

Indigenous Corporal Punishments in Ecuador and the Prohibition of Torture and Ill-Treatments

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I. Introduction

On May 9, 2010, Marcelo Olivo was found dead in the village of Zumbahua, located at the Ecuadorian province of Cotopaxi. The next day, five men suspected in his murder were caught and handed over to the indigenous authorities. In two separate sessions, the General Assembly of La Cocha-Zumbahua, the supreme indigenous authority of the locality, after being informed of the results of the inquiries, and having heard all the involved, sentenced the accused. They all received the same penalties: a fine of US\$5,000, a ban from all social and cultural celebrations for two years, expulsion from the community for two years, mandatory subjection to cold baths and stinging nettles for a half-hour period,¹ one thrash with a leather strap by each communal leader,² the task of carrying a hundredweight in a naked state, and making public apologies.³

During the days that followed, national authorities, the media, academics, and recognized jurists severely criticized the indigenous proceedings and the imposed punishments. Detractors portrayed the events in La Cocha as barbaric and violent. Ecuador's President himself called the events a 'monstrosity', a 'degrading spectacle', a 'barbarity'. "For God's sake, this is torture", he added.⁴

¹ The skin of the men was rubbed with stinging nettles before they were given a shower of ice-cold water. The cold water increases the burning sensation of the nettles. These acts are considered as ways of purification.

² The number of communal leaders that intervened, and therefore the number of strokes the defendants received is not clear.

³ *Acta* (handwritten record) No. 24 of the General Assembly of La Cocha-Zumbahua (May 16, 2010); Marc Simon Thomas, *Legal Pluralism and the Continuing Quest for Legal Certainty in Ecuador: A Case Study from the Andean Highlands*, OÑATI SOCIO-LEGAL SERIES (forthcoming 2012); Raúl Llasag Fernández, *Avances, límites y retos de la administración de justicia indígena en el Ecuador, año 2010: El Caso La Cocha*, in DEVELANDO EL DESENCANTO. INFORME SOBRE DERECHOS HUMANOS ECUADOR 93, 95-97 (PADH, 2010); Carlos Poveda, *La Cocha: 2002 – 2010. Retrocesos en un estado constitucional de derechos y justicia, social, democrático, soberano, independiente, unitario, intercultural, plurinacional y laico*, 49 NOVEDADES JURÍDICAS 6, 12-13 (2010); Irene Caselli, *Ecuador's Indigenous Justice System on Trial*, BBC (Jul. 27, 2010), <http://www.bbc.co.uk/news/world-latin-america-10683003> (All internet sources were last accessed on Jan. 11, 2012).

⁴ Irene Caselli, *supra* note 3. The case even appeared in a video edited by the government and passed through national television. It shows other cases allegedly heard by indigenous communities, asking the question: 'killings, lynchings, kidnappings, tortures... Is this indigenous justice?' (available at <http://www.youtube.com/watch?v=YmbZis93XCw>).

Indigenous leaders replied that Ecuador's Constitution recognizes the right of indigenous peoples to maintain and apply their own indigenous customary law (ICL).⁵ Furthermore, they argued that human rights must be 'interpreted inter-culturally', avoiding extreme universalistic or relativistic postures.⁶

The UN Special Rapporteur on indigenous people, James Anaya, expressed 'deep concern' at the polarized atmosphere that emerged from the media backlash and statements by government officials. He recalled that indigenous peoples' right to enjoy their own law is recognized in the Constitution and in international treaties signed by the government. The constitutional provision, in his view, 'is not only consistent with international standards on the subject [...] but it recognizes the undeniable reality of the existence and effective operation for hundreds of years of several indigenous justice systems'.⁷

After the events in La Cocha, the five defendants were arrested and put on trial before national criminal judges.⁸ At the same time, three indigenous leaders that heard the case were arrested for kidnapping, torture, mistreatment, and extortion. Both cases were referred to the Constitutional Court, but no final decision has been adopted yet.⁹

The *La Cocha* case is one of many cases that show the polarization in the country regarding ICL. The debate has many faces: the scope of the indigenous authorities' jurisdiction, access to justice of indigenous people, their right to self-determination, the role of women, the cooperation between

⁵ ICL is the set of rules and procedures based on the uses and customs, but not limited to them, that indigenous peoples utilize to regulate their internal affairs, as a system of social control. This set is not limited to regulations concerning contentious issues (conflict resolution, application of penalties for violation of the rules), but includes regulations relating to land management, spiritual and civil matters and regulatory authorities, in many cases difficult to separate from the set of everyday cultural practices of these groups. Authorities implementing these regulations may be different (central, segmental, or magical-religious) or concomitant. Finally, these rights are usually considered ancient legal traditions, pre-existing national law, found with different degrees of external influence on indigenous peoples in the region (see, Rodolfo Stavenhagen quoted by Roberto Cuellar, *Presentación*, in COORDINACIÓN ENTRE SISTEMAS JURÍDICOS Y ADMINISTRACIÓN DE JUSTICIA INDÍGENA EN COLOMBIA 7, 9 (Rosembert Ariza Santamaría, IIDH, 2010).

⁶ Raúl Llasag Fernández, *supra* note 3, at 103-104.

⁷ *Ordinary and indigenous justice in Ecuador: 'The key lies in dialogue' says UN expert*, Press release of the OHCHR (Jun. 8, 2010) <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10128&LangID=E>.

⁸ M. Simon Thomas, *supra* note 3.

⁹ *Corte Constitucional conoce caso La Cocha*, HOY (Jun. 8, 2010) <http://www.hoy.com.ec/noticias-ecuador/corte-constitucional-conoce-caso-la-cocha-412176.html>; Lorena Álvarez, *5 detenidos en caso La Cocha salen en libertad*, EL UNIVERSO (May 13, 2011) <http://www.eluniverso.com/2011/05/13/1/1447/5-detenidos-caso-cocha-1-ano-sin-condena.html>

indigenous adjudicators and national authorities, the limits of ICL, and corporal punishments, among others.

The aim of this research is to contribute to the debate on one particular issue: indigenous corporal punishments and the prohibition of torture and other ill-treatments and punishments. From an International Human Rights Law (IHRL) perspective, my purpose is to show that not all indigenous corporal punishments amount to forbidden acts. I will not try to undermine the prohibition of torture, instead, using the elements of the concept of ‘torture’ and ‘cruel, inhuman, and degrading punishments’ (CIDP) given by IHRL, I will show that certain indigenous corporal punishments do not fulfill all the requirements of torture or CIDP. I will also demonstrate that despite the views of several international bodies of the contrary, the culture of a society is always present in what it considers acceptable suffering for the assessment of the elements of torture and CIDP.

The importance of answering the question of ‘which corporal punishments amount to torture or CIDP?’ does not only have academic value, but also practical. On the one hand, the academic literature on indigenous corporal punishments in Ecuador is mainly circumscribed to descriptions and analysis made from anthropological or sociological perspectives. Perspectives from IHRL can hardly be found and are often confined to a few paragraphs of a more general study. On the other hand, up until now Ecuador has not adopted secondary laws that define and elucidate the scope of ICL,¹⁰ and the case law of national courts on the issue is minimal, non-systematic, and reduced to a very limited number of lower courts.¹¹ Conflicts between national law and ICL have not yet been sufficiently addressed, and national judges do not have enough guidance on the matter. Notwithstanding, due to the constitutional recognition of ICL, its

¹⁰ The Constitution of 1998 (art. 191, Constitutional Gazette, Jun. 1998) stipulated the need of a ‘coordination law’ between ICL and national law. Two drafts were presented on this matter, yet both were rejected (MARC SIMON THOMAS, LEGAL PLURALISM AND INTERLEGALITY IN ECUADOR. THE LA COCHA MURDER CASE 41-42 (Cuadernos del CEDLA 24, 2009). The Constitution of 2008 (art. 171, R.O. No. 449, Oct. 20, 2008) once again requested the adoption of a coordination law. On February 2010, another draft was submitted, which is still under discussion.

¹¹ M. Simon Thomas, *supra* note 10, at 42-45.

use has intensified. Nowadays, indigenous peoples openly resort to ICL, a practice that in the past was illegal. The result is an increase in the number of cases heard by indigenous authorities and, consequently, more corporal punishments are being imposed.¹² Clarifying how, when, and why corporal punishments amount to torture or CIDP will assist national judges in their task of controlling the constitutionality and conventionality¹³ of ICL, and will aid indigenous authorities in assessing themselves the extent of their powers. Lastly, indigenous leaders have expressed that if the Constitutional Court does not solve the *La Cocha* case in their favor, they will submit it to the Inter-American System (IAS), expecting that the Inter-American Commission of Human Rights (IACnHR) and the Inter-American Court of Human Rights (IACtHR) will declare a violation of Ecuador's international obligations.¹⁴ This paper is also intended to give some light to the parties in the event that the *La Cocha* or other similar case is brought to the regional system. Although the IAS has no case law on the issue, this paper critically analyzes the existing jurisprudence, with the intention of presenting possible scenarios in which indigenous corporal punishments could be acceptable. The case law of other international bodies and tribunals will help to complete the study.

Before going any further, I must clarify that my analysis will assume that indigenous corporal punishments are inflicted after a due process of law.¹⁵ I will also assume that the proceedings in general are respectful of other human rights, such as, the right to personal liberty, the right of equality, and the principle of non-discrimination. Additionally, my analysis will be circumscribed to corporal punishments imposed *in* indigenous legal proceedings and *after* the guilt of the defendant was proved beyond

¹² Solveig Hueber, *Cambios en la administración de justicia indígena en Ecuador después de la Reforma Constitucional de 1998*, 83 ECUADOR DEBATE 109, 117 (2011); *Justicia indígena se dicta sin control por falta de ley*, EL UNIVERSO (May 23, 2010) <http://www.eluniverso.com/2010/05/23/1/1447/justicia-indigena-cuestionada-tema-derechos-humanos.html>.

¹³ On the conventionality control see, Oswaldo Ruiz-Chiriboga, *The Conventionality Control: Examples of (Un)Successful Experiences in Latin America*, 3 INTER-AMERICAN AND EUROPEAN HUMAN RIGHTS JOURNAL 200 (2010).

¹⁴ Gloria Taco, *Caso La Cocha irá a la Corte Interamericana de Derechos Humanos*, COTOPAXI NOTICIAS (Jan. 5, 2011) <http://www.cotopaxinoticias.com/seccion.aspx?sid=13&nid=2046>.

¹⁵ It shall be noted that due process of law in indigenous contexts has several particularities that must be taken into consideration in order to assess if a fair trial was offered to the parties (see, R. Ariza Santamaría, *supra* note 5, at 77).

reasonable doubt. Accordingly, I will not discuss corporal punishments applied outside indigenous legal proceedings, or by non-indigenous groups, or *before* the defendant is found guilty. Finally, although this paper is limited to the study of Ecuador's ICL, nothing prevents my conclusions from being extrapolated to other (Latin American) countries with similar realities.

As to the structure of this paper, six sections follow this introduction. Section II describes the history of legal pluralism in Ecuador. Section III makes a succinct presentation of the international documents that recognize indigenous peoples' right to maintain their systems of law. The main theoretical contribution will be presented in sections IV, V and VI, in which the concepts of torture and CIDP are analyzed; at the end of each section some preliminary conclusions will be anticipated. Section VII will close with two final conclusions: not all indigenous corporal punishments amount to forbidden acts, and the culture of a society is always a relevant factor in the assessment of torture and CIDP.

II. Legal Pluralism in Ecuador

While Ecuador has always been a legally pluralistic country,¹⁶ where national law and ICL have co-existed even before independence from Spain, the way in which plural legal orders have been accommodated has varied considerably across time. When the Spanish Crown colonized the *Tawantinsuyo* (the Inca Empire) it applied a *segregationist* model that kept ICL only for local non serious cases between the *indios*, as long as it was not contrary to the Spanish religion or laws, and did not exercise an impact upon the colonial economic and political order - it was a *subordinate* legal pluralism. In 1830 the independent Republic of Ecuador replaced the *segregationist* model by an *assimilationist* one; its objective was to convert the *indios* into citizens by lifting their colonial status, but at the same

¹⁶ Legal pluralism is the simultaneous existence of two or more legal orders pertaining to more or less the same set of activities within one socio-political space, based on different sources of ultimate validity and maintained by forms of organization other than the State (Franz von Benda-Beckmann, *Who's Afraid of Legal Pluralism?*, 47 J. LEGAL PLURALISM & UNOFFICIAL L. 37, 37 (2002); Franz & Keebet von Benda-Beckmann, *The Dynamics of Change and Continuity in Plural Legal Orders*, 53-54 J. LEGAL PLURALISM & UNOFFICIAL L. 1, 14 (2006); Donna Lee Van Cott, *A Political Analysis of Legal Pluralism in Bolivia and Colombia*, 32(1) J. LAT. AMER. STUD. 207, 209 (2000).

time stripping them of their cultural values. ICL became illegal and a monist legal order was imposed. Yet, ICL continued to be practiced in a sort of *surreptitious* legal pluralism. Subsequently, from the decade of the 1920s an *integrationist* model came into play; certain collective rights and indigenous cultural particularities were legally protected, yet the monist legal order was still in force. It was in 1998 when the *de facto* legal pluralism was constitutionally recognized,¹⁷ passing to a *formal* or *de jure* legal pluralism.¹⁸

The 2008 Constitution came to expand and improve the recognition of ICL. Art. 1 defines Ecuador as a multicultural and plurinational State, acknowledging the coexistence in the Republic of several cultures and nationalities.¹⁹ Other provisions (e.g. Arts. 3(3), 10, 56-60, 242) reinforce the intention of the State to protect its cultural and ethnical diversity. Art. 57(9) and (10) recognizes the indigenous peoples' collective right to maintain and develop their own forms of social life, organization, and creation and exercise of authority in their territories, as well as the freedom to create, develop, and implement their own laws. Finally, Art. 171 provides the following:

The authorities of the indigenous communities and nationalities exercise judicial functions, based on their ancestral traditions and their own systems of law, within their territory, with a guarantee of participation and decision making of women. The authorities shall apply rules and procedures for resolving internal conflicts, and not contrary to the Constitution and human rights recognized in international instruments. The State shall ensure that indigenous jurisdiction decisions are respected by public institutions and authorities. Such decisions will be subject to constitutional review. The law shall establish mechanisms of coordination and cooperation between indigenous jurisdiction and ordinary jurisdiction' [author's translation].

¹⁷ Constitution of 1998, *supra* note 10, art. 191.

¹⁸ M. Simon Thomas, *supra* note 10, at 36-37; M. Simon Thomas, *supra* note 3; Raquel Yrigoyen Fajardo, *Hitos del reconocimiento del pluralismo jurídico y el derecho indígena en las políticas indigenistas y el constitucionalismo andino*, in PUEBLOS INDÍGENAS Y DERECHOS HUMANOS 537, 540-541 (Mikel Berraondo coord., 2006); CARLOS OCHOA GARCÍA, DERECHO CONSUETUDINARIO Y PLURALISMO JURÍDICO 89-94 (Cholsamaj, 2002).

¹⁹ In Ecuador indigenous peoples are classified in 'nationalities'. There are 13 different nationalities (LOUDERS TIBÁN & RAÚL ILAQUICHE, MANUAL DE ADMINISTRACIÓN DE JUSTICIA INDÍGENA EN EL ECUADOR 18 (IWGIA, 2004).

The constitutional recognition of ICL has the effect, in the first place, of giving indigenous laws the same value and binding power as national laws.²⁰ Secondly, all public institutions, particularly judges and courts, must modify their legally monistic practices,²¹ interpreting and applying the Constitution and secondary laws in an intercultural way.²² Thirdly, the Parliament loses its monopoly of legislative powers. Nowadays, indigenous authorities share the power to create, modify, and abolish the laws that regulate their internal affairs.²³ Finally, ICL is put on equal footing with national law, which means *inter alia* that indigenous authorities have the same legal and judicial powers as national authorities.

Consequently, from a strict juridical point of view, the constitutional recognition of ICL means that the sanctions and punishments ICL provides are *lawful*.²⁴ Whether these sanctions respect the Constitution is another issue, and the second step of the analysis. According to basic principles of constitutional law, every legal provision has a presumption of constitutionality, which means that the challenged provision shall be considered constitutional and then the arguments and reasons that point to its unconstitutionality shall be discussed.²⁵ Therefore, indigenous corporal punishments are presumed constitutional unless proven otherwise. This is of utmost importance for the purposes of this paper. As will be discussed in section IV, *lawful sanctions* are not considered torture or CIDP.

III. International Instruments that Protect the Right to Maintain Indigenous Laws

²⁰ Luis Fernando Ávila Linzán, *Los caminos de la justicia intercultural*, in DERECHOS ANCESTRALES. JUSTICIA EN CONTEXTOS PLURINACIONALES 175, 178 (Carlos Espinosa & Danilo Caicedo ed., 2009).

²¹ Gina Chávez Vallejo, *El derecho propio: ¿destapando la Caja de Pandora!*, in DESAFÍOS CONSTITUCIONALES. LA CONSTITUCIÓN ECUATORIANA DEL 2008 EN PERSPECTIVA 67, 82 (Ramiro Ávila Santamaría et al. eds., 2008)

²² Agustín Grijalva, *El Estado plurinacional e intercultural en la Constitución ecuatoriana de 2008*, in DERECHOS ANCESTRALES. JUSTICIA EN CONTEXTOS PLURINACIONALES 389, 394 (Carlos Espinosa & Danilo Caicedo ed., 2009).

²³ Oswaldo Ruiz-Chiriboga, *La justicia indígena en el Ecuador: pautas para una compatibilización con el derecho estatal*, in APORTES ANDINOS SOBRE DERECHOS HUMANOS. INVESTIGACIONES MONOGRÁFICAS 53, 69 (UASB, 2005).

²⁴ Since national and indigenous authorities are in equal footing, they both have the *notio*, *iudicium* and *imperium* powers. The *notio* is defined as the power to hear matters that according to the national or indigenous laws are under the jurisdiction of each judge. It includes the power to summon the parties, collect evidence, make notifications, etc. The *iudicium* is the ability to resolve the matter under consideration. The *imperium* is the power to enforce the law and to implement judicial decisions. It presupposes the power to enact penalties and sanctions for the breach of the law (Esther Sánchez Botero & Isabel C. Jaramillo, *La Jurisdicción especial indígena*, in DERECHOS ANCESTRALES. JUSTICIA EN CONTEXTOS PLURINACIONALES 125, 160-171 (Carlos Espinosa & Danilo Caicedo eds., 2009).

²⁵ Rubén Sánchez Gil, *La presunción de constitucionalidad*, in LA CIENCIA DEL DERECHO PROCESAL CONSTITUCIONAL. ESTUDIOS EN HOMENAJE A HÉCTOR FIX-ZAMUDIO 365 (Eduardo Ferrer & Arturo Zaldívar coords., Vol. VIII, 2008).

The right of indigenous peoples to use their own systems of law is recognized directly and indirectly through a variety of international instruments; most notably, the International Covenant on Civil and Political Rights (ICCPR),²⁶ the International Covenant on Economic, Social and Cultural Rights (ICESCR),²⁷ the International Labour Organization Convention No. 169 (ILO C169),²⁸ and the UN Declaration on the Rights of Indigenous People (UN Declaration).²⁹

Self-determination, protected in common Art. 1 of the ICCPR and the ICESCR, is expressed as the right of peoples to ‘freely determine their political status and freely pursue their economic, social and cultural development.’ The modern conception of this right engenders indigenous sovereignty,³⁰ as ‘states are obliged to grant a reasonable degree of sovereignty to indigenous peoples to enable them to pursue their own economic, social, and cultural development, provided that this autonomy is exercised within and subject to the sovereignty of the state’.³¹ An integral part of this right is the right of indigenous peoples to maintain and apply their own ICL, because ‘legal norms constitute a central part of the system through which a people govern its society’.³²

Arts. 8 and 9 of ILO C169 deal with the right of indigenous peoples to preserve their customary law. As is evident from the wording of these provisions,³³ this right is not absolute; its exercise must not be incompatible with fundamental national and international rights.

²⁶ G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171.

²⁷ G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3.

²⁸ Convention concerning Indigenous and Tribal Peoples in Independent Countries, (ILO No. 169), 72 ILO Off. Bull. 59 (1989).

²⁹ U.N. Doc. A/RES/47/1 (2007).

³⁰ *Saramaka People v. Suriname*, Judgment, IACtHR (ser. C) No. 172, ¶95 (Nov. 28, 2007).

³¹ Robin Perry, *Balancing Rights or Building Rights? Reconciling the Right to Use Customary Systems of Law with Competing Human Rights in Pursuit of Indigenous Sovereignty*, 24 HARVARD HUM. RTS. J. 71, 87 (2011).

³² Mattias Ahrén, *Indigenous Peoples’ Culture, Customs and Traditions and Customary Law—the Saami People’s Perspective*, 21 ARIZ. J. INT’L & COMP. L. 63, 108 (2004). In fact, if a particular indigenous community loses its customary law, it loses an essential part of its ethnic identity, even if it manages to preserve other significant parts of that identity. Actually, in Latin America the indigenous people that have succeeded to defend their customary law, are those with the most vigorous identity (Rodolfo Stavenhagen quoted by M. Simon Thomas, *supra* note 10, at 15).

³³ The articles read as follows: 8(1) In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws. 8(2) These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this

The predominance of human rights is also found in the UN Declaration. Although this instrument recognizes that indigenous peoples have the right to self-determination (Art. 3), and the right to ‘promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs’; it also stipulates that ICL shall be exercised ‘in accordance with international human rights standards’ (Art. 34).

Consequently, both Ecuadorian and International Law set as a limit of ICL the respect of human rights, but some questions remain: How shall human rights be interpreted? What role does culture play in the process of interpretation? By what process may it be determined that a cultural practice is illegitimate? Whatever the ultimate answer to these questions, Anaya states that ‘the internal decision-making dynamics that are themselves part of a cultural group identity should be the starting point’.³⁴ He adds that:

In any assessment of whether a particular cultural practice is prohibited rather than protected, the cultural group concerned should be accorded a certain deference for its own interpretive and decision-making processes in the application of universal human rights norms, just as states are accorded such deference. It may be paradoxical to think of universal human rights as having to accommodate diverse cultural traditions, but that is a paradox embraced by the international human rights regime by including rights of cultural integrity among the universally applicable human rights, precisely in an effort to promote common standards of human dignity in a world in which diverse cultures flourish.³⁵

This paper will follow Anaya’s logic in the assessment of indigenous corporal punishments and the prohibition of torture and CIDP.

So far I have presented the national and international law that protects the right to maintain and develop ICL. An integral part of indigenous law is the right of indigenous peoples to punish offenses according to their culture; consequently, this power is also protected by both national and international law. The next

principle. 8(3) The application of paragraphs 1 and 2 of this Article shall not prevent members of these peoples from exercising the rights granted to all citizens and from assuming the corresponding duties. 9(1) To the extent compatible with the national legal system and internationally recognised human rights, the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected. 9(2) The customs of these peoples in regard to penal matters shall be taken into consideration by the authorities and courts dealing with such cases.

³⁴ S. James Anaya, *International Human Rights and Indigenous Peoples: The Move toward the Multicultural State*, 21 ARIZ. J. INT’L & COMP. L. 13, 26 (2004).

³⁵ *Ibid.*

step is to discuss whether corporal punishments as an expression of ICL are prohibited by IHRL. For that purpose, the notion of ‘torture’ will be studied below.

IV. Torture in International and Ecuadorian Law

Due to its particular severity, its destructive effects on the victim and on persons and communities other than the primary victim, and the metastatic tendency of its administration, torture has a special position in International Law.³⁶ It is undisputable that the prohibition of torture is absolute and non-derogable. It is a matter of customary international law and peremptory *ius cogens* norm, which remains valid even under the most difficult circumstances.³⁷ Yet, the definition of torture is not uniform. On the one hand, several branches of International Law have their own prohibition of torture according to the framework they cover and the goals they pursue.³⁸ On the other hand, the existing definitions within each branch are not always similar, do not seem to have the same elements, and the language used is not identical.³⁹

I will not try to add anything new to the efforts of (re)defining torture.⁴⁰ I will only focus on the definitions of this evil given by IHRL, because the treatments applied by indigenous adjudicators in

³⁶ Sumner B. Twiss, *Torture, Justification, and Human Rights: Toward an Absolute Proscription*, 29(2) HUMAN RIGHTS QUARTERLY 346, 358 (2007).

³⁷ Special Rapporteur on torture, U.N. Doc. A/HRC/13/39/Add.5, ¶ 40 (Feb. 5, 2010) (by M. Nowak); CAT, *General Comment No. 2*, U.N. Doc. CAT/C/GC/2, ¶ 1 (Jan. 24, 2008); HRC, *General Comment No. 20*, ¶ 3, (Apr. 10, 1992), reprinted in U.N. Doc. HRI/GEN/1/Rev.6 at 151 (2003); *Maritza Urrutia v. Guatemala*, Judgment, IACtHR (ser. C) No. 103, ¶ 89 (Nov. 27, 2003); *Gómez-Paquiayauri Brothers v. Peru*, Judgment, IACtHR (ser. C) No. 110, ¶¶ 111-112 (Jul. 8, 2004); *Tibi v. Ecuador*, Judgment, IACtHR (ser. C) No. 114, ¶ 143 (Sep. 7, 2004); *Miguel Castro Castro Prison v. Peru*, Judgment, IACtHR (ser. C) No. 169, ¶ 271 (Nov. 25, 2006); *Bueno-Alves v. Argentina*, Judgment, IACtHR (ser. C) No. 164, ¶ 76 (May 11, 2007); *Bayarri v. Argentina*, Judgment, IACtHR (ser. C) No. 187, ¶ 81 (Oct. 30, 2008); *Prosecutor v. Deladić et al.*, Case No. IT-96-21, Trial Chamber Judgment, ICTY, ¶ 454 (Nov. 16, 1998); *Prosecutor v. Furundžija*, Case No. IT-95-17/1, Trial Chamber Judgment, ICTY, ¶ 144 (Dec. 10, 1998); *Prosecutor v. Milan Simić*, Case No. IT-95-9/2-S, Trial Chamber Judgment, ICTY, ¶ 34 (Oct. 17, 2002); UNGA Res. 59/182, U.N. Doc. A/RES/59/182, ¶ 2 (Dec. 20, 2004); UNGA Res. 62/148, U.N. Doc. A/RES/62/148, ¶ 3 (Dec. 18, 2007); UNGA Res. 64/153, ¶ 1, U.N. Doc. A/RES/64/153 (Mar. 26, 2010); UNCAT art. 2(2), G.A. Res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984); IACPPT art. 5, Sep. 12, 1985, O.A.S.T.S. No. 67; ACHR, art. 27, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

³⁸ Prohibitions and definitions of torture can be found in International Criminal Law (ICrL), in International Humanitarian Law (IHL), and in IHRL.

³⁹ For instance, UNCAT art. 1, and IACPPT art. 2.

⁴⁰ Among others, STEVEN DEWULF, *THE SIGNATURE OF EVIL. (RE)DEFINING TORTURE IN INTERNATIONAL LAW* (Intersentia, 2011); David Weissbrodt & Cheryl Heilman, *Defining Torture and Cruel, Inhuman, and Degrading Treatment* 29 LAW & INEQ. 343 (2011); Julianne Harper, *Defining Torture: Bridging the Gap Between Rhetoric and Reality*, 49 SANTA CLARA L. REV. 893 (2009); Lisa Yarwood, *Defining Torture: The Potential For 'Abuse'*, 8 JIJIS 324 (2008); David Sussman, *Defining Torture*, 37

Ecuador do not satisfy the contextual elements required by the other branches of International Law.⁴¹ On the contrary, as was stated in the previous section of this paper, IHRL is expressly conceived as a limitation of ICL. The analysis will then be limited to the definitions provided by two treaties: the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT)⁴² and the Inter-American Convention to Prevent and Punish Torture (IACPPT).⁴³

The text of these two articles shows that the language used to define torture within the same branch of International Law, namely IHRL, is not identical. As to the similarities, both instruments require that the act be intentionally performed, that pain or suffering is inflicted, and that the treatment has a purpose. Furthermore, both instruments stipulate ‘lawful’ sanctions as an exclusionary rule. As to the differences, the IACPPT does not use the word ‘severe’ to qualify the pain or suffering. This treaty also includes the use of methods intended to ‘obliterate the personality’ or ‘diminish’ the physical or mental capacities of the victim. Finally, the UNCAT, unlike the IACPPT, requires the participation of a public official.⁴⁴

CASE W. RES. J. INT'L L. 225 (2006); Nigel S. Rodley, *The Definition(s) of Torture in International Law*, 55(1) CURRENT LEGAL PROBLEMS 467 (2002).

⁴¹ IHL is applicable in contexts of warfare; it contains rules of war that bind all the parties to an armed conflict, whether national or international. In ICrL torture as crime against humanity needs to be committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack (Rome Statute, art. 7(1)). In the war crime of torture the conduct must take place in the context of and be associated with an armed conflict (Rome Statute, art. 8(2)(a)(ii) and (2)(c)(i)).

⁴² UNCAT art. 1(1) provides: ‘For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.’

⁴³ IACPPT art. 2 makes this definition: ‘For the purposes of this Convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish. The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article.’

⁴⁴ However, pursuant to IACPPT art. 3, only public servants and employees, or persons acting at their instigation shall be held guilty of the crime of torture. It seems then that according to this treaty the participation of a public officer is not an element of the definition of torture, but only an issue of imputability or accountability. The IACtHR does not have a clear interpretation on this issue yet (Dissenting Opinion of Judge Medina-Quiroga in *González et al. v. Mexico*, Judgment, IACtHR (ser. C) No. 205 (Nov. 16, 2009)).

Some efforts to unify the two definitions could be found in the case law of the IACtHR. In its landmark decision *Bueno-Alves v. Argentina*,⁴⁵ the San Jose Court, when interpreting the prohibition of torture stipulated in the American Convention on Human Rights (ACHR),⁴⁶ stated that it should consider not only the IACPPT, but also other treaties such as the UNCAT. This was ‘particularly important’ in its view, because the ‘the interpretation of a treaty must take into account not only the agreements and instruments related to the treaty [...], but also the system of which it is part’.⁴⁷ Based on the foregoing, the Court understood that the elements of torture were threefold: (a) an intentional act, (b) which causes severe physical or mental suffering, (c) committed with a given purpose.⁴⁸

As to the domestic law, Art. 66(3)(c) of Ecuador’s Constitution includes a general prohibition of torture, but the term is not defined. The Ecuadorian Criminal Code does not have a definition of torture either, and instead Art. 205 makes an open-ended list of treatments that could be considered torture.⁴⁹

In spite of its defects,⁵⁰ one can clearly identify in this provision the intent element and the ‘pain or suffering’ element, although there is no indication of the level of agony. Notably, the purposive element is absent.⁵¹

⁴⁵ *Case Bueno-Alves v. Argentina*, *supra* note 37.

⁴⁶ ACHR art. 5(2) provides: ‘No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.’

⁴⁷ *Case Bueno-Alves v. Argentina*, *supra* note 37, ¶ 78.

⁴⁸ *Case Bueno-Alves v. Argentina*, *supra* note 37, ¶ 79.

⁴⁹ Criminal Code (R. O. Supp. 147, Jan. 22, 1971) art. 205 provides: ‘Who issues or implements the order of tormenting prisoners or detainees by incommunicado for longer time than that specified by law, by chains, stocks, bar, handcuffs, ropes, unwholesome dungeons, or other torture, shall be punished with imprisonment of one to five years and interdiction of political rights for the same period’ [author’s translation].

⁵⁰ The CAT has regretted that the offence of torture, as defined in art. 1 UNCAT, has not yet been entered in Ecuador’s law (CAT, U.N. Doc. CAT/C/ECU/CO/3, ¶ 14 (Feb. 8, 2006), and U.N. Doc. CAT/C/ECU/CO/4-6, ¶ 10 (Dec. 7, 2010).

⁵¹ On October 2011, the President of Ecuador sent to the Parliament a Draft Act on the Organic Integral Criminal Code (*Proyecto de Ley Código Orgánico Integral Penal*). Art. 93 makes a definition of torture, but because it is still a draft, the definition could be completely modified by the Legislature, being impossible to make solid assessments on it. However, it can be highlighted that the tendency is to incorporate the definition of the IACPPT. The provision includes the intentionality of the perpetrator and the infliction of pain or suffering as fundamental elements. It also embraces the obliteration of the victims’ personality and the diminishment of their physical or mental capacities as methods of torture. It requires though that pain or suffering be severe, which is more in consonance with the UNCAT. The purposive element is absent. It seems that for the Draft any purpose will suffice to consider any intentional act that causes severe pain and suffering as torture. One can argue that the absence of purpose is not problematic, because the stated purposes in the UNCAT and the IACPPT are only indicative and not exhaustive (J. Harper, *supra* note 40, at 904). Conversely, some commentators have argued: (a) that other purposes not listed in the UNCAT could be considered only if they have something in common with the purposes expressly listed (Special Rapporteur

Consequently, without an accurate national definition of torture, I will consider as its elements the ones described above - intentionality, severe pain or suffering, and purpose. The next step is to question whether indigenous peoples' culture could be taken into consideration in the assessment of torture's constituent elements. I will do so by critically analyzing the case law of international human rights bodies.

1. Torture and Culture

The prohibition of torture has been interpreted in a way that excludes any influence of cultural arguments. For instance, the Committee against Torture (CAT) has rejected 'any religious or traditional justification that would violate [torture's] absolute prohibition'.⁵² According to the UN Special Rapporteur on torture, the freedom from torture 'must not be balanced against national security interests or even the protection of other human rights'⁵³. The logic behind the prohibition seems quite simple: *if X amounts to torture → X is absolutely forbidden*. But then comes the question: What is torture? In previous pages it was shown that there is no list of forbidden treatments; instead three elements were identified in its definition. Can cultural arguments have some weight in the assessment of these elements? To complicate the issue even more, certain 'lawful' treatments cannot be considered torture pursuant to Art. 1 UNCAT and Art. 2 IACPPT. Is the lawfulness influenced (or even justified) by cultural arguments? Finally, is the definition of torture static in time or does this concept evolve? In the following sections some answers will be presented to these questions in the reverse order they were formulated.

1.1. The Changing Nature of Torture

on torture, U.N. Doc. A/HRC/13/39/Add.5, *supra* note 37, ¶ 35); (b) that the purposive element differentiates torture from other 'lesser' ill-treatments (Special Rapporteur on torture, U.N. Doc. A/HRC/13/39/Add.5, *supra* note 37, ¶ 188; CAT, U.N. Doc. CAT/C/GC/2, *supra* note 37, ¶ 10); and (c) that torture needs *dolus specialis* in order to keep its 'uniqueness and stigma' (S. DEWULF, *supra* note 40, at 517). Without this element, criminal acts that cause severe pain or suffering will be automatically considered torture, trivializing the notion of this evil.

⁵² CAT, U.N. Doc. CAT/C/GC/2, *supra* note 37, ¶ 5. See also, CEDAW, *General Recommendation No. 19*, U.N. Doc. A/47/38 (1992), ¶ 24(e) and (f); Special Rapporteur on violence against women, U.N. Doc. E/CN.4/2002/83, ¶¶ 109, 119, 129 (Jan. 31, 2002) (by R. Coomaraswamy), and UN Doc. A/HRC/4/34, ¶ 31 (Jan. 17, 2007) (by Y. Ertük); UNGA Res. 63/155, UN Doc. A/RES/63/155, ¶ 16(i) (Dec. 18, 2008); HRC, *General Comment No. 28*, U.N. Doc. CCPR/C/21/Rev.1/Add.10, ¶ 28 (Mar. 29, 2000).

⁵³ Special Rapporteur on torture, U.N. Doc. A/HRC/13/39/Add.5, *supra* note 37, ¶ 40.

The European Court of Human Rights (ECtHR) and the IACtHR have stated that the regional human rights conventions are ‘living instruments’ which must be interpreted in the light of present-day conditions.⁵⁴ With this philosophy, it was stressed that ‘certain acts which were classified in the past as “inhuman and degrading treatment” as opposed to “torture” could be classified differently in future’.⁵⁵ One author rightly observed that the ‘evolution’ does not only apply to the concrete acts that could be labeled as torture. ‘It equally applies to the concept of torture *in se*’.⁵⁶ Then, it would be undeniable that social/cultural factors play a (significant) role in this so-called ‘evolution’. As IACtHR Judge García-Ramírez puts it, the ‘development of the culture and sensitivity of the individuals [...] may entail an evolution in the way in which certain treatment is perceived and, consequently, how it is characterized’.⁵⁷ The question that follows is who may legitimately declare that such evolution has taken place? At the regional level, the ECtHR frequently utilizes the ‘European consensus’ argument in order to define vague or uncertain convention terms or to identify legal values and moral principles accepted by the majority of the States Parties. By assessing the municipal legislations, regional judges have an indication ‘of what is acceptable in Europe and how far they can go without losing their authority and credibility’.⁵⁸ In short, the consensus is a tool to appraise if a civilization ‘is ready and mature enough to accept certain changes’.⁵⁹ If a consensus is identified, dissenting States have a narrow margin of appreciation to deviate

⁵⁴ *Ituango Massacres v. Colombia*, Judgment, IACtHR (ser. C) No. 148, ¶ 155 (Jul. 1, 2006); *Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment, IACtHR (ser. C) No. 146, ¶ 117 (Mar. 29, 2006); *Selmouni v. France*, Judgment, ECtHR (App. No. 25803/94), ¶ 101 (1999); *Tyrer v. the United Kingdom*, Judgment, ECtHR (App. No. 5856/72), ¶ 31 (1978); *Soering v. the United Kingdom*, Judgment, ECtHR (App. No. 14038/88), ¶ 102 (1989).

⁵⁵ *Selmouni v. France*, *supra* note 54, ¶ 101; *Cantoral-Benavides v. Peru*, Judgment, IACtHR (ser. C) No. 69, ¶ 99 (Aug. 19, 2000).

⁵⁶ S. DEWULF, *supra* note 40, at 35. This author also highlights that the threshold of torture is not only changing, it is lowering, so more acts that in the past were acceptable now are intolerable (*ibid*, at 137).

⁵⁷ Separate Concurring Opinion of Judge García-Ramírez, *Bamaca-Velásquez v. Guatemala*, Judgment, IACtHR (ser. C) No. 70, ¶ 9 (Nov. 25, 2000). See also, TORTURE IN INTERNATIONAL LAW, A GUIDE TO JURISPRUDENCE, 99 (CEJIL & APT, 2008).

⁵⁸ Kanstantsin Dzehtsiarou, *Consensus from within the Palace Walls*, 40 UCD WORKING PAPERS IN LAW, CRIMINOLOGY & SOCIO-LEGAL STUDIES 1, 18 (2010).

⁵⁹ Interview of Judge Kovler of the ECtHR, *ibid*, at 11.

from that consensus. On the contrary, if there is no consensus, the margin of appreciation of each State is broader.⁶⁰

The IACtHR, on the other hand, usually does not state if it reaches to a certain conclusion after analyzing an inter-American consensus.⁶¹ In fact, it has been labeled as a ‘major, though selective, importer of human rights interpretations’, because it usually cites decisions of the ECtHR and UN bodies on comparable issues.⁶² This importation of interpretations could be very useful in solving the case at hand in a uniform way, giving coherency to IHRL.⁶³ But it could also be read as an imposition—by means of interpretation—of the consensus reached in one part of the world (Europe) to other quite different social and cultural arena (Latin America and the Caribbean).

Hence, if an act that in the past did not amount to torture, but reaches the necessary consensus to label it as such in Europe, it does not automatically mean that Ecuador and the rest of Latin America must ‘evolve’ at the same pace. The American regional system, if called to decide on the issue, must analyze whether the continent is ready to accept the change and if the region’s legal values and moral principles demand the relabeling of certain acts as torture.⁶⁴

As to the national systems, the legitimate bodies in charge of defining what practices will no longer be tolerated are the national courts and parliaments. Thus, in principle, these bodies may declare that certain acts now amount to torture. A problem arises when not all social groups of a given country have access to

⁶⁰ E.g. *Leyla Şahin v. Turkey*, Judgment, ECtHR (App. No. 44774/98), ¶ 109 (2005). However, the regional consensus is not always decisive. K. Dzehtsiarou’s interviews with several ECtHR judges (*supra* note 58, at 15) show that the consensus could be outweighed by strong personal convictions of the judges in sensitive issues. In such cases, the fundamental values of the judges are being imposed upon States Parties, despite that the latter, as a region, disagree with such values or their scope.

⁶¹ Only in a small number of cases the San Jose Court has studied the case-law of national courts to support its findings (for instance, *Tiu-Tojín v. Guatemala*, Judgment, IACtHR (ser. C) No. 190, ¶ 87 (Nov. 26, 2008); *Contreras et al. v. El Salvador*, Judgment, IACtHR (ser. C) No. 232, ¶ 82 (Aug. 31, 2011).

⁶² Gerald L. Neuman, *Import, Export, and Regional Consent in the Inter-American Court of Human Rights*, 19(1) EJIL 101, 109 (2008). Although, it is fair to say that on many issues, including indigenous peoples’ rights, the IACtHR is the pioneer and has exported its interpretations. The Court has also adopted strong regional positions on issues such as amnesty laws in the Americas.

⁶³ Lucas Lixinski, *Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law*, 21(3) EJIL 585 (2010).

⁶⁴ The same reasoning applies to the universal human rights system. Before any UN body declares that an ‘evolution’ has taken place, it shall consider that such ‘evolution’ occurred in a significant number of countries and regions of the world; otherwise there could be a risk of imposing the moral perceptions of a (limited) number of nations over the others.

these bodies or even worse are discriminated by them. That is the case of indigenous peoples in most nations. Usually these ethno-culturally differentiated groups lack access to the formal justice system due to ‘ingrained direct or indirect discrimination’.⁶⁵ Often the official legal culture in a country ‘is not adapted to deal with cultural pluralism [and] the dominant values in a national society tend to ignore, neglect and reject indigenous cultures’.⁶⁶ Moreover, indigenous populations have very low rates of political representation and do not have equal possibilities to participate at every level of power.⁶⁷ Additionally, as a general rule, States must guarantee that indigenous peoples be consulted on ‘any matters that might affect them’,⁶⁸ taking into account that the purpose of such consultations should be to obtain their free and informed consent.⁶⁹ Consultation is applicable to State’s administrative and legislative activity that has an impact on the rights or interests of indigenous peoples.⁷⁰ This duty derives from the ‘overarching right of indigenous peoples to self-determination and from related principles of democracy and popular sovereignty’.⁷¹

Consequently, if any Ecuadorian public authority decides that a practice that in the past was not considered torture shall be labeled as such in the present day, but in doing so, indigenous peoples did not have a voice,⁷² such decision is nothing but imposition,⁷³ and its democratic legitimacy is to be doubted.⁷³

⁶⁵ Special Rapporteur on indigenous people, U.N. Doc. E/CN.4/2004/80, ¶ 23 (Jan. 26, 2004) (by R. Stavenhagen).

⁶⁶ *Ibid.*

⁶⁷ The Committee on the Elimination of Racial Discrimination (CERD) has shown its concerns on the low level of participation in political life by indigenous peoples in Ecuador and other Latin-American countries. It has recommended states to ensure full participation by indigenous peoples, especially women, in the administration at all levels, in all decision-making bodies, in particular representative bodies such as the parliament, in all levels of public service and public life, to take the necessary measures to enable them to be elected in comitias, and to have equal access to employment in the public service (CERD, U.N. Doc. A/51/18 Supp. 18, ¶ 51 (1996); U.N. Doc. A/52/18 Supp. 18, ¶¶ 319, 352 (1997); U.N. Doc. CERD/C/EQU/CO/19, ¶ 15 (Aug. 15 2008); U. N. Doc. CERD/C/CHL/CO/15-18, ¶ 20 (Sep. 7, 2009); U.N. Doc. A/65/18 Supp. 18, ¶ 28 (2010); U.N. Doc. CERD/C/GTM/CO/12-13, ¶ 10 (May 19, 2010).

⁶⁸ IACnHR, OEA/Ser/L/V/II.135 Doc. 40, ¶ 157 (Aug. 7, 2009).

⁶⁹ ILO C169, *supra* note 28, arts. 6(1), 6(2), 15(2), 22(3), 27(3) and 28; UN Declaration, *supra* note 29, arts. 10, 11, 15, 17, 19, 28, 29, 30, 32, 36 and 38.

⁷⁰ Special Rapporteur on indigenous people, UN Doc. A/HRC/12/34, ¶¶ 62-63 (Jul. 15, 2009) (by J. Anaya).

⁷¹ *Ibid.* ¶ 41.

⁷² The mechanism by which the ‘voice’ of indigenous peoples should be expressed varies depending on the scenarios. As seen above, in legislative or administrative measures the obligation of consultation must be fulfilled. In judicial procedures, indigenous peoples may be heard directly or indirectly by means of socio-legal-anthropological expertises. This type of expertise has been considered ‘suitable evidence’ for indigenous regulatory systems be taken into account when carrying out a legal procedure in

1.2. *Lawful Sanctions*

So far we have seen that torture is not a static concept; it changes in time and space. Acts that in the past were not considered torture could be tagged as such in the future. It is also possible that any given country or region ‘evolves’ faster by expanding the acts that amount to torture or lowering the threshold of this evil. However, before declaring that such evolution has taken place, national authorities should accord certain deference to the concerned indigenous peoples, and international bodies should verify that enough nations have moved in the same direction. Now, I will discuss a very controversial aspect of the notion of torture: the ‘lawful sanction’ exclusion rule.

The UNCAT and the IACPPT exclude from the concept of torture the physical or mental pain that is inherent in or incidental to ‘lawful sanctions’ and ‘lawful measures’.⁷⁴ One may argue that since indigenous corporal punishments in Ecuador are implicitly recognized by the Constitution, because it broadly protects indigenous peoples’ right to maintain their ICL, such punishments are *lawful* and thus excluded from the notion of torture. However, it is not that simple. The lawfulness of the punishment is not only limited to national law, but also to IHRL. The question then is to analyze if corporal punishments are acceptable sanctions in International Law. That is the purpose of the next section, where I will also discuss two other types of punishments: imprisonment and the death penalty. I will show that IHRL is willing to accept imprisonment and capital punishment, but at the same time rejects corporal punishments, even though the former may cause more suffering than the latter. Finally, I will discuss how the acceptability or proportionality of punishments is unavoidably linked with the moral values and legal

which they differ from national law or values (Rosembert Ariza Santamaría, *Peritazgo socio-antropo-jurídico y administración de justicia intercultural en Colombia*, in ACCESO A LA JUSTICIA DE LOS PUEBLOS INDÍGENAS 13, 13 (IIHR, 2010).

⁷³ In such cases the Constitutional Court might intervene in order to protect indigenous peoples’ constitutional rights.

⁷⁴ UNCAT art. 1, IACCPT art. 2.

principles of a society. Culture, therefore, is always present in the determination of the lawful nature of sanctions.

1.2.1. Corporal Punishments

Corporal punishments are not defined by any IHRL treaty or convention. The only non-binding definition has come from the Committee on the Rights of the Child (CRC), and read as follows: ‘The Committee defines “corporal” or “physical” punishment as any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light’.⁷⁵

Some countries expressed that corporal punishment should not be considered to constitute torture or mistreatment if it is duly prescribed under the national law.⁷⁶ The Special Rapporteur on torture, Mr. Nigel Rodly, responded that:

‘the “lawful sanctions” exclusion must necessarily refer to those sanctions that constitute practices widely accepted as legitimate by the international community, such as deprivation of liberty through imprisonment, which is common to almost all penal systems. Deprivation of liberty, however unpleasant, as long as it comports with basic internationally accepted standards, such as those set forth in the United Nations Standard Minimum Rules for the Treatment of Prisoners, is no doubt a lawful sanction. By contrast, the Special Rapporteur cannot accept the notion that the administration of such punishments as stoning to death, flogging and amputation - acts which would be unquestionably unlawful in, say, the context of custodial interrogation - can be deemed lawful simply because the punishment has been authorized in a procedurally legitimate manner, i.e. through the sanction of legislation, administrative rules or judicial order. To accept this view would be to accept that any physical punishment, no matter how torturous and cruel, can be considered lawful, as long as the punishment had been duly promulgated under the domestic law of a State. Punishment is, after all, one of the prohibited purposes of torture. Moreover, regardless of which “lawful sanctions” might be excluded from the definition of torture, the prohibition of [CIDP] remains. The Special Rapporteur would be unable to identify what that prohibition refers to if not the forms of corporal punishment referred to here. Indeed, [CIDP] are, then,

⁷⁵ CRC, *General Comment No. 8*, U.N. Doc. CRC/C/GC/8, ¶ 11 (Mar. 2, 2007).

⁷⁶ Special Rapporteur on torture, U.N. Doc. E/CN.4/1997/7 ¶ 7 (Jan. 10, 1997) (by N. Rodley).

by definition unlawful; so they can hardly qualify as “lawful sanctions” within the meaning of article 1 of the [UNCAT].⁷⁷

Years later the Special Rapporteur on torture Manfred Nowak added that ‘without exception, corporal punishment has a degrading and humiliating component’. Therefore, ‘[a]ll forms of corporal punishment must [...] be considered as amounting to cruel, inhuman or degrading punishment in violation of international treaty and customary law’.⁷⁸ Support for these views has come from various international bodies.⁷⁹

At first glance the logic of these statements seems very easy: *if X is corporal punishment → X amounts to torture or CIDP*. But a closer look may reveal that: (a) usually there is an argumentative flaw, because it takes for granted the elements that should have been proven explicitly (the argument is more or less as follows: corporal punishment is cruel, inhuman or degrading because it is cruel, inhuman or degrading);⁸⁰ (b) the majority of punishments mentioned by the international bodies (most likely) fulfill the elements of torture in the first place, e.g. amputations,⁸¹ (death by) stoning,⁸² ‘incredible cruel’ floggings,⁸³

⁷⁷ Ibid, ¶ 8. See also, Special Rapporteur on torture, U.N. Doc A/HRC/7/3/Add.7, ¶ 17 (Mar. 10, 2008) (by M. Nowak).

⁷⁸ Special Rapporteur on torture, U.N. Doc. A/HRC/13/39/Add.5, *supra* note 37, ¶ 209.

⁷⁹ See *infra* notes 80-91.

⁸⁰ In its General Comment No. 20 (U.N. Doc. A/47/40(Supp), ¶ 5 (Mar. 10, 1992), the HRC only stated that corporal punishments are prohibited by ICCPR art. 7, ‘including excessive chastisement ordered as punishment’, but why non-excessive chastisement shall be also prohibited was not answered. In *Osbourne v Jamaica* (Comm. No. 759/1997, HRC, CCPR/C/68/D/759/1997, ¶ 9.1 (2000) the HRC considered that 10 strokes of the tamarind switch constituted CIDP, but the Committee did not provide much explanation. In *Matthews v. Trinidad and Tobago* (Comm. No. 569/1993, HRC, CCPR/C/62/D/569/1993, ¶ 7.2 (1998), the HRC reiterated that corporal punishments are not compatible with human rights standards without given further reasons. In *Boodlal Sooklal v. Trinidad and Tobago* (Comm. No. 928/2000, HRC, CCPR/C/73/928/2000, ¶ 4.6 (2001), the HRC once again considered that corporal punishment is CIDP, without adding other arguments. The UN General Assembly called for the abolition of corporal punishment in the Trust Territories, but it did not explained why corporal punishment amounted to torture or other ill-treatments. (Res. 323 (IV), ¶ 2 (Nov. 15, 1949); Res. 440 (V), (Dec. 2, 1959), and Res. 562 (VI), ¶ 5 (Jan. 18, 1952).

⁸¹ Special Rapporteur on torture, U.N. Doc. A/HRC/13/39/Add.5, *supra* note 37, ¶ 216; Special Rapporteur on freedom of religion or belief, U.N. Doc. E/CN.4/2006/5/Add.2, ¶ 68 (Oct. 7, 2005) (by A. Jahangir); CAT, U.N. Doc. CAT/C/CR/28/5, ¶ 4 (Jun. 12, 2002); Special Rapporteur on Afghanistan, U.N. Doc. A/51/481, ¶ 81 (Oct. 11, 1996) (by C.H. Paik); Special Representative on Iran, U.N. Doc. E/CN.4/1991/35, ¶ 141 (Feb. 13, 1991) (by R. Galindo Pohl); Special Rapporteur on Iraq, U.N. Doc. E/CN.4/1995/56 ¶¶ 32-34 (Feb. 15, 1995) (by M. van der Stoep); U.N. Doc E/CN.4/1996/61, ¶ 29 (Mar. 4, 1996), and U.N. Doc. A/51/496, ¶ 108 (Oct. 15, 1996); Independent Expert on Sudan, U.N. Doc. E/CN.4/1994/48, ¶¶ 59-61 (Feb. 1, 1994) (by G. Bíró), and U.N. Doc. A/HRC/14/41, ¶ 59 (May 26, 2010) (by M. Chande Othman).

⁸² Special Rapporteur on torture, U.N. Doc. A/HRC/13/39/Add.5, *supra* note 37, ¶ 217.

⁸³ The expression ‘incredible cruel’ was used by Special Rapporteur Nowak to describe flogging with 5,000 slashes (U.N. Doc. A/HRC/13/39/Add.5, *supra* note 37, ¶ 216). The Special Representative on Iran counted 270 floggings, with some of the victims

crucifixion,⁸⁴ tattooing⁸⁵; (c) some other punishments (may) have been severe enough to be considered cruel or inhuman;⁸⁶ (d) punishments were imposed in contravention of basic principles of due process;⁸⁷ (e) were disproportionate;⁸⁸ and (f) their degrading or cruel nature was assessed in specific scenarios (e.g. discrimination against women,⁸⁹ violence against children,⁹⁰ mistreatments in prisons⁹¹).

As a result, it is unclear why *all* corporal punishments should be considered brutal or degrading in *all* scenarios. Certain corporal punishments may not fulfill the elements of torture, may not be severe enough to be considered cruel or inhuman, or may not be degrading in specific cultural contexts, yet IHRL seems to consider them all unlawful. Another issue is that IHRL is not consistent; it admits for other types of

being as young as 14 (U.N. Doc. E/CN.4/2002/42, ¶ 25-33 (Jan. 16, 2002) (by M. Danby Copithorne). In *Curtis Francis Doebbler v. Sudan* (Comm. No. 236/2000, ¶ 30 (2003), the ACnHPR heard a case where eight students were arrested and convicted to up to 40 lashes. The lashes leaved permanent scars on victims. In *Caesar v. Trinidad and Tobago* (Judgment, IACtHR (ser. C) No. 123, ¶ 76 (Mar. 11, 2005), the victim was convicted to 15 strokes. At that time, Mr. Caesar was recovering from surgery. According to his testimony, the pain produced by the slashes was ‘unbearable’. He passed out and had to be taken to the prison’s infirmary, where he remained for two months.

⁸⁴ Independent Expert on Sudan, U.N. Doc. E/CN.4/1994/48, *supra* note 81, ¶ 59.

⁸⁵ The Special Rapporteur on Iraq (U.N. Doc E/CN.4/1995/56, *supra* note 81, ¶ 34, and U.N. Doc E/CN.4/1996/61, *supra* note 81, ¶ 29) denounced the practice of tattooing an ‘X’ or other symbols between the eyebrows of all persons having suffered legally prescribed amputations.

⁸⁶ The Independent Expert on Sudan (U.N. Doc. E/CN.4/1994/48, *supra* note 81, ¶ 59) described the following penalties: adultery punished by 100 lashes; false accusation of unchastity, punished by 80 lashes; drinking alcohol, whipping of 40 lashes. In a latter report (U.N. Doc. A/HRC/14/41, *supra* note 81, ¶ 29) he narrated the case of a 16 year old non-Muslim Sudanese girl who was sentenced to 50 lashes for ‘indecent dressing’ for having worn a skirt and blouse. The IACnHR, in *Prince Pinder v. Bahamas* (*Prince Pinder v. Bahamas*, Case 12.513, IACnHR, Report No. 79/07, OEA/Ser.L/V/II.130, doc. 22, rev. 1, ¶¶ 35-36 (2007), found that the State, by imposing a sentence of six strokes upon Mr. Pinder, violated his rights, even though the punishment was not carried on. However, Mr. Pinder was under sentence of flogging for almost a decade, and had therefore been anticipating the infliction of corporal punishment for this period.

⁸⁷ E.g. the principle of *nulla poena sine lege* and of equality before the law (Special Rapporteur on freedom of religion, U.N. Doc E/CN.4/2006/5/Add.2, *supra* note 81, ¶ 100). In its report on Yemen (U.N. Doc. CAT/C/YEM/CO/2, ¶ 18 (Dec. 17, 2009), the CAT denounced that floggings were carried out ‘immediately, in public, without appeal’. It was also concerned at the ‘wide discretionary powers of judges to impose these sanctions and that they may be imposed in a discriminatory way against different groups, including women’. The Special Rapport on torture (U.N. Doc A/HRC/7/3/Add.7, *supra* note 77, ¶ 17) showed his concerns on the lack of respect of the principle of presumption of innocence. The Special Rapporteur on Iraq (U.N. Doc E/CN.4/1995/56, *supra* note 81, ¶ 34) described that some laws authorizing corporal punishments were retroactive.

⁸⁸ *Curtis Francis Doebbler v. Sudan*, ACnHPR, *supra* note 83, ¶¶ 39-40; Special Rapporteur on violence against women, U.N. Doc. E/CN.4/2003/75/ ¶ 68 (Jan. 6, 2003) (by R. Coomaraswamy); Special Representative on Iran, U.N. Doc. E/CN.4/1991/35, *supra* note 81, ¶ 140; Special Rapporteur on Iraq, U.N. Doc. E/CN.4/1995/56, *supra* note 81, ¶ 34, and U.N. Doc E/CN.4/1996/61, *supra* note 81, ¶ 29.

⁸⁹ CAT, U.N. Doc. CAT/C/YEM/CO/2, *supra* note 87, ¶ 18; Special Rapporteur on torture, U.N. Doc. A/HRC/13/39/Add.5, *supra* note 37, ¶ 218; Special Rapporteur on violence against women, U.N. Doc. E/CN.4/2003/75/Add.1 ¶ 460 (Feb. 27, 2003) (by R. Coomaraswamy).

⁹⁰ CRC, *General Comment No. 8*, *supra* note 75; IACnHR, OEA/Ser.L/V/II.135 Doc. 14 (Aug. 5, 2009), and OEA/Ser.L/V/II. Doc. 78 (Jul. 13, 2011); *A v. the United Kingdom*, Judgment, ECtHR (App. No. 25599/94), ¶ 24 (1998).

⁹¹ CPT, *Report on Malta*, Ref.: CPT/Inf(92)5, ¶¶ 16-17 and 42 (Oct. 1, 1992). See also, Standard Minimum Rules for the Treatment of Prisoners, Rule 31, *as amended* E.S.C. res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977).

punishments that may cause more pain and humiliation than corporal punishments. My question here is why IHRL shall prohibit sanctions accepted by some indigenous cultures and protected by Ecuadorian law that might cause less suffering than the ones internationally considered lawful. I also believe that the acceptability of a punishment lies in, among others grounds, the culture of a society. Therefore, accepting some punishments over others that may have the same consequences in terms of suffering, pain, and shame, means that a culture is given a preferential treatment, which can hardly be acceptable in a pluralistic world. I will prove my points by analyzing the two punishments considered lawful by IHRL: imprisonment and the death penalty.

1.2.2. Imprisonment

Deprivation of liberty and subsequent jail time will inevitably cause some sort of suffering or humiliation, but as long as the manner and method used to execute the measure do not exceed the unavoidable level of suffering inherent in detention, the persons are detained in conditions which are compatible with their human dignity, and the detainee's health and welfare are adequately warranted, there is no conflict under IHRL.⁹²

Individuals could be deprived of their freedom for decades, even for life;⁹³ but such harsh suffering is neither torture nor CIDP, because imprisonment is considered a lawful sanction.

In our modern democracies the power to punish has shifted and its exercise is shown to us as 'humane', but this is not anything but a disguise of the violence that continues to be perpetrated, although this time the violence is not self-evident. The modern punishment boasts not directly harming the physical body of a person, when in reality it does, only in a more subtle, yet reifying and alienating manner. The body of

⁹² *Montero-Aranguren et al. v. Venezuela*, Judgment, IACtHR (ser. C) No 150, ¶ 86 (Jul. 5, 2006); *Kudła v. Poland*, Judgment, ECtHR [G.C.] (App. No. 30210/96), ¶ 92 (2000); *Barabanshchikov v. Russia*, Judgment, ECtHR (App. No. 36220/02), ¶ 39 (2009).

⁹³ The imposition of a sentence of life imprisonment on an adult is not in itself incompatible with IHRL, but the imposition of an irreducible life sentence may raise an issue (*Kafkaris v. Cyprus*, Judgment, ECtHR (App. no. 21906/04), ¶ 97 (2008)).

the individuals is not only confined to a given space, but their will, thought, truths, and patterns of reference are constantly and stealthily affected in a perverse way we deem ‘humane’.⁹⁴

Indigenous people in detention usually are in a more vulnerable situation. They frequently are extracted from their cultural environment to be inserted in a completely different setting, far from their home communities with little contact with their families.⁹⁵ They often suffer restrictions on their cultural rights, such as access to their spiritual leaders, or limitations on religious practices;⁹⁶ sometimes they cannot even talk in their own language.⁹⁷ Yet, their suffering is not torture or ill-treatment.

Conversely, in most cases, after the traditional ceremony were indigenous authorities carried out the physical punishments and the cleansing rituals, the defendants have been purified, have apologized to the affected, have promised not to engage in such failure again, and have pledged to compensate the damage. The community trusts them, and the broken order and harmony are restored, which is cause for celebration. The defendants are taken to share meals and *chicha* (traditional beverage). They recovered their position as members of the group.⁹⁸

I do not dispute that ‘deprivation of liberty through imprisonment [...] is common to almost all penal systems’;⁹⁹ that is to say, that most cultures/societies in the world consider imprisonment lawful. My point is that imprisonment causes pain, suffering, and humiliation, but we are willing to accept that because it is *our way* to punish. We tolerate that trough deprivation of liberty and its inherent sacrifices certain legitimate aims will be achieved. However, there are *other ways* to punish crimes and to achieve the goals that other cultures consider legitimate. These *other ways* sometimes might cause less damage to the defendants and their families than imprisonment. Rejecting this alternative forms of punishments *ab*

⁹⁴ Gina Donoso, *Derechos humanos: discursividad, poder y resignificación social*, in LIBER-ACCIÓN (2006), available at <http://webcache.googleusercontent.com/search?q=cache:http://www.liber-accion.org/articulos/26/117&hl=en&strip=0>.

⁹⁵ Special Rapporteur on indigenous people, U.N. Doc. E/CN.4/2004/80, *supra* note 65, ¶ 33.

⁹⁶ *Ibid.*

⁹⁷ E.g., *López-Álvarez v. Honduras*, Judgment, IACtHR (ser. C) No. 141, ¶ 166 (Feb. 1, 2006).

⁹⁸ Diego Zambrano Álvarez, *Justicias ancestrales analogías y disanalogías entre sistemas jurídicos concurrentes*, in DERECHOS ANCESTRALES. JUSTICIA EN CONTEXTOS PLURINACIONALES 219, 241 (Carlos Espinosa & Danilo Caicedo ed., 2009).

⁹⁹ Special Rapporteur on torture, U.N. Doc. E/CN.4/1997/7, *supra* note 76, ¶ 8.

initio without considering the context in which they are carried on, not only signifies that a monistic vision of punishment is forcibly imposed to dissenting cultures, which undermines the pluralistic aim IHRL must have,¹⁰⁰ but also that the individual whom IHRL intends to protect may be subjected to more suffering than protection.

1.2.3. *Death Penalty*

The next punishment internationally accepted is the death penalty. Capital punishment is not *per se* incompatible with or prohibited by IHRL,¹⁰¹ but unlike imprisonment, the death penalty is not common to almost all penal systems; quite the opposite, there is a universal tendency to abolish this sanction.¹⁰² Yet, it is still permitted for by IHRL.

From the recognition of the death penalty as a lawful sanction, three conclusions can be drawn: (a) IHRL accords a certain deference to some societies/cultures in the establishment of penalties, and since such deference is possible, it may be accorded to other societies/cultures; (b) IHRL is willing to accept the suffering and humiliation produced by the death penalty, which (most likely) are more intense than the ones produced by corporal punishments; and (c) the death penalty contradicts the idea that only punishments that are common to most legal systems of the world could be regarded as lawful by IHRL.

2. Preliminary Conclusion I

My argument so far is twofold. First, I uphold that culture has a role to play in the assessment of torture. The evolving nature of this evil allows us to classify as torture acts that in the past were tolerated. Moreover, our moral values and legal principles determine which punishments are lawful and therefore excluded from the scope of the prohibition of torture. Second, I maintain that corporal punishment shall

¹⁰⁰ R. Perry, *supra* note 31, at 114.

¹⁰¹ However, the death penalty is strictly limited, see, ACHR art. 4; ICCPR art. 6.

¹⁰² E.g. ICCPR art. 6(6); G.A. Res. 2857 (XXVI), U.N. Doc. A/8429 (1971); Second Optional Protocol to the [ICCPR], Aiming at the Abolition of the Death Penalty, Dec. 15, 1989, U.N.T.S. 1642; Protocol to the [ACHR] to Abolish the Death Penalty, Jun. 8, 1998, O.A.S.T.S. 73.

not be *always* forbidden and rejected *ab initio*. I am not saying that the prohibition of torture should be relativized, nor that culture should justify acts of torture. Treatments that *today* are considered torture shall remain strictly prohibited. But we must ask first *who* considers such acts as amounting to torture and whether all the elements of torture are met. If national authorities decide to ban certain practices, they shall proceed in such a manner that indigenous peoples' right to consultation is respected and their voice is heard. Similarly, if only a small part of the international community considers that certain acts amount to torture, such a view cannot be imposed upon the rest of nations. A consensus in the region or in the world is needed, and regional and universal bodies must discover this consensus, because an 'evolution' that takes place in a limited sector of the international community, although important, cannot have unlimited effects in the entire world.

The consensus is only helpful to ascertain if the level of suffering caused by the act and its motives are permissible. For instance, there is a consensus that the suffering imprisonment produces is permissible. Moreover, there is no consensus yet that the suffering produced by reducible life imprisonment for adults is impermissible. Additionally, the consensus that nations have reached not always encompasses less suffering. Prison may cause in certain cases much more suffering than corporal punishment. Finally, we should bear in mind that even with no consensus some punishments are still acceptable under IHRL. This is the case of the death penalty, the ultimate form of corporal punishment.

Taking all of the above into consideration, a limited margin of appreciation should be granted to the States, so they can accommodate other types of sanctions that are considered lawful by indigenous peoples. The criteria that must guide us in determine which acts amount to torture are the elements of this evil and the cultural context in which the acts take place. That is the purpose of the next section.

V. **Assessing the Elements of Torture**

As discussed above, three elements must be present in any torture case: an intentional act, which causes severe pain or suffering, committed with a given purpose.

1. Intentional Act

The act of torture must be committed deliberately and not as a result of negligent conduct, an accident, or *force majeure*.¹⁰³ Generally, the intent of the perpetrator is irrelevant in IHRL.¹⁰⁴ A violation of a State's international obligations can be established even if the identity of the perpetrators is unknown. What is decisive is whether a breach has occurred 'with the support or the acquiescence of the government'.¹⁰⁵

The element of intent does not involve a subjective inquiry into the motivations of the perpetrators, but rather must be objectively determined under the circumstances.¹⁰⁶

Corporal punishments are always intentional, just like any other punishment is. No one is punished by accident. So, in principle, all forms of corporal punishments fulfill this element.

2. Severe Pain or Suffering

The agony required for a treatment to be considered torture must be 'severe'. The high level of pain and suffering serves three purposes: (a) it is a distinguishing factor between torture and CIDP,¹⁰⁷ (b) it prevents the term 'torture' to be used in an inflationary manner that trivializes its special stigma as one of the 'worst possible human rights violations and abuses human beings can inflict upon each other',¹⁰⁸ and (c) it limits the weight of cultural relativist arguments.¹⁰⁹

The evaluation of the pain and suffering should be made on a case-by-case basis taking into account the specific circumstances of each case, in view of objective and subjective factors. The former refer to the

¹⁰³ *Bueno-Alves v. Argentina*, *supra* note 37, ¶ 81.

¹⁰⁴ As to ICRL, two types of intent are sufficient for torture: direct intent and indirect intent, being excluded *dolus eventualis* and recklessness (see, S. DEWULF, *supra* note 40, at 224-225).

¹⁰⁵ *Velásquez-Rodríguez v. Honduras*, Judgment, IACtHR (ser. C) No. 4, ¶ 173 (Jul. 29, 1988).

¹⁰⁶ CAT, U.N. Doc. CAT/C/GC/2, *supra* note 37, ¶ 9.

¹⁰⁷ DIEGO RODRÍGUEZ-PINZÓN & CLAUDIA MARTIN, *THE PROHIBITION OF TORTURE AND ILL-TREATMENT IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM A HANDBOOK FOR VICTIMS AND THEIR ADVOCATES* 107 (OMCT, 2006).

¹⁰⁸ Special Rapporteur on torture, U.N. Doc. A/HRC/13/39/Add.5, *supra* note 37, ¶ 33.

¹⁰⁹ S. Dewulf, *supra* note 40, at 506.

characteristics of mistreatment, such as the *nature* and *manner* used to inflict harm. The latter refer to the characteristics of the individual undergoing the acts.¹¹⁰

The *nature* of a punishment could be egregious at first sight, because of its obvious brutal character (e.g. amputation of a limb, disfiguration with acid, infliction of one hundred strokes), or more dubious and not to be immediately called vicious (e.g. cold baths, stinging nettles, infliction of five strokes). The *manner* in which the treatment is carried out may clarify its (non-)atrocious nature. The length of time the victim endures the pain, the instruments used to produce harm, the number of incidents of violence, the context in which the treatment is inflicted, and other relevant circumstances shall be looked at.¹¹¹

Next, the subjective factor of the victim must be studied. Although each human being is different and experiences pain in different ways, (inter)national courts should analyze the effects that the treatment in question would have ‘upon the average prudent person’ within the (inter)national community.¹¹² After that, the particular characteristics (age, sex, health, etc.) of the victim may expand the reasoning.¹¹³ The culture of the individual that endures the treatment is one of such particular characteristics.¹¹⁴ Even the perception of pain is influenced by cultural attitudes and background.¹¹⁵

Consequently, the steps that should be followed when the severity of the pain or suffering is analyzed are:

(1) to examine the objective factors (nature and manner) of the act; (2) to look at the effects of the act

¹¹⁰ *Villagrán-Morales et al. v. Guatemala*, Judgment, IACtHR (ser. C) No. 63, ¶ 74 (Nov. 19, 1999).

¹¹¹ For instance, lying over stinging nettles for ten minutes produces less pain than lying over them for half hour. Whipping someone in a prison cell repeatedly on a systematic basis is not the same as whipping someone in a single incident in a traditional ceremony. Ten strokes in the face with a stick do not produce the same harm as 10 strokes on the back with a belt.

¹¹² J. Harper, *supra* note 40, at 924.

¹¹³ For instance, it is not the same to stroke a young boy, or to compel a pregnant woman to lay on stinging nettles, or to drop cold water on a man with an illness, than to do the same to a healthy strong man. The IACtHR has indicated that in the case of minors a higher standard of scrutiny must be applied (*Juvenile Reeducation Institute v. Paraguay*, Judgment, IACtHR (ser. C) No. 112, ¶ 162 (Sep. 2, 2004)). The IACnHR has done the same with regard to persons with mental disabilities (*Víctor Rosario Congo v. Ecuador*, Case 11.427, Report No. 63/99, IACnHR, OEA/Ser.L/V/II.95 Doc. 7 rev. (1998), ¶ 58).

¹¹⁴ *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Trial Chamber Judgment, ICTY, ¶ 237 (Nov. 30, 2005). See also, Elements of Crimes art. 8(2)(b)(xxi) footnote 49. For instance, imposing traditional punishments to a person that belongs to the community and was judged by their peers is not the same than to sanction a non-indigenous person that knows nothing about the community. Shaving the head of a *mestizo* does not have the same implications than saving the head of an *otavalo*, since for the latter the hair has a special traditional importance.

¹¹⁵ Encyclopedia Britannica quoted by S. DEWULF, *supra* note 40, at 101.

upon the average prudent person within the local, regional, or international community, depending on whether the examiner is a local authority, a regional court, or an international court; (3) to analyze the particular characteristics and conditions of the victims, including their culture, and (4) to look at the social and cultural context that surrounds the act. After this process, the examiner may be in a better position to declare whether or not the pain produced by the act in question reaches the severity threshold torture requires.

3. Purpose

The purposive element is not only essential but also a distinguishing feature of torture.¹¹⁶ As seen above, both the UNCAT and the IACPPT list the purposes that the perpetrator must possess upon inflicting the act of torture.¹¹⁷

Several authors maintain that corporal punishments imposed in certain indigenous communities in Ecuador do not intend (only) to punish the perpetrator; they rather serve as spiritual cleansing and purification of the wrongdoer, and to restore the social harmony of the community, using materials provided by the ‘Holy Earth’.¹¹⁸ For instance, in certain communities the use of stinging nettles and baths

¹¹⁶ Among others: Special Rapporteur on torture, U.N. Doc. A/HRC/13/39/Add.5, *supra* note 37, ¶¶ 35-36; CAT, U.N. Doc. CAT/C/GC/2, *supra* note 37, ¶ 10; Christian M. De Vos, *Mind the Gap: Purpose, Pain, and the Difference between Torture and Inhuman Treatment*, 14(2) HUMAN RIGHTS BRIEF 4, 4 (2007); Manfred Nowak, *What Practices Constitute Torture?: US and UN Standards*, 28(4) HUMAN RIGHTS QUARTERLY 809, 830 (2006).

¹¹⁷ Depending on the purpose, torture has been classified in the following types: *interrogational torture* (obtaining information from the victim or a third person), *judicial torture* (obtaining information, particularly confessions in the course of legal proceedings), *punitive torture* (punishing for an act the victim or a third person has committed or is suspected of having committed), *intimidatory torture* (intimidating the victim or a third person), *coercive torture* (making someone do something against his will); *discriminatory torture* (inflicting pain or suffering on discriminatory basis on any ground), *experimental torture* (conducting experiments on the victim without his consent). Experimental torture is not listed by the UNCAT or the IACPPT, but it is included in ICCPR art. 7.

¹¹⁸ HANS-JÜRGEN BRANDT & ROCÍO FRANCO VALDIVIA, *NORMAS, VALORES Y PROCEDIMIENTOS EN LA JUSTICIA COMUNITARIA. ESTUDIO CUALITATIVO EN COMUNIDADES INDÍGENAS Y CAMPESINAS DE ECUADOR Y PERÚ* 91 (IDL, 2007); M. Simon Thomas, *supra* note 18, at 64, L. Tibán & R. Ilaquiche, *supra* note 19, at 41; FERNANDO GARCÍA, *FORMAS INDÍGENAS DE ADMINISTRAR JUSTICIA. ESTUDIOS DE CASO DE LA NACIONALIDAD QUICHUA ECUATORIANA* 41 (FLACSO, 2002).

of ice-cold water is the cleansing ritual that precedes the actual punishment, which can also have a physical character (whippings) or a non-physical character (communal labors).¹¹⁹

Be as it may, the purposive element does not involve a subjective inquiry into the motivations of the perpetrators, but rather must be objectively determined under the circumstances,¹²⁰ with the cultural context as one of such circumstances, but nevertheless carrying relative weight. Additionally, punishing may not be (and does not need to be) the dominant purpose, although it is most likely present;¹²¹ and that is enough to satisfy the purposive element of torture.¹²²

Keeping in mind the above, it can be stressed that indigenous corporal sanctions almost always fulfill the purposive element. This assumption, however, must be confirmed by the examiner in the real case at hand, by hearing the indigenous people concerned and, if necessary, experts on the matter. In the event that the file shows that the act did not have the purpose of punishing (or any other ‘forbidden’ purpose), it will not amount to torture, due to the lack of one constituent element of this evil.¹²³

4. Preliminary Conclusion II

Corporal punishment always fulfills the element of intent, but not always fulfills the purposive or the ‘severe pain or suffering’ elements. If the high threshold of agony is met but the purposive element is

¹¹⁹ Emiliano Borja Jiménez, *Derecho indígena sancionador y derechos humanos in DERECHOS, COSTUMBRES Y JURISDICCIONES INDÍGENAS EN LA AMÉRICA LATINA CONTEMPORÁNEA* 185, 202 (Laura Giraudo ed., 2008).

¹²⁰ CAT, U.N. Doc. CAT/C/GC/2, *supra* note 37, ¶ 9; *Paniagua-Morales v. Guatemala*, Reparations and Costs, Judgment, IACtHR (ser. C) No. 76 (May 25, 2001); J. Harper, *supra* note 40, at 900. In ICtL, however, ‘[t]he infliction of severe pain in pursuance of a given prohibited purpose must be established beyond reasonable doubt and cannot be presumed’ (*Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Trial Chamber Judgment, ICTY, ¶ 188 (Mar. 15, 2002)).

¹²¹ For instance, the *Acta* No. 24 (*supra* note 3) shows that in *La Cocha* case the baths of ice-cold water and the rubbing of stinging nettles was intended to ‘purify’ the defendants, but other acts (whippings and carrying a hundredweight) were intended to punish. Gina Chávez & Fernando García (EL DERECHO A SER: DIVERSIDAD, IDENTIDAD Y CAMBIO (Flacso, 2004) describe the sanctions imposed by three Ecuadorian indigenous communities. While they also considered that the main purpose is reconciliation and rehabilitation, the punitive nature of the acts is also shown. Similarly, JAIME VINTIMILLA ET AL. (DERECHO INDÍGENA, CONFLICTO Y JUSTICIA COMUNITARIA EN COMUNIDADES KICHWAS DEL ECUADOR 35 (IDL, 2007) show that the regulations of one indigenous community contain terms such as ‘sanction’ and ‘punishment’, sometimes accompanied by the terms ‘rigorous’ or ‘severe’, which denotes the purpose of punishing.

¹²² *Prosecutor v. Deladić et al.*, *supra* note 37, ¶ 470; *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-T, Trial Chamber Judgment, ICTY, ¶ 128 (Apr. 3, 2008).

¹²³ The ICTY has established that ‘[t]orture as a criminal offence is not a gratuitous act of violence; it aims, through the infliction of severe mental or physical pain, to attain a certain result or purpose. Thus, in the absence of such purpose or goal, even very severe infliction of pain would not qualify as torture’ (*Prosecutor v. Krnojelac*, *supra* note 120, ¶ 180).

absent, or vice versa, the purpose is there but not the severe suffering, and the punishment will not amount to torture, simply because it does not meet the requirements set by the IHRL definition of torture. Conversely, if severe pain or suffering is inflicted with a ‘forbidden’ purpose, the punishment will amount to torture and no cultural argument can be used as a justification. It does not necessary mean that culture shall be excluded *ab initio*. Culture has a role to play in the assessment of the objective and subjective factors. The cultural environment in which the punishment is imposed, and the culture of the individual enduring the act are both relevant factors to be taken into consideration, but their weight is relative. Other factors, such as the nature of the act, the manner in which pain is inflicted, or different subjective characteristics of the victim must also be looked at.

As a result, corporal punishments will amount to torture in *some* cases, but not in *all* cases, which reinforces my argument: IHRL should not *always* forbid corporal punishments. Yet, another question still remains: whether corporal punishments that fell short of torture can still be CIDP.

VI. Cruel, Inhuman, or Degrading Punishments

The prohibition of torture includes a prohibition of cruel, inhuman, and degrading punishments (CIDP) and also cruel, inhuman, and degrading treatments (CIDT).¹²⁴ However, IHRL does not provide a definition of the latter. As a consequence, they are commonly defined by their distinction from torture.¹²⁵

Acts falling short of torture, due to the absence of either the element of intent or the purposive element, may still be considered cruel or inhuman, while acts aimed at humiliating the victim are considered degrading even where pain has not been inflicted. However, as stated above, punishments cannot be imposed unintentionally, and it is hard to believe that a sanction lacks the purpose of punishing. The

¹²⁴ ICCPR art. 7; ACHR art. 5(2); UNCAT art 16; IACPPT, arts. 6 and 7.

¹²⁵ Special Rapporteur on torture, U.N. Doc. A/HRC/13/39/Add.5, *supra* note 37, ¶ 186.

distinguishing factor is then the intensity of suffering. If pain reaches the ‘severe’ threshold, the acts amount to torture, otherwise they will not,¹²⁶ but they may amount to CIDP.

Similarly, as was stated above, some indigenous communities in Ecuador do not consider certain acts as punishments; instead they believe that such acts are part of a cleansing ritual. If such acts do not fulfill the purposive element, they cannot be labeled as torture, and since they are not punishments, they neither can be regarded as CIDP. Nevertheless, they can still be considered CIDT, because the notion of ‘treatment’ goes beyond the notion of ‘punishment’ and covers all kinds of acts inflicted upon the victim.¹²⁷

Therefore, the distinguishing factor between torture and CIDT in these cases is the purposive element.

Whatever the difference between torture and other ‘lesser’ forbidden acts is, the latter needs to cross a line in the ‘suffering scale’ in order to come into the IHRL prohibition. In an approach that originated within the ECtHR, international bodies have held that the harm suffered must attain a minimum level of severity to be regarded as cruel, inhuman, or degrading. Acts that cause little or no physical or mental harm do not amount to prohibited treatments or punishments.¹²⁸

The assessment of this ‘minimum level of severity’ follows the same rules as the ones described above for the ‘pain or suffering’ element of torture, but threshold to reach is lower. Torture requires the suffering to be ‘severe’, but CIDT and CIDP call for the suffering or humiliation to be ‘intense’ or ‘serious’, which requires ‘more than just a minor impairment on mental or physical abilities, and must go beyond temporary unhappiness, embarrassment or humiliation’.¹²⁹

¹²⁶ For instance, in *Prosecutor v. Krnojelac* (*supra* note 120, ¶ 219) the ICT found that ‘[a]lthough the losing of teeth and the bruising of the body constitute a serious infringement upon the victim’s well-being, they do not, in the circumstances of this case, reach the degree of severity implicit in the definition of torture’.

¹²⁷ For a description of the acts that have been considered ill-treatments by the HRC and the CAT, see David Fernández, *La noción de tortura y otros tratos o penas crueles, inhumanos o degradantes en el marco del Comité de Derechos Humanos y el Comité contra la Tortura de las Naciones Unidas*, 21 AM. U. INT’L L. REV. 101, 124-143 (2005). On the case-law of the IACtHR, see D. Rodríguez-Pinzón & C. Martín, *supra* note 107, at 107-133.

¹²⁸ D. Weissbrodt & C. Heilman, *supra* note 40, at 382.

¹²⁹ S. DEWULF, *supra* note 40, at 106; *M.S.S v. Belgium and Greece*, Judgment, ECtHR (App. No. 30696/09), ¶ 220 (2011).

The Constitutional Court of Colombia, for instance, considered that two types of corporal punishments (*el fuate*—whip—and *el cepo*—stocks) imposed by indigenous communities in that country, despite the physical rigors involved, were applied in a manner in which no serious physical or mental harm was produced and that they were not intended to denigrate defendants. The Court found no violation of the right to personal integrity.¹³⁰ As to the Ecuadorian context, some authors have stressed that although indigenous corporal punishments cause pain, in the majority of cases they are of short duration, do not cause permanent and irreparable damage, do not involve vital organs of the body, are dosed, are not unlimited, and from an indigenous conception are not infamous.¹³¹

Consequently, if the harm or humiliation does not reach the level of ‘serious’, indigenous corporal punishments or treatments do not amount to CIDP or CIDT, and therefore shall not be forbidden by IHRL. However, the harm reaching the level of ‘serious’ does not automatically mean that it shall be considered cruel, inhuman, or degrading. CIDT and CIDP are by definition relative concepts.¹³² In certain scenarios, the use of force is allowed, but it must respect the principle of proportionality. This principle requires the legality of the use of force under domestic law, that a legitimate purpose is aimed for, and a fair balance between the purpose of the measure and the interference with the right to personal integrity of the persons affected.¹³³

As discussed above, indigenous corporal punishments are lawful, because the Ecuadorian Constitution recognizes the right to maintain ICL, and punishments are an integral part of ICL. The purpose of these punishments are common to national law sanctions (deterrence, rehabilitation, retribution, prevention), but are also intended to achieve purposes that indigenous peoples find important (recovery of the harmony, reconciliation). The last step in the proportionality test is the determining factor (finding a

¹³⁰ Constitutional Court of Colombia, Judgment, T-349/96 (Aug. 8, 1996), and Judgment, T-523/97 (Oct. 15, 1997).

¹³¹ G. Chávez & F. García, *supra* note 121, at 204.

¹³² Manfred Nowak & Elizabeth McArthur, *The Distinction between Torture and Cruel, Inhuman or Degrading Treatment*, 16(3) TORTURE QUARTERLY JOURNAL ON REHABILITATION OF TORTURE VICTIMS AND PREVENTION OF TORTURE 147, 149 (2006).

¹³³ *Ibid.*

balance between the purpose of the measure and the interference with the right to personal integrity). As Stinneford puts it:

‘because punishment involves the deliberate infliction of pain, it is only permissible if it has some justification—some reason that makes the deliberate infliction of pain just. [A] punishment is permissible only to the *extent* that it is justified. If the punishment inflicts more pain than its justification will permit, it is “beyond the bounds of justice” and therefore excessive’.¹³⁴

In order to determine a fair balance, two questions must be considered. First, no matter how serious is the crime, or how legitimate or important are the purposes of the sanction, the punishment shall never produce ‘severe’ pain or suffering, because then the punishment will amount to torture, and the prohibition of torture is absolute.

Second, all criminal punishments, whether imposed by indigenous authorities or by national authorities, involve the infliction of physical or psychological pain. Since ILC and national law are on equal footing, the assessment of the balance should be left in the first place to the authorities imposing the sanction and acting in accordance with the values and interests of the societies they represent, without imposing into these authorities conceptions or perceptions foreign to their culture. For instance, indigenous peoples in Ecuador usually consider that imprisonment is useless,¹³⁵ and try to avoid it as much as possible.¹³⁶ Imprisonment in their view is barbaric. However, indigenous peoples are not allowed to impose their conceptions to the national Parliament and courts that imprisonment be replaced by corporal punishments. Conversely, why should Parliament or the courts then be allowed to demand that indigenous peoples adopt imprisonment as a ‘civilized’ way to punish crimes committed in indigenous territories? I am not saying that national authorities shall never review the proportionality of the punishments imposed by indigenous peoples. What I am saying is that national authorities, when called to

¹³⁴ John F. Stinneford, *Rethinking Proportionality under the Cruel and Unusual Punishments Clause*, 97(4) VIRGINIA LAW REVIEW 899, 962 (2011).

¹³⁵ D. Zambrano Álvarez, *supra* note 98, at 240-242.

¹³⁶ G. Chávez & F. García, *supra* note 121, at 204.

review indigenous sanctions, should first analyze whether the punishments are proportional according to the values and ways of thinking of the indigenous people concerned. Therefore, the alleged excessiveness of a punishment should be measured primarily against the limits established by prior practice of the relevant indigenous community. ‘If a punishment is significantly harsher than prior practice would permit for a given crime, the punishment is [...] presumptively cruel. Such a punishment would only be upheld in the rare circumstance in which the increase could be justified as a matter of retribution’.¹³⁷

Only after the proportionality of the punishment is assessed, the examiner would be in a better position to declare that the sanction is cruel, inhuman, or degrading, and that at the same time the cultural values of the indigenous people concerned are best respected.

VII. Final Conclusions

ICL has always coexisted with national law throughout the history of Ecuador. At first it was tolerated, then it became illegal, and now it is fully recognized by the Constitution and by International Law. An integral part of ICL is the power to enact and apply punishments. Such punishments are in principle lawful, because of the broad wording of the constitutional recognition. A number of sanctions and the rituals that precede them have a physical component. As a result, indigenous peoples and Ecuadorian authorities are engaged in a debate over the compatibility of such punishments with human rights. Some maintain that corporal sanctions violate the prohibition of torture and CIDP. Indigenous peoples respond that their traditional practices must be respected. I have argued that not all corporal punishments amount to torture or forbidden treatments or punishments, and that the assessment of the elements of these notions should always include the culture of the concerned indigenous community.

Despite the lack of uniformity of the definition of torture in IHRL, three elements were identified as an integral part of this evil. To be considered as torture the act must be intentional, must cause severe pain or

¹³⁷ J.F. Stinneford, *supra* note 134, at 968. This author refers to the Cruel and Unusual Punishment Clause of the U.S.A. Constitution, but his analysis provides an excellent model of how the proportionality of any punishment should be assessed.

suffering, and must have a ‘forbidden’ purpose. Indigenous corporal punishments always fulfill the element of intent, but not always fulfill the purposive or the ‘severe pain or suffering’ elements. Without one of these elements, the punishment simply will not amount to torture, because it does not meet the requirements set by the IHRL definition of torture.

On the other hand, the concepts of CIDT and CIDP do not require the act to be intentional or to have a purpose, but they do call for the act to cause ‘serious’ pain, suffering, or degradation. Minor acts of discomfort, shame, or embarrassment, as well as mild pain or suffering, do not reach the IHRL prohibition. Consequently, I argue that indigenous peoples have a margin of action that allows them to impose corporal punishments that do not enter into the scope of such prohibition.

The assessment of the severity of the act includes objective and subjective factors. The former refer to the characteristics of mistreatment, such as the *nature* and *manner* used to inflict harm. The latter refer to the characteristics of the individual undergoing the act. Culture has a role to play in both. As to the manner, the cultural context of the act makes a difference. Indigenous punishments usually are not intended to simply cause pain; they are part of a ritual used to repair the victims of the offense, to reinstate the harmony in the community, and to avoid private vengeance against the defendants. The ritual permits the offenders to ‘return’ to the community as full members. The acts are not considered barbaric or infamous, but as part of a process to restore the broken balance.

As to the characteristics of the individuals undergoing the treatment, their culture is also important. Certain acts that one culture considers offensive or impermissible, other cultures may accept or consider desirable. Even the perception of pain is different between cultures. Additionally, the individuals undergoing the treatment may accept it as a fair sanction for their crime, or may prefer the sanctions imposed by their own communities to the sanctions imposed by the State.

However, one should take in to consideration that the above-mentioned factors have a relative weight. Some other factors that should also be taken into account may reveal that the punishment in question reached the level of ‘serious’ or ‘severe’ agony or humiliation, and therefore entered into the scope of IHRL prohibition. The key issue here is to analyze all relevant factors and to weigh them according to the particularities of the case at hand. General answers that accept or reject *ab initio* the imposition of corporal punishments should, therefore, be avoided. That seems to be the main flaw in the arguments of most international bodies and Ecuadorian authorities, which reject indigenous corporal punishments without even looking at the particularities of each case or assessing the elements of torture and ill-treatments.

Culture has also a role to play in the concepts of torture and ill-treatments *in se*. The evolving nature of these evils allows us to reject acts that in the past were tolerated. Our values determine whether we depart from previous practices. However, before any international authority declares that an ‘evolution’ has taken place, it should discover that enough nations agree on that, otherwise the values of one society may be imposed onto others. At the national level, before any domestic authority declares that the country will not tolerate certain acts, it shall hear the indigenous peoples’ voice; otherwise the democratic nature of such declaration is to be doubted.

Moreover, our moral values and legal principles determine which punishments are lawful and therefore excluded from the scope of the IHRL prohibition. The UNCAT and the IACPPT both state that pain or suffering arising only from, inherent in or incidental to lawful sanctions are not included in the prohibition. However, internationally accepted punishments, such as imprisonment and capital punishment, may cause more damage than indigenous corporal punishments. If IHRL is meant to protect individuals from the abuse of States, it would be illogical to say that IHRL demands that indigenous peoples ignore their cultural practices by starting to utilize ‘civilized’ punishments such as imprisonment.

That would not only mean that IHRL is not protecting the culture of indigenous peoples, but also that it is willing to tolerate that the defendants are subject to more pain and suffering. The answer to this dilemma is not to reject corporal punishment altogether, but to make an effort to understand the cultural context in which it is applied and to discover if it truly exceeds the threshold of pain, suffering, and shame. This threshold should attempt to be as egalitarian as possible in respect to the punishments imposed by different cultures. A comparison between the consequences produced by imprisonment and by corporal punishments in the particular case might shed some light on this issue.

Finally, the alleged excessiveness of a punishment should be measured primarily against the boundaries established by prior practice of the relevant indigenous community. If a punishment is significantly harsher, it is presumptively cruel.

Taking all of the above into consideration, I argue that IHRL should grant a margin of appreciation to States such as Ecuador, so that other types of sanctions that are considered lawful by indigenous peoples could be accommodated.