Tortured Reasoning: The Intent to Torture Under International and Domestic Law

OONA A. HATHAWAY, AILEEN NOWLAN & JULIA SPIEGEL*

The infamous memos that concluded that torture only existed where there was infliction of pain equivalent in intensity to the pain "associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body functions" also concluded that "a defendant [must] act with the specific intent to inflict severe pain." Specifically, "the infliction of such pain must be the defendant's precise objective." Although this interpretation of the intent requirement has been definitively repudiated — and rightly so — there has thus far been little attention paid to the level of intent that is *required to prove torture under domestic and international law. This Article aims to bring clarity to this contested and misunderstood element of the legal definition of torture. We demonstrate that torture is a specific intent crime under U.S. law and international law. As we shall show, moreover, the very definition of torture in the Convention Against Torture supplies the additional mens rea requirement that renders the crime one of specific intent: The accused must not only inflict pain and suffering, but he must do so for a purpose prohibited by the Convention (for example, to extract a confession). We show that U.S. courts and international courts and tribunals have consistently applied this understanding of the specific intent standard for torture. In doing so, they have not required direct evidence of mental state, but have instead inferred intent from facts and circumstances that demonstrate knowing infliction of pain or suffering for a prohibited purpose. We hope that this conclusion will help guide U.S. practice in filling the dangerous analytical void left by the repudiated memos.*

* Gerard C. and Bernice Latrobe Smith Professor of International Law, Yale Law School; Associate, Cleary Gottleib Steen & Hamilton, LLP (as of October 2012); and MPA Candidate, Woodrow Wilson School, Princeton University, respectively. Our thanks to Muneer Ahmad, Teresa Miguel, Philip Levitz, Elizabeth Nielsen, Haley Nix, William Perdue, Chelsea Purvis, Saurabh Sanghvi, Sara Solow, and especially Rebecca Crootof for their excellent assistance in preparing this report.

INTRODUCTION

In the years following the attacks of September 11, 2001, the Office of Legal Counsel at the Department of Justice issued what have since come to be known as the infamous "torture memos." These memos concluded that the U.S. prohibition on torture only "proscribes acts inflicting, and that are specifically intended to inflict, severe pain or suffering," where "severe pain" is equivalent in intensity to the pain "associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body functions."[1] Once leaked to the public, this narrow definition of torture met with intense criticism.[2] Soon after he

1. Memorandum from Jay S. Bybee, Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President, on Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A, at 1, 6 (Aug. 1, 2002) [hereinafter Bybee Memo]. This definition is drawn from a body of law intended for emergency medical conditions, such as reimbursement of emergency medical care of aliens, 8 U.S.C. § 1369 (2000), or coverage under Medicare Choice plans, 42 U.S.C. § 1395w-22 (2000). *Id.* at 5.

2. DEP'T OF JUSTICE, OFFICE OF PROFESSIONAL RESPONSIBILITY, REPORT: INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL'S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY'S USE OF "ENHANCED INTERROGATION TECHNIQUES" ON

entered office, President Obama repudiated all of the memos that endorsed this exceedingly narrow definition of torture, hoping, no doubt, to consign the episode to the dust bin of history.[3]

Yet for all the discussion of torture over the last decade, questions persist about one of the key elements of the crime of torture under both international and U.S. law: the mens rea requirement — or the mental element of the offense. The Office of Legal Counsel memo that interpreted "severe pain" to be equivalent in intensity to the pain of "death, organ failure, or serious impairment of body functions" also concluded that "a defendant [must] act with the specific intent to inflict severe pain."[4] To satisfy this mens rea requirement, the memo argued, "the infliction of such pain must be the defendant's precise objective."[5] Consequently, "even if the defendant knows that severe pain will result from his actions, if causing such harm is not his objective, he lacks the requisite specific intent even though the defendant did not act in good faith."[6] Under this standard, if the accused knowingly causes pain or suffering but had some other objective for which pain and suffering was merely incidental, such as extracting information, he lacks the requisite "specific intent."

Although the Bush-era memos' interpretation of the prohibition on torture has been definitively repudiated,[7] there has thus far been little

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SUSPECTED TERRORISTS 43–46 (2009) (describing Yoo's drafting process and referring to the memorandum as the "bad things opinion").

3. In 2009, the Administration revoked the memos. *See infra* note 7. In addition, the United States, in response to the United Nations Human Rights Council, stated, "the United States is unequivocally committed to the humane treatment of all individuals in detention." U.N. Human Rights Council, Rep. of the Working Group on the Universal Periodic Review: United States of America, ¶ 31, U.N. Doc. A/HRC/16/11 (Jan. 4, 2011). Legal Adviser to the U.S. Department of State Harold Koh reiterated this commitment when discussing the many steps President Obama's Administration had taken to ensure an end to torture, including revoking "the Justice Department OLC opinions that had permitted practices that [he] consider[s] to be torture and cruel treatment." Harold Hongju Ko, Legal Adviser, U.S. Dep't of State, Annual Meeting of the American Society of International Law (Mar. 25, 2010) (transcript available at http://tinyurl.com/87on3k5).

4. Bybee Memo, *supra* note 1, at 3. This definition is drawn from a body of law intended for emergency medical conditions, such as reimbursement of emergency medical care of aliens, 8 U.S.C. § 1369 (2000), or coverage under Medicare Choice plans, 42 U.S.C. § 1395w-22 (2000). *Id.* at 5.

5. Bybee Memo, *supra* note 1, at 3.

6. *Id.* at 4.

7. In 2004, a memorandum by then-Acting Assistant Attorney General Daniel Levin superseded the 2002 memorandum authored by Bybee and Yoo in its entirety and stepped back from some of its analysis on presidential authority. Memorandum from Daniel Levin, Acting Assistant Attorney General, to James B. Comey, Deputy Attorney General, on Legal Standards Applicable under 18 U.S.C. §§ 2340–2340A, at 2 (Dec. 30, 2004). It also repudiated the 2002 specific intent analysis:

> We do not believe it is useful to try to define the precise meaning of 'specific intent' in § 2340. In light of the President's directive that the United States not engage in torture, *it would not be appropriate to rely on parsing the specific intent element of the statute to approve as lawful conduct that might otherwise amount to torture.*

attention paid to the clarifying the level of intent that *is* required to prove torture under domestic or international law. Even today, the definition of torture is still very much contested, with some praising the Bush-era "aggressive interrogation techniques" and others decrying them as illegal torture.[8]

This Article aims to bring clarity to this contested and misunderstood element of the legal definition of torture. We focus here in particular on the mens rea requirement for torture under international law — particularly under the Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture, or CAT). This is important not only to clarify the United States' international obligations, but also to clarify the scope of the domestic law prohibition on torture.[9]

This Article proceeds in three parts. Part I begins with the text of the key authoritative document — the Convention Against Torture, which the United States has ratified — and that Convention's negotiating history. Article 1 of the Convention includes intent as one of several defining elements of torture.[10] Specifically, it defines torture as "any act by which severe pain or suffering, whether physical or mental, is *intentionally* inflicted on a person *for such purposes* as obtaining from him or a third person information or a confession" or another prohibited purpose "by or at the

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Id. at 16–17 (emphasis added). In a January 22, 2009, Executive Order, President Obama revoked "[a]ll executive directives, orders, and regulations inconsistent with this order, including but not limited to those issued to or by the Central Intelligence Agency (CIA) from September 11, 2001, to January 20, 2009, concerning detention or the interrogation of detained individuals . . . ." Exec. Order No. 13,491, 74 Fed. Reg. 4893, § 3(c) (Jan. 22, 2009) (stating that these memos were revoked "in order to improve the effectiveness of human intelligence-gathering, to promote the safe, lawful, and humane treatment of individuals in United States custody and of United States personnel who are detained in armed conflicts, to ensure compliance with the treaty obligations of the United States, including the Geneva Conventions, and to take care that the laws of the United States are faithfully executed"). Two additional documents are part of what are sometimes collectively referred to as the "torture memos" of the Bush Administration: a memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency (CIA), also signed by Jay Bybee, and a letter from John Yoo to then Attorney General Alberto Gonzales. *See* Memorandum from Jay S. Bybee, Assistant Attorney General, to John Rizzo, Acting General Counsel of the Central Intelligence Agency, on Interrogation of al Qaeda Operative (Aug. 1, 2002); Letter from John Yoo, Deputy Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002). Both were understood to be included in the 2009 Executive Order.

8. *See, e.g.*, Jane Mayer, *Bin Laden Dead, Torture Debate Lives On*, NEW YORKER, May 2, 2011, *available at* http://tinyurl.com/3rlrpwj.

9. Even the 2002 memo acknowledged that the Convention's text and history were directly relevant to the proper interpretation of the United States' implementing legislation, noting that "Congress intended for the statute's definition to track the Convention's definition of torture and the reservations, understandings, and declarations that the United States submitted with its ratification." Bybee Memo, *supra* note 1, at 1.

10. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85, *available at* http://tinyurl.com/7ceyghn [hereinafter CAT].

instigation of or with the consent or acquiescence of a . . . person acting in an official capacity."[11] We examine the commentary on the meaning of this text, as well as the generally understood meaning of the language at the time it was written, based on the *travaux* of the Convention. Both make clear that the accused need not act with the exclusive objective (or purpose) of causing pain or suffering to be guilty of torture, as the torture memos suggest. Rather, the accused must intentionally inflict pain or suffering *for a prohibited purpose.* It is this prohibited purpose — specified in the Convention text — that turns an act into torture, and it is this prohibited purpose that renders torture a specific intent crime under international law.

Part II discusses the Convention's intent requirement as interpreted in U.S. law and applied by U.S. courts. The United States discussed a "specific intent" requirement during the Convention's drafting and included it in an Understanding attached to the Convention.[12] A complete picture of the legislative history indicates that the U.S. Understanding clarifies, rather than changes, the intent requirement in the Convention.[13] The existing U.S. jurisprudence interpreting torture largely confirms this view. This jurisprudence also clarifies the proof required to establish the intent requirement for torture, because it consistently allows intent to be established based on the attendant circumstances. In a federal case interpreting the federal statute implementing the Convention, for example, one court found that acts of "extraordinary cruelty and evil" constituted torture under the U.S. law without conducting a separate intent analysis.[14] Similarly, U.S. courts have inferred intent to torture from the totality of the circumstances in cases in which an alien is suing for civil damages under the Alien Tort Statute[15] or the Torture Victims Protection Act.[16]

Part III examines the Committee Against Torture's (Committee) application of the intent standard. The Committee's interpretation comports with the U.S. substantive specific intent standard and with the

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11. *Id.* art. 1 (emphasis added).

12. *See* CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT, S. EXEC. REP. 101-30, at 14 (1990); MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, S. TREATY DOC. 100-20, at 3 (1988) [hereinafter Message on CAT].

13. *See Convention Against Torture: Hearing before the S. Comm. on Foreign Relations*, 101st Cong. 9–10 (1990) [hereinafter Convention Hearing]. The United States came under criticism for what was seen by some as an attempt to change the severe pain requirement through its Understanding, but no criticism was raised due to an apparent change in the intent requirement. *Id.*

14. United States v. Belfast, 611 F.3d 783, 793 (11th Cir. 2010).

15. *See* Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980); *cf.* Sosa v. Alvarez-Machain, 542 U.S. 692, 738 (2004) (not finding torture due to a lack of a violation of a customary international law norm, rather than due to a lack of specific intent).

16. *See* Ortiz v. Gramajo, 886 F. Supp. 162, 178 (D. Mass. 1995).

U.S. courts' requirements for proof of intent. On the latter point, the Committee makes clear that intent can be inferred from the actions of the accused and the circumstances in which they were made. Indeed, in reviewing complaints,[17] the Committee rarely discusses intent separately; like the U.S. courts, it presumes intent based on the facts and circumstances of the complaint. Put simply, where the facts show that severe pain or suffering was knowingly inflicted on a person with the acquiescence of a public official for a purpose prohibited by the Convention,[18] the Committee concludes that the intent requirement is satisfied. In no instance has the Committee considered it necessary to conduct an intent analysis separate from its examination of these facts and circumstances.[19] The Committee has applied a similar approach in its concluding observations to country reports and country-specific inquiries.[20] In this context, the Committee has detailed a list of acts that constitute torture, such as prolonged sleep deprivation and violent shaking, from which intent can be inferred. We therefore conclude that Committee employs a specific intent standard similar to that of the U.S. courts. And like U.S. courts, the Committee does not require direct evidence of intent; it instead infers mens rea based on the totality of the facts and circumstances.

Part IV considers how international courts and tribunals approach claims of torture. Given the relatively small amount of jurisprudence examining the definition of intent under the Convention, the jurisprudence of international tribunals (albeit interpreting torture under their own statutes rather than under the Convention) offers a useful reference point for understanding intent to torture under international law — and how that intent may be proven in courts and tribunals.[21] We find that like the

17. Complaints are the Committee's adjudicatory equivalent to court cases.

18. Hereinafter described simply as a "prohibited purpose."

19. For all of the cases in which the Committee has determined torture has been committed, see Ali v. Tunisia, U.N. Doc. CAT/C/41/D/291/2006, Decision, ¶ 7.1 (U.N. Comm. Against Torture Nov. 26, 2008); Dimitrijevic v. Serbia and Montenegro, U.N. Doc. CAT/C/35/D/172/2000, Decision, ¶ 7.1 (U.N. Comm. Against Torture Nov. 16, 2005); Dimitrov v. Serbia and Montenegro, U.N. Doc. CAT/C/34/D/171/2000, Decision, ¶ 7.1 (U.N. Comm. Against Torture May 23, 2005); Dimitrijevic v. Serbia and Montenegro, U.N. Doc. CAT/C/33/D/207/2002, Decision, ¶ 5.3 (U.N. Comm. Against Torture Nov. 29, 2004); Falcon Ríos v. Canada, U.N. Doc. CAT/C/33/D/133/1999, Decision, ¶ 8.4 (U.N. Comm. Against Torture Nov. 23, 2004).

20. Concluding observations are the Committee's responses to reports filed by individual countries on the status of their Convention obligations under Article 19. The Committee also is "empowered to carry out a confidential inquiry if it receives reliable information which appears to it to contain well-founded indications that torture is being systematically practised in a State party" under Convention Article 20. CAT, *supra* note 10, art. 20; U.N. High Comm'r for Human Rights, Confidential Inquiries Under Article 20 of the Convention against Torture, http://tinyurl.com/7gheshn (last visited Nov. 7, 2010).

21. This examination is not exhaustive within the courts and tribunals, or for tribunals as a whole — for example, the Human Rights Committee of the International Covenant on Civil and

U.S. courts and the Committee, international tribunals apply a specific intent standard. And like U.S. courts and the Committee, international tribunals find the specific intent requirement is met in cases where the facts and circumstances demonstrate there has been infliction of pain or suffering for a prohibited purpose. For example, the International Criminal Tribunal for the Former Yugoslavia (ICTY) has found that it is sufficient to show that the accused inflicted pain and suffering for the purpose of obtaining information or a confession.[22] Similarly, the International Criminal Tribunal for Rwanda (ICTR) has determined torture occurred when severe harm has been inflicted for a prohibited purpose, such as investigation[23] or discrimination.[24] The European Court of Human Rights (ECtHR) has found that intent is satisfied when the "treatment," in this case being hung naked by his arms with his arms tied behind his back, "could only have been deliberately inflicted" and where it was "administered with the aim of obtaining admissions or information from the applicant."[25] Finally, the Inter-American Commission on Human Rights (IACHR) has concluded intention was satisfied by a showing that the act — in this case, rape — inflicted pain or suffering for a prohibited purpose, including "personal punishment and intimidation."[26]

This Article concludes, therefore, that the torture memos err not in describing torture as a specific intent crime, but in their description of the

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Political Rights has addressed the definition of torture under on Article 7 of the Covenant. *See* Human Rights Comm., General Comment 20: Article 7 prohibition of torture and cruel treatment or punishment (Mar. 10, 1992), *published in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev. 7 (May 12, 2004).

22. Prosecutor v. Furund'ija, Case No. IT-95-17/1-A, Judgment, ¶ 114 (Int'l Crim. Trib. for the former Yugoslavia July 21, 2000) (rejecting an improper finding of torture as a grounds for appeal). The ICTY combined the intent and purpose requirements into a single inquiry: "the accused 'must participate in an integral part of the torture and partake of the purpose behind the torture, that is the intent to obtain information or a confession , to punish or intimidate, humiliate, coerce or discriminate against the victim or a third person." *Id.* ¶ 118 (quoting Prosecutor v. Anto Furundzija, Case No. IT-95-17/1-T, Judgment (Int'l Crim. Trib. for the former Yugoslavia Dec. 10, 1998), *available at* http://tinyurl.com/6lr32cj).

23. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶¶ 682–83 (Sept. 2, 1998). The Trial Chamber also commented:

> On the issue of determining the offender's specific intent, the Chamber considers that intent is a mental factor which is difficult, even impossible, to determine. This is the reason why, in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact.

Id. ¶ 523.

24. Semanza v. Prosecutor, Case No. ICTR-97-20-T, Judgment and Sentence, ¶ 545 (May 15, 2003).

25. *Furund'ija*, Case No. IT-95-17/1-A, Judgment, ¶ 114 (rejecting an improper finding of torture as grounds for appeal); *see supra* note 22.

26. Martín de Mejía v. Perú, Case 10.970, Inter-Am. Comm'n H.R., Report No. 5/96, OEA/Ser.L/V/II.91, doc. 7 (1996).

meaning and significance of that conclusion. The negotiating history of the Convention, the plain meaning of the text, domestic jurisprudence on torture, the Committee Against Torture's interpretations, and international court and tribunal case law all make clear, first, that torture under international law is a specific intent crime, and second, that the specific intent standard for torture is met by evidence that the accused knowingly inflicted severe pain or suffering on a person for a prohibited purpose. Proof of that intent may, moreover, be inferred from the total facts and circumstances of the case and does not require direct evidence of the accused's mental state. In light of the repudiated torture memos and the blow they delivered to the United States' reputation as a human rights leader, the United States should reaffirm that it shares the understanding of the intent requirement for torture that is held by all other bodies that have considered the matter. This would be an important step toward reaffirming the United States' commitment to end torture and bolstering respect for the Convention, particularly in the context of the ongoing fight against terrorism.

I. THE CONVENTION TEXT AND HISTORY

A. Codification and Plain Meaning

We begin with the text of the Convention Against Torture.[27] Adopted by the U.N. General Assembly in December 1984, the Convention entered into force in June 1987. The United States ratified it in 1994.[28] The Convention penalizes acts of torture and cruel, inhuman, and degrading treatment in States Parties, aiming to "make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world."[29] Article 1 of the Convention defines torture as:

> any act by which severe pain or suffering, whether physical or mental, is *intentionally* inflicted on a person for such purposes as

27. As stated in Article 31(1) of the Vienna Convention on the Law of Treaties, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 21 U.S.T. 77, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

28. *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. TREATY COLLECTION, http://tinyurl.com/ccr7bc9 (last visited Apr. 17, 2012).

29. CAT, *supra* note 10. The prohibition on torture has been widely accepted as customary international law and jus cogens. *See, e.g.*, Filártiga v. Peña-Irala, 630 F.2d 876, 882 (2d Cir. 1980) (stating that the "prohibition [on torture] has become part of customary international law, as evidenced and defined by the Universal Declaration of Human Rights"); *Furund'ija*, Case No. IT-95-17/1-T, Judgment, ¶ 144 (stating that "the prohibition on torture is a peremptory norm or jus cogens").

> 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.[30]

Article 1 of the Convention Against Torture thus codifies four necessary elements for an action to constitute torture: (1) infliction of severe pain or suffering, whether physical or mental; (2) with intent; (3) for a purpose prohibited by the Convention;[31] and (4) by a public official or with an official's involvement or acquiescence.[32]

The requirement that the infliction of severe pain or suffering must be "intentional" indicates that merely negligent conduct does not, without more, amount to torture. As one commentary put it, "[t]his seems to imply the exclusion of negligent conduct from the application of Article 1."[33] In 2010, the U.N. Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment offered an example to highlight the distinction between negligence and intent:

> A detainee who is forgotten by the prison officials and suffers from severe pain due to the lack of food is without doubt the victim of a severe human rights violation. However, this treatment does not amount to torture given the lack of intent by the authorities. On the other hand, if the detainee is deprived of food *for the purpose* of extracting certain information, that ordeal, in accordance with article 1, would qualify as torture.[34]

The intention, as highlighted above, must be "directed at the conduct of inflicting severe pain or suffering as well as at the purpose to be achieved

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30. CAT, *supra* note 10, art. 1 (emphasis added).

31. Hereinafter described simply as a "prohibited" or "proscribed" purpose.

32. *See* Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Human Rights Council, ¶ 30, U.N. Doc. A/HRC/13/39/Add.5 (Feb. 5, 2010) (prepared by Manfred Nowak) [hereinafter Special Rapporteur Report].

33. J. HERMAN BURGERS & HANS DANELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 41 (1988); *see* GAIL H. MILLER, DEFINING TORTURE 13 (2005); MANFRED NOWAK & ELIZABETH MCARTHUR, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A COMMENTARY Article 1, 39, ¶ 29 (2008) [hereinafter Commentary].

34. Special Rapporteur Report, *supra* note 32, ¶ 34 (emphasis added).

by such conduct."[35] In this scenario, the actor must have intended the severe pain or suffering that resulted from depriving a detainee of food, and he must have done so for the purpose of extracting information (or some other prohibited purpose that falls within the scope of Article 1). Pain or suffering arising "*only* from, inherent in or incidental to lawful sanctions," such as detention or incarceration facilities, does not constitute torture.[36] By contrast, "cruel, inhuman, or degrading treatment or punishment" — which is also criminalized under the Convention — is a general intent crime. Whereas torture occurs where the torturer "deliberately inflicts severe pain or suffering on a powerless victim for a specific purpose, such as extracting a confession or information from the victim,"[37] cruel, inhuman, or degrading treatment or punishment "means the infliction of pain or suffering without purpose or intention."[38]

Much of the debate over the Convention's intent standard for torture centers on whether torture is properly understood as a specific intent crime — and, if so, how that standard can be met. To answer this question, it is first necessary to understand the concept of specific intent.[39] Specific intent is most commonly used "to designate a special mental element that is required above and beyond any mental state required with

35. Commentary, *supra* note 33, at 74, ¶ 107.

36. CAT, *supra* note 10, art. 1 (emphasis added).

37. Special Rapporteur Report, *supra* note 32, ¶ 188. *See, e.g.*, Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment, ¶ 442 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998). The prohibited purposes commonly recognized within the scope or Article 1 include extracting a confession, obtaining information from the victim or a third person, punishment, intimidation and coercion, and discrimination. But this list is not considered exhaustive. Commentary, *supra* note 33, at 75, ¶ 112. For secondary literature on purpose and intent to commit torture, see, for example, Mary Holper, *Specific Intent and the Purposeful Narrowing of Victim Protection Under the Convention Against Torture*, 88 OR. L. REV. 777 (2009).

38. Special Rapporteur Report, *supra* note 32, ¶ 188.

39. Indeed, much of the confusion in this debate stems from confusion not about the crime of torture, but about the relevant intent standards. The Model Penal Code in the United States long ago abandoned the "specific intent" language for a five-part classification of intent, in significant part because the concept of specific intent was regarded as confusing. The Code now classifies crimes into five categories of mens rea: (1) crimes requiring *intention* (or purpose) to do the forbidden act or cause the forbidden result, (2) crimes requiring *knowledge* of the nature of the act or the result that will follow, (3) crimes requiring *recklessness* in doing the act, (4) crimes requiring *negligence*, or (5) crimes for which the mental state is irrelevant — for which the actor is strictly liable. MODEL PENAL CODE § 2.02 cmt. 1 (2011); MARKUS D. DUBBER, CRIMINAL LAW: MODEL PENAL CODE 62–82 (2002); WAYNE R. LAFAVE, PRINCIPLES OF CRIMINAL LAW 160 (2d ed. 2010). Although the Code had abandoned the concept of specific intent, courts still regularly resort to it, particularly in jurisdictions that have not adopted the Code. Fowler v. United States, 131 S. Ct. 2045, 2053 (2011) (noting that it is "a federal crime 'to kill another person, with intent to . . . prevent the communication by any person to a law enforcement officer . . . of the United States of information relating to the commission or possible commission of a Federal offense,'" and observing that, "[v]iewed in isolation, this provision contains an ambiguity: Does the mens rea of the statute include a specific intent to prevent communication to a law enforcement officer *of the United States;* or is it satisfied by the mere intent to prevent communication to a law enforcement officer *who happens to be* a law enforcement officer of the United States?").

respect to the actus reus of the crime."[40] The distinction between general or basic intent (which does not require this special mental element) and specific intent (which does) was helpfully outlined by Lord Simon of the British House of Lords in *DPP v. Morgan*. He explained that crimes of basic intent (sometimes also referred to as general intent) are "those crimes whose definition expresses (or, more often, implies) a *mens rea* which does not go beyond the *actus reus*."[41] Assault is an example. The actus reus element of the offence is an act that causes another person to apprehend immediate and unlawful violence. The mens rea requirement necessitates nothing more than that the actus reus is volitional. In crimes of specific intent, on the other hand, "*mens rea* goes beyond contemplation of the *actus reus*."[42] The prosecution must show that the accused "acted with whatever specific intent is required by the definition of the subject offense."[43] For example, common-law burglary requires breaking and entering into the dwelling of another (actus reus) with intent to commit a felony therein (additional mens rea). Hence, burglary requires more than intent to commit the actus reus. Moreover, that additional mens rea requirement is specifically identified in the elements of the offense.

Applying this framework to the crime of torture, it is evident that torture under the Convention Against Torture *is* a specific intent crime — for both the act and state of mind are essential elements of the crime. The very definition of torture in the Convention Against Torture supplies the additional mens rea requirement: The accused must not only intend to inflict pain and suffering, but he must do so *for a purpose* prohibited by the Convention (for example, to extract a confession). To satisfy this requirement, however, causing such harm need not be the accused's objective or purpose. Rather, the specific intent standard for torture is met by evidence that the accused intentionally inflicted severe pain or suffering on a person *for a prohibited purpose*, as provided by the Convention (for example, in order to extract information).

To establish that a person accused of torture has the requisite purpose, it is not necessary to show that the forbidden purpose was actually realized — for example, that the interrogation was successful. It is only necessary to show that the accused "consciously desire[d] the forbidden result, whatever the likelihood of that result actually occurring from the

40. LAFAVE, *supra* note 39, at 178–79. Notably, the language does not appear in the U.S. Model Penal Code, which rejects the common law approach to intent. The Code "establishes four levels of culpable criminal intent ranging, in order, from the most culpable to the least culpable level; purposeful, knowing, reckless, and negligent." FRANK AUGUST SCHUBERT, CRIMINAL LAW: THE BASICS 157 (2d ed. 2010).

41. Kenneth J. Arenson, *The Pitfalls in the Law of Attempt: A New Perspective*, 69 J. CRIM. L. 146, 150 (2005) (quoting DPP v. Morgan, [1976] AC 182 at 216–17, 1975 WL 44975).

42. *Id.*

43. *Id.* at 151.

conduct."[44] Moreover, the Committee has explained that establishing intent and purpose does not involve a "subjective inquiry into the motivations of the perpetrators."[45] Instead, it simply requires "objective determinations under the circumstances."[46]

Consider a doctor who inflicts severe pain and suffering during a standard medical procedure. If that procedure is performed for the sole purpose of addressing a medical condition, it would not be torture, because the doctor's actions lack the prohibited purpose required by Article 1 and would therefore not satisfy the specific intent requirement. But a doctor who inflicts severe pain and suffering during that same medical procedure (by, for example, needlessly withholding pain medication) for the purpose of extracting a confession from the patient would have the requisite specific intent.

Criminal law not only distinguishes between general and specific intent, but often further distinguishes between different mental states in a more fine-grained way. The U.S. Model Penal Code, for example, distinguishes between acting "purposely" ("it is his conscious object to engage in conduct of that nature or to cause such a result"), "knowingly" ("he is aware that his conduct is of that nature or that such circumstances exist"), "recklessly" ("he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct"), and "negligently" ("he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct").[47] This more fine-grained delineation of mental state can cause particular confusion in the context of torture because torture requires pain or suffering be "intentionally inflicted on a person" for a proscribed purpose. One might mistakenly conclude that the requirement that pain or suffering be "intentionally inflicted" must meet the purposeful intent standard independent of the prohibited purpose requirement. Reading the statute as a whole, however, it is clear that it is sufficient that the accused intentionally inflict pain or suffering if that pain or suffering is inflicted for a prohibited purpose. Knowingly, not recklessly or negligently, is the applied intent standard. In other words, purpose need not be read into the requirement that pain or suffering be "intentionally inflicted" because it is explicitly provided for in the further requirement that the pain or suffering be inflicted for a prohibited "purpose."

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44. Holper, *supra* note 37, at 791.

45. U.N. Comm. Against Torture, *General Comment No. 2, Implementation of Article 2 by State Parties*, 9, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008).

46. *Id.*

47. MODEL PENAL CODE § 2.02(2) (2011).

B. Negotiating History and Commentary

The Convention's negotiating history — its *travaux préparatoires* — provides guidance as to participating country priorities and the collective intended meaning of the Convention's text.[48] Together, the documents support the above reading of the plain meaning of the text — that the Convention provides for a specific intent standard.

Before negotiation and ratification of the Convention, the U.N. General Assembly first unanimously adopted the Declaration Against Torture (Declaration).[49] The Declaration stated that torture "involves the infliction of severe physical or mental pain or suffering," and that "[t]he infliction of pain is *intentional* and must be at the instigation of a public official."[50] The Declaration also highlighted that the conduct must "serve[] specific purposes, such as obtaining information or a confession."[51] Although non-binding, the Declaration ultimately provided much of the substance that later was incorporated into the Convention Against Torture. In fact, the Swedish draft of the Convention, which formed the basis of the negotiations, used the exact text of the definition of torture from the Declaration.[52]

Much of the discussion among participating country delegates focused on the difference between torture and cruel, inhuman, and degrading treatment. Ultimately, the delegates distinguished torture from inhuman and degrading treatment in large part by "the essential aspect of the *objective* for which someone is subjected to inhuman treatment, such as obtaining information or a confession, or the execution of a punishment" — the purpose of the act.[53] Perhaps as revealing as what was said is what was not said: Little discussion or debate centered on the issue of intent independent of the purpose of the act.

To the extent that the intent standard entered the discussion, it led to rejection of a heightened standard. At one point during negotiations, the United States proposed that torture include only an act by which "extreme

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48. According to the Vienna Convention on the Law of Treaties Article 32, the preparatory work of the treaty and the circumstances in which it was concluded serve as a supplementary means of interpretation when language "(a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable." Vienna Convention on the Law of Treaties art. 32, May 23, 1969, 1155 U.N.T.S. 331. In this instance, given that the United States' positions since ratification has been at odds with the plain meaning of the treaty's text, we now turn to the negotiating history as a supplemental means of understanding the Convention.

49. CHRIS INGELSE, THE UN COMMITTEE AGAINST TORTURE: AN ASSESSMENT 69–70 (2001).

50. *Id.* at 70 (emphasis added).

51. *Id.*

52. *Id.* at 74. Unfortunately, the draft Sweden submitted to the 34th Session, E/CN.4/1285, is not available on the U.N. Documents database.

53. *Id.* at 58, 70.

pain or suffering . . . is deliberately and maliciously inflicted on a person."[54] This would have replaced the "intentional infliction" requirement with a requirement of "deliberate" and "malicious" infliction of "extreme" pain or suffering. This U.S. proposal, however, elicited little discussion by the Working Group; no other state commented on it, and ultimately the proposal failed.[55] Similarly, a proposal by the United Kingdom that the pain not only be intentionally, but also "systematically" inflicted also failed.[56] The Convention consequently went into force with the original requirement of "intentionally inflicted" pain or suffering for a proscribed purpose.[57]

The "purpose" requirement is further informed by the *travaux*. Article 1 provides that pain or suffering must be inflicted

> 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.[58]

It thus provides that conduct must be carried out for the purpose of achieving a specific result and contains a non-exhaustive list of objectives. At the time of adoption, the United Kingdom suggested that the definition would be more precise if the prohibited purposes were listed rather than exemplified in Article 1. The Swiss delegation objected to that proposal on the grounds that a list would inevitably exclude certain actions meant to be prohibited. France went even further, insisting that:

> torture should not be defined in terms of the status and motives of the perpetrators of acts of torture owing to the fact that this reference might afford States parties a means of evading their commitment to prevent or punish all acts of torture regardless of the identity and goals of the perpetrators.[59]

The final text of this portion of the definition can thus be understood to require a particular motive, objective, or goal — hence, it requires a mens rea (a proscribed purpose) that goes beyond the actus reus (volitional infliction of pain or suffering).

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54. BURGERS & DANELIUS, *supra* note 33, at 41; Commentary, *supra* note 33.

55. BURGERS & DANELIUS, *supra* note 33, at 46; Commentary, *supra* note 33.

56. BURGERS & DANELIUS, *supra* note 33, at 46; Commentary, *supra* note 33.

57. CAT, *supra* note 10. The United States ratified the Convention with a Reservation "that with reference to [A]rticle 1, the United States understands that, in order to constitute torture, an act must be specifically intended . . . ." Declarations and Reservations Made upon Ratification, Accession, or Succession [United States], 1830 U.N.T.S. 320 (Oct. 21, 1994). As a result, the United States is bound under international law only by what it announced was a specific intent standard.

58. CAT, *supra* note 10.

59. Commentary, *supra* note 33, at 40, ¶ 31.

The text and negotiating history of the Convention thus support the conclusion that the intent requirement for torture does not require that causing pain or suffering need not be the accused's objective or purpose. Instead, the accused must intentionally (knowingly, not negligently or recklessly) inflict pain or suffering. That pain or suffering, moreover, must be inflicted for a prohibited purpose. It is this prohibited purpose — debated by the States Parties to the Convention at its inception and expressly delineated in the final text of the Convention itself — that turns an act into torture, and this prohibited purpose that renders torture a specific intent crime under international law.

II. UNITED STATES: LAW, HISTORY, JURISPRUDENCE

U.S. legislative history and jurisprudence demonstrate that U.S. courts have applied the same specific intent standard provided for in the Convention Against Torture, and the same evidentiary requirements as international courts and tribunals. U.S. domestic courts have held that acts of "extraordinary cruelty and evil"[60] constitute torture when inflicted for a prohibited purpose. This understanding of intent under the Convention is reflected by the legislative history of the U.S. ratification and the implementing legislation passed by Congress, as well as the single criminal prosecution in U.S. courts under the implementing legislation. This intent has, moreover, been inferred from the circumstances of the case and thus has not required direct evidence as to the accused's mental state. This is true in criminal prosecutions under the U.S. implementing legislation for the Convention Against Torture, in cases in which immigrants are challenging deportation, and in cases involving the Alien Tort Statute. To the extent there are differences across these different bodies of domestic law interpreting the prohibition on torture, they go to the evidence required to establish intent, rather than to the standard of intent itself. Hence, U.S. case law conforms to the above reading of the plain text of the Convention and, as we shall see in Parts III and IV, to the jurisprudence of international bodies that have addressed the issue.

A. Legislative History and Implementing Legislation

The ratifying instrument of the Convention and its implementing legislation came into force at the same time.[61] As a result, the legislative

60. United States v. Belfast, 611 F.3d 783, 793 (11th Cir. 2010).

61. The implementing legislation is codified at 18 U.S.C. §§ 2340-2340A. Section 2340A provides:

> Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.

history of the Senate's consent to the Convention and to the implementing statute, as well as contemporaneous commentary from the State Department, provide a window into the U.S.'s understanding of the Convention at the time of ratification. This examination reveals that while specific intent is mentioned in both the treaty and the statute's legislative history, it was not a significant focus of debate in the Senate or in Congress as a whole. Rather than alter its meaning, the Understanding entered by the United States at the time it ratified appears to have been meant to clarify the meaning of intent under the Convention.

In 1988, President Reagan's letter of transmittal of the Convention Against Torture to the Senate urged the Senate to consent to ratification of the Convention, subject to certain reservations, understandings, and declarations, in order to "clearly express the United States' opposition to torture, an abhorrent practice," and "establish a regime for international cooperation in the criminal prosecution of torturers."[62] George P. Shultz, the Secretary of State at the time, explained to the Senate that the United States had contributed significantly to the development of the Convention, especially in directing the Convention to "focus on torture rather than on other relatively less abhorrent practices."[63] The Senate did not give its approval at that time, but rather continued to debate the language of the proposed reservations, understandings, and declarations.

Among the provisions under debate was an "Understanding" stating that an act of torture "must be *specifically* intended to inflict severe physical or mental pain or suffering."[64] The Committee on Foreign Relations Hearing Report on the Convention noted that the original U.S. understandings submitted by the Reagan Administration had come under criticism for raising the bar on the pain required for an act to constitute torture.

The United States' Understanding that an act of torture must be "specifically intended to inflict severe physical or mental pain or suffering" was not meant to modify the treaty standard of intent. As U.N. Special Rapporteur Manfred Nowak argues, the Understanding did not "go beyond the requirement of intention" stipulated in Article 1 itself.[65]

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18 U.S.C. § 2340A (2006). Section 2340 defines torture as "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control." *Id.* § 2340. The language thus directly tracks the Understanding.

62. Message on CAT, *supra* note 12, at iii.

63. *Id.* at v.

64. Commentary, *supra* note 33, at 74, ¶ 106 (emphasis added). The United Kingdom introduced a proposal that the pain must only be intentionally inflicted, but that it must also be inflicted "systematically." *Id.* at 74, ¶ 108. This proposal also was rejected, with the result that single, isolated acts can be considered torture under the Convention. *Id.* at 39, ¶ 29.

65. *Id.* at 74, ¶ 106.

Indeed, Abraham D. Sofaer, the State Department Legal Adviser at the time, defended the Understanding at the time as a simple interpretation of the treaty, not an effort to modify it. He explained, "the original [transmittal] package proposed an understanding to the effect that, in order to constitute 'torture,' 'an act must be a deliberate and calculated act of an extremely cruel and inhuman nature, specifically intended to inflict excruciating and agonizing physical or mental pain or suffering.'"[66] Although "this proposal was criticized as possibly setting a higher, more difficult evidentiary standard than the Convention required,"[67] he explained that "no higher standard was intended," and that the proposed Understanding did "not raise the high threshold of pain already required under international law."[68] Instead, he explained, the first transmittal package reflected a U.S. desire to clarify the definition of torture to allow more effective criminal prosecution under U.S. law.[69]

The U.S. instrument of ratification for the Convention was deposited on October 21, 1994.[70] No country expressly objected to the U.S. Understanding, suggesting that the States Parties regarded the Understanding to be consistent with the Convention's requirements.[71] The U.S. Congress enacted a law implementing the Convention's

66. Convention Hearing, *supra* note 13, at 9.

67. *Id.* at 9–10.

68. *Id.* at 10.

69. *Id.* This position was consistent with the proposal of the provision as an "Understanding" rather than as a "Reservation." Whereas a Reservation alters a country's treaty obligations, an Understanding states the member country's interpretation of the agreement as written.

70. Declarations and Reservations Made upon Ratification, Accession, or Succession, *supra* note 57.

71. Finland objected to the U.S. Reservation to Article 16 (restricting the U.S. obligation to prevent "cruel, inhuman or degrading treatment or punishment"). Declarations and Reservations Made upon Ratification, Accession, or Succession [Finland], 1830 U.N.T.S. 320 (Feb. 27, 1996). The Netherlands also objected to the reservation regarding Article 16, as well as to part II(1)(a) of the Understanding, on the grounds that it "appears to restrict the scope of the definition of torture under Article 1 of the Convention." Declarations and Reservations Made upon Ratification, Accession, or Succession [Netherlands], 1830 U.N.T.S. 320 (Feb. 26, 1996). Part II(1)(a) of the U.S. Understanding does mention intent, but it also expressly limits the scope of "mental pain or suffering" to which the convention reaches. Declarations and Reservations Made upon Ratification, Accession, or Succession [United States], 1830 U.N.T.S. 320 (Oct. 21, 1994). It is likely that it is this later limitation to which the Netherlands was referring. Sweden also objected to the reservation regarding Article 16, and expressed the view that "the understandings expressed by the United States of America do not relieve the United States of America as a party to the Convention from the responsibility to fulfil the obligations undertaken therein." Declarations and Reservations Made upon Ratification, Accession, or Succession [Sweden], 1830 U.N.T.S. 320 (Feb. 27, 1996). Finally, on February 26, 1996, the Government of Germany notified the Secretary-General that with respect to the U.S. reservations under I(1) and understandings under II(2) and (3), "it is the understanding of the Government of the Federal Republic of Germany that [the said reservations and understandings] do not touch upon the obligations of the United States of America as State Party to the Convention." Declarations and Reservations Made upon Ratification, Accession, or Succession, 1830 U.N.T.S. 320, n.23 (Feb. 26, 1996).

requirements — entitled the "Torture Act"[72] — shortly thereafter, and the treaty entered into force thirty days later.[73]

The Senate Executive Report accompanying the new Torture Act explained that torture must be "an extreme form of cruel and inhuman treatment, must cause severe pain and suffering, and must be intended to cause severe pain and suffering."[74] The Report explained that "[b]ecause *specific intent* is required, an act that results in unanticipated and unintended severity of pain and suffering is not torture for the purposes of this Convention."[75] Finally, the Report noted that the "requirement of intent is emphasized in Article 1 by reference to illustrative motives for torture."[76]

This history suggests that the Senate understood that torture under the Torture Act would require specific intent, and that specific intent was properly understood to mean that severe pain and suffering must be knowingly (not unintentionally) inflicted for a prohibited purpose. Although the specific intent text of the statute differs from the intent standard articulated in the Convention, the Senate ratifying history, the Understanding, and the implementing statute demonstrate a consistent belief among participants that the United States was clarifying, not altering, the Convention intent standard.

The question of intent under the Torture Act and the Convention was not in significant dispute until 2002, when the Department of Justice issued the controversial memoranda discussed above. In 2000, for example, the first U.S. submission to the U.N. Committee Against Torture did not mention intent in its discussion of Article 1.[77] Even in 2002 and thereafter, the issue received little public attention. In 2002, the D.C. Circuit explained that there were two ambiguities in the definition of torture raised in the drafting history of the Convention and of the statute,

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72. 18 U.S.C. § 2340 (2006).

73. The Torture Act was enacted on April 30, 1994, and amended on September 13, 1994. 18 U.S.C. § 2340 (2006). It became effective on Nov. 20, 2994, the day the United States became a party to the Convention. Pub. L. No. 103-236, 108 Stat. 463, 464 (1994); *see* United States v. Emmanuel, No. 06-20758-CR, 2007 WL 2002452, at *4 (S.D. Fla. July 5, 2007) (describing the relationship between ratification and the Torture Act).

74. S. REP. 101-30, *supra* note 12, at 6.

75. *Id.* at 14 (emphasis added); *see also* Message on CAT, *supra* note 12, at 3 (using virtually identical terms).

76. S. REP. 101-30, *supra* note 12, at 14; *see also* Message on CAT, *supra* note 12, at 3–4 (using virtually identical terms). At a Senate Foreign Relations Committee hearing discussing the Convention, Abraham D. Sofaer, State Department Legal Adviser under George H.W. Bush, told the committee that "there is no need for the legal protections of the Convention Against Torture in the United States. Existing U.S. law makes any act falling within the Convention's definition of torture a criminal offense .... We do not have a torture problem within the United States." Convention Hearing, *supra* note 13, at 5.

77. United States of America, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, ¶¶ 94–99, U.N. Doc. CAT/C/28/Add.5 (Feb 9, 2000).

but did not list the definition of "intentionally" as among them.[78] In the second U.S. submission to the Committee in 2005 and in subsequent discussions with the Committee, the United States focused on the claim that the Convention does not apply in wartime rather than on the meaning of the specific intent requirement.[79] This suggests that the torture memos were outliers and that the past and present U.S. interpretation of the intent standard by key political actors has generally been consistent with the international understanding. We now turn to the courts.

B. Judicial Interpretation of the U.S. Implementing Statute for the Convention

The United States implemented part of its obligations under the Convention Against Torture by passing a federal statute to make torture a crime.[80] This federal statute states that "'torture' means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control."[81]

The crime of torture in the United States has been criminally prosecuted only once.[82] The complaint was lodged against Charles Emmanuel, the son

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78. *See* Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 92 (D.C. Cir. 2002).

79. John B. Bellinger III, Legal Advisor to U.S. Sec'y of State, Remarks at U.S. Meeting with U.N. Committee Against Torture (May 5, 2006), *available at* http://tinyurl.com/7adwxxs; U.S. Response to Specific Recommendations Identified by the Committee Against Torture (Jul. 25, 2007), at 7, *available at* http://tinyurl.com/7zjeykb ("The law of war, and not the Convention, is the applicable legal framework governing these detentions."). This is consistent with the United States' position during the drafting of the Convention. The negotiator stated that the Convention:

> never intended to apply to armed conflicts and thus supersede the 1949 Geneva Conventions on humanitarian law in armed conflicts and the 1977 Protocols additional thereto. He stated his further understanding that incidents covered by the Geneva Conventions and Protocols thereto would not fall within the scope of the convention against torture and that to consider otherwise would result in an overlap of the different treaties, which would undermine the objective of eradicating torture.

Comm'n on Human Rights, Rep. of the Working Group, 40th Sess., ¶ 5, E/CN.4/1984/72 (Mar. 9, 1984).

80. 18 U.S.C. § 2340A (2006).

81. 18 U.S.C. § 2340(2). The statute defines "severe mental pain or suffering" as:

> The prolonged mental harm caused by or resulting from —
> (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
> (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
> (C) the threat of imminent death; or
> (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.

82. A November 6, 2010, search on Westlaw revealed sixty-six cases citing 18 U.S.C. § 2340, fifty-five of which reference "torture." The rest of the cases concern immigration proceedings, brutality in

of the former president of Liberia and indicted war criminal, Charles Taylor.[83] The indictment alleges that Emmanuel "repeatedly shocked the victim's genitalia and other body parts,"[84] burned the victim's flesh, and rubbed salt into the wounds,[85] with the intention to "to obtain information from the alleged victim about actual, perceived, or potential opponents of the Taylor presidency."[86]

At the trial, Emmanuel did not dispute the factual allegations against him or the finding on specific intent, but instead raised a range of procedural and constitutional concerns about the Torture Act itself.[87] At the district level, the jury found him guilty.[88] In his appeal, Emmanuel argued that slight variances between the Convention and the implementing legislation rendered the Torture Act unconstitutional because it exceeded the scope of the treaty.[89] One key difference between the definition of torture in the Convention and the Act, he argued, was that "the CAT requires that 'torture' be committed for some proscribed purpose — specifically, 'for such purposes as' obtaining information, punishing, intimidating, or coercing a person . . . whereas the Torture Act does not require the government to prove the defendant's motive."[90] Emmanuel's position emphasized the importance of the prohibited purpose element of specific intent to torture under the Convention, and its supposed absence in the U.S. implementing statute.

The Eleventh Circuit Court of Appeals responded to the argument regarding textual differences by noting that legislation implementing a treaty clearly bears "a 'rational relationship' to that treaty where the legislation 'tracks the language of the [treaty] in all material respects.'"[91] It

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prison or other excessive force, or private actions under the Alien Tort Statute, 28 U.S.C. § 1350. In addition, the Eleventh Circuit, in July 2010, explained that Emmanuel was the "first individual to be prosecuted under the Torture Act." United States v. Belfast, 611 F.3d 783, 793 (11th Cir. 2010).

83. United States v. Emmanuel, No. 06-20758-CR, 2007 WL 2002452, at *4 (S.D. Fla. July 5, 2007).

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at *5 (The arguments raised include: Congress lacks constitutional authority to pass the Torture Act or apply laws extraterritorially; the prosecution violates sovereign immunity; the Torture Act is unconstitutionally vague; and the application of the statute violates the Fifth and Sixth Amendments).

88. *Belfast*, 611 F.3d at 793. The jury at the trial level was instructed that defendant must have "committed an act with the specific intent to inflict severe physical pain or suffering." *Id.* at 822.

89. *Id.* at 803.

90. *Id.* In his appeal, Emmanuel also argued that the Torture Act was unconstitutional on many grounds.

91. *Id.* at 806 (quoting United States v. Lue, 134 F.3d 79 (2d Cir. 1998)). The Eleventh Circuit held that "the Torture Act tracks the provisions of the CAT in all material respects." *Id.* First,

> as courts have recognized in the context of other federal statutes that adopt the CAT's definition of torture, the CAT independently requires that torture be committed

looked to a congressional understanding of specific intent in the Convention and concluded that Congress had combined the intent and purpose inquiry. It further concluded that the differences between the Convention and the Torture Act were not material:[92]

> The congressional definition of torture contained in the Torture Act fully embodies the considerations that the CAT's "for such purposes" language is intended to "reinforce." Congress properly understood the thrust of this language to require intentionality on the part of the torturer . . . . The Torture Act in no way eliminates or obfuscates the intent requirement contained in the offense of torture; instead, the Act makes that requirement even clearer by stating that the proscribed acts must have been "specifically intended" to result in torture.[93]

Having dispensed with this and other grounds for appeal on the constitutionality of the Torture Act, the court upheld Emmanuel's conviction.[94] Therefore, in the only criminal prosecution under the Torture Act to date, the Eleventh Circuit made clear that the Torture Act adopts the same substantive standard of intent as the Convention. This decision thus once again reinforces the conclusion that the U.S. specific intent standard mirrors the specific intent standard of the Convention.

C. *Specific Intent to Torture in U.S. Immigration Law and the Alien Tort Statute*

Because so little domestic jurisprudence on the meaning of torture under Article 1 of the Convention exists, it is instructive to examine U.S. jurisprudence on torture in removal proceedings under the Immigration and Nationality Act and in civil actions under the Alien Tort Statute (ATS)[95] and the Torture Victim Protection Act (TVPA).[96] These cases

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> "intentionally," CAT art. 1(1), and the "for such purposes" language serves only to "reinforce" that requirement . . . . The "for such purposes" language is meant merely "to illustrate the common motivations that cause individuals to engage in torture . . . [and to] ensure[ ] that, whatever its specific goal, torture can occur . . . only when the production of pain is purposive, not merely haphazard.

Id. at 807 (quoting Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 93 (D.C. Cir. 2002)).

92. *Id.* at 807.

93. *Id.* at 807–08.

94. The court also repeated the facts that supported the finding of torture under the other elements of the crime: "The torture he is alleged to have committed was undertaken for a particular purpose (to intimidate any possible dissenters to his father's regime and extract information from them), caused severe physical and mental pain and suffering, and was perpetrated while he was acting in an official capacity." *Id.* at 804 n.4.

95. 28 U.S.C. § 1350 (2006).

96. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992).

help to develop an understanding of both the intent standard as applied and the evidence required to demonstrate that intent. The extensive jurisprudence on removal proceedings provides the most detailed analysis of intent to torture. Courts in these contexts have declined to find intent to inflict pain or suffering in cases involving willful blindness or deliberate indifference and have generally declined to find torture when pain and suffering arises from lawful sanctions.[97] These immigration cases differ from the international case law in only one respect: They appear to apply a stricter approach to proof of intent to torture, for example, declining to infer specific intent from circumstances in which an individual reasonably anticipates experiencing pain or suffering after removal but where there is no direct evidence that the pain or suffering is likely to be inflicted on that particular individual for a prohibited purpose. That difference in approach may arise out of the distinctive context in which the claims of torture arise in removal proceedings — including the uniquely prospective nature of the inquiry.

The remaining domestic case law appears to be in even closer agreement with the international jurisprudence. In civil suits concerning past torture under the Alien Tort Statute, U.S. courts have applied the same intent standard and have inferred torture from a totality of the circumstances, based on factual allegations of severe pain and suffering, official involvement, and a prohibited purpose.

1. The Immigration and Nationality Act

The Immigration and Nationality Act implemented the Convention's Article 3 requirement not to expel, return, or extradite an individual to a country "where there are substantial grounds for believing that he would be in danger of being subjected to torture."[98] The associated federal regulations define torture, for the purpose of removal proceedings, by incorporating the "definition of torture contained in Article 1 of the Convention Against Torture, subject to the reservations, understandings, declarations, and provisos contained in the United States Senate resolution in support of ratification of the Convention."[99] The regulations further

97. Pierre v. Gonzales, 502 F.3d 109, 118 (2d Cir. 2007).

98. The implementing legislation prohibits return of an individual where "it is more likely than not" that he will be tortured. Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-227, § 2242, 112 Stat. 2681–822. The applicable regulations are found at 8 C.F.R. §§ 208.16, 208.18 (2010). The "more likely than not" standard is based on the U.S. government's interpretation of Article 3, as articulated in its Reservation; other countries employ different standards, such as foreseeability or the establishment of "substantial grounds." Cordula Droege, *Transfer of Detainees: Legal Framework, Non-Refoulement, and Contemporary Challenges*, 90 INT'L REV. RED CROSS 679 (2008).

99. 8 C.F.R. § 208.18(a); *see also* United States Policy With Respect to Involuntary Return of Persons in Danger of Subjection to Torture, Pub. L. No. 105-277, div. G, subdiv. B, tit. XXII, § 2242(f)(2), 112 Stat. 2681–822 (1998) (codified at 8 U.S.C. § 1231 (2006)) ("Except as otherwise

specify a specific intent standard: "In order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering. An act that results in unanticipated or unintended severity of pain and suffering is not torture."[100] As in the Convention, the severe pain or suffering must also have been inflicted

> for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[101]

The case law interpreting this obligation not to remove individuals to a country where they will be tortured applies the same standard of specific intent as the international courts and tribunals, but adopts a stricter approach to inferring intent from the facts and circumstances. U.S. immigration tribunals have found dispositive the same criteria as those employed by international tribunals — intent to inflict severe pain and suffering, official sanction, and a proscribed purpose. To avoid removal, however, a successful CAT claim requires showing that it is more likely than not that the individual resisting removal will be targeted or singled out for torture.[102] This arises from the fact that in immigration cases, the torture at issue has not yet occurred — the courts must instead assess the likelihood that the individual before the court will be tortured if returned to her country of origin. In this way, the jurisprudence is distinctive from

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provided, the terms used in this section have the meanings given those terms in the Convention, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention."). The regulations also specify that torture "does not include lesser forms of cruel, inhuman or degrading treatment," 8 C.F.R. § 208.18(a)(2), it "does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions," § 208.18(a)(3), and it includes only certain forms of "mental pain or suffering," § 208.18(a)(4).

100. 8 C.F.R. § 208.18(a)(5).

101. *Id.* § 208.18(a)(1).

102. *See* Rodriguez v. Holder, No. 09-70460, 2010 WL 3297268, ¶ 5 (9th Cir. Apr. 14, 2010); Mark R. von Sternberg, *Outline of United States Asylum Law: Substantive Criteria and Procedural Concerns*, 201 PLI/NY 33, 77 (2010) ("[The intent of the individual actually imposing torture must be not merely deliberate, but undertaken with a view to imposing torture on the victim as the member of a specific class."); *see also* Guang Zou v. Mukasey, 266 F. App'x 11, 12 (2d Cir. 2008) (finding lack of evidence of torture due to membership in a large class of persons); Liu v. Mukasey, No. 07-1983-ag, 2008 WL 45283, at *1–2 (2d Cir. Jan 3, 2008) (finding lack of evidence of torture due to membership in a large class of persons). For immigrants who fear female genital mutilation, the Fourth Circuit has found that persecution could not be based on a fear of psychological harm alone. *See* Niang v. Gonzales, 492 F.3d 505, 507 (4th Cir. 2007) (upholding removal, refusing petition based on fear of female genital mutilation of daughter).

other cases in which courts assess claims of torture — where the court may assess evidence of events that have occurred rather than events that may occur in the future.

The targeting requirement is extensively explicated in a line of cases addressing deportations of criminals to Haiti. Under U.S. immigration law, aliens convicted of certain crimes are subject to removal from the United States. Up until 2000, Haitian policy had been to detain any Haitian deported for having committed crimes in another country and then to release them shortly thereafter.[103] In 2000, Haiti "began to hold deportees with no timetable for their release."[104] Criminal deportees to Haiti thereafter faced the prospect of being detained indefinitely in police holding cells.[105] Conditions in the prisons are — as one court succinctly put it — "awful."[106] In a long line of Article *3 non-refoulement* cases regarding Haiti's policy of indefinite detention of criminal deportees, courts have been reluctant to find torture arising out of lawful sanctions, even if those detentions have foreseeable consequences of severe pain and suffering resulting from generally deplorable prison conditions. The U.S. domestic implementing legislation of the Convention prohibits returning a person to another state where there are "substantial grounds for believing that he would be in danger of being subjected to torture."[107] A central question confronting the courts in these cases, therefore, was whether imprisonment in generally deplorable prison conditions could constitute torture.

In order to answer this question, U.S. courts first had to decide whether Haitian indefinite detention policy could be considered "lawful."[108] The courts looked for, but did not find, intent to inflict pain or suffering beyond that which is "inherent in or incidental to lawful sanctions" — an express exemption to the definition of torture, as noted in Part I.[109] While acknowledging that individuals had provided extensive information about deplorable Haitian prison conditions, the courts concluded that Haiti's detention policy in general was a lawful sanction implemented for a

103. This history is described by the Second Circuit Court of Appeals in *Pierre v. Gonzales*, 502 F.3d 109, 111–12 (2d Cir. 2007).

104. *Id.* at 112.

105. Cadet v. Bulger, 377 F.3d 1173, 1177 (11th Cir. 2004) (noting that the Board of Immigration Appeals had found that "indefinite detention of criminal deportees by itself is not torture").

106. *Pierre*, 502 F.3d at 112.

107. CAT, *supra* note 10, art. 3.

108. *Id.* art. 1 (noting that torture "does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions").

109. *Id.*; *see also* Al-Saher v. I.N.S., 268 F.3d 1143, 1147 (9th Cir. 2001) (finding torture as Al-Saher "suffered severe beatings and was burned with cigarettes over an 8 to 10 day period. These are not practices 'inherent in or incidental to lawful sanction.' These actions were specifically intended by officials to inflict severe physical pain.").

legitimate purpose.[110] Having concluded the Haitian detention policy was lawful, the courts determined that merely being subjected to substandard prison conditions did not constitute torture.[111]

The courts grappled, however, with whether a prohibited purpose and intent to torture may nonetheless be demonstrated in cases involving deplorable prison conditions. Over the past decade, courts upheld, and then overturned, a definition of specific intent that merely excluded unintended severe pain and suffering. Courts have offered and abandoned a definition of specific intent that allowed for torture to be proven through evidence of willful blindness. The courts struggled, in particular, with the specific intent requirement for torture in the context of immigrants facing presumptively lawful, though extremely harsh, prison conditions in their home countries.[112]

Starting with the seminal decision of *In re J-E-*, U.S. courts have proposed and rejected different formulations of intent. The Board of Immigration Appeals in *In re J-E-* held that detaining deportees, with knowledge of substandard prison conditions in Haiti, did not amount to torture, as there was no evidence that Haitian authorities deliberately created the prison conditions in order to inflict torture on the petitioner.[113] Three years later, in *Auguste v. Ridge*, the Third Circuit reiterated that "for an act to constitute torture, there must be a showing that the actor had the intent to commit the act as well as the intent to achieve the consequences of the act, namely the infliction of the severe pain and suffering."[114] As the facts of *Auguste* were indistinguishable from those of *In re J-E-*, the petitioner's claim was denied.[115] The courts struggled with evidence very loosely linking prison officials to any individual prisoner, in contrast to the evidence of personal infliction of pain and suffering presented to

110. *Cadet*, 377 F.3d at 1193.

111. *See* Castel v. Att'y Gen., 295 F. App'x 492 (3d Cir. 2008) (upholding *Pierre v. Gonzales*); Cruz v. Mukasey, No. 07-1394-ag, 2008 WL 45267 (2d Cir. Jan. 3, 2008) (upholding *In re J-E-* and *Pierre v. Gonzales*); Pierre v. Att'y Gen., 528 F.3d 180, 189 (3d Cir. 2008) (upholding *In re J-E-*, reminding that unintended consequences are not prohibited under the Convention and stating that this unfortunate and unintended consequence was the result of the Haitian policy "of imprisoning ex-convicts who are deported to Haiti in order to reduce crime"); *Pierre*, 502 F.3d at 121–22 (upholding *In re J-E-*); Lavira v. Att'y Gen., 478 F.3d 158, 167 (3d Cir. 2007) (finding that generally poor prison conditions are not sufficient to support a likelihood of torture); Auguste v. Ridge, 395 F.3d 123, 145–46 (3d Cir. 2005) (upholding *In re J-E-* and explaining that detention in deplorable prison conditions is not torture as the individual had not demonstrated that he, in particular, will be the target of the infliction of severe pain and suffering); *Cadet*, 377 F.3d at 1178 (noting that detentions were motivated by Haiti's desire for "immigration control and public safety"); Saint Fort v. Ashcroft, 223 F. Supp. 2d 343 (D. Mass. 2002) (upholding *In re J-E-*); *In re J-E-*, 23 I. & N. Dec. 291 (BIA 2002).

112. *See Pierre*, 502 F.3d at 119 n.8 (arguing that purpose must be isolated from specific intent, as detention is by its nature designed to punish).

113. *In re J-E-*, 23 I. & N. Dec. at 304.

114. *Auguste*, 395 F.3d at 145–46.

115. *Id.* at 154.

international courts and tribunals. Once again, this difference arose of necessity from the different context in which torture was considered: in the immigration context, after all, the courts are asked to determine a likelihood of future torture rather than to assess evidence of torture that has already occurred.

The Second, Third, and Eighth Circuits raised and rejected various tests for a finding of specific intent to torture. In 2007, in *Pierre v. Gonzales*,[116] the Second Circuit declined to agree with the Third Circuit's earlier speculations in *Lavira v. Attorney General* that willful blindness or deliberate indifference could suffice to show specific intent to torture. The petitioner, a diabetic who suffered from hypertension, feared a diabetic coma, stroke, or death in a Haitian holding cell without access to proper food and medicine.[117] The Second Circuit found that the specific intent was not "an impermissible narrowing of the CAT,"[118] and found no reason to disturb the immigration judge's conclusion that Pierre would likely receive medicines from his family and be released in a timely fashion.[119] In dicta, the court eschewed any claim that it was raising the evidentiary bar for claimants.[120] It appears that it was correct; its rejection of the willful blindness standard for establishing intent was entirely consistent with international case law on intent to torture.

In 2008, in *Pierre v. Attorney General*,[121] the Third Circuit also ruled out the possibility that torture could be demonstrated through evidence of willful blindness. The petitioner was "restricted to a liquid-only diet because of a self-imposed injury to his esophagus." He argued that "the prison officials' knowledge that it is practically certain that he will suffer severe pain if imprisoned in Haiti is sufficient for a finding of specific

116. *Pierre*, 502 F.3d at 118 (referring to this view expressed in *Lavira v. Att'y Gen.*, 478 F.3d 158, 171 (3d Cir. 2007), and *Thelemaque v. Ashcroft*, 363 F. Supp. 2d 198, 215 (D. Conn. 2005) — neither of which relied on willful blindness or negligence for a finding of torture).

117. *Pierre*, 502 F.3d at 112. The Second Circuit noted that the Convention is "not solely or predominantly concerned with immigration and refoulement," and expressed great deference for the political branches and their efforts to achieve domestic compliance in eradicating torture. *Id.* at 113–14.

118. The Second Circuit disagreed, given the Senate's express ratification understanding on specific intent. *Id.* at 116.

119. *Id.* at 121.

120. *Id.* at 118 n.6 ("That said, nothing in this opinion prevents the agency from drawing the inference, should the agency choose to do so, that a particular course of action is taken with specific intent to inflict severe pain and suffering if it is found on the record evidence that the actor is aware of a virtual certainty that such pain and suffering will result."). Later, the Second Circuit noted that "torture as commonly understood and practiced is not subtle, elusive, or easy to misconstrue, and the torturer's intentions are rarely if ever obscure.") *Id.* at 119.

121. Pierre v. Att'y Gen., 528 F.3d 180, 188 (3d Cir. 2008) ("We also stated in *Lavira*, in dicta, that we could not 'rule out' that specific intent could be proven through 'evidence of willful blindness.' As discussed below, we now rule out that possibility." (citation omitted)).

intent to torture under the CAT."[122] The government countered that "the jailer's knowledge that an action might cause severe pain and suffering is not sufficient for a finding of specific intent."[123] The Third Circuit ultimately held that Pierre was "unable to sustain his burden of proof to show that, by imprisoning him, the Haitian authorities ha[d] the specific intent to torture him."[124] Pierre had not met his burden, as he had not demonstrated the Haitian authorities specifically intended *him* to experience severe pain and suffering for a proscribed purpose.[125] However, in *Auguste v. Ridge*, the court left open the possiblity that "[i]f there is evidence that authorities are placing an individual in such conditions with the intent to inflict severe pain and suffering on that individual, such an act may rise to the level of torture."[126]

The Third Circuit proceeded to further examine what degree of intent is required in order to obtain relief under the Convention. It began by noting that Pierre did not allege that, if returned to Haiti, he would be imprisoned for any of the specific prohibited purposes, such as "to obtain information or a confession," "to punish him," "to intimidate or coerce him," or "for any discriminatory reason."[127] "Rather," the court explained, "Pierre will be imprisoned because the Haitian government has a blanket policy of imprisoning ex-convicts who are deported to Haiti in order to reduce crime."[128] Any suffering he therefore would experience is an "unfortunate but unintended consequence of the poor conditions in the Haitian prisons." Such "an unintended consequence is not," the court concluded "the type of proscribed purpose contemplated by the CAT."[129]

In removal cases, the courts have settled on evidence of targeting for a proscribed purpose as the way to distinguish torture from other cruel

122. *Id.* at 182–83.

123. *Id.* at 183.

124. *Id.*

125. *Id.* at 191. This was in contrast with the petitioner in *Lavira*, who presented evidence that he would be singled out by guards due to his HIV-positive status. *Id.* at 188.

126. *Id.* at 188 (quoting Auguste v. Ridge, 395 F.3d 123, 154 (3d Cir. 2005)). Most recently, in *Cherichel v. Holder*, the Eighth Circuit rejected its own earlier language about the possibility of showing specific intent due to foreseeability of harm. Cherichel v. Holder, 591 F.3d 1002, 1016 (8th Cir. 2010). The Eighth Circuit reiterated that in order to have specific intent an "actor must intend both the prohibited act and its prohibited consequences." *Id.* at 1013.

127. *Auguste*, 295 F.3d. at 189.

128. *Id.*

129. *Id.* The court goes on to state that mere proof of knowledge on the part of government officials does not satisfy the specific intent requirement: "Rather, we are persuaded by the discussion in *Auguste* that the specific intent requirement . . . requires a petitioner to show that his prospective torturer will have the motive or purpose to cause him pain or suffering." *Id.* Although this might be read to endorse the view that infliction of pain or suffering is only torture if it is the purpose of the perpetrator to inflict pain or suffering — that is, that the pain or suffering is itself the aim — it is best read in context to endorse the standard view that the pain or suffering must be knowingly inflicted for a *proscribed purpose* — e.g., coercion, punishment, or intimidation.

treatment.[130] In the United States, an individual only has a viable *non-refoulement* claim if he or she can prove why they would be "*individually* and *intentionally* singled out for harsh treatment" — for example, as a result of advanced AIDS.[131] One claimant successfully resisted removal by demonstrating evidence of likely targeting: He "had a valid claim because he presented evidence that showed that he would be targeted, such as being singled out by the guards because of his HIV-positive status."[132] Even in rejecting claims, the Second Circuit and the Third Circuit both noted that evidence of targeting would bring a claimant closer to proving specific intent.[133] In addition, a line of unpublished decisions of the Board of Immigration Appeals finds torture if, as a result of a special vulnerability, such as a physical or mental condition, a criminal deportee would be targeted by guards or by other inmates.[134] The jurisprudence

130. *Cf. infra* Section III.A, on evidence of individual complaints before the Committee Against Torture. The Committee also investigated allegations of systematic torture in Brazilian prisons. There, the Committee found both severity and proscribed purpose to be lacking. *See infra* Section III.C.

131. Jean-Pierre v. U.S. Att'y Gen., 500 F.3d 1315, 1324 (11th Cir. 2007) (emphasis in original).

132. Pierre v. Att'y Gen., 528 F.3d 180, 188 (3d Cir. 2008) (citing *Lavira v. Att'y Gen.*, 478 F.3d 158, 171 (3d Cir. 2007)).

133. *See* Pierre v. Gonzales, 502 F.3d 109, 121–22 (2d Cir. 2007) (noting that evidence of targeting, which was not present in *In re J-E-* or in this case, would get a petitioner closer to demonstrating specific intent); *Auguste*, 395 F.3d at 154 ("[W]e are not adopting a per se rule that brutal and deplorable prison conditions can never constitute torture. To the contrary, if there is evidence that authorities are placing *an individual* in such conditions with the intent to inflict severe pain and suffering *on that individual*, such an act may rise to the level of torture should the other requirements of the Convention be met.") (emphasis added).

134. In the Matter of Bristout Bourguignon, BIA A041-055-090, Mar. 10, 2009 (unpublished decision) (noting that the respondent was on anti-psychotic medication, the lack of which would likely cause him to have a psychotic break in prison. The respondent established that he is unlikely to receive medication while in prison, and his resulting behavior will increase the possibility of mistreatment); In the Matter of J-P-Z-, BIA A45-481-814, June 17, 2008 (unpublished decision) (properly concluding that "(1) prison authorities are more likely than not to deprive the respondent of medication, (2) he would, more likely than not, suffer a significant behavioral breakdown if deprived of his mediation . . . , (3) such a breakdown would, more likely than not, bring him to the unwelcome attention of prison guards, resulting in his torture"). The Board of Immigration Appeals (BIA) then noted that "specific intent is found in expert testimony that criminal detainees are "intentionally subjected to life threatening prison conditions for the purpose of extortion." *Id.* Two years earlier, the BIA found that "the respondent had met the burden of proof to demonstrate "specific intent" through intentional physical abuse:

> [The] decision hinged on the fact that it would be "highly unlikely" that mentally ill inmates would receive required medications in jail. If true, these inmates would be unable to control their behavior, thereby attracting increased attention from prison guards. This increased attention, in turn, would mean that it was more likely than not that unmedicated mentally ill inmates would be subjected to even harsher than normal prison conditions.

In the Matter of J-D-, BIA A37-320-280, Apr. 5, 2006 (unpublished decision). Two years before that, the BIA found that given the unlikelihood of receiving medication and the likelihood that a schizophrenic state will manifest itself in prison, it is "highly probable that [the petitioner] will be singled out and tortured or killed by prison guards." In the Matter of B-A-, BIA, A78-409-216, Aug. 19, 2004 (unpublished decision).

regarding removal proceedings indicates that if pain and suffering is "inherent in or incidental to lawful sanctions,"[135] petitioners must demonstrate the likelihood of *personally targeted* severe pain and suffering for a prohibited purpose. In other words, a petitioner's evidence of being *personally* singled out for mistreatment that results in severe pain or suffering appears to provide the courts with indicia of specific intent on the part of the prison officials.

The emphasis on individual targeting in the immigration cases is likely due to a number of unique contextual factors. First and foremost, the cases involve instances of torture that have not yet occurred. Hence, an immigrant facing detention must show that he reasonably fears that he will suffer a future act of torture, not simply point to "awful" conditions that affect large numbers of similarly situated persons. Second, the applicants in these cases are usually immigrants facing removal after a criminal conviction.[136] Indeed, immigration removal has become an important means of law enforcement in the United States, perhaps leaving courts wary to intervene.[137] Applicants are often already imprisoned due to their criminal conviction, and are subject to mandatory detention pending the litigation of their cases.[138] Hence, continued detention may not appear as burdensome as it might in another context. Finally, it is important to bear in mind that courts receive hundreds of *non-refoulement* claims per year. Courts are therefore not likely to be eager to find exceptions to what would otherwise be lawful deportation. The requirement of evidence of individual targeting may therefore be due in large part to the particular context of immigration claims seeking relief from removal.[139]

For all these differences, the U.S. courts' approach to specific intent to torture in the immigration context nonetheless is otherwise entirely consistent with the approach defined in the Convention and applied by the

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135. CAT, *supra* note 10, art. 1; *Pierre*, 502 F.3d at 119 n.8.

136. *Compare* Pierre, who "broke into the home of his ex-girlfriend and stabbed her repeatedly with a meat cleaver," *Pierre*, 528 F.3d at 183, *with* plaintiff Dianna Ortiz, who was a nun in Guatemala, Ortiz v. Gramajo, 886 F.Supp. 162, 173 (D. Mass. 1995).

137. During the 1996 immigration reforms, for example, lawful immigrants were excluded from many public benefits programs, but the U.S. government did not restrict immigrant admission. Instead, it made it easier to remove non-citizens by expanding the definition of aggravated felony to include minor offenses, suggesting a heightened desire to expand control over the immigrant population in exchange for allowing immigration to remain at already high levels. Adam B. Cox & Cristina M. Rodíguez, *The President and Immigration Law*, 119 YALE L.J. 458, 517, n.210 (2010); *see also* Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1827 (2007) (discussing the use of immigration law as a criminal enforcement strategy).

138. Immigration and Nationality Act, 8 U.S.C. § 1226(c) (1996), 8 C.F.R. § 236.1(c) (2007).

139. In this respect, it is possible that the United States is not distinctive. It in fact may be the case that other countries in their *non-refoulement* jurisprudence have also adopted a different approach to interpreting torture than they do in instances where a plaintiff is bringing a criminal law claim against the torturer him. That inquiry is beyond the scope of this Article, however.

Committee and other international courts and tribunals. In the immigration jurisprudence, the U.S. courts' interpretation of the intent standard for torture mirrors the approach adopted by U.S. courts in other contexts and by international bodies: The specific intent requirement for torture is met by evidence that pain or suffering will be knowingly inflicted on an individual for a proscribed purpose.

2. *The Alien Tort Statute*

There is significant domestic jurisprudence interpreting torture in the context of the Alien Tort Statute (ATS). The ATS, originally enacted in 1789, provides that the federal courts "shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[140] When an alien sues for damages under the ATS, domestic courts, much like the international tribunals, have applied the specific intent standard and have inferred intent from the facts and circumstances, including the severity of the pain and suffering, the nature of official action, and the evidence of a prohibited purpose.

The seminal case on the ATS, *Filártiga v. Peña-Irala*, decided before the Convention had been ratified by the United States, held that "the torturer has become — like the pirate and slave trader before him — *hostis humani generis*, an enemy of all mankind."[141] Peña had been the Inspector General of Police in Asuncion, Paraguay. Filártiga alleged that Peña had tortured and murdered his son. The basis for this allegation included "evidence [from the decedent's sister] of three independent autopsies demonstrating that her brother's death 'was the result of professional methods of torture.'"[142] In *Filártiga*, the Second Circuit reiterated the factual allegations of torture, official involvement, and the purpose of retaliation for political beliefs.[143] Intent is mentioned by the court twice in reciting the definition of torture, but never separately addressed.[144] The allegations of severe pain and suffering, official action, and a prohibited purpose were enough for the Second Circuit to find intent and therefore find civil liability for torture.

The Supreme Court also addressed the definition of torture in *Sosa v. Alvarez-Machain*.[145] Drug Enforcement Administration (DEA) officials had identified Alvarez-Machain, a physician, as having participated in the

140. 28 U.S.C. § 1350 (2006).
141. Filártiga v. Peña-Irala, 630 F.2d 876, 890 (2d Cir. 1980).
142. *Id.* at 878.
143. *Id.*
144. *Id.* at 883.
145. Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

torture and murder of a DEA agent. Unable to persuade Mexico to extradite him, the DEA hired Mexican nationals

> to seize Alvarez and bring him to the United States for trial. As so planned, a group of Mexicans, including petitioner Jose Francisco Sosa, abducted Alvarez from his house, held him overnight in a motel, and brought him by private plane to El Paso, Texas, where he was arrested by federal officers.[146]

The Supreme Court found that a single illegal detention for less than one day did not violate a well-defined norm of customary international law against torture, and therefore could not be found to be torture.[147] This holding comes at the end of the case and is not articulated in any detail. Thus, in both *Filártiga* and in *Sosa*, the courts took an approach similar to that of international tribunals considering allegations of torture: To establish specific intent, they looked for evidence that pain and suffering had been inflicted for a prohibited purpose.

3. The Torture Victim Protection Act

The Torture Victim Protection Act (TVPA) offers a third body of jurisprudence that demonstrates the U.S. interpretation of the prohibition on torture. U.S. courts have dismissed claims due to the lack of a connection between defendants and the conduct of state officials,[148] or due to the defendant's failure to act under the color of foreign law.[149] They have never dismissed a claim under the TVPA due solely to the absence of a specific intent.

The TVPA creates a cause of action against "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to torture."[150] Torture under the TVPA is defined as a specific intent crime similar to that of the Convention:

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146. *Id.* at 698.

147. *Id.* at 738 ("It is enough to hold that a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy."). The Court held that Sosa had not offered enough support for the proposition that arbitrary detentions contravened customary international law:

> Alvarez thus invokes a general prohibition of 'arbitrary' detention defined as officially sanctioned action exceeding positive authorization to detain under the domestic law of some government, regardless of the circumstances. Whether or not this is an accurate reading of the Covenant, Alvarez cites little authority that a rule so broad has the status of a binding customary norm today.

Id. at 736. Sosa referred to the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, not the Convention Against Torture. *Id.* at 734.

148. Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 260 (2d Cir. 2007).

149. Arar v. Ashcroft, 585 F.3d 559 (2d Cir. 2009).

150. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73, § 2(a) & (a)(1)

> Any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind.[151]

In assessing intent, the courts in TVPA cases have examined whether pain and suffering were knowingly inflicted for a prohibited purpose. For example, in *Price v. Socialist People's Libyan Arab Jamahiriya*, two American citizens alleged that they had been arrested and kept in a political prison in Libya "for the purpose of demonstrating Defendant's support of the government of Iran which held hostages in the U.S. Embassy in Tehran, Iran."[152] The District of Columbia Circuit held that "[s]uch motivation [of expressing support with Iranian hostage taking] does not satisfy the Convention's intentionality requirement."[153] The court thus found that there was no intent to inflict pain and suffering for a prohibited purpose. The courts have found torture in cases where the acts inflicted pain and suffering for a prohibited purpose. For example, courts have found torture where there were "visible signs of torture"[154] on the body of a political leader who had been abducted and killed, "beatings, unsanitary conditions, inadequate food and medical care, and mock executions" of a person taken hostage and later killed,[155] and threats of physical torture, "such as cutting off . . . fingers, pulling out . . . fingernails," and electric shocks to the testicles.[156] In these cases, the courts generally do not separately discuss specific intent or seek direct evidence of intent, instead inferring it from the circumstances.[157] In the TVPA cases, as in the ATS and immigration cases, U.S. courts have found the specific intent standard met where pain or suffering is knowingly inflicted for a prohibited purpose.

(1992).

151. *Id.* § 3(b)(1).

152. *See* Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 86 (D.C. Cir. 2002).

153. *Id.* at 94. The court also held that the plaintiffs had not pleaded sufficient detail regarding the severity of the beatings to support a finding in their favor. *Id.* at 93–94.

154. Chavez v. Carranza, 559 F.3d 486, 491 (6th Cir. 2009).

155. Kilburn v. Islamic Republic of Iran, 699 F. Supp. 2d 136, 152 (D.D.C. 2010).

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

157. Ortiz v. Gramajo, 886 F.Supp. 162, 178 (D. Mass. 1995) ("I find [the factual allegations] more than sufficient to establish that Gramajo did under color of law (by his order and command) subject Ortiz to torture . . . .").

III. COMMITTEE AGAINST TORTURE

In this Part, we examine the Committee Against Torture's jurisprudence on torture as developed in complaints proceedings, concluding observations to country reports, and special inquiries. Throughout these documents and decisions, the Committee has consistently applied the specific intent standard and concluded that particular acts — for example, beatings by law enforcement officials — constituted torture, and thereby implied that the intent requirement was satisfied. In each case, the Committee found torture based on the knowing infliction of pain or suffering for a prohibited purpose — the same specific intent standard applied by international courts and tribunals and U.S. courts. Moreover, the Committee, like all other bodies to have considered the question in the context of acts already committed, arrived at this finding without requiring direct evidence of mens rea, but instead by inferring the requisite specific intent from the facts and circumstances of the case.

A. Complaints

The majority of individual complaints filed before the Committee have centered on Article 3 claims of prohibited refoulement.[158] In four separate complaint proceedings, however, the Committee dealt specifically with claims of Article 1 torture, and in all four it concluded that torture occurred. Three of the proceedings — *Dragan Dimitrijevic*, *Dimitrov*, and *Danilo Dimitrijevic*, all involving Serbia and Montenegro — led to the Committee's first findings of torture in response to individual complaints.[159] All three complainants were filed by Serbian citizens of Roma origin who were beaten by police in connection with the investigation of a crime. And in all three instances, the Committee inferred intent based on the circumstances presented. In the fourth complaint, *Ali v. Tunisia*, a French-Tunisian woman claimed she was beaten and detained because of statements she made to a clerk working in a Tunisian court. The Committee again inferred intent based on the facts and circumstances surrounding Ali's beatings and detention. Finally, in a fifth complaint involving a non-Article 1 claim in *Ríos v. Canada*, the Committee applied a similar intent analysis, determining that, given his scars and wounds, Ríos likely had been subjected to torture by the Mexican military.[160] The

158. Article 3 prohibits expelling, returning, or extraditing individuals to a state where "there are substantial grounds for believing that [the complainant] would be in danger of being subjected to torture." CAT, *supra* note 10, art. 3. These complaints consequently focus on the likelihood that torture would occur if a person were transferred to another state, not whether torture has in fact occurred. Sarah Joseph, *Committee Against Torture: Recent Jurisprudence*, 6 HUM. RTS. L. REV. 571, 574 (2006).

159. Joseph, *supra* note 158, at 571.

160. U.N. Comm. Against Torture, Falcon Ríos v. Canada, ¶ 8.6, U.N. Doc.

Committee has thus consistently concluded that acts of torture occurred where the facts and circumstances demonstrated the knowing infliction of pain and suffering for a prohibited purpose.

In *Dragan Dimitrijevic v. Serbia and Montenegro*,[161] police officers handcuffed the complainant to a radiator and later a bicycle. While the complainant was incapacitated, several officers hit him with a metal bar and their nightsticks and "kicked and punched him all over his body while insulting his ethnic origins and cursing his 'gypsy mother.'"[162] The Committee determined that the Dimitrijevic's treatment while in detention could be "characterized as severe pain or suffering intentionally inflicted by public officials in the context of the investigation of a crime."[163] Consequently, the Committee held "that the facts . . . constituted torture within the meaning of Article 1 of the Convention."[164] The Committee did not separately analyze intent; instead, it inferred intent from the intentional infliction of pain and suffering for the purpose of advancing the investigation of an alleged crime.

In *Dimitrov v. Serbia and Montenegro*,[165] Dimitrov was arrested and taken to a police station without explanation. During his interrogation, the police "struck [Dimitrov] repeatedly with a baseball bat and a steel cable, and kicked and punched him all over his body" for thirteen hours.[166] Dimitrov lost consciousness multiple times during these beatings.[167] The Committee determined that Serbia and Montenegro had committed torture, based in part on the "severe pain or suffering intentionally inflicted [on Dimitrov] by public officials in the context of the investigation of a crime."[168] Without explicitly discussing intent, the Committee concluded that this pain or suffering amounted to "torture within the meaning of Article 1 of the Convention."[169] The Committee again found intent to torture based on the nature and purpose of the police beatings the victim experienced.

In *Danilo Dimitrijevic v. Serbia and Montenegro*,[170] the complainant was arrested without a warrant and taken to a police station, where he was forced to strip to his underwear. A presumed plain-clothes officer then

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CAT/C/33/D/133/1999 (Nov. 23, 2004).

161. U.N. Comm. Against Torture, Dragan Dimitrijevic v. Serbia and Montenegro, U.N. Doc. CAT/C/33/D/207/2002 (Nov. 29, 2004), *available at* http://tinyurl.com/8ya3xbp

162. *Id.* ¶ 2.1.

163. *Id.* ¶ 5.3.

164. *Id.*

165. U.N. Comm. Against Torture, Jovica Dimitrov v. Serbia and Montenegro, U.N. Doc. CAT/C/34/D/171/2000 (May 3, 2005).

166. *Id.* ¶ 2.1.

167. *Id.*

168. *Id.* ¶ 7.1.

169. *Id.*

170. U.N. Comm. Against Torture, Danilo Dimitrijevic v. Serbia and Montenegro, ¶ 2.1, U.N. Doc. CAT/C/35/D/172/2000 (Nov. 16, 2005).

handcuffed him to a metal bar and beat Dimitrijevic with a metal club for roughly one hour.[171] The police left Dimitrijevic in the room where he had been beaten for three full days, refusing to provide him access to food, water, a lavatory, or a doctor.[172] The Committee noted that the complainant's description of his detention and beating could be

> characterized as severe pain or suffering intentionally inflicted by public officials for such purposes as obtaining from him information or a confession or punishing him for an act he has committed, or intimidating or coercing him for any reason based on discrimination of any kind in the context of the investigation of a crime.[173]

Without further discussion, the Committee determined that this treatment constituted torture, again by finding intentional infliction of pain or suffering for the purpose of advancing the investigation of a crime based on the circumstances of the case.[174]

In *Ali v. Tunisia*,[175] the Committee found that the severe physical injuries and pain inflicted by police officers for the purpose of punishing and intimidating the victim constituted torture. Saadia Ali, a French-Tunisian national and resident of France, was visiting Tunisia to help her brother retrieve a document for his wedding.[176] While accompanying her brother to a Tunisian court to obtain the document for the ceremony, Ali got into a dispute with the desk clerk, during which she stated, "If you want to know the truth, it's thanks to us that you are here."[177] The clerk asked for her papers and requested that she accompany him to see the Vice President of the court.[178] She was taken to another room where a court official interrogated her and requested that she sign a document in Arabic, which she did not understand, so she refused.[179] A police officer then escorted her to a detention center in the basement of the court. In the detention center, another guard confronted her, ripped off her scarf and dress, and beat her severely.[180] After the initial beating, he "took her by the hair and dragged her to an unlit cell, where he continued punching and kicking her on the head and body."[181] She lost consciousness.[182] Ali was

171. *Id.*
172. *Id.* ¶ 2.2.
173. *Id.* ¶ 7.1.
174. *Id.*
175. U.N. Comm. Against Torture, Ali v. Tunisia, U.N. Doc. CAT/C/41/D/291/2006 (Nov. 26, 2008).
176. *Id.* ¶¶ 1, 2.1.
177. *Id.* ¶ 2.1.
178. *Id.* ¶¶ 2.1–2.2.
179. *Id.* ¶ 2.2.
180. *Id.* ¶ 2.4.
181. *Id.*

brought back to the ground floor, where she was threatened and harassed by the police.[183] She was asked to sign a document written in Arabic, but she again refused.[184] After she was finally released, Ali filed a complaint claiming that the ill-treatment to which she was subjected was perpetrated by state agents and was so severe as to amount to torture.[185] The Committee determined that Tunisian police officers inflicted severe pain and suffering "deliberately" and "with a view to punishing her for her words addressed to the registrar of the court of first instance in Tunis and to intimidating her" — the proscribed purpose.[186] Without any additional discussion of intent, the Committee concluded that Ali had been subjected to torture.

In the 2004 case of *Falcon Ríos v. Canada*,[187] the Committee determined that Falcon Ríos likely was subjected to torture by the Mexican military; his primary claim pertained to Article 3 of the Convention and not Article 1. In particular, the Committee stated that medical reports detailing that Falcon Ríos "bore numerous scars from cigarette burns on various parts of his body, and scars from knife wounds to both legs" provided "considerable weight to his allegation that he was tortured during the interrogations he underwent in a military camp."[188] Although the Committee was not tasked with determining whether an Article 1 violation had occurred, the facts of the situation — namely that Ríos had scarring and burns from knife wounds and cigarettes that had likely been inflicted for the purpose of punishment — provided sufficient evidence for the Committee to infer specific intent and determine that Ríos had previously been tortured and thus had reason to fear being subjected to torture if returned to Mexico.

B. Concluding Observations to Country Reports

In the Committee's concluding observations to country reports from November 2001 through May 2010, intent to commit torture arose in only one case — that of Colombia in 2009.[189] In this report, the Committee

182. *Id.*

183. *Id.* ¶ 2.5.

184. *Id.*

185. *Id.* ¶ 3.1.

186. *Id.* ¶ 15.4.

187. U.N. Comm. Against Torture, Falcon Ríos v. Canada, ¶ 1.1, U.N. Doc. CAT/C/33/D/133/1999 (Nov. 23, 2004).

188. *Id.* ¶ 8.4.

189. Concluding observations are the Committee's responses to reports filed by individual countries on the status of their Convention obligations under Article 19 of the Convention. Although established in 1984, Convention country reports and corresponding concluding observations are primarily available from November 2001 to the present; more information is available at Committee Against Torture, http://tinyurl.com/bla44w8 (last visited Nov. 7, 2010).

voiced concern relating to Colombia's definition of torture. The Committee stated alarm "about the possibility of erroneous definitions that assimilate the crime of torture to other less serious criminal offences such as that of personal injury, which does not require proof of the offender's intention."[190] The result, the Committee feared, would be "serious under-recording of cases of torture and entail impunity for the said crimes (i.e., Articles 1, 2 and 4 of the Convention)."[191] In this way, the Committee indicated that it regarded "the offender's intention" as an important factor for distinguishing between torture and other lesser crimes,[192] a distinction that affirms the Convention's specific intent requirement.

In response to Israel's country report in 1997, the Committee's concluding observation stated the following methods of interrogation all constituted torture: "(1) restraining in very painful conditions, (2) hooding under special conditions, (3) sounding of loud music for prolonged periods, (4) sleep deprivation for prolonged periods, (5) threats, including death threats, (6) violent shaking, and (7) using cold air to chill."[193] The Committee made no separate inquiry into intent, but the implication was clear: These acts, if committed by or with the acquiescence of public officials for the purpose of interrogation, are sufficient for the Committee to establish torture.

C. Special Inquiries

The Committee has conducted seven confidential inquiries since its establishment in 1988.[194] In these investigations, the Committee did not focus on whether particular acts of torture had occurred, but rather on allegations of systemic torture. Only three — those conducted on Brazil,

190. U.N. Comm. Against Torture, Consideration of Reports Submitted by States Parties under Article 19 of the Convention: Concluding observations of the Committee against Torture, U.N. Doc. CAT/C/COL/CO/4 (May 4, 2010), *available at* http://tinyurl.com/bn9wuhx.

191. *Id.*

192. *Id.*

193. U.N. Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Conclusions and recommendations of the Committee Against Torture, ¶ 257, U.N. Doc. A/52/44 (Sept. 5, 1997). *See also* SARAH JOSEPH ET AL., SEEKING REMEDIES FOR TORTURE VICTIMS: A HANDBOOK ON THE INDIVIDUAL COMPLAINTS PROCEDURES OF THE UN TREATY BODIES 207 (2006), for findings provided in the concluding observations to the county report of Yugoslavia in 1999, which unfortunately is not available online. In this report, the Committee determined that beating by fists and wooden or metallic clubs, mainly on the head, the in the kidney area, and on the soles of the feet, resulting in mutilations and even death in some cases, constituted torture in accordance with Article 1 of the Convention.

194. The Committee is empowered to carry out a confidential inquiry if it "receives reliable information which appears to it to contain well-founded indications that torture is being systematically practised in the territory of a State party." CAT, *supra* note 10, art. 20. More information on these inquiries is available at Confidential inquiries Under Article 20 of the Convention Against Torture, *supra* note 20.

Mexico, and Turkey — are publicly available. Of these, only the Brazil inquiry expressly touched upon the question of intent to torture.

In its Brazil inquiry, the Committee examined prisons and detention centers. The Committee noted "problems of overcrowding and inadequate conditions of deprivation of freedom," but stated that these arose from "a complex ensemble of factors," ranging from crime rates to insufficient public resources.[195] The Committee determined that "it would seem mistaken to try to equate torture with problematic conditions of detention," an issue that the Committee claimed Brazil had been trying to address.[196] "[O]vercrowding and unhealthy conditions," the Committee continued, "persist . . . despite the best efforts of Brazilian authorities, and not with their consent or acquiescence."[197] The efforts of the Brazilian authorities to improve conditions of confinement suggested that, far from intending to inflict pain or suffering on detainees, the public officials intended to alleviate problematic conditions. The Committee also stated that there was no evidence of "severe" pain or suffering or a prohibited purpose:

> The general character of the situation, which affects whole populations in detention centers, the lack of physical and psychological aggression against inmates and the absence of punitive purposes or of obtaining confessions or information indicate that one cannot identify the special degree of severity and the absence of the specific purpose that would define torture. This [is] even more obvious as the State authorities recognize the problem and endeavor to overcome them.[198]

The Committee stated, however, that purpose could be found in other cases even if there is no direct intention to commit torture by the national government:

> Torture may in fact be of a systematic character without resulting from the direct intention of a Government. It may be the consequence of factors which the Government has difficulty in controlling, and its existence may indicate a discrepancy between policy as determined by the central Government and its implementation by the local administration.[199]

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195. U.N. Comm. Against Torture, Report on Brazil Produced by the Committee Under Article 20 of the Convention and Reply from the Government of Brazil, ¶ 250, U.N. Doc. CAT/C/39/2 (July 28, 2008).

196. *Id.* ¶ 249.

197. *Id.* ¶ 251.

198. *Id.* ¶ 252.

199. *Id.* ¶ 178.

The Committee thus underscored that *government* intention is not required for systematic torture to occur — intention of the perpetrator, whether national officials, local officials, or private actors who act with the acquiescence of a public official, is enough. Local administrators, for example, could abuse detainees, without the national government intending such abuse, and the actions would constitute torture. Intent still must be proven in each case, but a national governmental intent to commit systematic torture is not necessary for a violation of the Convention to be found.

IV. INTERNATIONAL COURTS AND TRIBUNALS

Torture is a crime within the jurisdiction of several international tribunals. In particular, the International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), European Court of Human Rights (ECtHR), and the Inter-American Commission on Human Rights (IACHR) all have jurisdiction over torture. Although these tribunals interpret their own statutes, rather than the Convention Against Torture, their jurisprudence[200] provides further evidence of the meaning of intent and its relationship to torture as understood in international law more generally. This is particularly true because all of these bodies agree that torture has occurred when severe pain or suffering has been inflicted for a prohibited purpose with official acquiescence or involvement. In assessing intent, these international courts and tribunals once again look to the totality of the circumstances. Moreover, they agree that torture requires a prohibited purpose, whereas cruel, inhumane and degrading acts do not. This Part's examination of jurisprudence on torture and intent thus serves to affirm that the United States understanding of torture is consistent with an internationally applied specific intent standard for torture under international criminal and human rights law.

A. The International Criminal Tribunal for the Former Yugoslavia

Even though the ICTY's statute does not independently define torture, the ICTY has jurisdiction over torture because the crime qualifies as both a grave breach of the 1949 Geneva Conventions and a crime against humanity.[201] In *Prosecutor v. Anto Furund'ija*, the ICTY followed an

200. Other relevant sources of law might include Conventions and their interpretative bodies' jurisprudence. For example, the Human Rights Committee of the International Covenant on Civil and Political Rights has examined the question of what constitutes torture based on Article 7 of the Covenant. *See* Human Rights Comm., *supra* note 21.

201. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia

approach much like that of the Committee: It found torture required the intentional infliction of pain for a prohibited purpose. In employing this specific intent standard, the ICTY concluded that torture had occurred without conducting a separate intent analysis.

In *Prosecutor v. Furund'ija*,[202] the accused was charged with two counts: inhumane treatment and torture. The accused was a local commander of a paramilitary group, and according to the indictment, he had interrogated two women while several other soldiers beat, threatened, and raped them.[203] The Trial Chamber acknowledged that the Committee's definition of torture had gained broad international consensus.[204] Nonetheless, it clarified that, in ICTY jurisprudence, torture

> (i) consists of the infliction, by act or omission, of severe pain or suffering, whether physical or mental; in addition
>
> (ii) this act or omission must be *intentional*;
>
> (iii) it must *aim* at obtaining information or a confession, or at punishing, intimidating, humiliating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person;
>
> (iv) it must be linked to an armed conflict[.][205]

The Trial Chamber also distinguished between an accused who assists in the perpetration of torture and shares in the prohibited purpose and one who does neither: "Arguably, if the person attending the torture process neither shares in the purpose behind torture nor in any way assists in its perpetration, then he or she should not be regarded as criminally liable . . . ."[206] An example of one who would not be criminally liable in this way would be a "soldier whom a superior has ordered to attend a torture session in order to determine whether that soldier can stomach the sight of torture and thus be trained as a torturer."[207]

Since 1991, U.N. Doc. S/25704, annex (1993), *reprinted in* 32 I.L.M. 1203 (1994) [hereinafter Statute of the ICTY]. The relevant articles are Article 2 ("Grave breaches of the Geneva Conventions of 1949"), specifically section b of Article 2 (listing "torture" and "inhumane treatment") and Article 5 ("crimes against humanity), specifically section f of Article 5, listing "torture." *Id.* arts. 2(b), 5(f).

202. Prosecutor v. Furund'ija, Case No. IT-95-17/1-T, ¶ 2 (Int'l Crim. Trib. for the former Yugoslavia Dec. 10, 1998).

203. *Id.* ¶ 38.

204. *Id.* ¶ 161.

205. *Id.* ¶ 162 (emphasis added). The ICTY has jurisdiction over serious violations of international humanitarian law, Statute of the ICTY, *supra* note 201, art. 1, and in order for international humanitarian law to apply there must first be an armed conflict. *Furund'ija*, Case No. IT-95-17/1-T, Judgment, ¶ 258. The ICTY needed to include a link to an armed conflict in the definition of torture in order to establish jurisdiction over "torture and outrages upon personal dignity." *Id.* ¶ 259.

206. *Id.* ¶ 252.

207. *Id.*

The Trial Chamber explained that a judgment of criminal liability for torture would largely rest on satisfaction of the third element — the existence of a prohibited purpose:

> To determine whether an individual is a perpetrator or co-perpetrator of torture or must instead be regarded as an aider and abettor, or is even not to be regarded as criminally liable, it is crucial to ascertain whether the individual who takes part in the torture process also *partakes of the purpose behind torture* (that is, acts with the intention of obtaining information or a confession, of punishing, intimidating, humiliating or coercing the victim or a third person, or of discriminating, on any ground, against the victim or a third person).[208]

The Trial Chamber found that specific intent was met by finding that pain or suffering was inflicted for a prohibited purpose: "[T]he accused must participate in an integral part of the torture and partake of the purpose behind the torture, that is the intent to obtain information or a confession."[209] In reaching a judgment on the charge of torture, the Trial Chamber again addressed intention and prohibited purpose in a single finding: "The intention of the accused . . . was to obtain information."[210] The majority of the opinion focused on describing the severity of the victim's pain and suffering.[211]

On appeal, the accused disputed the Trial Chamber's findings on torture.[212] He pointed to conflicting witness testimony that favored his account,[213] and he claimed that a witness' identification was unreliable.[214] Most centrally, he argued that there were sufficient facts to show that the other soldiers had been the persons inflicting severe pain and suffering, while the accused had only questioned the victim.[215] In upholding the Trial Chamber's determination that the accused was guilty of committing torture, the Appeals Chamber gave heavy weight to the evidence of the severity of pain and suffering inflicted. The court stated that it was "inconceivable that it could ever be argued that the acts charged in . . . the Amended Indictment . . . , once proven, are not serious enough to amount to torture."[216] The Court mentioned the intent requirement in the

208. *Id.*
209. *Id.* ¶ 257.
210. *Id.* ¶¶ 265, 267.
211. *Id.* ¶¶ 264, 266.
212. Prosecutor v. Furund'ija, Case No. IT-95-17/1-A, Judgment, ¶¶ 80–85 (Int'l Crim. Trib. for the former Yugoslavia July 21, 2000).
213. *Id.* ¶ 81.
214. *Id.* ¶ 82.
215. *Id.* ¶ 84.
216. *Id.* ¶ 114 (rejecting an improper finding of torture as grounds for appeal).

definition of torture, but it did not independently analyze intent as part of its findings — suggesting, once again, that the facts and circumstances of the case allowed the Court to infer that the intent requirement had been fulfilled.[217] Furthermore, by requiring a finding of proscribed purpose, the ICTY's specific intent standard comports with that of the Convention.

B. The International Criminal Tribunal for Rwanda

The ICTR has jurisdiction over torture inflicted as part of widespread or systematic attacks against a civilian population[218] and over torture as a serious violation of Common Article 3 and Additional Protocol II.[219] It has used the Convention's definition of torture, including its specific intent standard to elaborate on torture under the ICTR statute,[220] which simply lists torture as one of many crimes against humanity. In *Prosecutor v. Akayesu* and in *Semanza v. Prosecutor*, the ICTR found torture based on the severity of injuries intentionally inflicted (such as seeking out a victim) for a prohibited purpose.

The ICTR Trial Chamber in *Prosecutor v. Akayesu* commented that "[o]n the issue of determining the offender's specific intent, the Chamber considers that intent is a mental factor which is difficult, even impossible, to determine."[221] It continued, "[t]his is the reason why, in the absence of a confession from the accused, his intent can be *inferred from a certain number of presumptions of fact*."[222] The Trial Chamber then listed the acts of Akayesu it found to constitute torture — including beating or threat to life during an interrogation — in other words, infliction of pain or suffering for a prohibited purpose (interrogation).[223] On appeal, Akayesu did not raise the legal or factual conclusions regarding torture as grounds for appeal.[224]

Later, in *Prosecutor v. Semanza*,[225] the ICTR Trial Chamber made reference to ICTY jurisprudence and to the Convention. It emphasized the importance of intentional infliction of pain and suffering in the service of a prohibited purpose for a finding of torture. In the Trial Chamber's discussion of Semanza's liability for torture and murder, the Trial Chamber

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217. Similarly, in *Prosecutor v. Delalic*, the Trial Chamber recognized three elements as in dispute: the severity of pain, prohibited purposes, and official sanction. *See* Prosecutor v. Delalic et al., Case No. IT-96-21-T, Judgment, ¶¶ 461, 470, 473. (In'l Crim. Trib. For the former Yugoslavia Nov. 16, 1998).

218. S.C. Res. 955 art. 3(f), U.N. Doc S/RES/955 (Nov. 8, 1994).

219. *Id.* art. 4(a).

220. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶¶ 593, 681 (Sept. 2, 1998).

221. *Id.* ¶ 523

222. *Id.* ¶ 523 (emphasis added) (discussing genocide rather than torture).

223. *Id.* ¶¶ 682–83.

224. Prosecutor v. Akayesu, Case No. ICTR-96-4-A, Judgment, ¶ 10 (June 1, 2001).

225. Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgment and Sentence, ¶ 342 (May 15, 2003) (stating that the definition of torture in the Convention is not identical to the crime of torture as a crime against humanity).

described how Semanza "intentionally inflicted serious injuries" when he cut off the arm of a man while interrogating him.[226] Elaborating on intent towards this victim, the Trial Chamber found "[t]he intentional nature of the Accused's conduct is demonstrated by his seeking out Rusanganwa for questioning and using the machete for inflicting serious injury shortly after Rusanganwa's negative response to the question."[227] Interrogation served as the prohibited purpose. Regarding a different victim, the Trial Chamber focused on the level of pain and suffering inflicted: "Noting, in particular, the extreme level of fear occasioned by the circumstances surrounding the event and nature of the rape of Victim A, the Chamber finds that the perpetrator inflicted severe mental suffering sufficient to form the material element of torture."[228] The Trial Chamber noted that the accused acted with intent to discriminate against Tutsis, which is a prohibited purpose.[229]

On appeal, the accused claimed that the elements of torture had not been demonstrated because the Prosecution had not proven that he acted in an official capacity.[230] The Appeals Chamber was not persuaded by the challenges to the torture charge, which focused on the credibility of the witnesses, timing, and detail of evidence against the accused.[231] The Appeals Chamber also emphasized the importance of purpose in a finding of torture. It distinguished torture from murder: "Torture requires a specific, enumerated purpose: in this case, to obtain information or a confession. Murder, on the other hand, requires no such purpose . . . ."[232] In both *Akayesu* and *Semanza*, the ICTR found torture where the facts and circumstances surrounding the infliction of pain and suffering — actions conducted under official sanction and for a prohibited purpose — indicated the intent requirement had been met. The reliance on prohibited purpose by the ICTR mirrors the Convention's use of prohibited purpose to separate torture from other cruel and inhumane acts; for both the ICTY and the Convention, a reliance on prohibited purpose is consistent with torture's status as a specific intent crime where the intent requirement may be met by a showing of infliction of pain or suffering for a prohibited purpose.

226. *Id.* ¶¶ 164, 213.

227. *Id.* ¶ 549.

228. *Id.* ¶ 482.

229. *Id.* ¶ 545.

230. Semanza v. Prosecutor, Case No. ICTR-97-20-A, Judgment, ¶ 286 (May 20, 2005). The Appeals Chamber rejected the requirement that the perpetrator must have acted in an official capacity, explaining that this is only a requirement under the Convention. *Id.* ¶ 248 (referring to the *Furund'ija* precedent on the official capacity requirement).

231. *Id.* ¶¶ 287–89.

232. *Id.* ¶ 320.

C. *The European Court of Human Rights*

The ECtHR adjudicates violations of the European Convention of Human Rights.[233] Torture is prohibited under the Convention, but not clearly defined: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."[234] The ECtHR has examined alleged acts of torture and has made an effort to distinguish these actions from cruel, inhuman and degrading treatment. It, too, applies the same intent standard as other international bodies and U.S. courts.

In 1978, before the Convention but after the Declaration Against Torture,[235] the ECtHR in *Case of Ireland v. United Kingdom*[236] analyzed a combination of five techniques that the United Kingdom used in interrogations in Northern Ireland. The ECtHR examined the severity of suffering and the purpose for which that suffering was inflicted: It acknowledged that the five techniques were intended to extract a confession,[237] but it stated that torture could be distinguished from cruel, inhuman, or degrading treatment "principally from a difference in the intensity of the suffering inflicted."[238] It concluded that the five techniques did not rise to the level of intensity or cruelty required to constitute torture — a separate inquiry from intent and proscribed purpose.

Later, in *Aksoy v. Turkey*,[239] the ECtHR found both intensity of suffering and an aim of obtaining information. It inferred intent in part from the level of preparation the torture would have required:

> This treatment could only have been deliberately inflicted: indeed a certain amount of preparation and exertion would have been required to carry it out. It would appear to have been administered with the aim of obtaining admissions or information from the applicant. In addition to the severe pain which it must have caused at the time, . . . it led to paralysis of both arms which lasted for some time. The Court considers that this treatment was of such a serious and cruel nature that it can only be described as torture.[240]

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233. Convention for the Protection of Human Rights and Fundamental Freedoms arts. 19–51, Nov. 4, 1950, 213 U.N.T.S. 222 (establishing the ECtHR).

234. *Id.* art. 3.

235. *See supra* text accompanying notes 49–51 (discussing the Declaration Against Torture).

236. Ireland v. United Kingdom, 23 Eur. Ct. H.R. (ser. B) ¶ 96 (1978). The five techniques were wall-standing (a forced stress position), hooding, subjection to noise, deprivation of sleep, and deprivation of food and drink.

237. *Id.* ¶ 167.

238. *Id.*

239. Aksoy v. Turkey (No. 26), 1996-VI Eur. Ct. H.R. 2260; *see also* Aydin v. Turkey (No. 50), 1997-VI Eur. Ct. H.R. 1867.

240. *Aksoy*, Eur. Ct. H.R. ¶ 64 (1996). In addition, in *Nevmerzhitsky v Ukraine*, the ECtHR found an almost per se standard of torture. It found that force-feeding, when not medically necessary, constituted torture under Article 3 of the European Convention on Human Rights. Nevmerzhitsky v.

The ECtHR thus joined the other international tribunals in finding specific intent where the totality of the facts and circumstances showed that pain and suffering had been inflicted for a prohibited purpose (in this case interrogation).

D. The Inter-American Commission on Human Rights

The IACHR is charged with investigating violations of the American Convention on Human Rights.[241] The Convention states that "[n]o one shall be subjected to torture."[242] In order to apply this undefined standard, the IACHR has looked to the Inter-American Convention to Prevent and Punish Torture.[243]

In *Martín de Mejía v. Perú*, the IACHR summarized the definition of torture found in Articles 2 and 3 of the Inter-American Convention to Prevent and Punish Torture as encompassing three elements:

1. It must be an *intentional* act through which physical and mental pain and suffering is inflicted on a person;
2. It must be committed with a *purpose*;
3. It must be committed by a public official or by a private person acting at the instigation of the former.[244]

Martin de Mejia repeatedly had been raped following the abduction of her husband. The IACHR first described the physical and mental pain and suffering that resulted from the sexual violence, and explained that "rape would appear to be a weapon used to punish, intimidate and humiliate."[245] For the second element, the Commission noted that for an act to be torture it must have been committed intentionally, for example, to produce "a certain result in the victim," such as personal punishment and

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Ukraine, Eur. Ct. H.R. 307, 330 (2005). Intent was not at issue; the applicant asserted that the purpose of the force-feeding was to humiliate him and to cause severe pain when he resisted, a point which it does not appear the Court engaged in great detail. *Id.*

241. Organization of the American States [OAS], *Statute of the Inter-American Commission on Human Rights* art. 41(f), O.A.S. Res. 447 (IX.0/79) (1979). Only the IACHR and States Parties may submit a case to the jurisdiction of the Inter-American Court of Human Rights. Organization of American States, American Convention on Human Rights, art. 61, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter *American Convention on Human Rights*]. Even if a State has acknowledged liability for torture, the IACtHR may decide on reparations such as medical care and monetary compensation. *See, e.g.*, Case of Gutierrez-Soler v. Colombia, Judgment, Inter-Am. Ct. H.R. (ser C) No. 132, at 51–52 (Sept. 12, 2005) (spelling out reparations that Colombia must make to torture victims after admitting liability).

242. *American Convention on Human Rights*, *supra* note 241, art. 5(2).

243. O.A.S., *Inter-American Convention to Prevent and Punish Torture*, O.A.T.S. No. 67, 25 I.L.M. 579 (Dec. 9, 1985).

244. Martín de Mejía v. Perú, Case 10.970, Inter-Am. Comm'n H.R., Report No. 5/96, OEA/Ser.L/V/II.91, doc. 7 (1996) (emphasis added).

245. *Id.*

intimidation.[246] The Government of Peru did not dispute the allegations, arguing only that the case was inadmissible. The IACHR found that the repeated sexual abuse of de Mejia constituted torture.[247] The Commission thus joined other international bodies in finding the required intent in circumstances in which the accused public official inflicted severe pain or suffering to achieve a prohibited purpose.

CONCLUSION

International bodies and U.S. courts are consistent in their approach to the intent requirement for torture. To prove torture, it is necessary to show that the accused intentionally inflicted pain or suffering *for a prohibited purpose.* The requirement of a mens rea element that extends beyond the actus reus of the action places the crime of torture comfortably in the company of other specific intent crimes, both domestic and international. That additional mens rea, moreover, is expressly specified by the Convention — the pain or suffering must be inflicted for a prohibited *purpose.*

In practice, a finding of specific intent does not require direct evidence of mental state but may instead be deduced from the complete set of facts and circumstances. The Committee on Torture and international courts and tribunals all find that torture has occurred when the circumstances as a whole — including the severity of the pain or suffering inflicted and the prohibited purpose of the act — indicate that the specific intent requirement is satisfied. When intent is separately analyzed, it is generally for the purpose of determining whether there is sufficient evidence of a prohibited purpose.

In criminal prosecution, legislative history, and interpretation of torture in other statutes, U.S. courts have approached intent to torture in precisely the same way as the Committee and international courts and tribunals. Like the international bodies, U.S. courts have emphasized the importance of prohibited purpose in determining whether the specific intent standard has been met. In the only domestic criminal prosecution to date for the crime of torture, the Eleventh Circuit described the intent requirement through reference to actions that reflect a prohibited purpose. The courts have adopted the same approach to intent in cases involving civil prosecution of torture under the TVPA and ATS. Although courts engaged in removal proceedings sometimes engage in a more detailed discussion of intent, they general do so to establish an individualized showing of prohibited purpose.

246. *Id.*
247. *Id.*

In sum, the U.S. specific intent standard for torture, as expressed in the text of statutes, legislative history, and jurisprudence, is indistinguishable from the specific intent standard expressed in international law. The standard adopted in the denounced torture memos is not only inconsistent with international law and practice, but runs directly counter to U.S. legislative history and U.S. court interpretation of a variety of statutes prohibiting torture. Given that U.S. law and practice is already consistent with international law and practice, the U.S. government can and should publicly reaffirm its full and unreserved commitment to the international prohibition on torture. Such a declaration would serve to acknowledge and affirm the United States' commitment to ending torture and punishing appropriately whenever transgressions arise, thus helping the country reclaim its moral and legal leadership in this area of international human rights.

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