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Edwin Odhiambo-Abuya

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REINFORCING REFUGEE PROTECTION IN THE WAKE OF THE WAR ON TERROR

EDWIN ODHIAMBO-ABUYA*

Abstract: This Article examines how the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) can be used as a practical tool to enhance the protection of persons who have fled their home States in search of asylum in the wake of the global “war on terror.” It compares and contrasts provisions of CAT to similar provisions contained in international refugee law. This Article contends that, in some respects, the protection provisions of CAT are wider than those found in international refugee law, and, in other respects, narrower than those found in international refugee law. It concludes by suggesting strategies for meeting the challenges ahead.

[I was] arrested by [Government] security forces [and] raped in [my] home in front of [my] children. . . . [I] was brutally beaten. . . . [I] was taken to Makal prison in Kinshasa. . . . [I] was not to receive any visits and shared a cell of 3 by 6 metres with seven other inmates. There were no proper sanitary provisions and [we] had to urinate on the floor. Every morning guards came into the cell and forced [us] to dance, [they] beat . . . and sometimes raped [us]. [I] was raped more than 10 times. . . . I was regularly beaten, sometimes with whips made of tyres on which metal thread was stuck. [I] was burnt with cigarettes on the inside of [my] thighs and struck with batons. [I] was detained for one year without trial. [Eventually] with the assistance of one of the supervisors of the prison who had been bribed by [my] sister, [I] managed to escape [and fled overseas to seek asylum as a refugee].

—Pauline Kisoki

* Dr. Edwin Odhiambo-Abuya is Lecturer, School of Law, Moi University, Kenya, and Advocate of the High Court of Kenya (edwinabuya@yahoo.co.uk). Educated in Kenya, South Africa, and Australia, the author completed a doctoral thesis in international human rights and refugee law at The University of Sydney, and obtained a Masters and undergraduate degrees in Law from the Universities of Cape Town and Nairobi respectively. He has previously taught law in Kenya, Australia, and the United Kingdom. His research interests lie in the areas of legal research and writing, international asylum, humanitarian and immigration laws, as well as in transitional justice. The author has also practiced law for several years in Kenya. Terri Drage, Leslie Gold, and Megan Fairlie deserve thanks for their thought-provoking comments on earlier versions of this Article. Any remaining errors and omissions are the author's. Thanks are also due to seminar participants at the Transitional Justice Institute, University of Ulster (Magee), United Kingdom, and School of Law, City University Hong Kong where this Article was presented. The author is also grateful to the 2007 Advanced Legal Writing & Drafting class at Moi University for their constructive ideas. Special thanks are given to the living God for His endless support.

INTRODUCTION

Many individuals such as Pauline Kisoki¹ are increasingly forced to seek sanctuary in other States because of beatings and other brutal acts at the hands of the State, State-sponsored agents, or militia members, which often constitute torture or cruel, inhuman, or degrading treatment. According to Bent Sorenson, the former Vice-Chairperson of the Committee Against Torture (Torture Committee), a “considerable numbers of refugees have been subjected to torture.”² Hard evidence collected in Kenya,³ Macedonia,⁴ East Timor,⁵ and Afghanistan⁶ corroborates this position. This evidence substantiates the thesis that torture is one of the leading triggers that forces people to flee their home States in search of protection elsewhere as refugees. Yet the definition of “refugee” in the 1951 United Nations (U.N.) Convention Relating to the Status of Refugees⁷ (Refugee Convention) is narrow because it excludes from protection those who have been forced to flee their home States because of the threat of torture. To qualify for asylum, the Refugee Convention requires an applicant to prove that he or she has a well founded fear of persecution in his or her home State based on race, religion, nationality, membership of a particular social group, or political opinion. According to Article 1(A)(2) of the Convention, “refugee” means any person who:

[O]wing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his na-

¹ *Kisoki v. Sweden*, Comm. No. 41/1996, U.N. Comm. Against Torture, 16th Sess., ¶¶ 2.2–3, U.N. Doc. CAT/C/16/D/41/1996 (May 8, 1996).

² Bent Sorenson, *Torture and Asylum*, in AN END TO TORTURE: STRATEGIES FOR ITS ERADICATION 172, 174 (Bertil Dunér ed., 1998).

³ In a recent survey that the author conducted on Kenya’s refugee status determination regime (2002–2003), more than half of the refugees and asylum seekers who participated in the project claimed they had suffered from acts that would constitute torture or cruel, inhuman, or degrading treatment. See generally Edwin Odhiambo-Abuya, *United Nations High Commissioner for Refugees and Status Determination Imtaxaan in Kenya: An Empirical Survey*, 48 J. AFR. L. 187 (2004) (for the results of the field study).

⁴ *Kosovo Refugees: Stories of Torture, Beatings, Extortion, Shortages*, UNHCR.ORG, May 21, 1999, <http://www.unhcr.org/cgi-bin/texis/vtx/print?tbl=NEWS&id=3ae6b81b6c>.

⁵ International Rehabilitation Council for Torture Victims (IRCT), Tulum Rai Timor, <http://www.irct.org> (follow “Find centres and programmes” hyperlink; then follow “Tulum Rai Timor” hyperlink) (last visited Feb. 21, 2007).

⁶ *Relief to Traumatized Afghan Refugees in Pakistan*, IRCT.ORG, Mar. 31, 2002, <http://www.irct.org/Default.aspx?ID=159&M=News&PID=617&NewsID=11>.

⁷ United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954) [hereinafter Refugee Convention].

tionality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.⁸

The growing number of incidents of torture occurring globally, coupled with the lack of provisions in international refugee law to protect victims of torture, necessitates an appropriate legal response by this corpus of law. If appropriate measures are not taken, there is a high risk that asylum seekers fleeing torture will remain in limbo. Protection of these specific forced migrants is especially important now that we are living in a world of terror where fear of the “other” and threats of war and insecurity are more imminent than before. In addition, it is likely that many host States will continue to deny entry and support to even the most genuine of cases.⁹ Since September 2001 and the ensuing global fight against terrorism, substantial restrictions have been placed on those seeking asylum as refugees. Asylum seekers have been “redefined as agents of insecurity” and “even as a potential source of armed terror.”¹⁰

The purpose of this Article is not to address views on the use of torture.¹¹ Rather, this Article evaluates the Convention Against Torture

⁸ *Id.*

⁹ See Edwin Odhiambo-Abuya, *Refugees and Internally Displaced Persons: Examining Overlapping Institutional Mandates of the International Committee of the Red Cross and United Nations High Commissioner for Refugees*, 7 SING. J. INT'L & COMP. L. 236, 246–49 (2003). See generally Mai Kaneko, *Beyond “Seclusionist” Japan: Evaluating the Free Afghans/Refugee Law Reform Campaign After September 11*, 21 REFUGEE 34 (2003); Evelien Brouwer, *Immigration, Asylum and Terrorism: A Changing Dynamic Legal and Practical Developments in the EU in Response to the Terrorist Attacks of 11.09*, 4 EUR. J. MIGRATION & L. 399 (2003); April McKenzie, *A Nation of Immigrants or a Nation of Suspects? State and Local Enforcement of Federal Immigration Laws Since 9/11*, 55 ALA. L. REV. 1149 (2004) (for further evaluation of this theme).

¹⁰ Gil Loescher, *Refugees as Grounds For International Action*, in REFUGEES AND FORCED DISPLACEMENT: INTERNATIONAL SECURITY, HUMAN VULNERABILITY, AND THE STATE 31, 31, 42 (Edward Newman & Joanne van Selm eds., 2003).

¹¹ Recently, some U.S. and Australian academics have worryingly advocated for the use of torture in cases involving suspected terrorists. See Mirko Bagaric & Julie Clarke, *Not Enough Official Torture in the World? The Circumstances in Which Torture Is Morally Justifiable*, 39 U.S.F. L. REV. 581 (2005). See generally ALAN DERSHOWITZ, *WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE* (2002) (defending the use of torture in “ticking bomb” cases of terrorism). Not surprisingly, these views have drawn sharp criticisms from fellow academics. See generally, e.g., Anne O'Rourke et al., *Torture, Slippery Slopes, Intellectual Apologists, and Ticking Bombs: An Australian Response to Bagaric and Clarke*, 40 U.S.F. L. REV. 85 (2005); Ben Saul, *Torturing Terrorists After September 11*, 27 INT'L J. L. & PSYCHIATRY 645 (2004).

and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)¹² and the extent to which the treaty can reinforce the international refugee protection regime in the wake of the so-called global “war on terrorism.” This Article contends that, notwithstanding increased security concerns across the world, States are still duty-bound to respect their international human rights obligations. In order to meet the contemporary needs of persons displaced by torture, the term “refugee” needs to be interpreted in a manner that is likely to realize this objective. Put another way, this Article advocates a liberal rather than a narrow approach to defining the term “refugee.” International refugee law supports this liberal position. Recognizing the principle of universality of human rights, the preamble of the Refugee Convention provides that the overall objective of international refugee protection is to “assure” forced migrants “the widest possible exercise of . . . fundamental rights and freedoms” espoused by the Universal Declaration of Human Rights (UDHR).¹³ This approach is consistent with the Vienna Convention on the Law of Treaties (Vienna Convention),¹⁴ which requires States to interpret any treaty “in good faith” and “in the light of its object and purpose.”¹⁵ Additionally, States are required under the terms of the *pacta sunt servanda*¹⁶ rule to perform their obligations in “good faith.”¹⁷

Section I examines key provisions of CAT that seek to protect asylum seekers. In Sections II and III, this Article compares and contrasts the protection regime of CAT to that of the Refugee Convention. These Sections further evaluate issues surrounding: (1) the scope of protection; (2) protected persons; (3) the *non-refoulement* concept; (4) relief under the international refugee and torture frameworks; (5) the evidentiary threshold; (6) perpetrators of acts that cause flight; (7) the application process; and (8) enforcement mechanisms provided for by these legal instruments. This Article contends that while certain protection

¹² Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc. A/RES/39/46 (Dec. 10, 1984), 1465 U.N.T.S. 85 (entered into force June 26, 1987) [hereinafter CAT].

¹³ Universal Declaration of Human Rights, G.A. Res. 217A, art. 22, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter UDHR].

¹⁴ Vienna Convention of the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention].

¹⁵ *Id.* art. 31.

¹⁶ See CONCISE AUSTRALIAN LEGAL DICTIONARY 323 (2d ed. 1998) (*pacta sunt servanda* is a “fundamental principle of international law that treaties concluded properly are to be observed”).

¹⁷ Vienna Convention, *supra* note 14, art. 26.

provisions of CAT are wider than those in refugee treaties, certain provisions of CAT are narrower than those found in refugee treaties. The Article concludes by suggesting strategies for meeting the challenges ahead.

I. Key Provisions of CAT

On December 10, 1984, at the thirty-sixth anniversary of the UDHR, the U.N. General Assembly unanimously adopted CAT. CAT was designed to globally combat incidents of torture.¹⁸ Earlier, on December 9, 1975, the international community adopted a non-binding Declaration on the Protection of All Persons from being subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Declaration).¹⁹ CAT is a multilateral treaty, guided by the Torture Declaration, which came into operation almost two and a half years after its adoption on June 26, 1987. As of January 1, 2006, 141 States were party to CAT.²⁰ While CAT recognizes the already existing prohibition against torture in international human rights law as proclaimed in the UDHR²¹ and the International Covenant on Civil and Political Rights (ICCPR),²² it was adopted to reinforce this prohibition. Consequently, the preamble to CAT states that the purpose of the treaty is to contribute to the “struggle against torture and other cruel, inhuman, or degrading treatment or punishment.”²³

With regard to its international supervisory mandate, the Torture Committee, the implementing body of CAT, discharges its function in four different ways. Article 19 requires State Parties to submit periodic reports to the Committee detailing the “measures they have taken to give effect to their undertakings under” the provisions of CAT. After studying a report of this kind, the Torture Committee makes its suggestions or comments and transmits them to the relevant State Party, which is at liberty to respond.²⁴ The Committee is also empowered to investigate, upon

¹⁸ The preamble to CAT underscores the treaty’s desirability “to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world.” CAT, *supra* note 12, pmbl.

¹⁹ G.A. Res. 3452 (XXX), U.N. Doc. A/RES/3452 (XXX) (Dec. 9, 1975).

²⁰ See Office of the U.N. High Comm’r for Hum. Rts., Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, <http://www.ohchr.org/english/countries/ratification/9.htm> (last visited Apr. 20, 2007) (for a list of parties).

²¹ CAT, *supra* note 12, pmbl.

²² International Covenant on Civil and Political Rights, G.A. Res. 2200(XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

²³ CAT, *supra* note 12, pmbl.

²⁴ *Id.* arts. 19(3), 19(4).

receipt of “reliable information,” incidents of torture in the territory of a State Party.²⁵ Moreover, the Torture Committee may receive and consider communications from one State Party regarding incidents of torture in another State Party.²⁶ Lastly, the Torture Committee also has a mandate to receive and consider communications from individuals, such as asylum seekers, concerning claims of torture that occur in the territory of Member States.²⁷

Ten experts constitute the Torture Committee.²⁸ Ten members was considered sufficient because the subject matter to be dealt with by the Committee is more specific than the wide range of problems that other committees such as the Human Rights Committee have to handle.²⁹ The experts are elected by secret ballot from a list of persons submitted by Member States.³⁰ Each member, however, is required to possess “high moral standing” and “recognized competence” in the area of human rights.³¹ Further, the experts, who are appointed for a term of four years,³² are required to serve in their “personal capacity.”³³ This implies that they are expected to act independently or as members based on their own knowledge, experience, and judgment and that they shall not act on behalf of the government that nominated them, or on behalf of the country of their nationality.³⁴

A. *The Definition of Torture and Establishing Torture*

1. Definition of Torture

In common parlance, “torture” refers to the “infliction of severe pain especially as a punishment or for the purpose of persuasion.”³⁵ The legal definition of torture embodies a higher threshold. In the realm of law, for a person to claim that he or she has been a victim of torture,

²⁵ *Id.* art. 20.

²⁶ *Id.* art. 21.

²⁷ *Id.* art. 22.

²⁸ CAT, *supra* note 12, art. 17(1).

²⁹ HERMAN BURGERS & HANS DANIELIUS, *THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT* 152 (1988).

³⁰ CAT, *supra* note 12, art. 17(2).

³¹ *Id.* art. 17(1); see *Election of Five Member of the Committee Against Torture*, CAT/SP/26 (Oct. 9, 2003) (for resumes of some of the members of the Torture Committee).

³² CAT, *supra* note 12, art. 17(1).

³³ *Id.* art. 17(4). If re-nominated, an expert is eligible for re-election. *Id.*

³⁴ BURGERS & DANIELIUS, *supra* note 29, at 152.

³⁵ OXFORD ENGLISH REFERENCE DICTIONARY 1521 (2d ed. 2000); THE CHAMBERS DICTIONARY 1062 (9th ed. 2003).

evidence over and above that of being subjected to severe pain must be adduced. Although both the ICCPR and UDHR clearly prohibit torture, neither treaty attempts to define the meaning of the term. In contrast, Article 1 of CAT specifically and comprehensively defines the international crime of torture:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him or a third person 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, . . . 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 from, inherent in or incidental to lawful sanctions.³⁶

This definition virtually mirrors the definition of torture contained in Article 1 of the 1975 Torture Declaration:

1. [T]orture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.

2. Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.³⁷

2. Establishing Torture

Four stringent elements are needed to establish torture under CAT. First, a person must demonstrate that the act at issue is more likely than not to cause severe mental or physical pain or suffering.³⁸

³⁶ CAT, *supra* note 12, art. 1.

³⁷ G.A. Res. 3452 (XXX), *supra* note 19, art. 1.

³⁸ CAT, *supra* note 12, art. 1.

He or she must also demonstrate that the alleged act was committed intentionally.³⁹ Third, the perpetrator of the act must be a public official acting directly or through a duly appointed representative.⁴⁰ Lastly, the act must be unlawful.⁴¹

a. *Severe Mental or Physical Suffering*

A person must first establish that the alleged torturous act is more likely than not to cause severe mental or physical pain or suffering.⁴² As is the case with many international treaties, CAT makes broad provisions, and, in particular, fails to provide examples of acts that would constitute torture.⁴³ Nonetheless, emerging jurisprudence from the U.N. Torture Committee has attempted to fill this gap.⁴⁴ In its first report issued in 1986, the U.N. Special Rapporteur gave examples of acts that could constitute physical and mental torture.⁴⁵ The report stated that beatings, burns (from cigarettes, electricity, burning coal), electric shocks, suspension, suffocation, exposure to excessive light or noise, sexual aggression, administration of drugs (causing vomiting, asphyxia, trembling, etc.), prolonged denial of sleep, food, sufficient hygiene, and/or medical assistance, threats to kill, and the disappearance of relatives all constituted physical or mental torture.⁴⁶ This list is somewhat consistent with jurisprudence from the Torture Committee, which establishes that beatings,⁴⁷ death threats,⁴⁸ burning and destruction of property,⁴⁹ sleep deprivation,⁵⁰ rape,⁵¹ subjection to electric shocks,⁵²

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ See generally CAT, *supra* note 12.

⁴⁴ *Id.* art. 17 (establishing the Torture Committee and charging it with the responsibility for implementing CAT).

⁴⁵ DEBORAH ANKER, LAW OF ASYLUM IN THE UNITED STATES 487–88 (1999) (quoting Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Report of the Special Rapporteur, U.N. ESCOR, Comm'n Hum. Rts., 41st Sess., ¶ 119, U.N. Doc. E/CN.4/1986/15 (1986)).

⁴⁶ *Id.*

⁴⁷ S.G. v. Netherlands, Comm. No. 223/2002, U.N. Comm. Against Torture, 33d Sess., U.N. Doc. CAT/C/32/D/135/1999 (May 14, 2004); S.U.A. v. Sweden, Comm. No. 223/2002, U.N. Comm. Against Torture, 33d Sess., U.N. Doc. CAT/C/33/D/223/2002 (Nov. 29, 2004).

⁴⁸ L.J.R.C. v. Sweden, Comm. No. 218/2002, U.N. Comm. Against Torture, 33d Sess., U.N. Doc. CAT/C/33/D/218/2002 (Sept. 20, 2005).

⁴⁹ Dzemajl et al. v. Yugoslavia, Comm. No. 161/2000, U.N. Comm. Against Torture, 29th Sess., U.N. Doc. CAT/C/29/D/161/2000 (Dec. 2, 2002).

⁵⁰ Ltaief v. Tunisia, Comm. No. 189/2001, U.N. Comm. Against Torture, 31st Sess., U.N. Doc. CAT/C/31/D/189/2001 (Nov. 20, 2003).

and submergence in ice⁵³ could be construed as severe physical or mental torture.

The test of what would amount to severe pain or suffering appears to be subjective and each case is assessed on its own merits. As is the case in civil and criminal law, medical evidence and expertise is marshalled to prove the mental or physical aspects of each claim.⁵⁴ This form of evidence helps to guide a court or tribunal in their efforts to reach a finding, especially in situations where an adjudicating body lacks the necessary knowledge or skill relating to particular aspects of the evidence.⁵⁵ In the context of CAT, this principle was affirmed in *G.R.B. v Sweden* where the Torture Committee found that the medical evidence presented by the applicant supported her claim that she suffered “severely from post-traumatic stress disorder, most probably as the consequence of the abuse”⁵⁶ she had earlier suffered at the hands of military forces in her home State.

In addition, a person must prove that the suffering they claim to have undergone was severe.⁵⁷ Herman Burgers and Hans Danelius, two key participants in the drafting of CAT, state that “alternative wordings, such as extreme or extremely severe pain were suggested during the *travaux préparatoires* [drafting history], but the phrase ‘severe pain’ was considered sufficient to convey the idea that only acts of a certain gravity shall be considered to constitute torture.”⁵⁸ Few would deny that it is difficult to articulate with mathematical precision

⁵¹ *G.R.B. v Sweden*, Comm. No. 83/1997, U.N. Comm. Against Torture, 20th Sess., U.N. Doc. CAT/C/20/D/83/1997 (May 15, 1998); *Kisoki*, CAT/C/16/D/41/1996.

⁵² *R.S. v Denmark*, Comm. No. 225/2003, U.N. Comm. Against Torture, 32d Sess., U.N. Doc. CAT/C/32/D/225/2003 (May 24, 2004); *U.S. v Finland*, Comm. No. 197/2002, U.N. Comm. Against Torture, 30th Sess., U.N. Doc. CAT/C/30/D/197/2002 (May 22, 2003).

⁵³ *Khan v. Canada*, Comm. No. 15/1994, U.N. Comm. Against Torture, 13th Sess., U.N. Doc. CAT/C/13/D/15/1994 (Nov. 18, 1994); *Aemei v. Switzerland*, Comm. No. 34/2002, U.N. Comm. Against Torture, 18th Sess., U.N. Doc. CAT/C/18/D/34/1995 (May 29, 1997).

⁵⁴ See S.K. SARKAR & EJAZ AHMED, *THE LAW OF EVIDENCE* 868–936 (2003); PETER MURPHY, *MURPHY ON EVIDENCE* ch. 11 (2003). See generally IAN FRECKELTON & HUGH SELBY, *EXPERT EVIDENCE: LAW, PRACTICE, PROCEDURE AND ADVOCACY* (2005).

⁵⁵ See, e.g., sections 45 and 48 of the Indian and Kenyan Evidence Acts respectively. Section 45 of the Indian Evidence Act defines expert as any person who is “specially skilled” in “foreign law, science or art or in questions as to identity of handwriting or finger impressions.” Evidence Act, No. 1 (1872) (India). Section 48(1) of the Kenyan Evidence Act provides that an expert is a person who is “specially skilled” in “foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger or other impressions.” Evidence Act, Laws of Kenya, CAP. 80 § 48(1) (1989).

⁵⁶ *G.R.B.*, CAT/C/31/D/189/2001, ¶ 6.7.

⁵⁷ CAT, *supra* note 12, art. 1.

⁵⁸ BURGERS & DANIELIUS, *supra* note 29, at 117.

what amounts to severe pain or suffering. As a result, each case is evaluated on its own circumstances. However, it should be noted that torture can arise from a single act that may not, in and of itself, be classified as extremely severe.

b. *Objectives of the Perpetrator*

The second requirement refers to the objectives of the perpetrator of an act.⁵⁹ Article 1 of CAT requires a victim to prove that the act was intentionally designed to obtain “information or a confession,” or to intimidate, coerce, discriminate, or punish the victim (or a third person) for an act committed or suspected to have been committed by the victim or a third person. Since the act in issue must be intentionally performed, it follows that accidents or negligent acts that cause pain and suffering do not qualify as torture. Because the phrase “for such purposes as” precedes the list of objectives, the list is illustrative and not exclusive.⁶⁰ It is notable that Article 1 of the Torture Declaration employs similar wording. Therefore, as new cases of alleged torture arise, other objectives may be included in that category. Even then, the words “such as” imply that unlisted purposes must have something in common with the purposes expressly listed.

c. *The Perpetrator*

According to the drafting history of CAT, the definition of torture was the subject of lengthy debates and negotiations. A number of opinions were expressed concerning the status of perpetrators of acts alleged to constitute torture. The French delegation argued that “the definition of the act of torture should be a definition of the intrinsic nature of the act or torture itself, irrespective of the status of the perpetrator.”⁶¹ This position failed to attract support. Most States, however, did agree that CAT should apply to “acts committed by public officials” and to acts for which those public officials “could otherwise be considered to have some responsibility.”⁶² The U.K. delegation suggested that the definition of perpetrator should be broadened to cover a “public official or any other agent of the State.”⁶³ The delegation of the Federal

⁵⁹ CAT, *supra* note 12, art. 1.

⁶⁰ *Id.*

⁶¹ BURGERS & DANIELIUS, *supra* note 29, at 45.

⁶² *Id.*

⁶³ *Id.*

Republic of Germany suggested a much broader definition for public official:

Not only to persons, who, regardless of their legal status, have been assigned public authority by state organs on a permanent basis or in an individual case, but also to persons who, in certain regions or under particular conditions, actually hold or exercise authority over others and whose authority is comparable to government authority or-be it only temporarily-has replaced government authority or whose authority has been derived from such persons.⁶⁴

Ultimately, it was agreed that the perpetrator of the act should be a public official acting directly or through a duly appointed delegate or agent. Accordingly, CAT applies not only to acts that are directly carried out by governmental officials, but also to acts that such officials incidentally perform, as well as to acts of others that they tolerate or condone.⁶⁵ This definition is broader than that of the Torture Declaration, which limits torture to acts committed by or at the instigation of public officials.⁶⁶

Article 16 of CAT requires State Parties to undertake measures that will prevent acts of torture “committed by or at the instigation of or with consent or acquiescence of a public official or any other person acting in an official capacity.”⁶⁷ This provision imports a substantial amount of government control within the ambit of the act that is claimed to constitute torture. The requirement is consistent with the primary aim of the treaty, namely to reduce instances of torture “throughout the world” by States or their agents.⁶⁸ The intention of the wording is to distinguish between official and private acts. As such, CAT excludes acts of abuse committed by opponents of the government, such as acts committed by militia, paramilitary, insurgents, guerrillas, and rebel groups. Thus in *G.R.B. v. Sweden*⁶⁹ and *S.V. v. Canada*,⁷⁰ the Torture Committee argued that allegations of torture at the hands of guerrilla groups, namely, *Sendero Luminoso* and Liberation Tigers of

⁶⁴ *Id.*

⁶⁵ See generally CAT, *supra* note 12.

⁶⁶ G.A. Res. 3452 (XXX), *supra* note 19, art. 1.

⁶⁷ CAT, *supra* note 12, art. 16.

⁶⁸ See *id.* p.mbl.

⁶⁹ *G.R.B.*, CAT/C/31/D/189/2001, ¶ 7.

⁷⁰ *S.V. v. Canada*, Comm. No. 49/1996, 30th Sess., ¶ 10, U.N. Doc. CAT/C/26/D/49/1996 (May 15, 1996).

Tamil Elam (LTTE) respectively, fell outside the scope of the treaty. In both applications, the Torture Committee emphasized this difference:

The issue whether the State party has an obligation to refrain from expelling a person who might risk pain or suffering inflicted by a non-governmental entity, without the consent or acquiescence of the Government, falls outside the scope of article 3 of [CAT].⁷¹

Accordingly, it concluded in *S.V.*: “[T]he issue, on which the authors base part of their claim that they would suffer torture by LTTE or other non-governmental entities on return to Sri Lanka, cannot be considered by the Committee.”⁷²

It would be unrealistic to require States to be accountable for acts solely committed by private actors. The rationale for this omission is based on the argument that these acts can be prosecuted via the national criminal justice system.⁷³ It is unreasonable to assume, however, that acts committed by State-controlled or State-supported vigilantes, death squads, or paramilitary groups will be prosecuted domestically.

In terms of proof, it is insufficient to show that a non-State actor committed an act. The test is whether the State abstained from or was unwilling to control those individuals or groups so that their actions can be “regarded as acts of the State rather than acts of private individuals.”⁷⁴ Accordingly, a person must additionally establish that the State ignored the commission of the alleged act in question. The victim must demonstrate that a public official was aware of the commission of the torturous act and abstained from acting, thereby breaching a legal obligation to intervene. The question of whether a government is unwilling to intervene is an evidentiary issue. As *Hajrizi Dzemajl et al. v. Yugoslavia* demonstrates, it is independent of the number of instances that a State is alleged to have failed to act.⁷⁵

The phrase “with the consent or acquiescence”⁷⁶ does not appear in the Torture Declaration and was only added to the international

⁷¹ *Id.* ¶ 9.5; G.R.B., CAT/C/31/D/189/2001, ¶ 6.5.

⁷² *S.V.*, CAT/C/26/D/49/1996, ¶ 9.5.

⁷³ See Sadiq Elmi v. Australia, Comm. No. 120/1998, U.N. Comm. Against Torture, 22d Sess., ¶ 5.2, U.N. Doc. CAT/C/22/D/120/1998 (May 25, 1999) (recognizing that a “[s]tate would normally be expected to take action, in accordance with its criminal law, against private persons having committed acts of torture against other persons”).

⁷⁴ ROBERT JENNINGS & ARTHUR WATTS, OPPENHEIM’S INTERNATIONAL LAW 550 (9th ed. 1996).

⁷⁵ See generally *Dzemajl*, CAT/C/29/D/161/2000.

⁷⁶ CAT, *supra* note 12, art. 1.

human rights framework with the adoption of CAT. A person is generally said to acquiesce to an act when he or she willingly fails to take action to prevent its commission.⁷⁷ The Torture Committee examined this issue in *Dzemajl*.⁷⁸ In April 1995, a report was lodged at the Danilovgrad Police Department alleging that two Romani minors had raped a Montenegrin girl, S.B.⁷⁹ About 200 Montenegrins, led by the girl's family, marched to the police station and called for the expulsion of all Roma from Danilovgrad.⁸⁰ They threatened to exterminate and burn down Roma houses.⁸¹ Quite apart from attempting to quell the tension, the police responded by ordering the Romani residents to evacuate the settlement immediately as they were at risk of being lynched by the Montenegrins.⁸² Although most fled to a neighboring region, the applicants remained to safeguard their homes and livestock.⁸³ Later the police informed them that "no one could guarantee their safety or provide them with protection."⁸⁴ Undisputed facts established that the Montenegrins razed the entire Roma settlement later that night.⁸⁵ They looted valuables and slaughtered cattle.⁸⁶ Police officers present at the scene failed to stop the anarchy.⁸⁷ Rather, they "simply moved their police car to a safe distance."⁸⁸ The applicants claimed that the officers did no more than feebly seek to persuade some of the attackers to calm down.⁸⁹ The authorities did ensure, however, that the violence and destruction of property was limited to the Roma settlement.⁹⁰

Hajrizi and sixty-four other persons, all of Romani origin and nationals of the Federal Republic of Yugoslavia, brought a claim alleging that the State was in breach of, among others, Articles 1 and 16 of CAT. Finding in their favor, the Torture Committee held that the burning and destruction of property constituted cruel, inhuman, or degrading

⁷⁷ See BLACK'S LAW DICTIONARY 25 (8th ed. 2004) ("acquiescence" means "implied consent to an act").

⁷⁸ See generally *Dzemajl*, CAT/C/29/D/161/2000.

⁷⁹ *Id.* ¶ 2.1.

⁸⁰ *Id.* ¶ 2.2.

⁸¹ *Id.*

⁸² *Id.* ¶ 2.4.

⁸³ *Dzemajl*, CAT/C/29/D/161/2000, ¶ 2.4.

⁸⁴ *Id.* ¶ 2.4.

⁸⁵ *Id.*

⁸⁶ *Id.* ¶ 2.7.

⁸⁷ *Id.* ¶ 2.12.

⁸⁸ *Dzemajl*, CAT/C/29/D/161/2000, ¶ 2.8.

⁸⁹ *Id.*

⁹⁰ *Id.* ¶ 2.9.

treatment or punishment.⁹¹ It also found that the police acquiesced to the unlawful acts as they failed to check the violent evictions and destruction of livelihoods:

The complainants have sufficiently demonstrated that the police (public officials), although they had been informed of the immediate risk that the complainants were facing and had been present at the scene of the events, did not take any appropriate steps in order to protect the complainants, thus implying “acquiescence.”⁹²

In their separate concurring opinion, Mr. Fernando Marino and Mr. Alejandro Poblete argued that the applicants had suffered torture because:

- (a) The[y] . . . were forced to abandon their homes in haste given the risk of severe personal and material harm;
- (b) Their settlement and homes were completely destroyed. Basic necessities were also destroyed;
- (c) Not only did the resulting forced displacement prevent them from returning to their original settlement, but many members of the group were forced to live poorly, without jobs or fixed places of abode;
- (d) Thus displaced and wronged, the[y] ha[d] still not received any compensation, seven years after the fact, although they have approached the domestic authorities;
- (e) All the inhabitants who were violently displaced belong to the Romani ethnic group, which is known to be especially vulnerable in many parts of Europe. In view of this, States must afford them greater protection.⁹³

Where State authority is wholly lacking, such as where the central government has collapsed, acts by groups exercising quasi-governmental powers have been found to satisfy the public official requirement and thus activate Article 3, the *non refoulement* obligation. As such, acts of groups exercising *de facto* prerogatives of the government fall within CAT. The Torture Committee addressed this principle in *Sadiq Elmi v. Australia*⁹⁴ and *H.M.H.I. v. Australia*.⁹⁵ In *Elmi*, the applicant, a Somali

⁹¹ *Id.* ¶ 9.2.

⁹² *Id.* ¶ 9.

⁹³ *Dzemaql*, CAT/C/29/D/161/2000, Annex (to the primary decision).

⁹⁴ *See generally Elmi*, CAT/C/22/D/120/1998.

national, fled to Australia following the 1991 civil conflict in Somalia. A case officer from the Department of Immigration and Multicultural Affairs, acting as a delegate for the Minister of Immigration and Multicultural Affairs (Immigration Minister), rejected Elmi's application for a protection visa and thus denied him refugee status.⁹⁶ The Refugee Review Tribunal (RRT) affirmed this decision.⁹⁷ A single judge of the Federal Court and a Full Court of the Federal Court dismissed subsequent appeals for review of the RRT's decision.⁹⁸ Subsequently, Elmi lodged an application for the grant of a protection visa based on "compassionate"⁹⁹ grounds with the Immigration Minister.¹⁰⁰ The Minister refused to grant him a protection visa,¹⁰¹ and Elmi became subject to deportation.¹⁰² Having exhausted the domestic legal framework, Elmi submitted an application to the Torture Committee arguing that his expulsion would constitute a violation by Australia of Article 3 of CAT. He further claimed that his background and clan membership would render him personally at risk of being subjected to torture.

At the time that Elmi lodged his application, Somalia lacked a central government.¹⁰³ In place were various armed clans that had control over different parts of the country.¹⁰⁴ One of the central issues before the Torture Committee was whether Elmi would be subjected to torture at the hands of State officials upon his return, and would thereby satisfy the public official requirement. Australia argued that the application was inadmissible as the alleged torturous acts were committed by non-State officials acting in their private capacity.¹⁰⁵ In response, counsel for the applicant argued that in instances where a central government is absent "the likelihood that other entities will exercise quasi-governmental powers"¹⁰⁶ increases. At the time, certain armed clans were in effective control of territories within Somalia.¹⁰⁷ Accordingly, counsel argued, the public official requirement in Article 1 was met. The Tor-

⁹⁵ H.M.H.I. v. Australia, Comm. No. 177/2001, U.N. Comm. Against Torture, 28th Sess., ¶ 4.5, U.N. Doc. CAT/C/28/D/177/2001 (May 1, 2002).

⁹⁶ *Elmi*, CAT/C/22/D/120/1998, ¶ 2.4.

⁹⁷ *Id.*

⁹⁸ *Id.* ¶ 2.5.

⁹⁹ Migration Act, 1958, §§ 417 & 501J (Austl.).

¹⁰⁰ *Elmi*, CAT/C/22/D/120/1998, ¶ 2.4.

¹⁰¹ *Id.*

¹⁰² *Id.* ¶ 2.5.

¹⁰³ *Id.* ¶ 4.20.

¹⁰⁴ *Id.* ¶ 4.20.

¹⁰⁵ *Elmi*, CAT/C/22/D/120/1998, ¶ 4.21.

¹⁰⁶ *Id.* ¶ 5.1.

¹⁰⁷ *Id.* ¶¶ 5.2, 5.5.

ture Committee agreed with the applicant's view. In rejecting the Australian contention, the Committee, which impliedly referred to the international law definition of state,¹⁰⁸ noted:

For a number of years Somalia has been without a central government, that the international community negotiates with the warring factions and that some of the factions operating in Mogadishu have set up quasi-governmental institutions and are negotiating the establishment of a common administration. It follows then that, de facto, those factions exercise certain prerogatives that are comparable to those normally exercised by legitimate governments.¹⁰⁹

In sum, acts by groups exercising quasi-governmental power represent acts committed by public officials and could constitute torture. However, this theory only applies in exceptional cases where a State has been without a functioning central government for a certain period of time, and the international community has dealt with the group or groups supposedly in power (for example, the warring clans in Somalia), thereby giving these factions quasi-governmental status.

Some critics have cast doubt on the ability of the Torture Committee to realize its mandate. Matthew Lippman, for example, claims that the independence of the Torture Committee could be eroded significantly since the ten experts are nominated, elected, and financed by State Parties.¹¹⁰ Therefore, he concludes, the Torture Committee is unlikely to take "bold or controversial initiatives."¹¹¹ This position is questionable. The jurisprudence that emerged from the Torture Committee challenges Lippman's allegation. Contrary to Lippman's assertion, the Torture Committee has made bold and controversial decisions against State Parties, such as Australia in *Elmi*. Indeed, the *Elmi* decision is a significant development in CAT jurisprudence, because it shows the Committee's willingness to adopt a flexible and broader protection-based approach in interpreting the Convention.¹¹²

¹⁰⁸ See Montevideo Convention on the Rights and Duties of States art. 1, Dec. 26, 1933, 49 Stat. 3097 (entered into force Dec. 26, 1934) (underlining that one of the qualifications of a state is the "capacity to enter into relations with other states").

¹⁰⁹ *Elmi*, CAT/C/22/D/120/1998, ¶ 6.5.

¹¹⁰ Matthew Lippman, *The Development and Drafting of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 17 B.C. INT'L & COMP. L. REV. 275, 320 (1994).

¹¹¹ *Id.*

¹¹² Brian Gorlick, *The Convention and The Committee Against Torture: A Complimentary Protection Regime for Refugees*, 11 INT'L J. REFUGEE L. 479, 490 (1999).

It would be difficult, therefore, for a claimant to invoke this line of argument once a central government is re-established. Subsequent applications, such as *H.M.H.I.*,¹¹³ *Y.H.A. v. Australia*,¹¹⁴ and *United States v. Finland*,¹¹⁵ addressed this point. In the 2001 decision of *H.M.H.I.*, H, a Somalia national, sought to invoke Article 3 of CAT following the rejection of his application for refugee status. Australia argued that since October 2000 an internationally recognized Transitional National Government (TNG) had been established in Somalia.¹¹⁶ They argued that elections had been held at all levels¹¹⁷ and that the political circumstances in Somalia had changed since the *Elmi* decision in 1998. H responded by asserting that although a TNG was operational in Somalia, its authority was limited and confined to Mogadishu, the capital city.¹¹⁸ He claimed that the rest of the country was still under control of the warring factions. The Torture Committee rejected his argument. It held that State authority had been re-established in Somalia in the form of the TNG, “which has relations with the international community in its capacity as National Government, though some doubts may exist as to the reach of its territorial authority and its permanence.”¹¹⁹ In the Committee’s opinion, this case fell outside the *Elmi* exception.¹²⁰

d. *Lawful Sanctions*

Lastly, the act that leads to severe pain and suffering should not arise from “lawful sanctions.”¹²¹ Notably, CAT does not define or seek to interpret the term “lawful.” Nonetheless, the term could be taken to mean those acts that are permitted by the law. As the Australian High Court noted in the 1909 decision of *Bear v. Lynch*,¹²² a lawful act is one that is not forbidden by law.¹²³ Failure by CAT to define the phrase “lawful sanctions” leaves Article 1 open as to whether the sanctions must be lawful under international and/or domestic standards.¹²⁴ Prina

¹¹³ See generally *H.M.H.I.*, CAT/C/28/D/177/2001.

¹¹⁴ See *Y.H.A. v. Australia*, Comm. No. 162/2000, U.N. Comm. Against Torture, 27th Sess., ¶ 4.5, U.N. Doc. CAT/C/27/D/162/2000 (Mar. 27, 2002).

¹¹⁵ *U.S. v. Finland*, CAT, C/30/D/197/2002, ¶ 4.4.

¹¹⁶ *Y.H.A.*, CAT/C/27/D/162/2000, ¶ 4.5.

¹¹⁷ *Id.*

¹¹⁸ *Id.* ¶ 5.2.

¹¹⁹ *H.M.H.I.*, CAT/C/28/D/177/2001, ¶ 6.4.

¹²⁰ See *infra* Section 4.

¹²¹ CAT, *supra* note 12, art. 1.

¹²² (1909) 8 C.L.R. 592.

¹²³ *Id.* at 600, 603, 606.

¹²⁴ *Id.*

Sharvit, a one-time Judge Advocate General of the Israel Defence Forces, claims that only domestic standards must be satisfied.¹²⁵ This position is accurate to a certain extent. Both Article 2—requiring State Parties to make the necessary domestic arrangements to implement CAT—and Article 4—urging State Parties to ensure that “all acts of torture are offenses under its criminal law”—of CAT introduce national standards.¹²⁶

Article 4, however, should not be interpreted to mean that State Parties are granted liberty to pass legislation to legitimize what could otherwise amount to torture in light of domestic and international standards.¹²⁷ If this were the case, then the provision would have very little practical meaning and extremely limited application. While Article 4 only refers to domestic law, Article 1 also embraces international legal standards.¹²⁸ Support is found in the intention of the treaty, as expressed in its preamble, to ameliorate torture throughout the world and buttress the already existing international human rights law.¹²⁹ Arguably, the provision imports international human rights standards into the equation. In addition, Article 2(1) of CAT stipulates that Article 1 of the treaty is “without prejudice to any international instrument or national legislation which does not contain provisions of wider interpretation.”¹³⁰ Moreover, the principal that human rights transcend national borders is today generally accepted.¹³¹ As such, sanctions must be consistent with both international and domestic legal standards.

Neither Article 1 nor any other article in CAT attempts to define what would amount to “cruel, inhuman or degrading punishment.” The *travaux préparatoires* suggest that, owing to the vagueness of these terms, it was “impossible to find any satisfactory definition.”¹³² Consequently, each case is assessed on its own merits.

¹²⁵ Pnina Sharvit, *The Definition of Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*, 23 ISR. Y.B. HUM. RTS. 147, 169 (1994).

¹²⁶ CAT, *supra* note 12, arts. 2, 4.

¹²⁷ *See id.*, art. 4.

¹²⁸ *See id.*, arts. 1, 4.

¹²⁹ *See id.*, pmb.

¹³⁰ *Id.*, art. 2.1.

¹³¹ *See* UDHR, *supra* note 13, pmb. (recognizing the “inherent dignity and of the equal and inalienable rights of all members of the human family [as] the foundation of freedom, justice and peace in the world”).

¹³² BURGERS & DANIELIUS, *supra* note 29, at 122.

B. Preventing Torture

CAT imposes two important obligations upon State Parties. The first obligation is contained in paragraph 1 of Article 2 and requires State Parties to make formal and non-formal arrangements at the domestic level to prevent torture from occurring within the State and its territories.¹³³ It makes it mandatory for State Parties to undertake judicial and non-judicial measures that will eradicate torture. Notwithstanding its broad wording, this provision is crucial, as it not only seeks to prevent torture from occurring within the physical boundaries of a State but also in other territories under its mandate. Other territories include a State Party's territorial waters and exclusive economic zone, its excised migration zones, "ships flying its flag, and aircraft registered in the State concerned as well as platforms and other installations on its continental shelf."¹³⁴ In addition, paragraph 3 of Article 2 prohibits a perpetrator from invoking orders from a "superior officer" or "public authority" to justify acts of torture or other cruel or degrading treatment or punishment.¹³⁵ The paragraph was drafted against the background of the Nuremberg trials where junior officers raised the defence of superior orders to justify acts that could amount to torture or cruel, inhuman, or degrading punishment.¹³⁶ This is an important element in making the prohibition of torture effective; it pre-empts accused torturers from successfully pleading that they were not acting on their own volition in an effort to defeat the "intentionally inflicted" requirement of the torture definition.

Reinforcing paragraphs 1 and 3 is paragraph 2 of Article 2, which bars State Parties from derogating from the treaty.¹³⁷ In other words, the Convention bars State Parties from taking measures that are contrary to their obligations under the treaty. Unlike many human rights protection treaties, this prohibition is not limited to times of peace.¹³⁸

¹³³ CAT, *supra* note 12, art. 2.

¹³⁴ BURGERS & DANIELIUS, *supra* note 29, at 124.

¹³⁵ CAT, *supra* note 12, art. 2.

¹³⁶ Walter Rockler, who served as a prosecutor at the Nuremberg trials from 1947 to 1949, writes that "Nuremberg developed the doctrine that so-called superior orders may possibly serve as mitigation, but not as exoneration for war crimes." See Walter Rockler, *Judgments of Nuremberg: The Past Half Century and Beyond—A Panel Discussion of Nuremberg Prosecutors*, 16 B.C. THIRD WORLD L.J. 193, 209–12 (1996).

¹³⁷ CAT, *supra* note 12, art. 2.

¹³⁸ See, e.g., Organization of American States, The American Convention on Human Rights art. 27(1), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978) [hereinafter American Convention] ("In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take

Rather, it is an absolute right to be free from torture, from which there is no derogation, even on grounds of national security or local politics:

No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.¹³⁹

In 1993, the Torture Committee reiterated the terms of paragraph 3 of Article 2 during an inquiry it conducted against Turkey pursuant to Article 20 of CAT, which empowers the committee to inquire into acts of torture that are alleged to be committed in a State Party's territory.¹⁴⁰ The Torture Committee pointed out that "no exceptional circumstances whatsoever . . . , may be invoked as a justification of torture."¹⁴¹

C. *Refoulement*

International law guarantees every person who has been forced to flee her or his home State the right to seek and enjoy asylum in a another State. Article 14 of the UDHR provides that "everyone has the right to seek and to enjoy in other countries asylum from persecution."¹⁴² Child (persons under the age of eighteen) asylum seekers are also guaranteed this entitlement under the terms of the 1990 Convention on the Rights of the Child (CRC).¹⁴³ Article 22 of the CRC requires States to:

measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin."); European Convention for the Protection of Human Rights and Fundamental Freedoms art. 15(1), Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Aug. 3, 1953) ("In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.").

¹³⁹ CAT, *supra* note 12, art. 2.

¹⁴⁰ U.N. Comm. Against Torture, *Summary Accounts of the Results of the Proceedings Concerning the Inquiry on Turkey*, 14 HUM. RTS. L.J. 426, 428 (1993) (reproducing the text of the inquiry).

¹⁴¹ *Id.* at 428.

¹⁴² UDHR, *supra* note 13, art. 14.

¹⁴³ Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/RES/44/25 (Nov. 20, 1989), 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) [hereinafter CRC].

[T]ake appropriate measures to ensure that a child who is seeking refugee status . . . , whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments¹⁴⁴

Even so, there is no corresponding duty on State Parties to admit asylum seekers. States view such an obligation as an encroachment on their sovereignty. During the drafting of the Refugee Convention, the Canadian delegate was clear that, even if his country adopted the Refugee Convention, “its federal structure meant that the provincial authorities were sovereign in certain fields.”¹⁴⁵ In recent times, asylum States, such as Australia, while invoking sovereignty, have claimed that they have a right to decide whom to admit into their territory and to determine the terms under which those who are admitted are allowed to stay.¹⁴⁶ The reluctance to erode State sovereignty explains why States that adopted the Refugee Convention failed to embrace the 1967 Declaration on Territorial Asylum,¹⁴⁷ which sought to entrench the right to asylum in international refugee law.¹⁴⁸

The Refugee Convention provides for the right of *non refoulement*. Under this obligation, States are prohibited from expelling, returning (*refouler*), or extraditing a person to any territory where it is more likely than not that he or she could face torture. Articles 32 and 33 of the Refugee Convention provide for this prohibition.¹⁴⁹ Article 32 sets constraints on the ability of States to expel a refugee in their territory lawfully:

(1) The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

¹⁴⁴ *Id.* art. 22.

¹⁴⁵ Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Summary Record of the Third Meeting*, U.N. Doc. A/CONF.2/SR.3 at 17 (Nov. 19, 1951) (statement of Mr. Chance, Canada) [hereinafter *Summary Record of the Third Meeting*].

¹⁴⁶ See Edwin Odhiambo-Abuya, “A Place to Call Home:” *Temporary Asylum in Australia—Lessons for South Africa*, 15 *STELLENBOSCH L. REV.* 429, 431–32 (2004).

¹⁴⁷ Declaration on Territorial Asylum, G.A. Res. 2312 (XXII), U.N. Doc. A/6912 (Dec. 14, 1967).

¹⁴⁸ *Id.* art. 1.

¹⁴⁹ Refugee Convention, *supra* note 7, arts. 32, 33.

(2) The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.¹⁵⁰

Article 33 provides for the norm of *non refoulement*. It prohibits States from:

[E]xpel[ling] or return[ing] (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.¹⁵¹

These provisions are consistent with a proposal made by the Swedish delegate at the Conference of Plenipotentiaries.¹⁵²

Article 3 of CAT codifies the norm of *non-refoulement*.¹⁵³ This Article has no equivalent in the Torture Convention, and thus creates a significant addition to the international human rights protection framework. The wording of Article 3 draws explicitly on the language of Article 33 of the Refugee Convention, which prohibits State Parties from *refouling* asylum seekers to States where their lives would be threatened.¹⁵⁴

To reiterate, the appropriate test is whether it is more likely than not that a person will suffer torture if returned to a particular State. The crucial question is not whether there are substantial grounds “for believing that the applicant would *be tortured if* returned, but rather whether there are substantial grounds for believing that he or she

¹⁵⁰ *Id.* art. 32.

¹⁵¹ *Id.* art. 33.

¹⁵² The original Swedish amendment proposal reads:

No Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, *membership of a particular social group*, or political opinion, or *where he would be exposed to the risk of being sent to a territory where his life or freedom would thereby be endangered.*

See Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Item 6 of the Agenda*, U.N. Doc. A/CONF.2/70 at 1 (July 11, 1951) (emphasized language denotes amending language).

¹⁵³ CAT, *supra* note 12, art. 3.

¹⁵⁴ Refugee Convention, *supra* note 7, art. 33; CAT, *supra* note 12, art. 3.

would *be in danger of being tortured*.”¹⁵⁵ This position is consistent with the emerging jurisprudence from the Torture Committee.¹⁵⁶ At its 317th meeting, the Torture Committee issued its first General Comment to guide State Parties and individuals regarding the implementation of Article 3 within the context of the procedure envisaged in Article 22.¹⁵⁷ The General Comment interpreted the reference to “another State” in CAT’s Article 3 broadly. According to the General Comment, the phrase “another State” refers to “the State to which the individual concerned is being [transferred], as well as any State to which [he or she] may subsequently be expelled, returned or extradited.”¹⁵⁸

Article 3 requires that a decision on whether substantial grounds have been established be guided by, among others, an assessment of the general human rights situation of the country of return.¹⁵⁹ Factors to be taken into consideration include the existence in the State concerned of a consistent pattern of gross, flagrant, or mass violations of human rights.¹⁶⁰ This does not mean that a person is automatically immune from being transferred to a State with a poor human rights history. Nor does it mean that he or she is obviously returnable to a State with a good human rights record. As the Torture Committee has consistently maintained, one must adduce “additional grounds” to demonstrate that he or she “would be personally at risk.”¹⁶¹ Each case must be examined on its own merits, with the human rights pattern of a State remaining a weighty factor. Relevant considerations, according to the General Comment, include:

- Has the person been tortured or maltreated by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity in the past? If so, was this in the recent past?

¹⁵⁵ David Weissbrodt & Isabel Hörtreiter, *The Principle of Non-Refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of other International Human Rights Treaties*, 5 BUFF. HUM. RTS. L. REV. 1, 14 (1999).

¹⁵⁶ See, e.g., *Mutombo v. Switz.*, Comm. No. 13/1993, U.N. Comm. Against Torture, 12th Sess., ¶ 9.3, U.N. Doc. CAT/C/12/D/13/1993, (Apr. 27, 1994).

¹⁵⁷ U.N. Comm. Against Torture, *General Comment 1, Implementation of Article 3 of the Convention in the Context of Article 22: 21/11/97*, Annex IX, at 52, U.N. Doc. A/53/44 [hereinafter CAT General Comment].

¹⁵⁸ *Id.* ¶ 2.

¹⁵⁹ See CAT, *supra* note 12, art. 3.

¹⁶⁰ *Id.* art. 3(2).

¹⁶¹ *Y.H.A.*, CAT/C/27/D/162/2000, ¶ 7.2; *Khan*, CAT/C/32/D/15/1994, ¶ 12.2; *Mutombo*, CAT/C/12/D/13/1993, ¶ 9.3.

- Is there medical or other independent evidence to support a claim by the author that he/she has been tortured or maltreated in the past? Has the torture had after-effects?
- Has the internal situation in respect of human rights altered?
- Has the author engaged in political or other activity within or outside the State concerned which would appear to make him/her particularly vulnerable to the risk of being placed in danger of torture were he/she to be expelled, returned or extradited to the State in question?
- Is there any evidence as to the credibility of the author?
- Are there any factual inconsistencies in the claim of the author? If so, are they relevant?¹⁶²

Sources of information would include U.N. agencies, governments, non-governmental organizations, international and local human rights groups, domestic and international newspapers, and writings of observers.¹⁶³

Although the risk of torture must be assessed on grounds that go beyond mere theory or suspicion, the Torture Committee maintains that an individual, upon whom the burden rests,¹⁶⁴ does not have to show that the risk is highly probable.¹⁶⁵ If this was the case, it would be “contrary to the spirit” of CAT.¹⁶⁶ In fact, in certain respects, the Committee has been known to grant considerable latitude to applicants. For example, in the landmark decision of *Pauline Kisoki v. Sweden*, notwithstanding the contradictions and inconsistencies in the petitioner’s testimony, the Torture Committee still prohibited the State Party from returning the applicant to Zaire.¹⁶⁷ The Committee argued that “complete accuracy is seldom to be expected by victims of torture and that such inconsistencies as may exist in the author’s presentation of the facts are not material and do not raise doubts about the general verac-

¹⁶² CAT General Comment, *supra* note 157, ¶ 8.

¹⁶³ In *A.K. v. Australia*, for instance, the applicant relied on reports produced by Amnesty International (¶¶ 2.10 and 2.11), the U.N. Commission on Human Rights (¶ 4.13), the U.N. High Commissioner for Refugees (¶ 4.13), the Australian Federal Government (¶ 4.15) and the U.S. State Department (¶ 4.14). Comm. No. 148/1999, U.N. Comm. Against Torture, 32d Sess., ¶¶ 2.10, 2.11, 4.13, 4.15, U.N. Doc. CAT/C/32/D/148/1999 (May 11, 2004).

¹⁶⁴ This is based on the proposition that a person who alleges the existence or non-existence of a particular set of facts must prove those facts (the burden of proof is expressed in the Latin maxim: *ei incumbit probatio qui dicit, non qui negat*).

¹⁶⁵ CAT General Comment, *supra* note 157, ¶ 6.

¹⁶⁶ BURGERS & DANIELIUS, *supra* note 29, at 127.

¹⁶⁷ *Kisoki*, CAT/C/16/D41/1996, ¶ 10.

ity of the author's claims."¹⁶⁸ The danger of being subjected to torture, however, must be "foreseeable . . . real and personal."¹⁶⁹

II. STRENGTHS: CAT AND THE REFUGEE CONVENTION COMPARED

By way of comparison to international refugee law, CAT offers at least five significant advantages to refugees and asylum seekers with regard to the scope of protection, protected persons, the *refoulement* prohibition, the nexus requirement, and time considerations.

A. Scope

The first notable feature of CAT concerns its scope of protection. Many States have adopted and use the classic definition of refugee found in the Refugee Convention to assess claims lodged by those seeking asylum as refugees.¹⁷⁰ Under the Convention, the term "refugee" means any person who has fled her or his home State owing to a well-founded fear of persecution based on race, religion, nationality, membership of a particular social group, or political opinion.¹⁷¹ This definition does not explicitly include asylum seekers—persons seeking protection as refugees.¹⁷² However, unlike the refugee treaties, CAT is more general and targets a person who, for whatever reason, is in danger of being subjected to torture if handed over to another State.¹⁷³ Its scope thus extends to cases that involve asylum seekers. It is apparent, therefore, that the scope of CAT is more far-reaching than the *Refugee Convention*.

B. Excluded Persons

A second advantage CAT has over the Refugee Convention relates to categories of persons that are excluded from protection by the Convention. International refugee law excludes specific categories of per-

¹⁶⁸ *Id.* ¶ 9.3.

¹⁶⁹ *M.P.S. v. Australia*, Comm. No. 138/1999, U.N. Comm. Against Torture, 28th Sess., ¶ 7.5, U.N. Doc. CAT/C/28/D/138/1999 (Apr. 30, 2002); *Aemei*, CAT/C/18/D/34/1995, ¶ 9.5; *S.V.*, CAT/C/26/D/49/1996, ¶ 9.8.

¹⁷⁰ Refugee Act, 1996 §§ 2, 42 (Ir.), available at http://www.irishstatutebook.ie/1976_33.html; Immigration and Nationality Act, 8 U.S.C. § 1101(A)(42)(a) (2004); Refugees Act, Laws of Kenya, § 3(1) (2006).

¹⁷¹ Refugee Convention, *supra* note 7, art. 1(A)(2).

¹⁷² See Edwin Odhiambo-Abuya, *Revisiting Liberalism and Post-Colonial Theory in the Context of Refugee Applications*, 24 NETH. Q. HUM. RTS. 193, 214–18 (2006) (for further analysis of the distinction between "refugee" and asylum seeker).

¹⁷³ See *id.*

sons, regardless of whether they meet the criteria of refugee set forth in Article 1(A) of the Refugee Convention, so long as there are “serious reasons” for considering that they have engaged in criminal acts, in their State of origin or elsewhere, before entering a host State.¹⁷⁴ Before a claim is rejected because the applicant is alleged to have committed an offence, the claim is first considered in its entirety to determine whether the application has any merits. The rule is to exclude after this determination, not before.¹⁷⁵ A person against whom there is sufficient evidence to show that he or she has committed any of the following offenses is excluded from international protection:

- A crime against peace, a war crime, or a crime against humanity, as defined in international law;
- A serious non-political crime in their home or any transit State;
- Acts contrary to the purposes and principles of the United Nations.¹⁷⁶

Domestic legislation of many refugee-host States also recognizes these grounds of exclusion.¹⁷⁷

The Exclusion Clause has a dual purpose. Primarily, the Clause is intended to prevent fugitives who may have committed criminal offenses in their State of origin or in any other State from hiding as refugees and, thereby, defeating the course of justice. The *travaux préparatoires* to the Refugee Convention supports this view. In his speech to the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Sergije Makiedo, the Yugoslav representative, argued that the draft Refugee Convention was too narrow, and thus unacceptable, because the definition of the term “refugee”:

[E]xclude[d] persons who had committed crimes as defined in Article 14 (2) of the Universal Declaration of Human Rights or in Article 6 of the Charter of the International Military Tri-

¹⁷⁴ See Refugee Convention, *supra* note 7, art. 1(A).

¹⁷⁵ U.N. High Comm. for Refugees (UNHCR), *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, ¶¶ 28–31, U.N. Doc. HCR/IP/4/Eng/Rev.1 (Jan. 1992) [hereinafter *UNHCR Handbook*].

¹⁷⁶ Refugee Convention, *supra* note 7, art. 1(F); see also UDHR, *supra* note 13, art. 14(2) (The right to asylum “may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.”).

¹⁷⁷ See, e.g., Immigration Act 1987, 1987 S.N.Z. No. 74, § 129L; The Government of the United Republic of Tanzania, Bill Supplement, “The Refugees Act, 1998,” No. 6, Gazette of the United Republic of Tanzania No. 39, vol. 79, art. 4.

bunal. [Accordingly], notorious war criminals would continue to find protection in the territory of States Members of the United Nations.¹⁷⁸

A handbook published by the U.N. High Commissioner for Refugees (UNHCR) to guide officials during the refugee status determination proceedings explains that the Exclusion Clause was written into the Refugee Convention to prevent post-World War II criminals from gaining protection due to a host State's lack of territorial jurisdiction to prosecute.¹⁷⁹ In addition, the clause bars States from according refugee status and accompanying entitlements to certain persons, especially suspected criminals who might otherwise constitute a threat to national security.

In contrast, considering that it is silent towards the exclusion of persons generally, CAT differs significantly. As long as a person is able to satisfy the criteria of torture contained in Article 1, they can invoke the *non refoulement* protection. A survey of decisions handed down by the Torture Committee affirms this position.¹⁸⁰ This jurisprudence demonstrates that many claimants who seek protection under CAT have been involved in political activities in their home State.¹⁸¹ In fact, it is because of their political involvement that many seek sanctuary elsewhere, mostly in the West. In the context of refugee law, these claimants would fall within the "persecution for" category of the term "refugee" of the Refugee Convention.¹⁸²

Under CAT, this class of persons must establish that they are more likely than not to be subjected to danger if moved to the State where an offense is claimed to have been committed. In *Said Aemei v. Switzerland*,¹⁸³ *S.H. v. Norway*,¹⁸⁴ and *Gorki Paez v. Sweden*,¹⁸⁵ the applicants admitted that they had been involved in political and criminal activities in their home States. S, for instance, a member of the Ethiopian All-Amhara People's Organization, was in charge of propaganda and re-

¹⁷⁸ *Summary Record of the Third Meeting*, *supra* note 145, at 7.

¹⁷⁹ *UNHCR Handbook*, *supra* note 175, ¶ 147.

¹⁸⁰ *See generally*, e.g., *Mutombo*, CAT/C/12/D/13/1993; *U.S. v. Finland*, CAT/C/30/D/197/2002.

¹⁸¹ *See generally*, e.g., *Aemei*, CAT/C/18/D/34/1995; *Paez v. Sweden*, Comm. No. 39/1996, U.N. Comm. Against Torture, 18th Sess., U.N. Doc. CAT/C/18/D/39/1996 (Apr. 28, 1997); *S.H. v. Norway*, Comm. No. 121/1998, U.N. Comm. Against Torture, 23rd Sess., U.N. Doc. CAT/C/23/D/121/1998 (Apr. 19, 2000).

¹⁸² *See* Refugee Convention, *supra* note 7, art. 1(A).

¹⁸³ *See generally* *Aemei*, CAT/C/18/D/34/1995.

¹⁸⁴ *See generally* *S.H.*, CAT/C/23/D/121/1998.

¹⁸⁵ *See generally* *Paez*, CAT/C/18/D/39/1996.

cruitment, smuggling weapons, and organizing attacks to capture weapons and making arrangements for their distribution.¹⁸⁶ Aimei, an activist for the Iranian People's Mojahedin, confessed to throwing a Molotov cocktail into the house of a senior Iranian official.¹⁸⁷

In *Paez*, the Swiss Board of Immigration rejected the claimant's application for asylum because he had participated in serious non-political crimes in Peru, contrary to article 1F of the Refugee Convention and Chapter 3(2) of the 1990 Aliens Act.¹⁸⁸ This decision, which the Appeals Board affirmed, was based on Paez's admission that he distributed leaflets and handmade bombs that were used against the police during a demonstration in Peru.¹⁸⁹ In finding for the applicant, the Torture Committee underlined the absolute nature of CAT:

The Committee considers that the test of article 3 of [CAT] is absolute. Whenever substantial grounds exist for believing that an individual would be in danger of being subjected to torture upon expulsion to another State, the State party is under obligation not to return the person concerned to that State. The nature of the activities in which the person concerned engaged cannot be a material consideration when making a determination under article 3¹⁹⁰

Does this mean that "bad" refugees—those likely to be excluded from refugee protection on grounds of national security—can circumvent the criminal justice system by hiding under CAT? Considering that the primary goal of CAT is to combat torture, all potential victims are protected for as long as they are in danger of being subjected to torture, irrespective of a person's past conduct. As noted by the Swiss delegate at the drafting process, the "aim of the [Convention] was not to create new categories of victims."¹⁹¹ Even so, once it is established that a person is no longer at risk, he or she can be transferred to any State where it is alleged that an offense was committed for prosecution.

It must also be emphasised that a finding in favor of a failed asylum applicant under Article 3 of CAT in no way guarantees a person refugee

¹⁸⁶ *S.H.*, CAT/C/23/D/121/1998, ¶ 2.1.

¹⁸⁷ *Aimei*, CAT/C/18/D/34/1995, ¶¶ 2.1–2.2.

¹⁸⁸ *Paez*, CAT/C/18/D/39/1996, ¶ 2.3.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* ¶ 14.5.

¹⁹¹ BURGERS & DANIELIUS, *supra* note 29, at 49.

status or affects an asylum application. The question of whether or not a person should be granted asylum rests on a refugee-receiving State.

C. *Refoulement*

The third advantage relates to the norm of *refoulement*, which all treaties prohibit. In the context of refugee law, Article 33 of the Refugee Convention prohibits State Parties from expelling or returning refugees to States where they are likely to face the risks they originally fled.¹⁹² Although the Refugee Convention further prohibits States from making reservations on, among others, Article 33,¹⁹³ the general protection offered to refugees is nonetheless limited considering that States can derogate from this provision on grounds of national security. Article 32 of the Refugee Convention, which prohibits States from *refouling* refugees save for reasons of “national security or public order,” reinforces this provision.¹⁹⁴

In contrast, CAT prohibits States from derogating from Article 3 if a person satisfies the criteria set forth in Article 1.¹⁹⁵ Article 3 of the 1975 Torture Convention first established this rule:

Exceptional circumstances such as a state of war or a threat of war, internal political instability or any other public emergency may not be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment.¹⁹⁶

This prohibition is currently found in Article 2 of CAT, which provides:

No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.¹⁹⁷

Unlike refugee law, the *non-refoulement* provision in CAT is absolute and non-derogable, even for reasons of public emergency, and irrespective of a claimant’s criminal record. Therefore, under no exceptional cir-

¹⁹² Article 33 prohibits States from “expel[ling] or return[ing] (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” Refugee Convention, *supra* note 7, art. 33.

¹⁹³ Article 42(1) of the Refugee Convention provides that “at the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to” Article 33. *Id.* art 33.

¹⁹⁴ Refugee Convention, *supra* note 7, art. 32.

¹⁹⁵ CAT, *supra* note 12, arts. 1, 3.

¹⁹⁶ G.A. Res. 3452 (XXX), *supra* note 19, art. 3.

¹⁹⁷ CAT, *supra* note 12, art. 2 (emphasis added).

cumstances whatsoever is a State justified in returning a potential victim of torture to any State. The Torture Committee has consistently emphasised this position. In *Aemei*, for instance, it was underlined that:

[T]he protection accorded by article 3 of the Convention is absolute. Whenever there are substantial grounds for believing that a particular person would be in danger of being subjected to torture if he was expelled to another State, the State party is required not to return that person to that State. The nature of the activities in which the person engaged is not a relevant consideration in the taking of a decision in accordance with article 3 of the [CAT].¹⁹⁸

Similarly, in *Paez* the Torture Committee contended:

[T]he test of article 3 of the Convention is absolute. Whenever substantial grounds exist for believing that an individual would be in danger of being subjected to torture upon expulsion to another State, the State party is under obligation not to return the person concerned to that State. The nature of the activities in which the person concerned engaged cannot be a material consideration when making a determination under article 3 of the [CAT].¹⁹⁹

Because Article 2 of CAT covers any State, not merely an applicant's home State, State Parties to the treaty, or transit States, this gives CAT "potentially wide territorial scope."²⁰⁰ The legislative history of CAT suggests that the provision was written into the treaty in order to make the *refoulement* provision "more complete."²⁰¹ Worthy of note is that the grounds enumerated in Article 3 are examples of circumstances that might otherwise give rise to "public emergency."²⁰² Thus, other circumstances may be brought under this heading as long as an applicant can demonstrate that they fall within the general category of public emergency. The Torture Committee made this point in *Balabou Mutombo v. Switzerland*²⁰³ and *Khan v. Canada*,²⁰⁴ where it sought to prohibit Switzerland and Canada from returning failed asylum claimants

¹⁹⁸ *Aemei*, CAT/C/18/D/34/1995, ¶ 9.8.

¹⁹⁹ *Paez*, CAT/C/18/D/39/1996, ¶ 14.5.

²⁰⁰ ANKER, *supra* note 45, at 521–22.

²⁰¹ BURGERS & DANIELIUS, *supra* note 29, at 126.

²⁰² CAT, *supra* note 12, art. 3.

²⁰³ *See generally Mutombo*, CAT/C/12/D/13/1993.

²⁰⁴ *See generally Khan*, CAT/C/32/D/15/1994.

who had nonetheless demonstrated that they could suffer torture if repatriated.

In *Mutombo*, the applicant, a Zaire (now Democratic Republic of Congo (DRC)) national, alleged that he had suffered torture at the hands of Government officials because of his membership in a pro-democracy political party, Union pour la Démocratie et le Progres Social (UDPS).²⁰⁵ The applicant claimed that the UDPS had challenged the despotic rule of the late President Mobutu Sese Seko.²⁰⁶ The applicant alleged that he was subjected to electric shocks, beaten with a rifle, and that his testicles were bruised until he lost consciousness.²⁰⁷ He then fled to Switzerland and applied for asylum.²⁰⁸ His primary application to the Cantonal Office for Asylum Seekers was rejected on grounds of credibility. Subsequent appeals to the Federal Refugee Office and Commission of Appeal in Refugee Matters also failed, and he became at risk of deportation.²⁰⁹

The applicant's main assertion before the Torture Committee was that there was a real risk that he would suffer torture if returned to the DRC.²¹⁰ Responding to this allegation, Switzerland argued that the applicant had failed to satisfy the "substantial grounds for" test in Article 3(1) of the Swiss Aliens Act.²¹¹ Considering the generalized violations of human rights that had been reported in Zaire, Switzerland argued that to come under Article 3 the applicant had to show that he belonged to a particular group, that was confined to a particular territory, at whom the violations were directed.²¹² In short, the applicant had to show that a real risk existed that he could be subjected to torture. The Torture Committee found that there were substantial grounds for believing that the applicant would be in danger of being subjected to torture if returned to the DRC.²¹³ It drew on his political record and the serious human rights situation in Zaire, which various U.N. agencies had documented. These agencies included the Commission on Human Rights and special reports prepared by, among others, the Special Rapporteur on the Question of Torture.²¹⁴ In conclusion, the Committee

²⁰⁵ *Mutombo*, CAT/C/12/D/13/1993, ¶¶ 2.1, 2.2.

²⁰⁶ *Id.*

²⁰⁷ *Id.* ¶ 2.2.

²⁰⁸ *Id.* ¶ 2.3.

²⁰⁹ *Id.* ¶¶ 2.4–2.5.

²¹⁰ *Mutombo*, CAT/C/12/D/13/1993, ¶¶ 3.1, 3.2.

²¹¹ *Id.* ¶ 6.1.

²¹² *Id.* ¶¶ 6.2–5.

²¹³ *Id.* ¶ 9.6.

²¹⁴ *Id.* ¶ 9.5.

noted “that a consistent pattern of gross, flagrant, or mass violations does exist in Zaire and that the situation may be deteriorating.”²¹⁵ Accordingly, the Torture Committee held that returning the applicant to the DRC would constitute a violation of CAT Article 3. It also declared that Switzerland had an “obligation to refrain from expelling [the applicant] to Zaire, or any other country, where he runs a risk of being expelled or returned to Zaire or of being subjected to torture.”²¹⁶ An asylum seeker can only be returned when he or she is no longer in danger of being subjected to torture. In this respect, the scope of Article 33 of the Refugee Convention is much narrower than Article 3 of CAT.²¹⁷

D. Nexus Requirement

For an individual to be granted refugee status under the Refugee Convention, the alleged victim must demonstrate that he or she suffered persecution for “reasons of” any one of the five grounds enumerated in the treaty.²¹⁸ In *YHA v. Australia*,²¹⁹ for example, the petitioner’s asylum claim was rejected because he was unable to prove a nexus between the danger that he faced and his clan membership.²²⁰ Relief under CAT is not limited by a nexus requirement. A person only needs to establish the substantial likelihood of enduring severe mental pain or suffering inflicted by a public official if returned to another State. Cases like *Paez*,²²¹ *Aemei*,²²² and *Mutombo*²²³ support this proposition. This is a significant development because failure to connect persecution with any one of the five specified reasons has led, and continues to lead, to the rejection of otherwise meritorious asylum applications in various parts of the world.²²⁴

²¹⁵ *Mutombo*, CAT/C/12/D/13/1993, ¶ 3.1.

²¹⁶ *Id.* ¶ 10.

²¹⁷ See Refugee Convention, *supra* note 7, art. 33; CAT, *supra* note 12, art. 3.

²¹⁸ See Refugee Convention, *supra* note 7, art. 1(A)(2).

²¹⁹ *Y.H.A.*, CAT/C/27/D/162/2000, ¶ 8.

²²⁰ *Id.* ¶¶ 2.6–8.

²²¹ See *Paez*, CAT/C/18/D/39/1996, ¶ 5.2.

²²² See *Aemei*, CAT/C/18/D/34/1995, ¶ 9.5.

²²³ See *Mutombo*, CAT/C/12/D/13/1993, ¶ 9.3.

²²⁴ See *Applicant A and Another v. Minister for Immig. and Ethnic Affairs and Another* (1997) 142 A.L.R. 331 (Austl.); *Adan (Hassan Hussein) v. Sec’y of State for the Home Dep’t* (1999) 1 A.C. 293, 311 (U.K.); *Gomez v. Immig. and Naturalization Serv.*, 947 F.2d 660, 663–64 (2d Cir. 1991).

E. Assessment of Applications: Time Concerns

Refugee status applications and applications for relief under CAT are first heard and determined by a status assessment official or the Torture Committee, respectively.²²⁵ Generally, the adjudicating bodies apply the requisite legal tests to the evidence to determine whether a person meets the set criteria. Successful applicants are granted protection under both regimes.²²⁶ A major difference, however, exists with regard to failed claimants. Those asylum seekers whose claims are rejected under the refugee framework can challenge these decisions through an appeals process,²²⁷ which is available in most refugee-host States.²²⁸ In contrast, those whose claims are rejected by the Torture Committee have no further recourse.²²⁹ This Section focuses on the time spent to finalize asylum and torture applications. Figures 1 and 2 (below) are graphical representations of the procedures used to assess refugee and torture applications.

Applications lodged under the refugee framework involve more procedural steps than those filed under CAT.²³⁰ Consequently, it may take longer to obtain relief via the refugee route, especially in instances where a claim is rejected and an asylum seeker lodges an appeal. In many instances, the multi-layered asylum process has lengthened the road to relief for refugee applicants, as compared with that of those who seek protection under CAT. Table 1 below²³¹ compares and contrasts the (approximate) time it took to assess refugee and torture applications for a period of just over ten years, from 1993 to 2004. The data is drawn from claims lodged by failed asylum seekers who subsequently sought relief from the Torture Committee. For consistency purposes, the same claims are used and fourteen applications are analyzed.

²²⁵ See *infra* figures 1 and 2.

²²⁶ *Id.*

²²⁷ See *infra* figure 2.

²²⁸ See, e.g., Refugee Act, 1996 § 15 (Ir.) (establishing the Refugee Appeals Tribunal to “consider and decide appeals”); see also Regulations to the South African Refugees Act, Apr. 6, 2000, regs. 13, 14, available at <http://www.unhcr.org/cgi-bin/texis/vtx/rsd/rsddocview.pdf?tbl=RSDLEGAL&id=3affee564> (outlining the appeals process for claims for asylum lodged in South Africa).

²²⁹ See *infra* figure 1.

²³⁰ See *infra* figures 1 and 2.

²³¹ Data from fourteen applications outlined in table 1.

	Refugee Claims	Torture Applications
0–1 years	1 (<i>Elmi</i>)	3 (<i>GRB, Elmi, SA</i>)
1–2 years	5 (<i>SG, YHA, Villamar, RT, SA</i>)	6 (<i>Paez, HMHI, US, YHA, SH, RS</i>)
2–3 years	4 (<i>GRB, SH, HMHI, US</i>)	2 (<i>RT, BSS</i>)
3–4 years	1 (<i>RS</i>)	1 (<i>Villamar</i>)
4–5 years	2 (<i>SV, Paez</i>)	2 (<i>SV, SG</i>)
Above 5 years	1 (<i>BSS</i>)	0

What does the data suggest? Of the fourteen applications that came before the Torture Committee between 1993 and 2004, just under one-fifth (three applications, or twenty-one percent) were decided within one year. A much lower output of seven percent (one application) was recorded for refugee claims. According to the survey, the vast majority of asylum applications (twelve applications, or eighty-six percent) were handed down in between one and five years. Again, the Torture Committee posts a favorable outcome, as just over two-thirds (eleven applications, or seventy-eight percent) of the surveyed claims were assessed within these time lines. Lastly, whereas at least one asylum claim took over five years to finalize, none of the applications lodged in the Torture Committee fell into this category. This evidence suggests that the probability of receiving a decision, positive or negative, within one year under the CAT framework is almost three times higher than under the refugee regime. Additionally, the chances that a claim will be heard and determined within five years are lower under the refugee assessment framework. Moreover, it is highly unlikely for an application lodged with the Torture Committee to take more than five years to finalize. In sum, the data supports the argument that applications under the CAT regime are generally expedited, notwithstanding the fact that the Torture Committee meets only twice every year.²³²

²³² See U.N. High Comm'r for Hum. Rts., Committee Against Torture: Monitoring the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, available at <http://www.ohchr.org/english/bodies/cat/> (last visited Apr. 21, 2007) ("The [Torture] Committee meets in Geneva and normally holds two sessions per year consisting of a plenary (of three weeks in May and two weeks in November) and a one-week pre-session working group.").

III. LIMITATIONS: TORTURE CONVENTION AND INTERNATIONAL REFUGEE LAW

Within the CAT communication system, at least four shortcomings can be identified. These relate to the evidentiary threshold, the perpetrator of the act causing flight, the claim application process, and enforcement mechanisms.

A. Evidentiary Threshold

The evidentiary threshold or standard of proof that a petitioner should satisfy presents the first shortcoming associated with proceeding under CAT. To succeed under this treaty “*substantial grounds*” must be established.²³³ The original Swedish draft of the Torture Convention²³⁴ proposed that there should be *reasonable* grounds to believe that a person might be in danger of suffering torture and other cruel, inhuman, degrading inhuman, or degrading treatment or punishment.²³⁵ Under the terms of the present wording, there must be a “factual basis for [a person’s] position sufficient to require a response from the State party.”²³⁶ This could involve considering matters such as the human rights record of the State to which a person is to be transferred. The Torture Committee has consistently maintained that the mere possibility of a person being subjected to torture in their home State does not suffice to prohibit his or her return owing to incompatibility with the *non-refoulement* provisions of CAT.²³⁷ The Committee has also contended that the existence of a State’s consistent pattern of gross, flagrant, or mass violations of human rights does not constitute sufficient grounds for determining that a person would be in danger of being subjected to torture upon return to that State; additional grounds must exist that indicate that the individual concerned would be personally at risk.²³⁸ Conversely, the absence of a consistent pattern of gross violations of human rights does not mean that a person cannot be considered to be in danger of being subjected to torture in his or her specific

²³³ CAT, *supra* note 12, art. 3 (emphasis added).

²³⁴ U.N. Econ. & Soc. Council (ECOSOC), Comm. on Hum. Rts., *Draft International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc E/CN.4/1285 (Jan. 23, 1978).

²³⁵ *Id.* art. 4 (emphasis added).

²³⁶ CAT General Comment, *supra* note 157, ¶ 5.

²³⁷ *Paez*, CAT/C/18/D/39/1996, ¶ 6.4; *Mutombo*, CAT/C/12/D/13/1993, ¶ 6.3.

²³⁸ *Khan*, CAT/C/32/D/15/1994, ¶ 12.2. See generally *Y.H.A.*, CAT/C/27/D/162/2000, ¶ 7.2.

circumstances.²³⁹ Therefore, it is crucial for a person to adduce additional evidence that will sufficiently demonstrate that the risk he or she claims to face is real, personal, and foreseeable.

In *Mutombo*, for example, the claimant's profile was a key consideration in the assessment of his application.²⁴⁰ Factors that were noted included his ethnic background, alleged political affiliation, detention history, desertion from the army, and clandestine departure from the DRC.²⁴¹ Also considered were the gross human rights violations in which his home State was allegedly involved.²⁴² Reports from U.N. agencies like the Commission of Human Rights, the Special Rapporteur on the Question of Torture, and the Working Group on Enforced or Involuntary Disappearances were referred to in an effort to determine the prevailing human rights situation in the country.²⁴³ These sources illustrated a "consistent pattern of gross, flagrant or mass violations" of human rights that was unlikely to improve in the near future.²⁴⁴ After considering the evidence, including the fact that the DRC was not a party to CAT, the Torture Committee concluded that it was more likely than not that the applicant would suffer torture if returned to his home State.²⁴⁵

In *Y.H.A* and *H.M.H.I*, the Torture Committee rejected claims by Somali nationals because State authority had been re-established in Somalia in the form of the TNG.²⁴⁶ These decisions raise serious concerns. The first concern lies in the Committee's acknowledgement that there were still widespread violations of human rights in the country. In *Y.H.A.*, the Torture Committee recognized the "ongoing widespread violations of human rights in Somalia."²⁴⁷ In *H.M.H.I.*, the Committee noted "the existence in the [country] of a consistent pattern of gross, flagrant or mass violations of human rights."²⁴⁸ Granted, the Torture Committee has persistently maintained that the existence of human rights violations is *per se* insufficient to prove a claim. This brings us to the second concern, which relates to the doubts that the Torture Committee itself raised in *H.M.H.I* regarding the reach of the TNG's

²³⁹ *Y.H.A.*, CAT/C/27/D/162/2000, ¶ 7.2; *Khan*, CAT/C/32/D/15/1994, ¶ 12.2.

²⁴⁰ *Mutombo*, CAT/C/12/D/13/1993, ¶ 9.4.

²⁴¹ *Id.*

²⁴² *Id.* ¶¶ 9.3, 9.5.

²⁴³ *Id.* ¶ 9.5.

²⁴⁴ *Khan*, CAT/C/32/D/15/1994, ¶ 9.5.

²⁴⁵ *Mutombo*, CAT/C/12/D/13/1993, ¶¶ 9.6–10.

²⁴⁶ See *infra* notes 226–29 and accompanying text.

²⁴⁷ *Y.H.A.*, CAT/C/27/D/162/2000, ¶ 7.4.

²⁴⁸ *H.M.H.I.*, CAT/C/28/D/177/2001, ¶ 6.5.

territorial authority and its permanence. Considering the seemingly changed political circumstances, it is possible to distinguish *Y.H.A* and *H.M.H.I* from *Elmi*. Even so, it is still doubtful whether the applicants would have received effective protection if they were returned to their home State. It was averred in *H.M.H.I* that the applicant ought to have adduced “additional grounds” to show that he was “personally at risk.”²⁴⁹ However, the nature or content of the additional evidence required to prove a claim in such instances remains unclear. In fact, the Committee has so far failed to shed any light on this issue. Indeed, the practice of giving sufficient reasons for a decision promotes one of the fundamental requirements of due process, namely, the right to be heard (expressed in the maxim *audi alteram partem*).²⁵⁰ This approach is likely to benefit claimants and States alike, as well as the general human rights and refugee regimes.

As is the case with applications seeking relief under CAT, the burden of proof lies with the asylum seeker to demonstrate that he or she meets the definition of a refugee.²⁵¹ In contrast to the CAT relief regime, the threshold test of the Refugee Convention is ostensibly lower, and only requires proof on a balance of probability. According to the UNHCR, claimants only need to establish their claims to a “reasonable degree.”²⁵²

B. Perpetrator of Act Causing Flight

States are generally liable for acts of public administrators. In contrast, their duty in relation to acts committed by non-State officials is limited. States can only be held accountable when they fail to “exercise due diligence to prevent . . . injurious acts” committed by private actors.²⁵³ This brings us to the second limitation. Article 3 of CAT restricts application of the treaty to situations where a person is likely to face torture occasioned by public officials or any other person acting in the same capacity.²⁵⁴ This restriction is buttressed by Article 16 of

²⁴⁹ *Id.* ¶ 6.5.

²⁵⁰ ICCPR, *supra* note 22, art. 14; UDHR, *supra* note 13, art. 10.

²⁵¹ *UNHCR Handbook*, *supra* note 175, ¶ 196 (providing that the burden of proof “lies on the person submitting a claim”); *see also* Aliens Act, No. 301 § 97(4) (2004) (Fin.) (entitled “Asylum Investigation,” which requires a person applying for refugee status to “give the grounds on which he or she believes that the State in question is not safe for him or her”); Immigration Act 1987, 1987 S.N.Z. No. 74, § 129G(5) (“it is the responsibility of the claimant to establish the claim”).

²⁵² *UNHCR Handbook*, *supra* note 175, ¶ 42.

²⁵³ JENNINGS & WATTS, *supra* note 74, at 549.

²⁵⁴ CAT, *supra* note 12, art. 3.

CAT, which requires States to “undertake measures to prevent” torture by public officials “or any other person acting in a personal capacity.”²⁵⁵ Consequently, a person can be handed over to a State where there are high chances that they could face severe physical or mental suffering caused by private individuals or groups, unless it can be shown that the State was unwilling to control them.

There are several instances where the Torture Committee has rejected applications lodged by failed asylum applicants because private actors committed the alleged acts. Examples include *S.V.*,²⁵⁶ *Luis Chorlango v. Sweden*,²⁵⁷ and *G.R.B.*²⁵⁸ Chorlango, an Ecuadorian national, and S, a Tamil from the area of Jaffna in north Sri Lanka, sought asylum in Sweden and Canada respectively. Both alleged that they were at risk of torture at the hands of guerrilla groups, namely, *Fuerzas Armadas Revolucionarias del Ecuador-Defensores del Pueblo* (FARE-DP) (*Chorlango*) and LTTE (*S.V.*).²⁵⁹ S further claimed that his refusal to join LTTE made him a target of the movement.²⁶⁰ Similarly, in *G.R.B.*, G, a Peruvian national whose application for asylum was rejected by the Swedish authorities, claimed that members of *Sendero Luminoso* had raped and imprisoned her for several nights before she managed to escape.²⁶¹ Both G and Chorlango claimed that they had lodged complaints with the local police, but that no action was taken.²⁶² Sweden, the State Party involved in *GRB* and *Chorlango*, disputed these allegations. In *Chorlango*, it argued that “Ecuadorian authorities do not tolerate the activities of FARE-DP and that such activities were viewed as “criminal.”²⁶³ Stockholm also asserted that the claimant had failed to prove that Ecuadorian authorities were unable to protect him against FARE-DP.²⁶⁴ Canada espoused a similar line of argument in *S.V.* It was contended that Colombo, the capital of Sri Lanka, had taken “different measures. . .to investigate and prevent acts of torture.”²⁶⁵ For example, “all arrests and detentions [had to] be reported to the Human Rights Commission (es-

²⁵⁵ *Id.* art. 16.

²⁵⁶ *S.V.*, CAT/C/26/D/49/1996, ¶ 9.8.

²⁵⁷ *Chorlango v. Sweden*, Comm. No. 218/2002, Comm. Against Torture, 33d Sess., ¶ 5.2, U.N. Doc. CAT/C/33/D/218/2002 (Nov. 23, 2004).

²⁵⁸ *G.R.B.*, CAT/C/31/D/189/2001, ¶ 6.5.

²⁵⁹ *Chorlango*, CAT/C/33/D/218/2002, ¶ 2.1; *S.V.*, CAT/C/26/D/49/1996, ¶ 2.1.

²⁶⁰ *S.V.*, CAT/C/26/D/49/1996, ¶ 2.4.

²⁶¹ *Id.* ¶¶ 2.2, 2.5.

²⁶² *Id.* ¶ 4.3.

²⁶³ *Chorlango*, CAT/C/33/D/218/2002, ¶ 4.6.

²⁶⁴ *Id.*

²⁶⁵ *Id.* ¶ 7.13.

established in 1997) within 48 hours, . . . and a 24-hour service to deal with public complaints of instances of harassment by elements in the security forces ha[d] been established by the [Sri Lankan] Government.”²⁶⁶

The Torture Committee found in favor of the State Parties in all three instances. It noted that the national authorities did not condone or tolerate activities by terrorist or guerrilla groups.²⁶⁷ Hence, acts by these non-governmental entities fell “outside the scope of article 3”²⁶⁸ of CAT, unless such entities, as was the case in *Elmi*, exercised non-governmental authority over the territory to which the complainant would be returned.²⁶⁹ This narrow construction, according to some scholars, is the “most significant limitation”²⁷⁰ of CAT, especially considering the myriad acts of torture that non-State entities, like insurgent groups, commit. Accordingly, this restriction renders the scope of CAT narrower than refugee law, which recognizes that persecution can emanate from both the State and non-State entities. Paragraph 65 of the UNHCR Handbook,²⁷¹ entitled “agents of persecution,” provides:

Persecution is normally related to action by the authorities of a country. It may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned. . . . Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.²⁷²

²⁶⁶ *Id.*

²⁶⁷ See, e.g., *Chorlango*, CAT/C/33/D/218/2002, ¶ 5.2 (where it was noted that the applicant had “not disputed the State’s party allegation that the Ecuadorian authorities do not tolerate FARE-DP activities carried out in border areas of the country, which they regard as criminal and link to a series of kidnapping and murder cases”).

²⁶⁸ *G.R.B.*, CAT/C/31/D/189/2001, ¶ 6.5; *Chorlango*, CAT/C/33/D/218/2002, ¶ 5.2; *S.V.*, CAT/C/26/D/49/1996, ¶ 9.5.

²⁶⁹ See *Chorlango*, CAT/C/33/D/218/2002, ¶ 5.2.

²⁷⁰ Kristen Rosati, *The United Nations Convention Against Torture: A Self-executing Treaty that Prevents the Removal of Persons Ineligible for Asylum and Withholding of Removals*, 26 *DENV. J. INT’L. L. & POL’Y* 533, 538 (1998).

²⁷¹ *UNHCR Handbook*, *supra* note 175, ¶ 65.

²⁷² See also *R v. Secretary of State for the Home Department, Ex parte Adan, R v. Secretary of State for the Home Department, Ex parte Aitseguer* (2001) 2 A.C. 477 (where the House of Lords found that returning asylum seekers to France and Germany, where they had stayed on the way to the United Kingdom, would constitute *refoulement* because those States did not recognize persecution from non-State authorities).

C. Application Process

Thirdly, although the system of individual petitions is designed to operate as an instrument of enforcement by which victims of torture can seek international protection against their defaulting Governments, the Torture Committee is empowered to entertain petitions only when a State recognizes its jurisdiction. Drawing on the language of earlier international human rights treaties, especially the 1976 ICCPR,²⁷³ Article 22(1) of CAT states:

A State Party . . . may at any time declare . . . that it recognizes the competence of the [Torture] Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the [Convention]. No communication shall be received by the Committee if it concerns a State Party to the [Convention] which has not made such a declaration.²⁷⁴

As of January 1, 2006, fifty-four States had accepted the competence of the Torture Committee under Article 22 of CAT.²⁷⁵ Thus, individual petitions can only be received and heard by the Torture Committee against these States. Conversely, the Torture Committee can neither receive nor hear individual petitions against the remaining 138 States (seventy-two percent) that have not recognized its mandate.

This optional procedure allows State Parties to withdraw a declaration "at any time"²⁷⁶ without prejudicing matters that are already in the adjudication process.²⁷⁷ John Kidd writes that the weakness of CAT in

²⁷³ According to Article 41(1) of the ICCPR:

A State Party . . . may at any time declare . . . that it recognizes the competence of the [Human Rights] Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the [ICCPR]. Communications . . . may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the [Human Rights] Committee. No communication shall be received by the [Human Rights] Committee if it concerns a State Party which has not made such a declaration.

ICCPR, *supra* note 22 art. 41(1).

²⁷⁴ CAT, *supra* note 12, art. 22(1).

²⁷⁵ U.N. High Comm'r for Hum. Rts., Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Ratifications and Reservations, <http://www.ohchr.org/English/countries/ratification/9.htm#reservations> (last visited Apr. 24, 2007).

²⁷⁶ CAT, *supra* note 12, art. 21, ¶ 2.

²⁷⁷ *Id.* art. 22, ¶ 8.

this regard is “hardly surprising.”²⁷⁸ He contends that the weak enforcement provisions are “a reflection of jealously guarded national sovereignty and a consequent reluctance, at a general international level, to permit international legal intervention in matters considered to be within a State’s domestic jurisdiction.”²⁷⁹

This creates yet another fundamental weakness in CAT because States can ignore the mandate of the Torture Committee, the focal point of the CAT operational mandate. For example, following the decision in *Elmi*, the Australian Federal Government in its 2000 report to the Torture Committee expressed concern “about increasing resort” to CAT by unsuccessful asylum-seekers, “apparently in an effort to delay their removal” from the country.²⁸⁰ Further, it argued that “in nearly all cases such people have had their claims under the Refugee Convention, [CAT] and [ICCPR] exhaustively considered by domestic processes, and had utilized multiple layers of review.”²⁸¹ It concluded that in the future, “it will closely examine each request from interim measure rather than automatically complying” with them.²⁸² In many ways Australia’s reaction to *Elmi* affirms Lippman’s thesis that “a stark contradiction . . . continues to exist between the recognition that freedom from torture is a fundamental human right and the international community’s deference to state sovereignty.”²⁸³ While comparing fundamental rights such as the right to life or prohibition against slavery, Sharvit describes the prohibition against torture as one of the “most fundamental rights.”²⁸⁴ The fundamental point that Australia missed in *Elmi* is that the protection against torture is a fundamental human right that all democratic States should combat, not encourage.

Peder Magee describes this limitation as a “severe blow to [CAT] ability to function.”²⁸⁵ Arriving at the decision to withdraw a declaration could be influenced by several factors, including how a State interprets any decision of the Torture Committee. This is crucial, especially considering that a vast majority of its verdicts have centered on prohibiting

²⁷⁸ John Kidd, *Torture and International Law: A Note on Recent Developments*, 15 U. QUEENSLAND L.J. 228, 234 (1989).

²⁷⁹ *Id.*

²⁸⁰ U.N. Comm. Against Torture, *Summary record of the first part (public) of the 444th meeting: Australia*, ¶ 16, U.N. Doc. CAT/C/SR.444 (Nov. 21, 2000).

²⁸¹ *Id.*

²⁸² *Id.* ¶ 17.

²⁸³ Lippman, *supra* note 110, at 325.

²⁸⁴ Sharvit, *supra* note 125, at 147.

²⁸⁵ Peder Magee, *The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 25 GEO. WASH. J. INT’L L. & ECON. 807, 838 (1992).

States from *refouling* asylum seekers facing deportation owing to failed refugee claims. Moreover, provisions such as Article 22 would be an incentive to those State Parties that have poor human rights records to invoke and thereby remove themselves from CAT international scrutiny.²⁸⁶ Alternatively, some States may hesitate to become party to CAT or specific provisions, such as Article 22, thereby circumventing the intended effect of the treaty.

In addition to the requirement that petitions can only be entertained against those States that have agreed to be subject to the jurisdiction of the Torture Committee, individual claimants are required under the terms of the well-known international rule to exhaust all available domestic remedies before an application can be declared admissible.²⁸⁷ Notably, availability connotes accessibility. Thus, in practice, claimants must proceed to the highest or last decision maker in the hierarchy of courts and tribunals from which they would have obtained an effective remedy. As Figure 2 shows, multiple procedures guide the refugee review process.

Generally, a refugee status determination official first hears asylum applications and decides whether the claimant is a person who meets the definition of refugee in the Refugee Convention.²⁸⁸ An asylum seeker must demonstrate that he or she fled their home State owing to “a well-founded fear” of persecution in their home State based on “race, religion, nationality, membership of a particular social group or political opinion.”²⁸⁹ It is reasonable to assume that in objective legal systems decisions will be based on the facts that are presented and arguments that the parties advance. If it is established that an individual faces persecution for one of the Refugee Convention reasons, the next line of inquiry involves determining if he or she is a genuine asylum seeker or a “bad” refugee that ought to be excluded. Those applicants who meet the refugee definition, and are able to show that there is no reason to exclude them from protection, are granted refugee status.²⁹⁰ On the other hand, those claims that fail to meet these criteria are rejected.²⁹¹

²⁸⁶ See CAT, *supra* note 12, art. 22.

²⁸⁷ *Id.* art. 22(5)(2) (providing that “[t]he [Torture] Committee shall not consider any communication from an individual under this article unless it has ascertained that: 2. The individual has exhausted all available domestic remedies.”)

²⁸⁸ See *infra* figure 2.

²⁸⁹ This is pursuant to Article 1(A)(2) of the Refugee Convention.

²⁹⁰ See *infra* figure 2.

²⁹¹ See *id.*

Rejected applicants can appeal their cases to the requisite appellate court or tribunal.²⁹² The first appellate decision-maker can either affirm or set aside the primary decision.²⁹³ If the latter option is exercised, the matter is returned to the official who heard the initial application for reconsideration in accordance with the terms outlined by the appellate court or tribunal.²⁹⁴ Dissatisfied parties can lodge further appeals (usually before courts).²⁹⁵ Like the first appellate body, its second counterpart may affirm or set aside the primary decision. Rejected asylum seekers at this stage become liable to deportation.²⁹⁶ Their successful counterparts are returned to the original decision maker.²⁹⁷ Although a court is the final arbiter in the judicial hierarchy, rejected claimants in some States have a last chance to plead their case after exhausting the judicial machinery. For example, in Australia²⁹⁸ and Canada,²⁹⁹ failed refugee claimants can appeal their cases to the Immigration Minister on compassionate and humanitarian grounds. In situations where discretionary remedies for failed applicants exist, these, too, must be invoked because they are also an effective form of domestic relief.

The exhaustion of all available domestic remedies rule reiterates provisions of international human rights law. For example, like CAT, the ICCPR states:

The [Human Rights] Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the mat-

²⁹² *See id.*

²⁹³ *See id.*

²⁹⁴ *See id.*

²⁹⁵ *See infra* figure 2.

²⁹⁶ *See id.*

²⁹⁷ *See id.*

²⁹⁸ Section 417 of the Migration Act 1958 empowers the Immigration Minister on grounds of “public interest” to “substitute for a decision” of the Refugee Review Tribunal “another decision, being a decision that is more favourable to the applicant.” Migration Act, 1958, § 417 (Austl.). Also, section 501J states that “[i]f the Minister thinks that it is in the public interest to do so, the Minister may set aside an [Administrative Appeals Tribunal] protection visa decision and substitute another decision that is more favourable to the applicant in the review.” *Id.*

²⁹⁹ Section 25(1) of the 2001 Immigration and Refugee Protection Act allows the Canadian Immigration Minister, on application or on his or her own volition, to grant an asylum seeker “permanent resident status or an exemption from any applicable criteria or obligation of [the] Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.” Immigration and Refugee Protection Act, S.C. 2001, ch. 27, § 25(1) (2001).

ter, in conformity with the generally recognized principles of international law.³⁰⁰

Similarly, Article 11(3) of the 1966 International Convention on the Elimination of All Forms of Racial Discrimination (ICEFRD)³⁰¹ is clear that applications will be entertained once “all available domestic remedies have been invoked and exhausted.”³⁰² The remedies to be exhausted are those established by municipal law.

In terms of scope, the remedies to be exhausted under CAT are those established by municipal law as well. Two exceptions to the rule exist. First, in instances where the application for domestic remedies is unreasonably lengthy, Article 22(5)(2) of CAT creates an exception.³⁰³ Like the ICCPR and the ICEFRD, it states that the rule of local remedies, as it is sometimes referred to as, is inapplicable “where the application of the remedies is unreasonably prolonged.”³⁰⁴ Thus, the rule of local remedies is inapplicable to situations where a person is unable to receive quick and efficient adjudication. Claimants bear the burden of showing that they are unable to receive quick and efficient adjudication. This exception recognizes the natural law maxim that justice delayed is justice denied. The test seems to be one of time, rather than one of access to “procedural facilities.”³⁰⁵ In light of the universal and unique nature of claims that come before the Torture Committee, few would deny that it is unattainable to lay a common standard regarding undue delay in the administration of justice. Hence, again, each case will have to be determined on its own merits.

The exhaustion of local remedies also requires a person to have recourse to the available substantive remedies for the object sought. Accordingly, and in contrast to ICEFRD and ICCPR, the local remedies rule under CAT is inapplicable in situations where it seems unlikely that invoking the domestic legal framework will bring any effective relief to a claimant.³⁰⁶ In *Bouabdallah Ltaief v. Tunisia*,³⁰⁷ the Torture

³⁰⁰ ICCPR, *supra* note 22, art. 41(1)(c).

³⁰¹ International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) [hereinafter ICEFRD].

³⁰² *Id.* art. 11(3).

³⁰³ CAT, *supra* note 2, art. 22(5)(2).

³⁰⁴ Article 41(c) of the ICCPR and 11(3) of the ICEFRD provide that this rule does not apply where the procedure for invoking the remedies is “unreasonably prolonged.” ICCPR, *supra* note 22, art 41(c); ICEFRD, *supra* note 301, 11(3).

³⁰⁵ JENNINGS & WATTS, *supra* note 74, at 549.

³⁰⁶ CAT, *supra* note 12, art. 22(5)(b).

³⁰⁷ *Ltaief*, CAT/C/31/D/189/2001, ¶ 7.2.

Committee admitted Ltaief's application, even though he had not exhausted all local remedies, because it was apparent that domestic remedies were unavailable or an obviously futile means of recourse. Citing the Tunisian Statute of Limitations, the Torture Committee primarily considered that the alleged acts of torture or cruel, inhuman, or degrading treatment were barred by statute. Further, and more importantly, it was noted that, although the claimant had long before lodged complaints with the local authorities, there was hardly any evidence to suggest that the State had taken any "voluntary" investigations in relation to the allegations contained in the complaint.³⁰⁸ Accordingly, the Torture Committee concluded that it was "very unlikely" in these circumstances that Ltaief "would obtain" any relief by exhausting local remedies.³⁰⁹

In contrast, the Refugee Convention does not contain similar provisions, and the chances of facing problems of this nature are altogether removed. Moreover, it is now generally accepted that the norm of *refoulement* has attained the status of customary international law³¹⁰—that is, law that has evolved from the practice and customs of States.³¹¹ Thus, all States, irrespective of whether they are party to the international refugee treaty, are required to refrain from returning persons to places where their lives are at risk.

D. Enforcement Mechanisms

The last limitation relates to CAT enforcement mechanism, which is greatly limited and restrictive in comparison to the Refugee Convention. Aside from the temporary protection that could be offered to refugees and asylum seekers via its *non-refoulement* provisions, there is little that the Torture Committee can do upon finding torture since it is a monitoring body with declaratory powers only. In *Amei*, the Torture Committee made clear that "finding of a violation under article 3 has

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ Nils Coleman, *Non Refoulement Revised Renewed Review of the Status of the Principle of Non Refoulement as Customary International Law*, 5 EUR. J. MIGRATION & L. 23, 23 (2003); Edwin Odhiambo-Abuya, *Past Lessons, Future Insights: African Asylum Law in Historical Perspective*, 19 INT'L J. REFUGEE L. (forthcoming 2007).

³¹¹ See *North Sea Continental Shelf* (F.R.G. v. Den.; F.R.G. v. Neth.), Judgment, 1969 I.C.J. 3 (Feb. 20).

declaratory character."³¹² Thus, States are not "required to modify [their] decision(s) concerning the granting of asylum."³¹³

Additionally, where a person fails to demonstrate that he or she is likely to suffer torture if repatriated to his or her home State, the Torture Committee only goes as far as stating that the applicant has failed to prove "torture" and that their removal will not constitute a breach of Articles 3 or 16. It leaves the next line of action to the State involved without making further recommendations for removal.

This gap in the law has created room for some refugee-receiving States to make a wide range of proposals regarding return of failed asylum claimants. In *H.M.H.I.*, for example, Australia made a curious recommendation. They offered to return the applicant, a failed asylum seeker from Somalia, to Kenya from where he was expected to find his way "to a stable area" of his "choice" in Somalia using the UNHCR voluntarily repatriation program.³¹⁴ It is unclear from the evidence whether the Australian Government had sought and, indeed, received permission from Nairobi allowing the applicant entry into Kenya. Aside from noting the undesirability of removing the applicant to another State and expecting him to repatriate to his home State, there is very little that the Torture Committee can do to ensure that a failed applicant is actually returned to a safe place in the relevant home State.

On the other hand, unlike the protection provided by CAT, international refugee law offers permanent or durable solutions, such as resettlement in third States and local integration, in addition to the *non-refoulement* prohibition. Figures 1 and 2 below are representations of enforcement mechanisms under CAT and the Refugee Convention respectively.

³¹² *Aemei*, CAT/C/18/D/34/1995, ¶ 11.

³¹³ *Id.*

³¹⁴ *H.M.H.I.*, CAT/C/28/D/177/2001, ¶ 4.11.

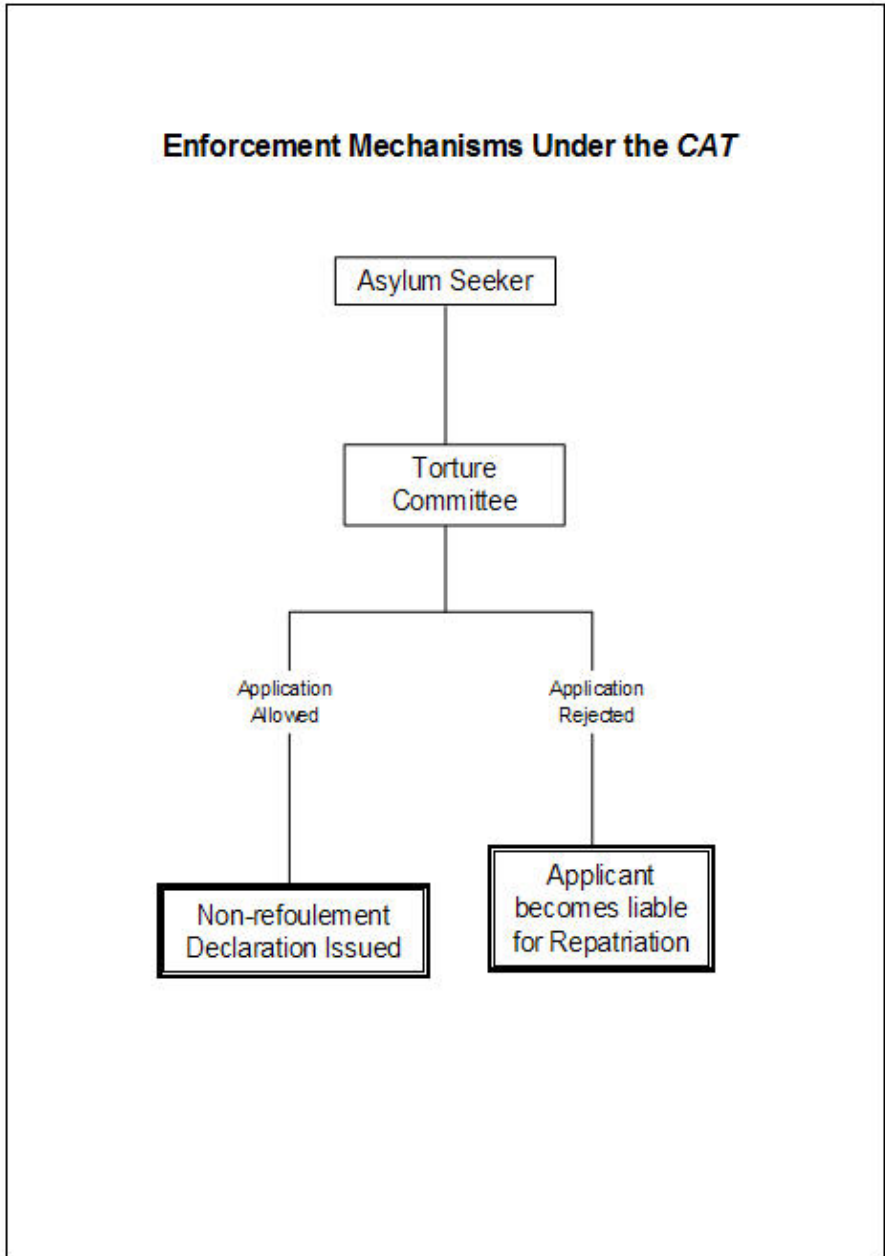


Figure 1

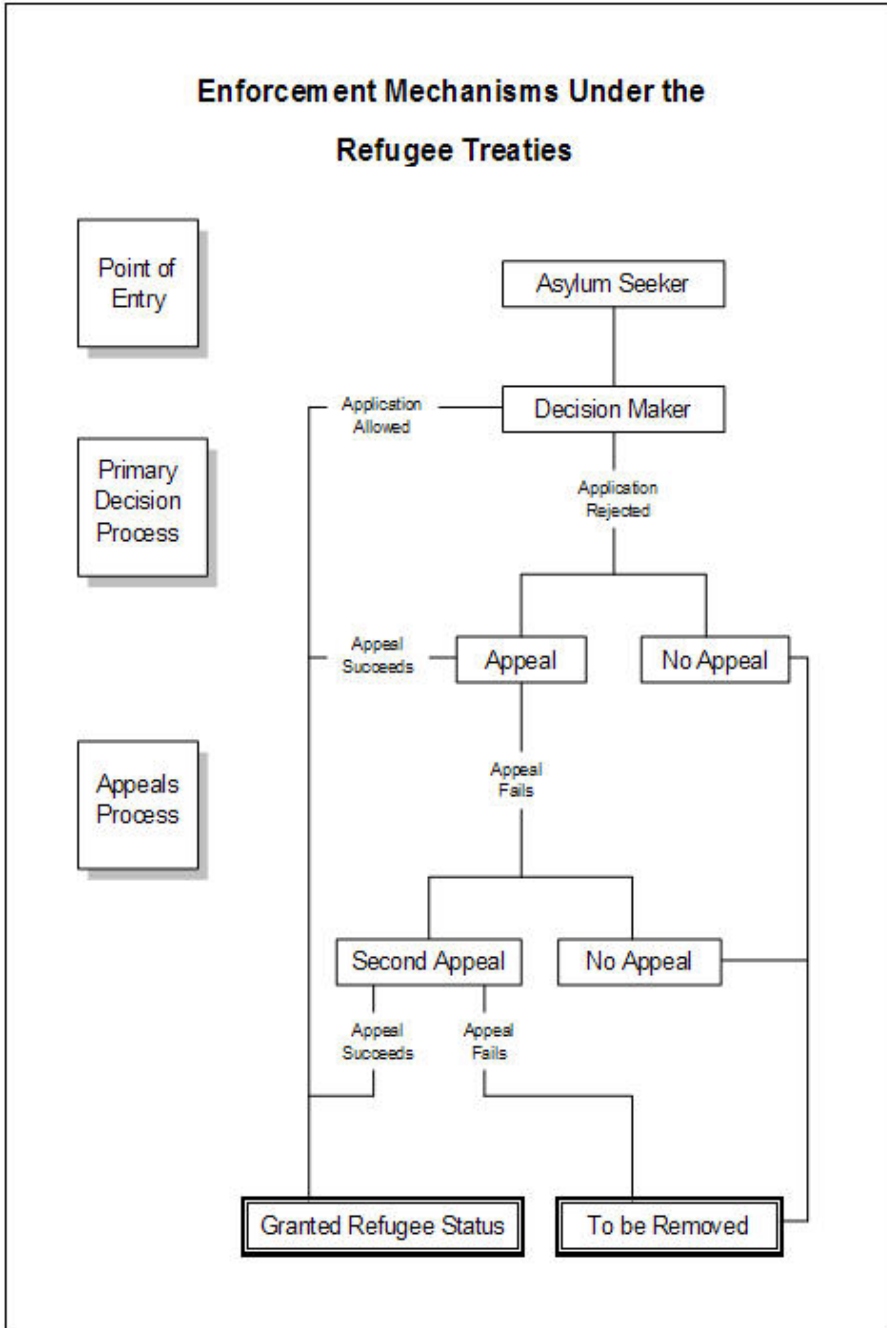


Figure 2

E. CAT and Refugee Convention Compared and Contrasted

Table 2 below compares and contrasts the nature of protection under CAT and the Refugee Convention.

	CAT	Refugee Treaty
Scope of protection	Targets persons generally (includes refugees and asylum seekers).	Persons must be formally determined to be “refugee.”
Excluded persons	None.	“Bad” refugees.
<i>Refoulement</i> provision	Absolute, non-derogable.	Derogable on grounds of national security.
Relief	No nexus requirement.	Nexus— “for reasons of” —requirement.
Time to assess claims	Generally shorter.	Longer.
Evidentiary threshold	“Substantial” grounds.	Balance of probability.
Perpetrator	State actors.	State and non-State actors.
Application process	State must recognise competence of Torture Committee before individual petitions are filed.	Claims directly lodged with third States.
Enforcement Mechanisms	Limited to opinions.	Durable solutions.

CONCLUSION: LOOKING TO THE FUTURE

The preceding analysis demonstrates that the protection regime of CAT is wider than that of the Refugee Convention regarding issues relating to scope of protection, excluded persons, relief, and the *refoulement* provision, as well the time taken to consider applications. The international torture regime, however, is narrower than its asylum counterpart in relation to the evidentiary threshold, questions surrounding perpetrators of acts alleged to constitute torture, the application process, and enforcement mechanisms. Drawing on the advantages of CAT over the Refugee Convention, it is arguable that in many respects, CAT provides complementary protection to asylum seekers displaced by torture.

This is not to infer that CAT should replace the Refugee Convention. Rather, in order to protect effectively victims of torture who have been forced to seek sanctuary elsewhere, the two instruments should reinforce one another. CAT should be seen as an effective tool rather than a hindrance. Practice shows that this wider approach has been embraced in some States. For example, the Canadian Supreme Court has argued that “underlying the [Refugee] Convention is the international community’s commitment to the assurance of basic human rights

without discrimination.”³¹⁵ Accordingly, if a humanitarian approach to the plight facing those seeking asylum as refugees is favored, it is apparent that receiving States must adopt measures that seek to reinforce, rather than dilute, the already struggling asylum regime.

The idea of having a Torture Committee to monitor the eradication of torture globally is a sound one. However, its mandate and operation, and hence CAT, is significantly hampered by the requirement that communications relating to the violation of the treaty can only be considered against States that have recognized the Committee’s jurisdiction. Recently, in December 2002, the international community adopted an Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Optional Protocol)³¹⁶ to reinforce the Torture Committee’s operational mandate. In particular, the Optional Protocol established a Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment³¹⁷ to carry out regular visits to places where people are deprived of their liberty, such as prisons, and to explore preventive measures at a domestic level.³¹⁸ If the number of States that have signed or become party to this treaty is something to rely on, it shows a commitment by members of the international community to combat torture and other inhuman treatment.³¹⁹ This is an essential step toward fortifying the international human rights and refugee regimes. Notably, regional human rights treaties³²⁰ and inter-

³¹⁵ *Ward v. Canada*, [1993] 2 S.C.R. 689, ¶ 71 (Can.).

³¹⁶ G.A. Res. 57/199, U.N. Doc. A/Res/57/199 (Jan. 9, 2003) [hereinafter *Optional Protocol to CAT*].

³¹⁷ *See id.* art. 2(1).

³¹⁸ Article 4(1) of the *Optional Protocol to CAT* requires each State party to:

[A]llow visits . . . to any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence (hereinafter referred to as places of detention). These visits shall be undertaken with a view to strengthening, if necessary, the protection of these persons against torture and other cruel, inhuman or degrading treatment or punishment.

Optional Protocol to CAT, *supra* note 316, art. 4(1).

³¹⁹ As of November 1, 2006, fifty-four states are signatories and twenty-eight states are parties to the *Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. See Office of the United Nations High Commissioner for Human Rights, *Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Ratifications and Reservations*, http://www.ohchr.org/english/countries/ratification/9_b.htm (last visited Feb. 5, 2007).

³²⁰ *See African (Banjul) Charter on Human and Peoples’ Rights* art. 5, June 27, 1981, OAU Doc. CAB/LEG/67/3; *American Convention*, *supra* note 138, art. 3; *European Con-*

national humanitarian law³²¹ recognize the prohibition against torture and inhuman treatment.

A State's subscription to the wide range of international instruments does not guarantee protection to those in need. The future of CAT depends on States taking practical steps to translate the provisions of international law into real rights. Meeting international obligations requires States to undertake good faith measures that will guarantee the enjoyment of rights to citizens and strangers alike. The negative duty of States in relation to torture means that they should refrain from engaging in acts that could constitute torture and or cruel, inhuman, or degrading treatment. Thus, the diplomatic assurances that the United Kingdom and the United States are said to have entered into with Lebanon,³²² as well as with Egypt³²³ and Syria,³²⁴ to allow for the return of persons suspected of terrorist activities is a step in the wrong direction in the global fight against torture.

Granted, Beirut, Cairo, and Damascus are said to have promised that returnees will be protected from torture or cruel, inhuman, or degrading treatment. Nevertheless, these agreements raise serious concerns. Primarily, the ability of London or Washington to effectively monitor or enforce these assurances remains questionable. Additionally, because these States are known to systematically practice torture,³²⁵ it is doubtful whether these agreements can provide returnees with an adequate guarantee of safety. Curiously, in its 2005 report, the U.S. De-

vention for the Protection of Human Rights and Fundamental Freedoms art. 3, Feb. 1, 1989, Europ. T.S. No. 126.

³²¹ The following Geneva Conventions have Article 3 in common. *See, e.g.*, Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 75 U.N.T.S. 287; *see also* Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 75, June 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Convention, 12 August, 1949, Relating to Protection of Victims of International Armed Conflicts (Protocol II) art. 4, June 8, 1977, 1125 U.N.T.S. 609.

³²² *See* Richard Norton-Taylor, *After the Bombs: Talks on "No Torture" Deals Hit Delays*, GUARDIAN, Aug. 25, 2005, at 6.

³²³ *See* Stephen Milan, *U.S. Agents "Kidnapped Militant" for Torture in Egypt*, SUNDAY TIMES (U.K.), Feb. 6, 2005, at 8.

³²⁴ *See* James Gordon, *U.S. Judge Rejects Canadian's Suit over Deportation to Syria*, CALGARY HERALD, Feb. 17, 2006, at A4.

³²⁵ *See, e.g.*, Amnesty International, 2005 International Report on Lebanon, Egypt and Syria, available at <http://web.amnesty.org/report2005/index-eng>.

partment of State described the human rights record of both Egypt and Lebanon as awful.³²⁶ As the Torture Committee³²⁷ and regional courts like the European Court of Human Rights³²⁸ have stressed, procurement of a diplomatic assurance with a government that has a well-documented record of torture offers very little protection against future violations. The historical record affirms this position.³²⁹ Further, it is arguable that these agreements sanction the use of torture or inhuman treatment. Moreover, entering into such agreements is inconsistent with President George W. Bush's claim that it is the policy of his Administration to "neither torture suspects nor deliver them to countries where they are likely to be tortured,"³³⁰ and Prime Minister Tony Blair's statement that the United Kingdom "utterly condemn[s] torture in every set of circumstances."³³¹ In sum, policies such as these are likely to severely compromise the system of protection of those fearing torture at home.³³²

Few would deny that CAT and its Optional Protocol cannot totally eradicate torture. Even so, they can add necessary impetus to an ongoing fight. We find ourselves in a world in which the self-proclaimed champions of human rights and democracy, like Australia, the United States, and the United Kingdom, have been implicated in acts of torture or inhuman treatment in the wake of the "war on terrorism."³³³

³²⁶ See Bureau of Democracy, Human Rights, and Labor, 2005 Country Reports on Human Rights Practices, available at <http://www.state.gov/g/drl/rls/hrrpt/2005/c17095.htm> (noting that the Egyptian rights record is "poor" and the Lebanese record is "problematic").

³²⁷ *Agiza v. Sweden*, Comm. No. 233/2003, U.N. Comm. Against Torture, 34th Sess., ¶ 13.4, U.N. Doc. CAT/C/34/D/233/2003 (May 20, 2005) (noting that "[t]he procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against [the] manifest risk" that the claimant faced).

³²⁸ *Chahal v. United Kingdom*, 23 Eur. Ct. H. R. 413, 463 (1997) (where the European Court of Human Rights argued that it was "not persuaded that the [diplomatic] assurances [between the United Kingdom and India] would provide Mr. Chahal with an adequate guarantee of safety").

³²⁹ See Martin Jones, *Lies, Damned Lies and Diplomatic Assurances: The Misuse of Diplomatic Assurances in Removal Proceedings*, 8 EUR. J. MIGRATION & L. 9, 10 (2006); HUMAN RIGHTS WATCH, "Empty Promises": Diplomatic Assurances No Safeguard Against Torture, available at <http://www.hrw.org/reports/2004/un0404> (last visited Feb. 5, 2007).

³³⁰ *Canadian Alleges U.S. Sent Him to Syria for Torture over Al-Qaida Allegations*, ASSOCIATED PRESS NEWSWIRES, Mar. 30, 2005.

³³¹ David Pallister, *Britons Imprisoned in Saudi Arabia Denied Right to Pursue Regime over Torture Allegations*, GUARDIAN, June 15, 2006, at 6.

³³² See generally *Kisoki*, CAT/C/16/D/41/1996.

³³³ Andrew Woodcock, *UK Troops Torture Prisoners in Iraq*, DAILY POST, May 1, 2004, at 2; Larry Shaughnessy, *Firm Doubts Role in Iraqi Prisoner Abuse*, CNN.COM, May 5, 2004; <http://www.cnn.com/2004/WORLD/meast/05/05/iraq.abuse/caci/index.html> (last visited

Thus the battle against torture must continue to be waged full force, lest the so-called “rogue States” follow the “great protectors” into a lawless abyss.