement constituted torture). Indeed, the 2002 DOJ

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opportunity to address this issue, decisions and opinions issued by foreign courts and international bodies might serve as indicators of an international prohibition against certain interrogation techniques. Assuming for the purposes of discussion that a U.S. body reviewed certain interrogation methods to assess whether they constituted "torture" for purposes of CAT and domestic implementing legislation, it might consider looking at jurisprudence by non-U.S. bodies for guidance, though such jurisprudence would not be binding upon U.S. courts. It should also be noted that the U.S. military has also barred specified interrogation techniques it has deemed to rise to the level of torture, and a reviewing court may consider these prohibitions as well.[91]

This section will briefly discuss two notable circumstances in which international bodies have assessed whether a State's interrogation techniques constituted torture.

British Interrogation Techniques Employed in Northern Ireland

In 1978, the European Court of Human Rights (ECHR) heard a case brought by Ireland against the United Kingdom concerning British tactics used to counter secessionist movements and organizations in Northern Ireland during the early 1970s, and whether such tactics violated the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention).[92] One issue that the ECHR was asked to resolve was whether five interrogation techniques previously employed by British authorities and approved by "high level" British officials[93] violated Article 3 of the European Convention, which provides that "no one shall be

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[90] (...continued)
memo discussing severe physical pain and suffering constituting torture suggested that it must be "equivalent in intensity to the pain accompanying *serious* physical injury, such as organ failure, impairment of bodily function, or even death." 2002 DOJ Memo *supra* note 60, at 1. In the 2004 DOJ Memo superseding the Department's earlier memorandum on torture, the DOJ rejected this earlier finding to the extent that it treated severe physical suffering as identical to severe physical pain, and concluded that "severe physical suffering" may constitute torture under the federal torture statute even if such suffering does not involve "severe physical pain." 2004 DOJ Memo, *supra* note 63, at 10.

[91] The 1992 version of the Army Field Manual lists the following acts as examples of mental or physical torture: mock execution; electric shock; infliction of pain through chemicals or bondage (other than legitimate use of restraints to prevent escape); chemically-induced psychosis; forcing an individual to stand, sit, or kneel in abnormal positions for prolonged periods of time; food deprivation; abnormal sleep deprivation; and any form of beating. Department of the Army Field Manual 34-52, Intelligence Interrogation (1992),at 1-8, *available at* [http://www4.army.mil/ocpa/reports/ArmyIGDetaineeAbuse/FM34-52Intel Interrogation.pdf].

[92] Ireland v. United Kingdom, Judgment, European Court of Human Rights (1978), *available at* [http://www.worldlii.org/eu/cases/ECHR/1978/1.html] [*hereinafter* "*Ireland*"].

[93] *Id.* at ¶ 97. At the time of the Court's decision, Britain had pledged not to use the interrogation techniques in the future. *Id.* at ¶ 153.

subjected to torture or to inhuman or degrading treatment or punishment."[94] According to the ECHR, these five interrogation techniques, which were sometimes used in combination and other times individually, included

> (1) wall-standing: forcing the detainees to remain for periods of some hours in a "stress position", described by those who underwent it as being "spreadeagled against the wall, with their fingers put high above the head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers";
>
> (2) hooding: putting a black or navy coloured bag over the detainees' heads and, at least initially, keeping it there all the time except during interrogation;
>
> (3) subjection to noise: pending their interrogations, holding the detainees in a room where there was a continuous loud and hissing noise;
>
> (4) deprivation of sleep: pending their interrogations, depriving the detainees of sleep; and
>
> (5) deprivation of food and drink: subjecting the detainees to a reduced diet during their stay at the center and pending interrogations.[95]

An investigation by the European Commission of Human Rights concluded that no physical injury resulted from the use of these techniques, though certain detainees suffered weight loss and adverse effects upon their "acute psychiatric systems ... during interrogation."[96]

The ECHR concluded that the interrogation techniques employed by Britain violated the European Convention's prohibition upon "inhuman or degrading treatment," but found that the interrogation methods did not constitute "torture."[97] The ECHR stated that a distinction exists between inhuman or degrading treatment and torture; a "distinction [that] derives principally from a difference in the intensity of the suffering inflicted."[98] The ECHR concluded that while the five interrogation techniques, at least when used in combination, were inhuman or degrading treatment, "they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood."[99] The ECHR did not offer an in-depth analysis as to why these techniques did not cause sufficient suffering to constitute torture, although it should be noted that it appeared that few, if any, of the persons who were subject to the interrogation techniques sustained lasting, debilitating physical or mental injuries. It did note, however, that its inquiry required an evaluation of "all the circumstances of the case, such as the duration of the treatment, its physical or mental

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[94] 213 U.N.T.S. 211(1955).

[95] *Ireland*, *supra* note 92, at ¶ 96.

[96] *Id.* at ¶ 104.

[97] *Id.* at ¶ 167.

[98] *Id.*

[99] *Id.*

effects and, in some cases, the sex, age and state of health of the victim."[100] Accordingly, it may be possible that in different circumstances these interrogation techniques might be judged by the ECHR to rise to the level of torture.

Israeli Interrogation Techniques Employed Against Palestinian Security Detainees

Beginning in the late 1980s and ending in the late 1990s, certain Israeli security forces were authorized to employ harsh interrogation techniques against Palestinian security detainees, including the use of "moderate physical pressure." In its initial report to the CAT Committee, Israel argued that the interrogation techniques it employed were in accordance with international law prohibiting torture.[101] It specifically noted the ECHR decision declaring that the interrogation techniques employed by Britain in Northern Ireland during the early 1970s did not constitute torture.[102] The Committee concluded, however, that such tactics were "completely unacceptable" given Israel's obligations under CAT Articles 2 and 16.[103]

In response to Committee concerns about its interrogation techniques, Israel submitted additional information concerning the nature of the interrogation techniques it employed against Palestinian security detainees. According to the CAT Committee, these interrogation techniques included

(1) restraining in very painful conditions,
(2) hooding under special conditions,
(3) sounding of loud music for prolonged periods,
(4) sleep deprivation for prolonged periods,
(5) threats, including death threats,
(6) violent shaking, and
(7) using cold air to chill.[104]

In 1997, after examining a special report by Israel discussing these tactics, the Committee concluded that the tactics described violated Israel's obligations as a party to CAT, representing a breach of CAT Article 16 and constituting torture as defined by CAT Article 1.[105] The Committee opinion suggests that some of the interrogation techniques employed by Israel might constitute torture when employed singularly,[106]

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[100] *Id.* at ¶ 162.

[101] Committee against Torture, Initial reports of States Parties Due in 1992: Israel, U.N. Doc. CAT/C/16/Add.4 (1994), at ¶ 34.

[102] *Id.*

[103] *See* Committee against Torture, Concluding Observations of the Committee against Torture: Israel, A/49/44 (1994) at ¶ 168.

[104] Concluding Observations of the Committee against Torture : Israel, 18th Sess., U.N. Doc. A/52/44 (1997) at ¶ 257.

[105] *Id.* at ¶ 256.

[106] *See id.* at ¶ 257 (noting that the Committee's conclusion that the interrogation techniques (continued...)

although the Committee did not specify how particular methods constituted torture. Despite acknowledging that Israel faced a "terrible dilemma ... in dealing with terrorist threats to its security," the Committee noted that CAT provides that no exceptional circumstances permit State parties to engage in torture.[107] Accordingly, the Committee recommended that Israel immediately cease its use of the interrogation tactics described above.[108]

The Committee is an advisory body, and its rulings are not binding. However, in 1999, the Israeli Supreme Court, sitting as the Israeli High Court of Justice, concluded that the interrogation techniques evaluated by the Committee were contrary to Israeli law, and prohibited their usage except in cases when "special permission" was granted permitting their usage against detainees believed to possess information about an imminent attack.[109] In doing so, however, the High Court did not expressly determine whether such actions constituted "torture." According to the State Department, Israel is reported to have used such techniques at least 90 times since the Israeli High Court's ruling.[110] For its part, the U.S. State Department reported in 2000 that Israeli security forces "abused, and in some cases, tortured Palestinians suspected of security offenses."[111] More recently, the State Department has described Israel's interrogation tactics as "degrading treatment," but noted that human rights groups claim that torture is being employed.[112]

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[106] (...continued)
constituted torture was "particularly evident where such methods of interrogation [were] used in combination, which appears to be the standard case").

[107] *Id.* at ¶ 258.

[108] *Id.* at ¶ 260.

[109] *See* Pub. Comm. Against Torture in Israel v. State of Israel, Judgment, H.C. 5100/94, Israeli High Court of Justice (1999), *available at* [http://www.hamoked.org.il/items/260_eng.pdf].

[110] U.S. Dept. of State, Bureau Of Democracy, Human Rights, and Labor, Country Reports on Human Rights Practices - 2002 (Mar. 31, 2003), *available at* [http://www.state.gov/g/drl/rls/hrrpt/2002/18289.htm].

[111] U.S. Dept. of State, Bureau Of Democracy, Human Rights, and Labor, Country Reports on Human Rights Practices - 1999: Israel and the Occupied Territories (Feb. 23, 2000), *available at* [http://www.state.gov/g/drl/rls/hrrpt/1999/416.htm].

[112] U.S. Dept. of State, Bureau Of Democracy, Human Rights, and Labor, Country Reports on Human Rights Practices - 2003: Israel and the Occupied Territories (Feb. 25, 2004), *available at* [http://www.state.gov/g/drl/rls/hrrpt/2003/27929.htm]. *See also* U.S. Dept. of State, Bureau Of Democracy, Human Rights, and Labor, Country Reports on Human Rights Practices - 2005: Israel and the Occupied Territories (Mar. 5, 2006), *available at* [http://www.state.gov/g/drl/rls/hrrpt/2003/27929.htm].