

# The International Law of Torture: From Universal Proscription to Effective Application and Enforcement

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Man has the capacity to push aside from his mind unpleasant problems.

—Sean MacBride (1977)<sup>1</sup>

In extreme situations when human lives and dignity are at stake, neutrality is a sin. It helps the killers, not the victims.

—Elie Wiesel<sup>2</sup>

## I. INTRODUCTION: THE NATURE AND SCOPE OF THE PROBLEM

This Article presents a comprehensive review of world torture and the efforts to eradicate it through both official and unofficial strategies of intervention, with special emphasis on the legal strategies. This Article recognizes the complexity of these strategies as they form a vast number of initiatives emerging from various elements of the international community. Part II of the Article touches on matters of definition and legal history. This enables the examination of the inherent characteristics of torture as they impact issues of governance, social control, and principles of basic respect and human dignity. Part III examines the efforts to universally proscribe torture in international law. It provides an overview of critical provisions of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Part IV describes and critically evalu-

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1. ALEX P. SCHMID, PROJECT INTERDISCIPLINAIR ONDERZOEK NAAR OORZAKEN VAN MENSEN-RECHTENSCHENDIGEN (P.I.O.O.M.) RESEARCH ON GROSS HUMAN RIGHTS VIOLATIONS (1989).

2. *Id.* Mr. Wiesel is a survivor of the Holocaust and a Nobel Prize winner.

ates United Nations-sponsored mechanisms created for the purpose of eradicating torture. Part V examines United States policy and the impact of domestic concerns on Congress's attempts to ratify international treaties. Part VI describes the decentralized character of the international system and underlines the importance of regional and municipal law initiatives to facilitate the objective of ending torture. This Part extensively reviews United States, European, and Israeli practice and case law. Part VII touches on the importance of civil society initiatives that complement litigation, legislation, administrative action, and United Nations initiatives in working toward a regime of complete abolition. It discusses a number of strategic initiatives available in the attempt to effectively abolish torture.

There is a universal consensus in the international community that torture and other forms of cruel, inhuman, or degrading punishment or treatment cannot be reconciled with a global order fundamentally committed to basic respect and human dignity. Torture attacks the essential physical and psychological integrity of a human being. It is, therefore, not surprising that torture is prohibited by international, regional, and national law. However, the practice of state craft proves that there exists an operational code that accepts and sometimes, advertently or inadvertently, supports the torturer.<sup>3</sup> It may go further and seek to immunize the torturer from any sense of responsibility for torture-conditioned conduct.<sup>4</sup>

The empirical evidence that supports this charge indicates that the international community is far from reaching its goal of complete eradication of torture.<sup>5</sup> For example, Amnesty International's Annual Report of 1999 provides the following statistics relating to torture and ill-treatment: in the sub-Saharan African region, some thirty-three countries provide evidence of torture or ill-treatment by state operatives, and twenty countries are implicated in deaths attributable to torture, ill-treatment, or negligence through inhuman and degrading prison conditions.<sup>6</sup> In the Middle East and North Africa, at least eighteen countries reveal evidence of torture or ill-treatment, and at least eight countries show evidence of deaths resulting from torture,

3. See, e.g., T.R. Gurr, *The Political Origins of State Violence and Terror: A Theoretical Analysis*, reprinted in M. STOHL & GEORGE A. LOPEZ, *GOVERNMENT VIOLENCE AND REPRESSION: AN AGENDA FOR RESEARCH*, (M. Stohl & George A. Lopez eds., 1986); M. STOHL & GEORGE A. LOPEZ, *THE STATE AS TERRORIST: THE DYNAMICS OF GOVERNMENTAL VIOLENCE AND REPRESSION* (1984); A.P. SCHMID ET AL., *POLITICAL TERRORISM: A NEW GUIDE TO ACTORS, AUTHORS, CONCEPTS, DATA BASES, THEORIES AND LITERATURE* 58–59 (1988); David Claridge, *Know Thine Enemy: Understanding State Terrorism*, P.I.O.O.M. NEWSLETTER, Winter 1999/2000. For the leading study on the politics of torture, see ALEX P. SCHMID, *THE POLITICS OF PAIN: TORTURERS AND THEIR MASTERS* (1985).

4. See generally Wayne C. Booth, *Individuals and the Mystery of the Social Self; or Does Amnesty Have a Leg to Stand On?*, reprinted in *FREEDOM AND INTERPRETATION: THE OXFORD AMNESTY LECTURES 1992* at 69–101 (Barbara Johnson ed., 1993) (presenting the most penetrating and insightful analysis of individual identity, social identity, universal obligation, and the issue of torture).

5. E.g., NIGEL S. RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* (1987); AMNESTY INTERNATIONAL, *TORTURE IN THE EIGHTIES* (1984); SCHMID, *supra* note 1.

6. AFRICA 1999: HIGHLIGHTS OF AMNESTY INTERNATIONAL REPORT 1999 COVERING EVENTS FROM JANUARY TO DECEMBER 1998, at <http://www.amnesty.org/ailib/aireport/ar99/af.htm> (1999).

ill-treatment, or inhuman and degrading prison conditions.<sup>7</sup> In Europe, there were reports of people tortured or ill-treated by state operatives in some thirty-one countries; death in custody is confirmed or suspected in at least six countries.<sup>8</sup> In the Americas, twenty-one countries practice torture or ill-treatment, and deaths attributable to torture or inhuman and degrading prison conditions occurred in at least six countries.<sup>9</sup> In the Asia-Pacific region, at least twenty-two countries report torture or various forms of ill-treatment by state operatives; deaths from ill-treatment or torture are indicated in at least eleven countries.<sup>10</sup> Statistics on torture show that during 1998, no less than 125 countries reportedly tortured people. Furthermore, torture or ill-treatment, lack of medical care, and cruel, inhuman, or degrading prison conditions resulted in deaths in fifty-one countries.<sup>11</sup> These statistics are quite shocking considering that torture and ill-treatment are most often committed by governmental officials, who knew or should have known that the law prohibited their acts of torture or ill-treatment. Even more disquieting is the knowledge that the practice of torture is often among the least transparent aspects of governmental policy and practice. Amnesty International's numbers may simply reflect the tip of the iceberg.<sup>12</sup>

In order to uncover completely and begin to attack the problem of torture it is important that the issue became a higher priority within the international community. It is no longer a matter of developing international instruments of universal prescriptive force. The international community must now give the existing laws proscribing torture full procedural efficacy. The international community needs to develop effective strategies to give practi-

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7. MIDDLE EAST & NORTH AFRICA 1999: HIGHLIGHTS OF AMNESTY INTERNATIONAL REPORT 1999 COVERING EVENTS FROM JANUARY TO DECEMBER 1998, at <http://www.amnesty.org/ailib/aireport/ar99/mde.htm> (1999).

8. EUROPE 1999: HIGHLIGHTS OF AMNESTY INTERNATIONAL REPORT 1999 COVERING EVENTS FROM JANUARY TO DECEMBER 1998, at <http://www.amnesty.org/ailib/aireport/ar99/eur.htm> (1999).

9. AMERICAS 1999: HIGHLIGHTS OF AMNESTY INTERNATIONAL REPORT 1999 COVERING EVENTS FROM JANUARY TO DECEMBER 1998, at <http://www.amnesty.org/ailib/aireport/ar99/amr.htm> (1999).

10. ASIA PACIFIC 1999: HIGHLIGHTS OF AMNESTY INTERNATIONAL REPORT 1999 COVERING EVENTS FROM JANUARY TO DECEMBER 1998, at <http://www.amnesty.org/ailib/aireport/ar99/asa.htm> (1999).

11. FACTS AND FIGURES ABOUT AMNESTY INTERNATIONAL AND ITS WORK FOR HUMAN RIGHTS, at <http://www.web.amnesty.org/web/aboutai.nsf> (last visited on Dec. 2, 2000).

12. See generally UN COMMITTEE AGAINST TORTURE MUST CONDEMN INCREASING INSTITUTIONALIZED CRUELTY IN USA, Amnesty International Public Document, AI Index AMR 51/68/2000 News service Nr. 84, at <http://www.web.amnesty.org/ai.nsf/index/AMR510682000> (Sept. 5, 2000) (establishing that "[s]ince the United States ratified the Convention Against Torture [*infra* note 44], in October 1994, its increasingly punitive approach towards offenders has continued to lead to practices which facilitate torture or other forms of ill-treatment prohibited under international law . . . The spiraling prison and jail population . . . and the resulting pressures on incarceration facilities have contributed to widespread ill-treatment of men, women and children in custody. Police brutality is rife in many areas, and it is disproportionately directed at racial and ethnic minorities." This suggests that even such countries as the United States (a country with a relatively "clean record" as to gross human rights violations) are still confronted by the problem of torture.).

cal, operational effect to an obligation *erga omnes*<sup>13</sup> to eliminate torture from the operations and practices of governance at all levels.<sup>14</sup>

The relationship between torture and governance is complicated. In addition to inflicting individual suffering, the practice of torture undermines the very foundations and principles of the current world order. Torture is completely antithetical to the notion of good governance and the democratic ideal.<sup>15</sup> The minimum criteria for achieving good governance include the elements of accountability, transparency, responsibility, and the consent of the governed.<sup>16</sup> The standards which guide the practices of official torture, however, involve an obfuscation of accountability, a strenuous cloak of secrecy to prevent any level of transparency, a denial of any sense of responsibility for torture, and a complete disregard for the will of the people. In this sense, the practice of torture undermines the very foundations and principles of the current world order.

As torture is conduct that cannot be officially sanctioned by law, it is also conduct that seeks, operationally, to trump law. In this sense, torture challenges the very idea of law itself. Furthermore, the practice of torture, which denies transparency, accountability, and responsibility, often triggers enhanced levels of deprivation, such as disappearances, extrajudicial killings, and genocide. Because these forms of deprivation immeasurably enhance the stakes involved in social conflict and increase the difficulty of implementing strategies of peaceful conflict resolution, the practice of torture attacks the idea of peace itself.<sup>17</sup>

Thus, apart from the prospect of numerous deprivations directed at the victims of torture, torture has broader consequences for world order. It attacks the authority and legitimacy of the state, provokes or intensifies social conflict, undermines the idea of peace, and, in its tacit claim to unlimited social control, challenges the idea of the rule of law itself.

13. See generally *Case Concerning Barcelona Traction, Light and Power Co. (Belgium v. Spain)* 1972 I.C.J. 3, 32 (Feb. 5) (establishing that sufficient legal basis exists to reach the conclusion that all crimes against humanity function *erga omnes*, the International Court of Justice recognized, "[t]he prohibition in international law of acts, such as those alleged in this case, is an obligation *erga omnes* which all states have a legal interest in ensuring is implemented.")

14. See M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 489 (1992) (stating that torture is an act violating international law and represents an infringement of an *ius cogens* norm, which is defined as a norm whose importance rises to a level that is acknowledged to be superior to and overriding of any other principle).

15. Thomas M. Franck, *The Emerging Right To Democratic Governance*, 86 AM. J. INT'L. L. 46, 46 (1992) (quoting the former U.S. Secretary of State, James A. Baker III, who said, "legitimacy in 1991 flows not from the barrel of a gun but from the will of the people.")

16. Universal Declaration of Human Rights, *adopted* Dec. 10, 1948, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948) [hereinafter *Universal Declaration of Human Rights*] (stipulating that it is "[t]he will of the people [that] shall be the basis of the authority of government.")

17. See Philip Alston, *Peace as a Human Right*, 11 BULL. PEACE PROPOSALS J. 126, 319-30 (1981), *reprinted in* RICHARD PIERRE CLAUDE & BURNS H. WESTON, *HUMAN RIGHTS IN THE WORLD COMMUNITY: ISSUES AND ACTION* 198-207 (1992).

## II. DEFINING TORTURE

### A. *Inherent Characteristics of Torture*

The central characteristic of the legal concept of torture is that it is an intrinsic part of the narrative of official behavior. The practice of torture is a powerful institutional expression of state craft, power, and social control. The official use of torture, even if denied in theory but used in practice, functionally means that the state (an organ of human association) uses these powers (as critical components of security) to intimidate or sometimes even eliminate its enemies, or indeed non-enemies. When torture becomes routine practice in governance,<sup>18</sup> the state does not represent the moral order of the community, but instead is the repository of authorized violence and impermissible coercion.<sup>19</sup> This is expressed by achieving power through brute force. However, when power is maintained by practices of torture and ill treatment, the claim to state legitimacy is illusory, or weakened.

The state also seeks to validate its use of violence and coercion by appeals to its authority. Even naked power has its limitations in the scheme of social control. The state elite constantly search for moral and ideological justifications for their current and continued existence. The use of torture by the state indicates insecurity in the processes of governance. The state invariably appeals to some moral or normative standard in order to validate recourse to this form of violence and weaken the identification of the state with naked power or brute force. Thus, the state tries to elevate the morality of its use of violence by appeals to notions of self-defense, the protection of security interests at all levels (including national security), the morality of the survival of the state (as a romantic or moral artifact), or the morality implicit in the construction of a state as a higher order framework of human association.<sup>20</sup>

18. See FACTS AND FIGURES ABOUT AMNESTY INTERNATIONAL AND ITS WORK FOR HUMAN RIGHTS, at <http://www.web.amnesty.org/web/aboutai.nsf> (last visited on Dec. 2, 2000) (noting that other practices used by the state to intimidate or sometimes even eliminate its enemies or non-enemies are the following: (1) extrajudicial executions (in 1998 carried out in forty-seven countries around the world); (2) disappearances (in 1998 people disappeared or remained disappeared from previous years in thirty-seven countries); (3) imprisonment of prisoners of conscience (confirmed or possible prisoners in conscience were in 1998 held in seventy-eight countries); (4) unfair trial (political prisoners received unfair trials in 1998 in thirty-five countries); (5) detention without charge or trial (in 1998 people were arbitrarily arrested and detained or in detention without charge or trial in sixty-six countries); (6) imposition of death penalty (executions were carried out in thirty-six countries in 1998 while prisoners were under death sentence in at least seventy-seven countries)).

19. See F.H. Bradley, *Some Remarks on Punishment*, INT'L J. OF ETHICS, Apr. 1894, reprinted in COLLECTED ESSAYS (1958), cited in H. LAUTERPACHT, AN INTERNATIONAL BILL OF RIGHTS OF MAN (1945) (noting that the philosophical justification for state absolutism is often tied to the idealistic school of old philosophers, "[t]he rights of the individual are not worth serious criticism . . . . The welfare of the community is the end and is the ultimate standard. And over its members the right of the moral organism is absolute. Its duty and its right is to dispose of these members as seems to it best. Its right and its duty is, in brief, to be a Providence to itself.").

20. See *id.*

### B. Historical Approaches Toward Practices of Torture

The law did not always define and prohibit torture. Instead, a historical, comparative perspective on the nature of social control discloses ubiquitous evidence of the willingness of those who exercise formal, effective control over others to use torture as an instrument and implement of official social control. Indeed, it is tempting to suggest that the torturer holds a psychological predisposition for the use of torture, possibly rooted in private motives and pathologies.<sup>21</sup> However, what distinguishes torture is that cultural, religious, or ideological perspectives of the operative power elite often covertly sanction it. Thus validated, torture is at least tacitly accepted as in the interest of the community where it is used. In other words, the predisposition to torture requires for its efficacy that it be displaced on public enemies with a religious, cultural, or ideological mechanism of overt or tacit validation of an alleged community interest (usually public order, security, or law and order).

In the history of the common law, torture was an institutionalized part of legal procedure. The procedural methods, by which oaths and proofs could be established, were invariably linked to the judicial infliction of pain for the establishment of a "legal" truth. Possibly the most notorious procedure was the trial by ordeal.<sup>22</sup> In certain situations, where the torturer exhibited a certain masochistic<sup>23</sup> impulse that could influence operational behavior, the torturer rationalized the infliction of pain and suffering as a form of moral cleansing or a moral purgative. It is a tribute to human progress, moral sensibility, and juridical enlightenment that the judiciary, which often shamelessly professed its commitment to the ideals of justice and the rule of law, could reform its procedural methods to conform to ideas of practical reason and operational moral sensibility. However, before the legal profession itself is excoriated for historical hypocrisy, it must also be remembered that the torturer used religious rectitude in the defense or propagation of their religious ideals and institutions.

Religion and law generated a complex moral paradox. Namely, torture was often deemed to be indispensable for the discovery of truth. The pain and suffering, experienced in the practice of torture, was also seen as providing the socially redeeming benefits of moral and spiritual cleansing.<sup>24</sup>

21. See John J. Baeza & Brent E. Turvey, *Sadistic Behavior: A Literature Review*, Knowledge Solutions Library, Electronic Publication, (May 1999) (exploring the close relation that exists between torture and sadism), at [http://www.corpus-delicti.com/sadistic\\_behavior.html](http://www.corpus-delicti.com/sadistic_behavior.html).

22. See JOHN H. LANGBEIN, *TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIENT REGIME* 3-72 (1977) (providing a comprehensive discussion about Roman-canon statutory system of proofs, including the description of methods used for "judicial torture" defined as, "the use of physical coercion by officers of the state in order to gather evidence for judicial proceedings." *Id.* at 3).

23. See STEDMAN'S MEDICAL DICTIONARY, *LAWYER'S EDITION* 837 (5th unabr. ed. 1982) (defining masochism as a "[p]assive algolagnia, a form of perversion in which sexual pleasure is heightened in the person who is beaten and maltreated; the opposite of sadism").

24. See SCHMID, *supra* note 1, at 136 (describing the use of torture to achieve goals of ideological purity within totalitarian regimes).

### C. *Two Forms of Torture*

At this point it should be noted that there are, in fact, two forms of torture. The first refers to the infliction of extreme pain and suffering by a victimizer who dominates and controls. The pain may have either physical or psychological elements or a combination of both. The second version concerns the more restrictive legal definition which includes official state sanction and/or participation. The paradigmatic example of this version involves police or official security practices invoked for the purpose of obtaining a confession, or perhaps as a distinctive form of state-sponsored terrorism and repression.<sup>25</sup> In this latter signification, the torture of a victim with official sanction sends a social message of intimidation and a message about the scope, character, and strategies of official social control. This Article concerns itself with this narrower concept of torture.

The 1984 U.N. Convention Against Torture narrowly defines torture within the confines of the second form. The Convention defines torture as any act which intentionally inflicts severe mental or physical pain on a victim for the purpose of obtaining information or a confession or for punishing the victim for conduct or suspected conduct. Torture may also occur when the infliction of pain and suffering is motivated by any form of officially sanctioned discrimination. Another facet of the Convention definition of torture is that pain or suffering is administered at the instigation, consent, or acquiescence of a public official or another person acting in an official capacity.<sup>26</sup> Therefore, the Convention Against Torture does not necessarily prosecute acts that fall under the first version of torture, namely those that are not inflicted with state sanction.<sup>27</sup>

### D. *Torture in International and Regional Law*

Within the second definition of torture, systematic or widespread torture belongs to a special group of crimes recognized by international law as "crimes against humanity."<sup>28</sup> The category further includes the practice of systematic or widespread murder, forced disappearances, deportation and forcible transfers, arbitrary detention, and persecutions on political or other

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25. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, 39 U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/46 (1984) (entered into force June 26, 1987) [hereinafter *Convention Against Torture*] (specifically excluding from the definition of torture "pain or suffering arising only from, inherent in or incidental to lawful sanctions." *Id.*).

26. *Id.*

27. See SCHMID, *supra* note 1, at 25-26 (defining torture to include killings, summary executions, killing in presumptive armed conflicts, fatal torture, killing by abuse of power in a legal process, killing by death squad, genocide, detained-disappeared and torture).

28. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter *Nuremberg Charter*].

grounds. A number of international conventions or instruments recognize these crimes as crimes against humanity.<sup>29</sup>

The effort to eradicate torture works at many levels of international, regional, and national decision-making and often involves both public and civil society initiatives, working in complementary roles.<sup>30</sup> In addition to the prohibition of torture in contemporary international law and practice, the capacity to provide a sanctioning response to torture has also been extended to the institutions of private law. Thus, in certain regional jurisdictions, torture is viewed as not only a criminal wrong,<sup>31</sup> but also as a civil wrong with a tortious character.<sup>32</sup> This latter area represents an important change in the capacity to control and punish torture through the institutions of civil society.

This has led to multiple initiatives driven by international and regional institutions dealing with human rights law. The most notable initiative is the emergence of a private law dimension that greatly empowers private enforcement against public actors who are implicated in the practice of torture. This development embodies the extension of sanctions against torture from the public to the private sphere.

29. See e.g., *id.*; S.C. Res. 808, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/808 (1993); S.C. Res. 955, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/955 (1994); Cf. *Report of the Secretary General pursuant to paragraph 2 of Security Council resolution 808*, U.N. Doc. S/25704, (1993) (arguing that crimes against humanity do not draw their legality only from international law treaties or other written international instruments, but are also established under international customary law, "the application of the principle *nulum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not rise").

30. See generally FACTS AND FIGURES ABOUT AMNESTY INTERNATIONAL AND ITS WORK FOR HUMAN RIGHTS, at <http://www.web.amnesty.org/web/aboutai.nsf> (last visited on Dec. 2, 2000) (stipulating "today an ever-growing human rights constituency is gathering the facts on abuses by governments, taking action to stop them and strengthening the forces necessary to prevent future violations. More than 1000 domestic and regional organizations are working to protect basic human rights.")

31. See, e.g., *Regina v. Bartle, Ex Parte Pinochet*, 37 I.L.M. 1302 (H.L. 1998); *Regina v. Bartle, Ex Parte Pinochet*, 38 I.L.M. 581 (H.L. 1999); see also *Prosecutor v. Kunarac, et al., Amended Complaint of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia*, Case No.: IT-96-23-PT (2000).

32. See *Alien Tort Claims Act*, 28 U.S.C. § 1350 (2000); *Torture Victim Protection Act of 1991*, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (1994)) (allowing actions to be brought against an individual who, under actual or apparent authority or under color of law of any foreign nation, had subjected another individual to either torture or extrajudicial killing); see also *Construction and Application of Alien Tort Statute* (28 U.S.C.A. § 1350) *Providing for Federal Jurisdiction Over Alien's Action for Tort Committed in Violation of Law of Nations or Treaty of the United States*, 116 A.L.R. Fed. 387 (1993); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (providing the paradigmatic use of 28 U.S.C. § 1350 involving Joelito Filartiga, a seventeen-year-old boy, who was tortured by Paraguayan authorities and died under torture, and holding that, "the law of nations clearly prohibits official torture").



### III. FROM UNIVERSAL PROHIBITION TO UNIVERSAL ERADICATION OF TORTURE: DEVELOPMENTS OF INTERNATIONAL LAW STANDARDS

#### A. *Initial Development of Relevant International Law*

It is generally recognized today that modern human rights law evolved in response to the atrocities committed during the Second World War and to the effort to provide a moral as well as judicial reckoning and understanding of the legacy of that conflict. The creation of the U.N. Charter in 1945<sup>33</sup> represented an effort to specifically prescribe certain obligations on states. These revolutionary obligations related to the matters of aggression, peace and security, and fundamental human rights that implicitly recognized that the idea of state and the idea of sovereignty are not unlimited. Further developments, especially the creation of the Universal Declaration of Rights,<sup>34</sup> created rights for the individual that might be exercised against a sovereign state, another milestone achievement. The 1949 Geneva Conventions<sup>35</sup> and related protocols further extended developments in humanitarian law. Furthermore, the growth of regional human rights law reflects a strong and compelling desire on the part of the international community to ground the perspectives and operations envisioned in the Universal Declaration of Human Rights in actual practice. Additionally, modern constitution-making has tended to draw normative inspiration from the Universal Declaration of Human Rights. Many human rights provisions have found expression in post-war constitutions.<sup>36</sup>

#### B. *Universal Prohibition of Torture*

One of the most fundamental aspects of human rights law is the universal proscription of torture. Article 5 of the Universal Declaration of Human Rights holds that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." This sentiment is similarly expressed in Article 7 of the International Covenant on Political and Civil Rights,<sup>37</sup> Article 3 of the European Convention for the Protection of Human

33. See U.N. CHARTER.

34. See Universal Declaration of Human Rights, *supra* note 15, art. 19.

35. See Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516, 75 U.N.T.S. 287.

36. See, e.g., UGANDA CONST., *reprinted in* 18 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Gisbert H. Franz ed., 1997).

37. See International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, art. 7 [hereinafter International Covenant on Civil and Political Rights] (stipulating that "[i]n particular, no one shall be subjected without his free consent to medical or scientific experimentation").

Rights and Fundamental Freedoms,<sup>38</sup> Article 5 of the African Charter on Human and Peoples' Rights,<sup>39</sup> Article 5 of the American Convention on Human Rights,<sup>40</sup> and Article 99 of the 1949 Geneva Convention dealing with the protection of the prisoners of war.<sup>41</sup> Notwithstanding rhetorical agreements on the prohibition of torture and related practices, there remains a strong desire within state governance to have recourse to the use of violence.

Despite the clear consensus in favor of outlawing torture, the perennial problem facing the international community is the weakness of these prescriptions in practice. The desire of the international community to enforce compliance with human rights expectations through centralized, bureaucratic United Nations agencies has limited efficacy in seeking to control and eliminate torture on a world-wide basis.

Indeed, one of the important developments relevant to the elimination of torture emerged in 1961 with the creation of a nongovernmental organization, Amnesty International.<sup>42</sup> Amnesty International's focus on individual participation for individual victims was an important innovation in the development of human rights law generally and, more particularly, in the development of a grassroots-based global initiative to support and complement the work of the United Nations.<sup>43</sup> Amnesty International's early monitoring of torture on a worldwide basis provided the form of interest articulation, pressure, and support for governmental initiatives (especially in Sweden and Denmark) that enabled the adoption of the Declaration on Protection of All Persons from Being Subjected to Torture and other Cruel, Inhumane or Degrading Punishment by the General Assembly in 1975<sup>44</sup> and later, in 1984,

38. See European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Apr. 11, 1950, 213 U.N.T.S. 222, art. 3 [hereinafter European Convention for the Protection of Human Rights and Fundamental Freedoms] (prohibiting torture by stating that, "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment").

39. See African Charter on Human and Peoples' Rights, *opened for signature* June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58, art. 5 (1982) [hereinafter African Charter on Human and Peoples' Rights] (extending the protection to the maximum when it sets out that "[a]ll forms of exploitation and degradation of man, particularly . . . torture, cruel, inhuman or degrading punishment and treatment shall be prohibited").

40. See American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123, art. 5(2) (stipulating in Article 5 (2) that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person").

41. See Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (stating that, "[n]o moral or physical coercion may be exerted on a prisoner of war in order to induce him to admit himself guilty of the act of which he is accused").

42. See FACTS AND FIGURES ABOUT AMNESTY INTERNATIONAL AND ITS WORK FOR HUMAN RIGHTS, at <http://www.web.amnesty.org/web/aboutai.nsf> (last visited on Dec. 2, 2000) (providing a comprehensive description of the origins and ongoing work of Amnesty International).

43. *Id.*

44. See Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, G.A. Res. 34/52, U.N. GAOR, 39th Sess., Supp. No. 34, U.N. Doc. A/10034 (1975) [hereinafter Declaration Against Torture] (declaring that certain "exceptional circumstances such as a state of war or a threat of war, internal political instability or any other

the Convention Against Torture and Other Cruel Inhumane or Degrading Treatment or Punishment.<sup>45</sup> The Convention Against Torture itself is supplemented by several other U.N. General Assembly initiatives promulgated in part as a result of pressure from global civil society.<sup>46</sup> These developments included the drafting of the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment,<sup>47</sup> the Code of Conduct for Law Enforcement Officials,<sup>48</sup> and the Principles of Medical Ethics.<sup>49</sup> In 1985, the U.N. Commission on Human Rights established the office of the Special Rapporteur on Torture. The treaty-making process and the enforcement mechanisms created by the United Nations are in itself an extremely important part of the efforts to universally eradicate torture.

Despite its far-reaching progress in giving some efficacy to the prescriptive force of international laws that seek to eradicate torture, the United Nations faces certain inherent institutional limitations. This has led to international organizations mobilizing their resources to aid the international campaign against torture. In the mid-1990s, for example, Amnesty International held an international conference to refocus international concern on torture, lobbied for action against torture at the U.N. World Conference on Racism, and launched a campaign to universally eradicate torture to complement the efforts of the United Nations.<sup>50</sup> This illustrates the need for international organization in the campaign to eradicate torture.

### *C. Convention Against Torture*<sup>51</sup>

The most important U.N. treaty for controlling, regulating, and prohibiting torture and related practices is the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The drafting of the Convention Against Torture was commenced by the U.N. Com-

public emergency may not be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment").

45. See Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) [hereinafter *Convention Against Torture*].

46. See G.A. Res. 3218, U.N. GAOR, 29th Sess., Supp. No. 31, at 82, U.N. Doc. A/9631 (1974) (emphasizing the enactment of a resolution resulting from sustained pressure by national and international non-governmental organizations).

47. See Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, G.A. Res. 43/173, U.N. GAOR, 43rd Sess., Supp. No. 49, U.N. Doc. A/43/49 (1988).

48. Code of Conduct for Law Enforcement Officials, G.A. Res. 34/169, U.N. GAOR, 34th Sess., Supp. No. 46, at 185, U.N. Doc. A/34/46 (1979).

49. Principles of Medical Ethics Relevant to the Role of Health Personnel, Particularly Physicians, in the Protection of Prisoners and Detainees Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 37/194, U.N. GAOR, 37th Sess., Supp. No. 51, at 210, U.N. Doc. A/37/51 (1982).

50. Amnesty International, <http://www.stop torture.org> (last visited on Dec. 2, 2000) (describing the campaign against torture that was launched in October 2000 in more than sixty countries).

51. For a detailed overview of the Convention Against Torture, see *Convention Against Torture, 1990: Hearings before the U.S. Senate Foreign Relations Comm.*, 101-2nd Cong. (1990) (statement of Winston P. Nagan, Board Chairman, Amnesty International USA).

mission on Human Rights in 1978, and the document was adopted by the General Assembly in 1984.<sup>52</sup> In its final form, the Convention Against Torture was based substantially, but not exclusively, on the Declaration Against Torture. The Convention Against Torture stipulates explicitly in Article 2 that countries under the Convention are obliged to "take effective legislative, administrative, judicial and other measures to prevent acts of torture." This particular provision formally established the specific legal obligation of the state to prevent torture.

No government had previously asserted such an extensive list of reservations, declarations, and understandings as that proposed by the U.S. State Department's letter of December 19, 1989. Among the more disquieting reservations were the proposed declaration that the provisions of Article 1 through Sixteen of the Convention not be self-executing; the proposed federal-state reservation seeking to limit the implementation of the Convention "to the extent that the Federal Government exercises legislative and judicial jurisdiction over the matters covered therein"; and the proposed understanding of the definition of torture in Article 1.

The United States also expressed concern regarding Article 2's wide jurisdictional reach strengthening the capacity of state action to prohibit torture. Furthermore, Article 7(1) of the Convention Against Torture imposes upon every state that is a party to this Convention a solemn duty to extradite anyone found in its jurisdiction whom is alleged to have committed torture or to "submit the case to its competent authorities for the purpose of prosecution." The practical weakness of this approach is that states may be reluctant to prosecute nationals of another state, especially government officials, because of the fear of reciprocal actions against their own citizens, hence the U.S. reservations.

As important as the United Nations' appeals to state responsibility may be, practice has shown that a great deal more needs to be done to constrain the behavior of state officials bent on committing acts of torture. For example, one of the most interesting methods of seeking to police and prevent torture is the "urgent action" technique developed by Amnesty International.<sup>53</sup> Urgent action is launched on behalf of prisoners and others who are in immediate danger of serious human rights violations, such as torture or extrajudicial execution. The Urgent Action Network is made up of more than 80,000 volunteers in more than eighty-five countries. First, the Amnesty International Secretariat in London issues the urgent action to the national sections, who then distribute it to the members of the Urgent Action network in the relevant country or territory. The members are asked to send appeals by the fastest means possible to the people, organizations, and insti-

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52. For the underlying mandate for the drafting of the Convention Against Torture, see G.A. Res. 32/62, U.N. GAOR, 32d Sess., Supp. No. 45, U.N. Doc. A/32/355 (1977).

53. FACTS AND FIGURES ABOUT AMNESTY INTERNATIONAL AND ITS WORK FOR HUMAN RIGHTS, at <http://www.web.amnesty.org/web/aboutai.nsf> (last visited on Dec. 2, 2000).

tutions indicated. The number of appeals varies in each case. A case can generate anywhere between three and 5000 appeals.

Urgent action is a tool of enforcement that is not limited by the constraints of diplomatic protocol, nor does it require political action from bureaucrats within the United Nations, who may be torn between their obligations to seek states' financial and political support and their desires to expose the states' wrongdoings. The urgent action method of intervention identifies the victim, the range of potential victimizers in the chain of command, the venue where torture occurs, and the nature of the torture practice under scrutiny. The urgent action technique is especially effective due to its methods of electronic distribution and global, cross-cultural mobilization of opinion. The technique also identifies officials in the chain of responsibility, bringing transparency to otherwise anonymous processes.

Further Articles highlight the importance of state compliance in the effective application of the Convention Against Torture. Article 2 limits the processes that provide for the easy justification of torture through variously formulated national security imperatives. Article 2 specifically holds that torture cannot be validated by the claim to exceptional circumstances as in, for example, "war or a threat of war, internal political instability or any other public emergency." Article 2 follows the principle of the Nuremberg Charter that an order from a superior officer or public authority cannot serve as a legal defense.<sup>54</sup>

Article 4 of the Convention Against Torture makes clear that the crime of torture is of a "grave nature." States must therefore regard it as within the category of crimes for which the defendant may be extradited under Article 8. Articles 5 through 7 of the Convention Against Torture incorporate the well-established principle of state-conditioned universal jurisdiction: the state is obliged to either institute criminal proceedings against the torturer or to extradite the person to another state to stand trial there. The principles of jurisdiction based on nationality or territoriality do not constrain these precepts.

The Convention's emphasis on preventing torture is also extremely important. Torture cannot be undone once it is committed, and a sanctioning policy in which the punishment is somehow proportionate to the crime is very problematic in cases of torture, mass murder, and genocide. Therefore, an extremely important strategy of global torture law enforcement is to emphasize the prevention of torture. Article 10 of the Convention Against Torture requires states to educate their "law enforcement personnel, civil or military, medical personnel, public officials, and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment" about the prohibition against torture. Resolution 1999/32 of the U.N. Commission on Human Rights

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54. Nuremberg Charter, *supra* note 28.

bolstered this mandate, calling upon the United Nations High Commissioner for Human Rights to provide, at the request of governments, advisory services to these governments.<sup>55</sup> These advisors would guide states with respect to their obligations to ensure education and training of law enforcement and other personnel, as well as technical assistance in the development, production, and distribution of appropriate teaching materials.

Amnesty International adopted a Twelve-Point Program for the Prevention of Torture in October 1983 that recognizes the same obligation. The ninth point of this Twelve-Point Program stipulates: "It should be made clear during the training of all officials involved in the custody, interrogation or treatment of prisoners that torture is a criminal act. They should be instructed that they are obliged to disobey any order to torture."<sup>56</sup>

Education is a long-term goal, and the effective prevention of torture must be grafted onto the core expectations of law enforcement in the field, where officials directly interrogate those in their custody. Toward that end, Article 11 of the Convention Against Torture requires states to "keep under systematic review interrogation rules, instructions, methods and practices, as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment."<sup>57</sup> Article 11 professionalizes the practices of interrogation and mandates the creation of a record of actual practices, thereby enhancing not only education, but transparency and accountability as well.

Article 12 of the Convention Against Torture requires the parties to the Convention to "promptly and impartially" investigate allegations of torture. Moreover, the state must investigate the prospect of torture practices within its jurisdiction if "there [are] reasonable grounds to believe that an act of torture has been committed." In this case, the Twelve-Point Program of Amnesty International might represent even a broader obligation by requiring that "[g]overnments should ensure that all [i.e., not only those with reasonable ground for investigation] complaints and reports of torture are impartially and effectively investigated." Furthermore, Amnesty would insist that "[t]he methods of findings of such investigations . . . be made public."<sup>58</sup>

Another important aspect of the Convention Against Torture relates to the security and safety of those who are willing to come forward and complain, or those who might serve as credible witnesses to establish that torture has happened. Article 13 imposes upon a state party the obligation to

55. U.N.C.H.R. Res. 32, U.N. ESCOR, 56th Sess., 55th Mtg., U.N. Doc. E/CN.4/RES/1999/32 (1999).

56. AMNESTY INTERNATIONAL, TWELVE-POINT PROGRAM FOR THE PREVENTION OF TORTURE, available at Recommendations for the protection and promotion of human rights at <http://www.web.amnesty.org/web/aboutai.nsf> (last visited Dec. 2, 2000) [hereinafter TWELVE-POINT PROGRAM FOR THE PREVENTION OF TORTURE].

57. Convention Against Torture, *supra* note 25, art. 11.

58. TWELVE-POINT PROGRAM FOR THE PREVENTION OF TORTURE, *supra* note 56.

ensure that any individual who alleges they have been subjected to torture has the right to complain to state authorities. The obvious impulse of official reaction to complainants and witnesses is to harass them, intimidate them, or in other ways threaten them with ill-treatment. In order to secure a viable rule of law as the basis for the prohibition of torture, a central procedural value is acknowledged. If the individual cannot complain, then there is nothing to prevent and nothing to punish. Additionally, the sheer difficulty of protecting witnesses and complainants from officials charged with responsibility for the torture-based victimization strikes at the heart of the entire process of law enforcement under the rule of law. Since torture strikes at the core legitimacy of the state, the individual might well appreciate the reluctance of states to establish enhanced methods for protection of victims of torture and the witnesses. It may be that Article 13, and the capacity to give it sum and substance, provides the testing ground for the effectiveness of the Convention Against Torture itself.

At first blush, Articles 12 and 13 may seem to call for a fox to investigate the chicken coop. However, these provisions assume that states are complex structures and that governance is often a matter of the exercise of multiple, concurrent and sequential powers; one branch of a state can police another branch of the state and hold it accountable for breaking the rules. This insight compels the appraisers of the Convention Against Torture to examine a state not as an undivided homogeneous entity, but as a cluster of coextensive and competing interests. Due to this decentralized and divided structure, political parties and advocacy groups may be able to structure enough pressure to compel officials to act, even when the officials would be otherwise reluctant to do so.

Article 13 must also be read in the light of Article 15, which extends the legal protection of fundamental procedural values. Specifically, Article 15 states that evidence extracted by torture cannot be used in proceedings against the victim of torture or anyone implicated by the victim, with the exception of the torturer himself.<sup>59</sup> States have historically relied on tainted evidence to establish legal versions of the "truth" in order to justify the punishment of their enemies. Surprisingly, this tainted and coerced evidence is still ubiquitous in the procedures of many states. To the extent that tainted evidence is admissible, it undermines the capacity for law enforcement and provides disincentives for governmental officials to engage in proper investigative work. To the extent that judges admit tainted evidence, they create a crisis of confidence in the legal system itself because the legal "truths" generated are not credible predicates for the administration of jus-

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59. Convention Against Torture, *supra* note 25, art. 15. Article Fifteen of the Convention Against Torture does not allow a statement extracted under torture to be used "against a person accused of torture as evidence that the statement was made." *Id.* Similarly, the sixth point of the Twelve-Point Program of Amnesty International stipulates that "[g]overnments should ensure that confessions or other evidence obtained under torture may never be invoked in legal proceedings." TWELVE-POINT PROGRAM FOR THE PREVENTION OF TORTURE, *supra* note 56.

tice. The erosion of the due process values in Articles 13 and 15 of the Convention Against Torture represents the most serious assault on the foundation of the rule of law. For example, the well-developed South African legal system, with its independent judiciary, nevertheless had judges routinely admitting evidence based on abusive police practices or torture.<sup>60</sup> Similarly, Russia's notorious "show-trials," which began in 1936 under the rule of Stalin, represented some of the high points in the use of torture and confessions in legal proceedings.<sup>61</sup>

Article 14 of the Convention Against Torture addresses the question of reparations. It advocates an "enforceable right to fair and adequate compensation." The term "compensation" is defined as "the means for as full a rehabilitation as possible." While it is true that compensation for torture may have some intrinsically therapeutic effects (as well as cover the costs of medical and psychological interventions where they exist), compensation cannot address the most significant consequence of torture for the victims, which is the assault on the essence of the victims' identity, respect, and dignity. The process of torture often involves isolating the victim, removing the victim's clothing, assaulting the victim's sexual organs, depriving the victim of sleep, inflicting psychological and physical pain that usually ensures the loss of bowel and kidney movements, and, in the case of women, rape with an indefinite time-frame. The horrors of torture are such that, in spite of rehabilitation efforts, the victim will never be the same. This does not mean that seeking to rehabilitate torture victims is not mandated by the deepest sense of humane identification.

In addition to those aspects of the Convention Against Torture that address matters of cruel, inhuman, or degrading treatment or punishment, the Convention also establishes institutions and procedures to effect implementation of its goals. It establishes a Committee Against Torture (Article 17) and outlines the Committee's functioning (Article 18). The Committee Against Torture is empowered to examine reports from state parties to the Convention and to inquire into allegations of systematic practices of torture (Articles 19 and 20). The Committee Against Torture is also empowered to accept complaints from states alleging a particular state's noncompliance with the Convention (Article 21). However, this power might only be exercised with the explicit consent of the state alleged to be in non-compliance. Under Article 22, the Committee Against Torture may receive complaints from individuals against the state and is to report annually to state parties and to the U.N. General Assembly.

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60. See, e.g., NATIONAL ASSOCIATION OF DEMOCRATIC LAWYERS, *THE ROLE OF LAWYERS AND THE LEGAL SYSTEM IN THE GROSS HUMAN RIGHTS VIOLATIONS OF APARTHEID* (1998) (submission to the South African Truth and Reconciliation Commission).

61. ALFRED ERICH SENN, *READINGS IN RUSSIAN POLITICAL AND DIPLOMATIC HISTORY, VOLUME II—THE SOVIET PERIOD 160–61* (1966).



#### IV. THE U.N.-SPONSORED MECHANISMS DEDICATED TO THE ERADICATION OF TORTURE

Three of the most important U.N.-sponsored mechanisms dedicated to the eradication of torture are: (1) the Committee Against Torture, which was established pursuant to Article 17 of the Convention Against Torture, (2) the U.N. Special Rapporteur on Torture, created pursuant to the U.N. Commission on Human Rights' Resolution 1985/33, and (3) the U.N. Voluntary Fund for Victims of Torture, set up pursuant to U.N. General Assembly Resolution 36/151 of December 16, 1981. Related initiatives of importance emerged from the First U.N. Congress on the Prevention of Crime and the Treatment of Offenders in 1955, that, among other things, adopted the Standard Minimal Rules for the Treatment of Prisoners.<sup>62</sup>

##### *A. Committee Against Torture*

The major function of the Committee Against Torture is to monitor the implementation of the Convention. This body, consisting of ten experts who are nationals of the state parties, is elected through a secret ballot. The Committee carries out its task through the procedures in Articles 19, 20, and 21 of the Convention Against Torture. According to Article 19, the parties to the Convention submit to the Committee, by way of the U.N. Secretary-General, reports on the measures they have taken under the Convention. These reports are then subject to the Committee's revision and comments, and information from them can be included in the Committee's annual report.<sup>63</sup> Furthermore, if a state's report or other source discloses information which contains well-founded allegations that a state party systematically practices torture, the Committee has the power under Article 20 to invite that state party to examine the allegation and to provide explanations regarding the allegation.<sup>64</sup> The investigation may include a visit to the institutions allegedly practicing torture.<sup>65</sup> The Committee communicates the

62. U.N. Standard Minimum Rules for the Treatment of Prisoners, *approved* July 31, 1957, E.S.C. Res. 663(c), U.N. ESCOR, 24th Sess., Supp. No. 1, at 11, U.N. Doc. E/3048 (1957), *amended* May 13, 1977, E.S.C. Res. 2076, U.N. ESCOR, 62nd Sess., Supp. No. 1, at 35, U.N. Doc. E/5988 (1977).

63. The representatives of the states concerned are invited "to attend the meeting when their reports are considered." Representatives are allowed and expected to answer any additional questions which may be put to them by the Committee and to "clarify, if needed, certain aspects of the reports already submitted." After such clarification, the Committee (according to Article 19, para. 3) may make general comments on the report as well as indicate whether it appears to it that some obligations of the state concerned have not been discharged. These comments are then transmitted to the state concerned which may reply to them. UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, FACT SHEET NO. 17, THE COMMITTEE AGAINST TORTURE, at <http://www.unhchr.ch/html/menu6/2/fs17.htm> (2000).

64. The procedure set out in Article 20 of the Convention Against Torture is confidential and pursues the cooperation of the state. The only exception to the confidentiality rule is if, after all the proceedings regarding an investigation under Article 20 have been completed, the Committee decides to include a summary account of the results into its annual report. In this case the work of the Committee is made public. Otherwise, all the work and documents relating to its functions under Article 20 are confidential.

65. UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, FACT SHEET NO. 17, THE COMMITTEE AGAINST TORTURE, at <http://www.unhchr.ch/html/menu6/2/fs17.htm> (2000). This is an excep-

outcomes of the investigation to the state party concerned, along with the comments and suggestions of the Committee Against Torture. However, the competence conferred upon the Committee by Article 20 is optional; the state party may, at the time of ratifying or acceding to the Convention Against Torture, declare that it does not recognize this competence.<sup>66</sup>

The Committee usually holds two regular sessions each year but a special session may be convened at the request of a majority of its ten members or of a state party to the Convention Against Torture.<sup>67</sup> All proceedings of the Committee are confidential and the Committee invites the concerned state party to cooperate with the Committee at all stages of the proceedings. Also, in order to be able to include a summary account of the investigation findings in its annual report, the Committee is required to consult the state party concerned. The expenses incurred in connection with all of the Committee's activities are borne by the state parties to the Convention Against Torture.<sup>68</sup> The Committee itself adopts its procedural rules.

Article 22 of the Convention Against Torture gives individuals<sup>69</sup> the right to complain directly to the Committee Against Torture. The accused state party must recognize the competence of the Committee to consider complaints filed by the individuals, and as of January 1, 2000, only forty out of 119 states have made such a declaration.<sup>70</sup> Another limitation on the filing of individual complaints is that, according to the Committee's rules of procedure, a communication can not be admitted if it is anonymous.<sup>71</sup> This is mitigated, however, by the rule that all individual complaints are examined

tion to the standard procedure that involves either inviting representatives of the concerned state to participate in the examination and submit observations, or requesting additional information from those representatives and others. The Committee may also designate a confidential inquiry, with which representatives of the state concerned are invited to cooperate.

66. *Id.* In this case, the Committee Against Torture may not exercise the powers conferred upon it by Article 20 for so long as the state concerned maintains its reservation.

67. Sessions of the Committee Against Torture, United Nations High Commissioner for Human Rights, at <http://www.unhchr.ch/html/menu2/6/cat/cats.htm> (last visited Dec. 2, 2000).

68. UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, FACT SHEET NO. 4, METHODS OF COMBATING TORTURE, at <http://www.unhchr.ch/html/menu6/2/fs4.htm> (2000). Although the state parties share these expenses in proportion to their contribution to the budget of the United Nations, no single state's share may cover more than twenty-five percent of the Committee's expenses.

69. See *infra* note 65. Private individuals claiming to be victims of a violation of the Convention Against Torture by a state that has accepted the competence of the Committee under Article 22, as well as their relatives or representatives, are entitled to submit communications to the Committee.

70. Press Release, United Nations Committee Against Torture, Panel Scheduled to Consider Reports from Poland, Portugal, China, Paraguay, Armenia, El Salvador, the United States, the Netherlands and Slovenia (Apr. 28, 2000), available at <http://www.unhchr.ch/hurricane/hurricane.nsf/newsroom>. Although 119 states have ratified or acceded to the Convention, only the following forty states have recognized the competence of the Committee under Articles 21 and 22: Algeria, Argentina, Australia, Austria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Ecuador, Finland, France, Greece, Hungary, Iceland, Italy, Liechtenstein, Luxembourg, Malta, Monaco, Netherlands, New Zealand, Norway, Poland, Portugal, Russian Federation, Senegal, Slovak Republic, Slovenia, South Africa, Spain, Sweden, Switzerland, Togo, Tunisia, Turkey, Uruguay, Venezuela and Yugoslavia. In addition, the United Kingdom and the United States have recognized the competence of the Committee under Article Twenty-One only (competence of the Committee over the claims filed by states but not over those filed by individuals).

71. See *infra* note 65.

by the Committee in closed meetings. Once the Committee Against Torture decides that a communication is admissible, it informs the author of the communication, transmits its decision to the state concerned, and then proceeds to consider the merits. The state that has allegedly violated the Convention is then under the obligation to submit to the Committee explanations or statements clarifying the case and describing any remedial measures taken.

Individual communication about the fact or imminence of torture presumably creates an emergency situation in which immediate action is required. Since the Committee Against Torture does not operate as a standing committee with a structure of executive directors and staff who can respond to complaints and reports continuously, it may be that the Committee's methods in individual cases create only the illusion that it has the capacity to act under pressure. The six month deadline for a state's response to the individual's communication represents a further weakness of the Committee's procedure. This delay creates the opportunity for the disappearance or extra-judicial execution of a victim, who might have the capacity to talk and expose what has happened; dead torture victims tell no tales. Thus, while the structures created by the United Nations provide symbolic importance, an important element of legitimacy, as well as a degree of efficacy to the campaign against torture, institutional imperfections indicate that the United Nations' structures do not exhaust the possible methods of providing global accountability for torture.

The lack of institutional clout of the Committee Against Torture is a result of budgetary constraints, political constraints, and other factors that limit the effort to eradicate torture. These limitations are reflected in the following: (1) the enforcement mechanism which relies heavily on official state cooperation is highly problematic, (2) budgets are limited and the figures indicated for torture rehabilitation work are almost derisory, and (3) the Committee's capacity to deal with individual complaints for over a decade has not altered the ubiquity of torture world-wide, indicating that the individual complaint mechanism is little more than a symbolic gesture.<sup>72</sup> Perhaps we would be better off without it, since it cannot be viewed as a serious response to a serious problem.

The most important aspect of torture, apart from victimizing the victim, is that it is an exercise of power and, from a legal point of view, an exercise

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72. Cf. STATISTICAL SURVEY OF INDIVIDUAL COMPLAINTS DEALT WITH BY THE COMMITTEE AGAINST TORTURE UNDER THE PROCEDURE GOVERNED BY ARTICLE TWENTY-TWO OF THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, at <http://www.unhcr.ch/html/menu2/8/stat3.htm> (updated Oct. 12, 2000). Since 1987, the United Nations Committee has received 154 individual complaints from the forty-one signatory countries. Thirty-three cases were deemed inadmissible, forty have been discontinued, and one suspended. This leaves three admitted cases and thirty-nine in pre-admissible stage. In contrast, Amnesty International initiated 425 new actions and pursued further appeal for 272 existing actions for the Urgent Action Network, which extends over ninety-four countries and territories. Of the 425 new actions, 131 were issued on behalf of victims of torture or related practices.

of official power. Because torture is so ubiquitous, especially in states that are often undemocratic and unwilling to honor the rule of law, the state itself will have difficulty discussing or negotiating the systematic use of torture by its operatives without having to engage in a discourse about its own bases of authority and legitimacy.

The critical question is whether the methods used by the Committee Against Torture correspond to social realities or whether they blindly accept the word of the accused state. Estimates indicate that the Committee's methods are simply not effective in counteracting the problems of power and authority generated by those who routinely practice torture.

The Committee's critical weakness is the futility generated by the combination of its structures and procedures. Its structure comprises a group of experts thoroughly vetted by state parties themselves, presenting a conflict of interest for those whose impartiality is most vital to the process. While the bureaucratic culture required by the Committee's links with the United Nations brings with it such assets as professionalism, broad discretion, and widespread respect, this bureaucracy also has disadvantages. For example, overbearing state dominance threatens the Committee's capacity for practical implementation of a higher level of independent-minded action.

The problem of confidentiality presents another procedural difficulty for the Committee. Confidential diplomatic dialogue between bureaucrats and the accused state's authorities simply may not address the urgency of the problem from the victim's point of view or the practical problem that the more culpable the state party, the more that state will want to obstruct any investigation.<sup>73</sup> This list of impediments is by no means exhaustive, but it does demonstrate that, despite the symbolic importance of the Committee Against Torture, serious structural and procedural limitations compromise its efficacy.

### B. *The Special Rapporteur on Torture*

Another attempt to combat torture produced the U.N. Special Rapporteur, a position established to complement the Committee Against Torture. The U.N. Commission on Human Rights appointed a Special Rapporteur to seek credible information on torture and to respond without delay. While the Committee examines specific allegations of torture, the Rapporteur monitors torture in general.<sup>74</sup>

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73. The Committee's treatment of the confidentiality factor may be contrasted with the urgent action technique developed by Amnesty International to which we have earlier referred. Unconstrained by institutional limitations of an international bureaucracy sustained largely by states, Human Rights International Nongovernmental Organizations (INGOs) are often able to generate international public accountability. Therefore, this freedom renders INGOs more impartial and perhaps better positioned to respond to accusations of torture. See *supra* note 50.

74. *Civil and Political Rights, Including Question of: Torture and Detention: Report of Special Rapporteur, Sir Nigel S. Rodley, Submitted Pursuant to Commission on Human Rights Resolution 1998/38, U.N. Commission on Human Rights, 55th Sess., Provisional Agenda Item 11(a), U.N. Doc. E/CN.4/1999/61 (1999).*

The Rapporteur may ask the government of an individual state party to provide information on its legislative and administrative measures to prevent torture, and to remedy its consequences. Furthermore, the Special Rapporteur can examine questions of torture in states which are parties to the Convention, all U.N. member states, and even all states with U.N. observer status. Finally, in an effort to protect the right to physical and mental integrity, the Rapporteur may bring accusations of torture to the attention of the government concerned, consult with government representatives, and make on-site consultative visits.<sup>75</sup>

Like those of the Committee Against Torture, the formation and proposed functions of the U.N. Special Rapporteur were an optimistic gesture to combat torture, but the Rapporteur also shares the Committee's inefficacy. In addition to the burden of a staggering workload, lack of funding poses a major problem for the Special Rapporteur. The United States has increased funding, but the Special Rapporteur still receives only marginal financial support.<sup>76</sup> Other states should follow suit to fully empower the Rapporteur in eradicating torture.

### *C. The U.N. Voluntary Fund for Victims of Torture*

In 1981, the United Nations established another well-intentioned yet ineffective measure to combat torture: the Voluntary Fund for Victims of Torture. While critics argue that establishing the Fund implies a passive acceptance of torture, the complete eradication of torture continues to be one of the priorities of the United Nations. The Fund, administered by the U.N. Secretary General based on the advice of the Board of Trustees, was set up as a means of humanitarian, legal, and financial aid to persons who have been tortured and to their families.<sup>77</sup> Thus, the formation of this mechanism reflects both a genuine commitment to remedy past occurrences of torture and an honest admission that the United Nations cannot yet meet its goal of preventing all future instances of torture.

The Fund's main problem is that it depends entirely on voluntary contributions from governments,<sup>78</sup> private organizations, institutions, and individuals, rather than on regular financing through the United Nations' budget.<sup>79</sup> The subsidies the Fund does receive are used to finance rehabilitation projects to provide victims and their families with medical treatment,

75. *Id.*

76. See Torture Victims Relief Act of 1998 § 4-6, 22 U.S.C. § 2152 (1998); Torture Victims Relief Authorization Act of 1999 § 2-4, Pub. L. No. 106-87, 113 Stat. 1301 (1999).

77. U.N.C.H.R. Res. 32, U.N. ESCOR, 56th Sess., 55th Mtg., U.N. Doc. E/CN.4/RES/1999/32 (1999).

78. See Torture Victim Relief Act of 1998 § 4-6, 22 U.S.C. § 2152 (2000); Torture Victim Relief Authorization Act of 1999 § 2-4, Pub. L. No. 106-87, § 4, 113 Stat. 1301 (1999).

79. Within its first five years of operation (between 1983 and 1988) the Fund accepted 131 subsidies totaling \$3.6 million. U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS, FACT SHEET NO. 4, available at <http://www.unhchr.ch/html/menu6/2/fs4.htm> (last visited Mar. 2, 2001).

physiotherapy, psychiatric, and psychological care. Funds are also used to support projects focused on training specialists, usually from the medical profession, in special techniques needed to treat the victims of torture. The Voluntary Fund parallels the other U.N. mechanisms: if properly implemented, it could make real progress toward the goal of ending torture; but, in its current state, it has very little practical effect.

## V. TORTURE AND THE UNITED STATES POLICY

### A. *Congressional Joint Resolution Regarding Opposition of the United States to the Practice of Torture by Foreign Governments*<sup>80</sup>

The United States began its formal domestic effort to eradicate torture when Congress adopted the Joint Resolution Regarding Opposition of the United States to the Practice of Torture by Foreign Governments in 1984. The Joint Resolution affirmed "a continuing policy of the United States government to oppose the practice of torture by foreign governments through public and private diplomacy . . . [and to oppose] acts of torture wherever they occur, without regard to ideological or regional considerations . . . ."<sup>81</sup>

Furthermore, the Joint Resolution decreed that the United States government must work with both governments and NGOs to combat the practice of torture worldwide.<sup>82</sup> Section 2(a) of the Joint Resolution urged the executive branch to engage more fully in this enterprise through: asking the Permanent Representative of the United States to the United Nations to continue to raise the issue of torture in that forum, asking the President to be actively involved in the prescription of the Convention Against Torture, and asking the U.S. Secretary of State to issue formal instructions to the chief of every U.S. mission abroad. This last provision is the most important and most assertive aspect of this section of the Joint Resolution, for it demands that the Secretary of State indicate exactly what U.S. policy is with respect to torture and gives instructions that the chiefs of mission examine the allegations of torture in that state. Finally, this section instructs the Secretary of State to "express concern in individual cases of torture brought to the attention of a United States diplomatic mission including, whenever feasible, sending United States observers to trials when there is a reason to believe that torture has been used against the accused."<sup>83</sup> These far-reaching requests that the executive branch investigate, publicize, intervene, and observe allegations of torture within a foreign sovereign state send a political

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80. Joint Resolution Regarding the Implementation of the Public Policy of the United States Government in Opposition to the Practice of Torture by any Foreign Government, H.R.J. Res. 605, 98th Cong., 98 Stat. 1721 (1984) (codified in 22 U.S.C. § 2656 (2000)).

81. *Id.*

82. *See id.*

83. *Id.* § 2(b)(4).

signal that such conduct is well within the bounds of diplomatic responsibility and the mandate of international law.

As progressive as the ultimate goals of the Joint Resolution may be, the document itself is alarmingly weak. The language of the Joint Resolution is formulated in terms of requests, so the President need not feel bound by the Joint Resolution. Furthermore, the most drastic measure suggested is the expression of concern, hardly an aggressive leap toward the goal of eradicating torture.

Like the United Nations measures, the U.S. Joint Resolution serves mostly as a symbol. It promotes principles by giving them weight and prestige in the executive branch to enable full U.S. support to diplomats who intervene. In this indirect capacity, the Joint Resolution could be an effective tool in working to end torture world-wide, particularly if the United States could persuade other countries to follow suit.

### *B. Convention Against Torture: Ratification by the United States*

The United States has recently ratified the Convention Against Torture, but the campaign to accomplish this took nearly twenty years. The United States' long refusal to ratify the Convention Against Torture is indicative of its general unwillingness to subscribe to the treaty-based regime concerned with international human rights.<sup>84</sup> Although the United States may have been a lead player in the development of the International Bill of Rights, right-wing interests in the U.S. Senate view any surrender of U.S. sovereignty, even to international instruments of human rights law, with considerable suspicion.

### *C. Torture Victim Protection Act of 1991*

The holding of a case<sup>85</sup> decided under the Alien Tort Claims Act<sup>86</sup> spurred Congress to pass the Torture Victim Protection Act of 1991.<sup>87</sup> This legislation was aimed at mitigating the effects of torture. Under the Act, a torturer acting under actual or apparent authority or color of law may be liable in a civil action for damages to the victim. Several limitations restrict the eligibility of claims under this Act: the claimant must exhaust all domestic remedies (in the original state) before invoking the Act; and claims are subject to a ten-year statute of limitations.<sup>88</sup>

84. For an overview of the political impediments to U.S. ratification of the human rights treaties, with particular reference to the campaign to ratify the Convention Against Torture, see Winston P. Nagan, *The Politics of Ratification: The Potential for United States Adoption and Enforcement of the Convention Against Torture, The Covenants on Civil and Political Rights and Economic, Social and Cultural Rights*, 20 GA. INT'L & COMP. L. 311, 311 (1990).

85. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

86. Alien Tort Claims Act, 28 U.S.C. § 1350 (2000).

87. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (2000)). This Act also establishes civil liability for an extra-judicial killing. *See id.*

88. *See id.*

The Act uses the definition of torture established by the Convention Against Torture, a definition that addresses physical and mental suffering. The latter includes the actual infliction, or even threatened infliction, of severe pain, suffering, or mind-altering procedures. Alternatively, other procedures calculated to disrupt profoundly the senses or the personality, threats of imminent death, and threats to do any of these actions to someone else are also included in this definition.<sup>89</sup> Courts have interpreted the Torture Victim Protection Act to expand rather than limit the Alien Tort Claim Act.<sup>90</sup> Furthermore, courts have ruled that claims under these two acts are not barred by the Foreign Sovereign Immunities Act.<sup>91</sup>

In addition to the 1991 Act, the Torture Victim Relief Act of 1998<sup>92</sup> and Torture Victim Relief Reauthorization Act of 1999<sup>93</sup> have appropriated more funding to further the campaign against torture and facilitate the rehabilitation of the victims. Though it does not necessarily counteract U.S. reluctance to join international legislation against torture, this domestic legislation does demonstrate some U.S. effort to provide legal remedies for torture victims.

#### D. Executive Order 13,107: Implementation of Human Rights Treaties

One example of an initiative from the executive branch came on December 10, 1998. In commemoration of the 50th anniversary of the adoption of the Universal Declaration of Human Rights, President Clinton issued an executive order<sup>94</sup> on the implementation of human rights treaties.<sup>95</sup> The Executive Order reiterates the commitment of the "policy and practice of the Government of the United States . . . to the protection and promotion of human rights and fundamental freedoms,"<sup>96</sup> working to protect human rights bilaterally and through international as well as regional organizations. A concrete facet of this commitment requires that the head of each agency appoint a contact officer for the overall coordination and implementation of this Executive Order.<sup>97</sup>

89. *See id.*

90. *See Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1191 (S.D.N.Y. 1996).

91. *See id.* at 1198.

92. Torture Victim Relief Act of 1998, 22 U.S.C. § 2152 (2000).

93. Torture Victim Relief Authorization Act of 1999, Pub. L. No. 106-87, 113 Stat. 1301 (1999) (to be codified at 22 U.S.C. § 2151).

94. Exec. Order 13,107, 63 Fed. Reg. 68,991 (Dec. 15, 1998), *reprinted in* 38 I.L.M. 493 (1999). [hereinafter Executive Order]

95. The preamble of the Executive Order names three human rights treaties in particular: the International Covenant on Civil and Political Rights, the Convention Against Torture, the International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195, *reprinted in* 5 I.L.M. 352 (1966). However, it also recognizes that the Executive Order shall apply to "other relevant treaties concerned with protection and promotion of human rights to which the United States is now or may become a party in the future." Executive Order, *supra* note 94, at 68,991.

96. Executive Order, *supra* note 94, § 1(a).

97. *Id.* § 2(a).



Unfortunately, the Executive Order assigns an ambiguous role to the courts in the enforcement of the Order. Ironically, it appears to exempt the U.S. government from the very accountability it seeks to impose on other governments: according to sub-section 6 (a) “[n]othing in this order shall create any right or benefit, substantive or procedural, enforceable by any party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.”<sup>98</sup>

The Executive Order also creates the Interagency Working Group on Human Rights Treaties,<sup>99</sup> that links the Department of State, the Department of Justice, the Department of Defense, the Joint Chiefs of Staff, and such “other agencies as the chair deems appropriate” under a chair who is the Assistant to the President for National Security Affairs.<sup>100</sup> This suggests a realistic recognition of the fact that grave human rights violations, particularly those that implicate torture practices, are matters that often come vested with security-sensitive implications.

The scope of the term “national security affairs” and the terms “Department of Defense,” “Joint Chiefs of Staff,” and “other agencies” are also somewhat ambiguous, for they may or may not include the intelligence agencies of the Department of State, the Department of Defense, or the Central Intelligence Agency. This question is significant for the implementation of the Executive Order because bringing grave human rights violations to light often requires cooperation from intelligence interventions. This creates a dual role for intelligence agencies and a potential conflict of interest: the intelligence operatives must supply data about particular governmental entities while they themselves are involved in gross human rights violations. Still, intelligence operatives probably know more about the status of human rights violations in other countries than do general diplomatic bureaucrats.

The future of the paradigm of ostensible conflict between national security interests on the one hand, and human rights interests on the other, presents another element of the intelligence-agency ambiguity in the Executive Order. “National security interests” are often a synonym for the survival interest of the state, and these interests are often used to justify transgressions of human rights violations deemed vital to the survival of the state. States often make exaggerated claims about threats to their survival in order to justify efforts to destroy their supposed enemies. Therefore, the culture of national security tends to have an uneasy coexistence with the culture of human rights. However, the systematic use of torture is itself a condition that delegitimizes the state and thus exacerbates its national security problems. Whether the arsenal of intelligence capabilities will be an asset or a liability in the effort to eradicate torture is still uncertain.

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98. *Id.* § 6(a).

99. *Id.* § 4.

100. *Id.* § 4(b).

### E. Torture Within the United States

Ironically, the United States, which claims to promote human rights throughout the world, has been the subject of torture allegations at home.<sup>101</sup> This calls into question the United States' view of its human rights treaty obligations, particularly given the United States' ratification of the Convention Against Torture. In May 2000, Amnesty International submitted a brief to the United Nations Committee against torture, stating that the United States is simply not doing enough to secure compliance with the mandate of the Convention and noting the lack of effective oversight entities to monitor prison conditions and police departments. Amnesty further pointed out that United States' reservations, declarations, and understandings have tended to water down United States compliance with the Treaty. Perhaps the most important omission in United States' policy is that torture is not a distinct crime under federal law. Clearly, a great deal more must be done by the federal authorities to ensure that the United States complies with its international obligations.

## VI. LITIGATION STRATEGIES TO ERADICATE TORTURE

As important as the U.N. mechanisms are for facilitating the process of eradicating torture on a global basis, courts play an equally important role in defending the rule of law. In the age of globalism, law offers a more aggressive role for domestic courts in making and applying international law. Where U.N. mechanisms have been symbolic in establishing the principles of international law against torture, the legal system, through domestic courts, regional courts, *ad hoc* tribunals, and the International Criminal Court, must apply these principles firmly and consistently. This Part will review the decisions of diverse courts in the campaign to eradicate torture.

### A. United States Case Law

Perhaps the two greatest advancements in United States case law approaches to the claims of torture victims have been evidentiary. The two facets of this change are the admissibility of confessions in criminal cases, and the assertions that, in civil cases, universal jurisdiction must apply.

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101. See AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA RIGHTS FOR ALL, at <http://www.rightsforallusa.org/info/report/index.htm> (last visited on Dec. 2, 2000). In this report, Amnesty International outlines several human rights concerns regarding police practices throughout the United States. This extensive list included: beatings, excessive force, and unjustified shootings by police officers; physical and mental abuse of prisoners and detainees by prison guards, including use of electro-shock equipment and cruel use of restraints; sexual abuse of female prisoners by male guards; prisoners held in cruel conditions in isolation units; ill-treatment of children in custody; failure to protect prisoners from abuses by staff or other inmates; inadequate medical or mental health care and overcrowded and dangerous conditions; racist treatment of ethnic or racial minorities by police or prison guards; ill-treatment of asylum-seekers held in detention; and cruel conditions on death row and in the application of the death penalty.

United States case law represents a development in both criminal and civil torture law. The area most relevant to torture concerns questions of police interrogation methods and the legal boundaries of generating evidence and confessions. The general evidentiary rule, founded in English common law, required that statements be voluntary in order to be admissible. The courts would not accept statements "obtained by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression."<sup>102</sup> This principle gained a due process constitutional imprimatur in *Brown v. Miss.*<sup>103</sup> in 1936. Fifteen years later, *Williams v. United States*<sup>104</sup> established the illegality of brutal tactics by police to coerce confessions from a defendant. The totality of the circumstances test for determining whether confessions are voluntary provides unclear criteria for finding the line between permissible and impermissible conduct. To determine such distinctions, United States' courts could look to the Torture Convention for supplemental prescriptive guidance in defining minimum standards.

Three cases reveal the development of torture in United States civil law. *Filartiga v. Pena-Irala*<sup>105</sup> is the leading case in expanding the role of domestic courts in the application of human rights law in general and in the law relating to the prohibition of torture, in particular. This case emerged prior to the United States' ratification of the Convention Against Torture. *Filartiga* determined that, based on the Alien Tort Claims Act<sup>106</sup>, torture constitutes a civil wrong simply because it violates customary international law. It expanded the scope of the legal remedies to include private litigants as plaintiffs, providing an important vehicle through which a torturer could be subject to legal proceedings.

In *Kadić v. Karadžić*,<sup>107</sup> another U.S. appellate court held that mass rape, coerced prostitution, and other forms of physical violence directed at Croatian women by the Bosnian Serb military constituted torture as defined in the Convention Against Torture.<sup>108</sup> One important aspect of this case was that the level of "state action" required for "official" torture entailed not actual authority but merely the "semblance of official authority."<sup>109</sup>

Finally in *Ortiz v. Gramajo*,<sup>110</sup> the District Court of Massachusetts held that the kidnapping, beating, and rape of a nun constituted torture.<sup>111</sup> In

102. JUDGES' RULES AND ADMINISTRATIVE DIRECTIONS TO THE POLICE, Home Office circular No. 31/1964, Princ. (e), quoted in AMNESTY INTERNATIONAL, *TORTURE IN THE EIGHTIES* 51 (1984). The Judges' Rules are in the form of advice to police officers on what will and will not be allowed as evidence in a trial.

103. *Brown v. Mississippi*, 297 U.S. 278 (1936).

104. *Williams v. United States*, 341 U.S. 97 (1951).

105. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). The case is more thoroughly discussed *supra* note 32.

106. Alien Tort Claims Act, 28 U.S.C. § 1350 (2000).

107. *Kadić v. Karadžić*, 70 F.3d 232 (2d Cir. 1995).

108. *See id.* at 244.

109. *Id.*

110. *Ortiz v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995).

111. *See id.* at 178. This case did not use the Alien Tort Claims Act as the two previous cases did, but

order to qualify as an official act, the torture need not occur while the defendant has direct custody over the victim; rather the torture need only the "consent or acquiescence of a public official."<sup>112</sup>

### B. European Case Law

A series of cases before the European Court of Human Rights provides a survey of the Court's application of its provision against torture. In 1967, the governments of Denmark, Norway, Sweden, and the Netherlands brought before the Commission<sup>113</sup> allegations that the Greek government had committed acts that amounted to significant violations of Article 3 of the Convention.<sup>114</sup> Article 3 provides that "[n]o one shall be subjected to torture or inhuman or degrading treatment or punishment."<sup>115</sup> An essential feature of Article 3 is that it is non-derogable: in no circumstance can torture or cruel and inhuman treatment be excused or tolerated for any reason.

Based on hearings and investigations by the Sub-Commission, the Court<sup>116</sup> concluded that Greek security officials had inflicted torture and ill-treatment on several individuals in their custody, particularly through the application of "falanga" or severe beating of all parts of the body. The Commission found that the purpose of the torture had been "the extraction of information including confessions concerning the political activities and associations of the victims and other persons considered to be subversive."<sup>117</sup> The Greek government had directly and indirectly prevented the Commission from completing its investigation of several cases.<sup>118</sup> Upon these findings and based on the Greek government's denunciation of both the report and the European Convention of Human Rights, the Commission forced Greece out of the Council of Europe for human rights violations, isolating Greece from the international community.<sup>119</sup>

In 1976, the Commission ruled on allegations of torture and other forms of inhuman treatment in the conflict in Northern Ireland.<sup>120</sup> The British

instead applied the Torture Victim Protection Act. Nonetheless, that definition is identical to the one provided in the Convention Against Torture.

112. *Id.* at 178, n.15.

113. The European Commission of Human Rights (the Commission) is an investigative body which refers cases to the European Court of Human Rights, a regional court whose decisions are binding on its member states. Both are governed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention).

114. See *Report of the European Commission of Human Rights on the "Greek Case,"* 1969 Y.B. Eur. Conv. On H.R. 1, 5 (1969) [hereinafter Report on Greek Case].

115. European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 38, art. 3.

116. See Resolution DH (70) 1 of the Committee of Ministers of the Council of Europe, 1969 Y.B. Eur. Conv. on H.R. (Eur. Comm'n of H.R.) 511, at ¶ 3.

117. *Report on Greek Case*, *supra* note 114, at 504.

118. See *id.*

119. See Resolution DH (70) 1 of the Committee of Ministers of the Council of Europe, 1969 Y.B. Eur. Conv. on H.R. (Eur. Comm'n of H.R.) 511, at ¶ 3.

120. See *Ireland v. United Kingdom*, 1976 Y.B. Eur. Conv. on H.R. (Eur. Comm'n on H.R.) 512.

authorities had developed practices of detention and interrogation which included: (1) forcing detainees or prisoners to stand for long hours; (2) placing black hoods over their heads; (3) holding detainees or prisoners prior to interrogation in a room with a continuing, loud, hissing noise; (4) depriving them of sleep; and (5) depriving them of food and drink.<sup>121</sup> The Commission found that this constituted not only inhuman and degrading treatment but actual torture within the meaning of Article 3. According to the Commission, the

combined application of methods which prevent the use of the senses, especially the eyes and the ears, directly affects the personality physically and mentally. The will to resist or to give in cannot, under such conditions, be formed with any degree of independence. Those most firmly resistant might give in at an early stage when subjected to this sophisticated method to break down or even eliminate the will.<sup>122</sup>

After the Commission filed its report, the Irish government referred the case to the European Court of Human Rights.<sup>123</sup> The Court, however, did not accept the Commission's qualification of Article 3 violations in the instant case. Rather, the Court distinguished between torture on the one hand and inhuman or degrading treatment on the other, noting that torture constitutes an "*aggravated and deliberate* form of cruel, inhuman or degrading treatment or punishment."<sup>124</sup> (emphasis added) The Court ruled that the use of the five techniques breached Article 3 because these practices constituted cruel, inhuman and degrading treatment. It refused, however, to characterize them as torture.<sup>125</sup>

The Court also applied the "aggravated and deliberate" distinction in later cases.<sup>126</sup> In *Tyrer v. United Kingdom*, a fifteen-year-old British student assaulted a schoolmate and was sentenced to three strokes of a birch rod. This punishment entailed removing his trousers and underwear and then bending him over a table in order for the strokes to be administered. According to the Court, this form of corporal punishment was a direct violation of Article 3.<sup>127</sup>

In *Soering v. United Kingdom*,<sup>128</sup> the Court considered whether a convicted murderer subjected to extradition might experience torture upon extradition to the United States. The Court did not suggest that the death penalty itself

121. *See id.*

122. *Id.* § 2.

123. *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) at 5 (1978).

124. *Id.* at 67.

125. *Id.*

126. *Tyrer v. United Kingdom*, 26 Eur. Ct. H.R. (ser. A) (1978).

127. *Id.* at 17.

128. *Soering v. United Kingdom*, 11 Eur. Ct. H.R. (ser. A) (1988) *reprinted in* 11 Eur. H.R. Rep. 439 (1989).

might violate Article 3, but rather distinguished between the death penalty and death row.<sup>129</sup> The Court concluded that the death row phenomenon would be a breach of Article 3, but did not express any opinion as to whether putting someone on death row was itself torture.<sup>130</sup>

In 1996, the Court found torture per se for the first time in the case of *Aksoy v. Turkey*.<sup>131</sup> Mr. Aksoy was arrested and held in custody by Turkish security forces. Upon his release, he was admitted to a hospital and diagnosed with bilateral radial paralysis, or paralysis of both arms caused by damage to nerves in the upper arms. The Turkish public prosecutor decided that "there were no grounds to institute criminal proceedings against [Mr. Aksoy]." The Turkish authorities have not been called to responsibility in criminal or civil proceedings for the alleged ill-treatment of Mr. Aksoy.<sup>132</sup>

Mr. Aksoy alleged that he had been subjected to extremely serious forms of ill-treatment. This included being locked up with two other detainees in a cell measuring approximately 1.5 x 3 meters, with only one bed, and only two meals a day. Interrogated about whether he knew a man called Metin, his torturers stated, "If you don't know him now, you will know him under torture." On the second day, he was stripped naked, his hands were tied behind his back, and he was strung up by his arms in a so-called Palestinian hanging. While he was hanging, electrodes were connected to his genitals, and water was thrown over him, causing electrocution. He was blindfolded for the duration of this ordeal (about thirty-five minutes). During the next two days he was repeatedly beaten without being suspended. This continued for four days.<sup>133</sup> Not surprisingly, the Turkish authorities denied these allegations.<sup>134</sup>

Both the Commission and the Court accepted Mr. Aksoy's version of the facts. The Commission noted that: "there was no evidence that [Mr. Aksoy] had suffered any disability prior to his arrest, nor any evidence of any untoward incident [since] his release from police custody." While the bilateral radial paralysis could have been caused in other ways, it was consistent with the form of torture known as Palestinian hanging; and, most importantly, the Turkish authorities offered no alternative explanation for Mr. Aksoy's

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129. Protocol No. 6 was adopted to amend the Convention, abolishing the death penalty in the Contracting States. However, the United Kingdom was not a party of the Protocol No. 6 at the time the *Soering* case was decided, and thus the risk of subjection to the death penalty itself was not the determining factor in this case. *See id.* at 448, 460.

130. The ECHR recognized that the U.S. has a well-developed judicial system where fundamental rights are protected. A narrow majority (6-5) of the Commission therefore concluded that extraditing Mr. Soering to the U.S. would not constitute treatment contrary to Article Three of the Convention. The Court, however, decided unanimously that it would. *Id.* at 425-61, 463-64, 478.

131. *Aksoy v. Turkey*, 6 Eur. Ct. H.R. 2260 (1996).

132. *Id.* at 2266-67.

133. *See id.* at 2265-66.

134. According to the Turkish government authorities, however, no torture occurred. Mr. Aksoy's custody, they claimed, ended after he signed a statement denying any involvement with PKK and he made no complaint about having been tortured. *See id.* at 2266.

injuries.<sup>135</sup> Governmental officials claimed that “it was inconceivable that [Mr. Aksoy] could have been ill-treated,”<sup>136</sup> but the Commission found this argument unconvincing. The officials’ outright rejection of the allegation without any further consideration or investigation damaged their credibility.<sup>137</sup>

Furthermore, the Commission sent a delegation which had heard the earlier evidence to Turkey on two separate occasions,<sup>138</sup> and the delegation concluded that Mr. Aksoy had been tortured.<sup>139</sup> The Court accepted the facts as established by the Commission, and articulated an important shift in the burden of proof in torture cases:<sup>140</sup>

[W]here 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 as to the causing of the injury, failing which a clear issue arises under Article 3 of the Convention.<sup>141</sup>

Finally, the Court’s opinion in the Askoy case underscored the importance of Article 3 and offered guidelines for evaluating potential violations:

Article 3 . . . enshrines one of the fundamental values of democratic society. . . the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the Convention . . . [it] makes no provision for exceptions and no derogation . . . even in the event of a public emergency threatening the life of the nation . . . . In order to determine whether any particular form of ill-treatment should be qualified as torture, the Court must have regard to the distinction drawn in Article 3 between this notion and that of inhuman or degrading treatment . . . . [This is] to attach only to deliberate inhuman treatment causing very serious and cruel suffering.<sup>142</sup>

A more recent torture case was *Selmouni v. France*.<sup>143</sup> The Court found that the French police had beaten, sodomized, and threatened Mr. Selmouni while he was in their custody. The Court rejected the French government’s

135. *Id.* at 2268.

136. *Id.*

137. *See id.*

138. *See id.* at 2272.

139. *Id.* at 2271. Between the filing and acceptance of the application, Mr. Aksoy was shot and killed. According to his representatives (his father pursued the case after Mr. Aksoy’s death), Mr. Aksoy had been threatened with death and pressed to withdraw his application to the ECHR. The Turkish authorities, on the other hand, maintained that Mr. Aksoy’s death was connected to an internal dispute among PKK factions and charged another PKK member with Askoy’s murder. *Id.*

140. *See id.* at 2278.

141. *Id.*

142. *Id.* at 2279.

143. *Selmouni v. France*, 1109 Eur. Ct. H.R. (1999).

argument that Mr. Selmouni was ineligible because he did not exhaust domestic remedies.<sup>144</sup> It noted that the medical certificates and reports sufficiently convinced the Commission of the credibility of the applicant's allegations concerning the large number of blows he received, as well as their intensity.<sup>145</sup> The Court, therefore, declared Mr. Selmouni's application admissible and found violations of Article 6, Section 1, as well as Article 3.<sup>146</sup>

The Court then applied the guiding principles established in the *Tomasi*<sup>147</sup> and the *Ribitsch*<sup>148</sup> cases.<sup>149</sup> Through these examples the Court noted that torture is "deliberate in human treatment causing very serious and cruel suffering";<sup>150</sup> a condition distinguishable from inhuman and degrading treatment. The Court further noted that the distinction between torture and inhuman and degrading treatment was also reflected in the Convention Against Torture<sup>151</sup> and decided to apply the guiding principle and the severity requirement to the instant case. This meant they acknowledged that the acts of violence and other types of abuse, namely psychological and sexual abuse, experienced by Mr. Selmouni were of such intensity that they could cause substantial pain,<sup>152</sup> and could also be classified as "heinous and humiliating for anyone, irrespective of their condition."<sup>153</sup> Considering that all parts of Mr. Selmouni's body were abused, the abuse was repeated and sustained for a number of days, and all of this was substantiated by medical reports, the Court's final determination was that "the physical and mental violence, considered as a whole, committed against the applicant's person caused 'severe' pain and suffering and was particularly serious and cruel. Such conduct must be regarded as acts of torture for the purposes of Article 3 of the Convention."<sup>154</sup> However, the European Court of Human Rights refrained from committing to a particular set of criteria for the severity requirement, or creating a list of acts which would always be considered torture, or characterizing the evidence necessary to prove either. Thus, the outcome of an individual case remains unpredictable.<sup>155</sup>

144. See European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 38, Protocol No. 11, Art. 35, § 1.

145. See *id.*

146. See *Selmouni v. France*, 1109 Eur. Ct. H.R. (1999), Annex.

147. *Tomasi v. France*, 241 Eur. Ct. H.R. (ser. A) (1992).

148. *Ribitsch v. Austria*, 336 Eur. Ct. H.R. (ser. A) (1995).

149. The guiding principle is described by the Court as follows: "[W]here 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, failing which a clear issue arises under Article 3 of the Convention." *Selmouni v. France*, 1109 Eur. Ct. H.R. (1999), para. 87.

150. *Id.*, para. 63.

151. The Court noted that "[t]he United Nations Convention against Torture and Other Cruel, Inhuman or Degrading treatment or Punishment . . . also makes such a distinction, as can be seen from Articles 1 and 16." *Id.*, para. 97.

152. See *id.*, para. 102.

153. *Id.*, para. 103.

154. *Id.*, para. 105.

155. Compare the outcome of *Selmouni v. France* with a more recent case, *Mahmut Kaya v. Turkey*, 1416 Eur. Ct. H.R. (2000).



### C. *Israeli Supreme Court Judgment: The Legality of Interrogation*

The history of conflict between Israel and the Palestinians has included wars, high intensity internal conflicts, and terrorism. The Israeli government issued "directives regulating interrogation methods"<sup>156</sup> that authorize its General Security Service (GSS) to engage in torture when interrogating individuals suspected of endangering security. In 1999, an Israeli Supreme Court condemned these practices:

Terrorist acts and the general disruption of order are [the GSS'] means of choice . . . . They carry out terrorist attacks in which scores are murdered in public areas, public transportation, city squares and centers, theaters and coffee shops . . . . They act out of cruelty and without mercy.<sup>157</sup>

Furthermore:

On the one hand, it is our duty to ensure that human dignity be protected; that it is not harmed at the hands of those who abuse it, and to do all that we can to restrain police investigators from fulfilling the object of their interrogation through prohibited and criminal means; on the other hand, it is (also) our duty to fight the increasingly growing crime rate which destroys the positive aspects of our country, and to prevent the disruption of public peace to the caprices of violent criminals that were beaten by police investigators.<sup>158</sup>

This declaration raises the issue of whether any moral and juridical motives can justify torture. The Court considered the permissibility of interrogations which elicit confessions and the disclosure of evidence which might prevent a substantial tragedy. Still, the Court made "no exceptions to the prohibitions against torture and found no room for balancing."<sup>159</sup>

In this case the Supreme Court stated that interrogation methods must be "inherently accessory to the very essence of an interrogation and . . . both fair and reasonable."<sup>160</sup> If the interrogator exceeds their authority, they bear criminal responsibility for their actions subject to the necessity defense. Thus, though the Israeli Court made an important advance in giving the prohibition of torture near absolute standing under Israeli law, it remains to

156. *Judgment Concerning the Legality of the General Security Service's Interrogation Methods*, Supreme Court of Israel, 38 I.L.M. 1471 (1999). The methods of interrogation used by the GSS included physical practices such as shaking the suspect—a method that could cause brain damage, spinal cord injury, loss of consciousness, loss of control over excretory functions, etc.

157. *See id.* at 1472.

158. *Id.* at 1481.

159. *Id.* at 1482.

160. *Id.* at 1488.

be seen whether the necessity defense minimizes the absolute character of this prohibition.<sup>161</sup>

## VII. THE STRATEGIC IMPORTANCE OF CIVIL SOCIETY FOR ERADICATION OF TORTURE

Strategies must include several actors. Governments must be at the forefront of such efforts as they play the central role in rogue states as the aggressor, the perpetrator, if not the facilitator of torture. However, another crucial actor is the international non-governmental organization, critical in putting torture and other human rights issues on the agenda of the international community.

The activism of international non-governmental organizations (INGOs) has helped create the necessary legal framework for realizing the ideal of completely eradicating torture. Still, these organizations are only one component of a global civil society network. Members of civil society must recognize their own potential victimhood and contribute to efforts to prohibit torture.

Global civil society encompasses a vast variety of organizations, all of which have been affected by the communications revolution, particularly the Internet. The advancement in worldwide communication has broad implications for human rights advocacy, agitation, networking, and solidarity, for they can enable unprecedented levels of cohesion in the global civil society. Furthermore, they can facilitate campaigns of public awareness and collaboration among INGOS to help realize and complement more formal efforts for eradicating torture worldwide.

Power itself is fluid in the modern global context, and, if beneficent civil society does not fill the void, those committed to the future of human indignity undoubtedly will. More must be done to solicit participation from key institutions of global civil society, such as professional, academic, and scientific associations, as well as those individuals in the academic and scientific fields. INGOs can launch appeals to those individuals in the legal, law enforcement, and medical professions, challenging them to enact their ethical and moral ideals to contribute to international efforts to combat torture. Since victims are often tortured for their political views, political parties and parliamentarians must mobilize their support for these persecuted individuals.

Understanding and connection among the institutions of civil society would be an indispensable strategic initiative for providing public support and pressure to the important work of eradicating torture.

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161. See *Azanian Peoples Org. v. President of the Republic of S. Afr.*, CCT 17/96; see also Winston P. Nagan, *Conflict Resolution and Democratic Transformation: Confronting the Shameful Past—Prescribing a Humane Future*, S. AFR. L.J. (forthcoming 2001) (manuscript at 27–28, on file with author).

One area which remains a challenge is the development of strategies for universalizing the enforcement and application of international law proscribing torture.

Making torture a civil as well as a criminal wrong and subjecting torturers to universal civil jurisdiction will be two essential steps toward this goal. Furthermore, universal recognition of both civil and criminal decisions will increase the effectiveness of these remedies.

Other strategies for enhancing enforcement of laws against torture include encouraging prosecutors to fulfil their obligation to prosecute torture cases; tightening extradition standards so that torturers will not escape responsibility; and pressuring diplomats to confront foreign leaders in countries which violate anti-torture laws. The Special Rapporteur is committed to carry out a comprehensive assessment of the social processes of torture<sup>162</sup> and the monitoring of human rights violations will aid such a strategy.<sup>163</sup>

Uniting the efforts of INGOs, professional organizations, and other institutions will be an integral element of a worldwide plan to end torture.

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162. See INTERIM REPORT OF THE SPECIAL RAPPORTEUR OF THE COMMISSION ON HUMAN RIGHTS ON THE QUESTION OF TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, UN General Assembly, 55th Session, Item 116(a) of the provisional agenda, HUMAN RIGHTS QUESTIONS: IMPLEMENTATION OF HUMAN RIGHTS INSTRUMENTS, A/55/290. (Aug. 2000).

163. See PATRICK BALL, WHO DID WHAT TO WHOM? PLANNING AND IMPLEMENTING A LARGE SCALE HUMAN RIGHTS DATA PROJECT (1996). Study done under the auspices of the American Association For The Advancement of Science. On the conceptual and practical challenges of this, see SCHMID & JONGMAN, MONITORING HUMAN RIGHTS VIOLATIONS (1991) (P.I.O.O.M.)

