The Development and Drafting of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Matthew Lippman
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INTRODUCTION

This Article traces the development and drafting of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.¹ Part I gives an overview of the development of torture in the ancient world and Europe. Part II of the Article recounts the use of torture in the first-half of the twentieth century and outlines the international efforts to control torture. Part III describes and analyzes the 1984 United Nations Convention Against Torture.

I. A BRIEF HISTORY OF TORTURE

A. The Rise And Fall Of Torture

The Greeks and Romans were the first people to systematically use and rely on torture.² Rome based its general principles governing torture on the practice in Greece.³ The Romans applied torture primarily against slaves in criminal, and later in civil, cases to ensure

† Copyright © 1994, Matthew Lippman.
* The author received his Ph.D. at Northwestern University; his J.D. at American University; and his LL.M. at Harvard University. The author is an Associate Professor of Criminal Justice at the University of Illinois at Chicago.

This article is dedicated with deep and ever-lasting devotion to Lidia Janus (June 9, 1958-January 24, 1991) who, even as she gracefully bowed to brain cancer, bore witness to the truth that love is the oxygen of our existence. Lidia’s memory will continue to animate and to inspire our every moment.

² CHARLES LEA, TORTURE 6 (1973).
³ Id. at 8.
the reliability of their testimony. Slaves were thought to lack moral rectitude and, consequently, authorities inflicted torture to ensure that they testified truthfully.

Slaves performed an array of functions in Roman society and virtually all legal actions involved slave testimony. Litigants who called slaves to testify were required to deposit the price of the slave in order to provide remuneration in the case of injury or death. The Romans, however, prohibited slaves from testifying against their master or the master’s extended family. This limitation was based on the fear that a vengeful slave would twist his testimony in order to incriminate his owner. Roman law did not allow reliance on testimony resulting from the torture of slaves as a primary mode of proof. The only purpose of slave testimony was to augment other evidence which strongly pointed to a defendant’s guilt. Those who falsely accused slaves of capital crimes, and thereby caused their torture, were themselves subject to torture or lex talionis.

The Romans gradually began to use torture against free citizens charged with high treason, which was known as crimen majestatis. These individuals, by virtue of their suspected treason, were deemed to have forfeited their rights. Over time, the Romans came to interpret the notion of high treason broadly so that a variety of political and religious dissenters were subjected to interrogation by torture.

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4 Malise Ruthven, Torture—The Grand Conspiracy 31-32 (1978). Foreigners also were subject to torture. They were considered to be those whose territory had not entered into treaty relations with Rome. Id. at 28-29. Various modes of capital punishment in Greece and Rome, of course, were extraordinarily gruesome and arguably may constitute torture. See Edward Peters, Torture 35 (1985). The Roman jurist Ulpian defined torture as “torment and corporeal suffering and pain employed to extract the truth.” Id. at 28.

5 Lea, supra note 2, at 14. A Roman citizen who committed perjury suffered various disabilities (infamia). A slave did not enjoy and could not be deprived of privileges. Thus, the infliction of pain was used to ensure a slave’s veracity. Peters, supra note 4, at 15.

6 Lea, supra note 2, at 15.

7 Id. at 19.

8 Id. at 15-16. This later was extended to prohibit slaves from testifying against their former owners. Id. at 17. The purchase of a slave to exclude his testimony from court was pronounced void and the price was refunded, which allowed the slave to be tortured. Id. at 16.

9 Ruthven, supra note 4, at 29-30.

10 Lea, supra note 2, at 19.

11 Id. at 9.

12 Id.

13 Id. at 9-11. Treasonous acts included undressing or beating a slave adjacent to the emperor’s image; or carrying a coin or ring impressed with the emperor’s image into a latrine or house of ill repute. Id. at 10.
The infliction of torture soon became even more widespread. In the third century A.D., Roman citizens were divided into honestiores and humiliores.\textsuperscript{14} The honestiores included the privileged governing class, whereas, the humiliores were comprised of the poor and those who occupied the minor trades; the humiliores were not considered to share the virtue of the higher orders.\textsuperscript{15} The humiliores were permitted to testify only under torture, and those convicted were subject to various forms of corporal punishment.\textsuperscript{16}

Several principles guided the administration of torture. One principle established the minimum age limit for torture at fourteen, other than in cases of treason.\textsuperscript{17} In addition, authorities spared women from torture during pregnancy.\textsuperscript{18} Investigations could not be commenced with torture; authorities could use such persecution only to augment and complete the evidence.\textsuperscript{19} Although there were no strict limitations regarding its application, torture was to be administered with moderation.\textsuperscript{20}

The Romans' standard technique of torture was the rack, a wooden frame mounted on rails which could be manipulated so as to painfully distend the victim's joints and muscles.\textsuperscript{21} Distension of the joints and muscles became the aim of related methods of torture.\textsuperscript{22} Other methods included the application of red hot metals and hooks designed to tear the flesh.\textsuperscript{23}

The Roman practice of torture was a major reference for those who subsequently relied on and justified the practice.\textsuperscript{24} The Romans, however, were fully aware of the unreliability of testimony extracted through the use of torture.\textsuperscript{25} They recognized that most people would prevaricate and implicate others, most often the innocent, in order to avoid pain.\textsuperscript{26} On the other hand, a minority would defy authority and refuse to testify under any circumstances. Thus, the famous jurist Ulpian cautioned that interrogation under torture

\begin{footnotes}
\item[14] Peters, supra note 4, at 26.
\item[15] Id. at 26-27.
\item[16] Id.
\item[17] Id. at 20.
\item[18] Id.
\item[19] Peters, supra note 4, at 20.
\item[20] Lea, supra note 2, at 22.
\item[21] Peters, supra note 4, at 35.
\item[22] Id.
\item[23] Id. at 35—36; Lea, supra note 2, at 23.
\item[24] Lea, supra note 2, at 23.
\item[25] Ruthven, supra note 4, at 30.
\item[26] Lea, supra note 2, at 21.
\end{footnotes}
should neither be trusted automatically, nor be rejected immediately because he believed interrogation under torture to be "dangerous and deceptive." 27 Despite the fact that several recorded cases documented instances in which false confessions were extracted under torture, the application of torture to elicit testimony was never seriously challenged by legal commentators. 28 The Germanic tribes which overran Roman territories in the third century assimilated portions of the indigenous legal system. 29 They accepted the stricture that only slaves should be permitted to testify under torture. 30 They rejected the torture of freemen, however, as inimical to the rights and privileges of citizens. 31 Torture was utilized in rare instances as an extraordinary technique of both judicial investigation and of exacting vengeance against irresponsible and cruel tyrants. 32

The Christian Church also decried the inhumanity of extracting confessions through the use of torture. 33 In addition, the Church viewed the practice of singling out certain categories of individuals for torture as contrary to the Christian vision of the Church Universal. 34 This remained the teaching of the Church from the fourth until the mid-thirteenth century, when Pope Innocent IV authorized the use of torture against heretics. 35

The transcendence of reason coincided with the development of strong centralized governmental regimes. 36 An inquisitorial mode of criminal procedure, which was under the control of judicial officials, displaced the decentralized accusatorial model. 37 A professional class of judges, prosecutors, and defense attorneys developed. 38 These specialists introduced Roman law principles into European jurisprudence. 39

27 Ruthven, supra note 4, at 31; Lea, supra note 2, at 21.
28 See Lea, supra note 2, at 21–22.
29 See generally id.
30 Id. at 31.
31 Id. at 25, 31, 45, 51. In the absence of strong centralized regimes, disputes generally were settled through blood feuds, retribution and private compensation. Id. at 25.
32 Lea, supra note 2, at 47.
33 Ruthven, supra note 4, at 43.
34 Id. at 45–44.
35 Id. at 44.
36 Peters, supra note 4, at 51.
37 Id.
38 Id.
39 Id. at 43, 51. A judge could discover the perpetration of a crime in one of three ways: a report by an official; an oath by a respectable citizen; or through private knowledge. Id. The judge was to conduct a preliminary inquiry to determine whether an offense had occurred and who was the likely perpetrator. Peters, supra note 4, at 56. Once the accused was
The challenge was to develop a system of proof which provided a semblance of predictability, legitimacy, and uniformity of result. The solution was to permit convictions only upon certainty of guilt. A judgment of culpability required either the testimony of two eyewitnesses or a spontaneous confession. In the absence of such full proof, a judge was authorized to attempt to extract a confession through the use of torture upon the presentation of circumstantial evidence which amounted to half proof. Such half proof consisted of one eyewitness or other evidence amounting to probable cause that the accused had committed the crime. In the absence of an eyewitness, probable cause was determined by a strict formula in which each "indicia" of evidence was assigned a score. In aggregate, the circumstantial evidence was required to total half proof. For example, following a robbery, an individual might be apprehended with a bloody knife and a large cache of money. Each of the latter indicia would be a quarter proof, and together they would equal half proof. As a result, the judge was authorized to order that the individual be subjected to interrogation under torture.

Full proof rarely was available. As a result, from the twelfth to the eighteenth century, European jurists relied heavily on confessions extracted through torture. Torture was so prevalent that it came to be referred to as the "queen of proofs." An entire jurisprudence of torture developed. Officials could use torture only in cases where the punishment was death or mutilation. First authorities showed the accused the instruments of torture in order to motivate him or her to confess and avoid the infliction of pain. If
the accused did not confess, the judge conducted the interrogation as the defendant underwent the torture. A notary recorded the proceedings. A medical expert also attended the torture session to safeguard the accused. The judge, however, had the discretion to select the specific method of torture. The gravity of the charges, as well as the customs of the region in which the trial was held, most commonly influenced the judge's selection.

The guidelines prohibited the torture from being savage or causing permanent injury or death; in addition, judges could not introduce new techniques. The torturers calibrated the amount of pain inflicted to the quality of the evidence against the defendant, as well as to the age, sex, and strength of the accused. The officials were to apply the torment for the length of time it took for the judge to recite a creed or prayer. A judge was not to ask leading or suggestive questions. The information extracted was to be investigated and verified. Torturers inflicted more severe pain for inconsistencies in testimony.

Those who did not inculpate themselves under torture could be abused again if the authorities deemed the first application of torture insufficient, or if new evidence arose. Authorities recognized that responses elicited under torture were unreliable, thus, they required a confession to be repeated, usually the next day, in the courtroom. A judge deemed a confession made in the courtroom as official. If the defendant recanted, the judge usually subjected the individual to torture once again. A judge who violated these guidelines was subject to an action for damages following the expiration of his term in office.
Eventually authorities extended the use of torture beyond its previous narrow practice.\textsuperscript{66} Once convicted, individuals were tortured in order to discover their accomplices.\textsuperscript{67} Governments also tortured witnesses who appeared to be offering perjurious or inconsistent testimony as well as witnesses of questionable character.\textsuperscript{68} Authorities extracted the testimony of all witnesses in treason trials under torture.\textsuperscript{69}

The strappado, also known as the "queen of torments" was the most widely used European torture technique.\textsuperscript{70} In the seventeenth and eighteenth centuries, the leg-screw or leg-brace was another common torture device.\textsuperscript{71} A third torture method, used for women and children, was the binding and progressive tightening of cords around the wrists.\textsuperscript{72} Other favored tortures included applying and igniting a flammable substance on the soles of the accused's feet, or preventing the accused from sleeping for as long as forty hours.\textsuperscript{73} In addition, the repertoire of torture included stretchings on the rack, water torture, and the use of thumbscrews.\textsuperscript{74}

The use of torture became increasingly difficult to reconcile with the historical tide of humanity and rationality. In 1764, Italian criminologist Cesare Beccaria drafted the most comprehensive and influential critique of torture.\textsuperscript{75} Although Beccaria's arguments were not novel, he provided an intellectual justification which quickened the currents of reform.

Beccaria contended the use of torture was contrary to the principle that an individual should not be punished absent a finding of

\textsuperscript{66} See Lea, supra note 2, at 115.

\textsuperscript{67} Ruthven, supra note 4, at 69. This practice was prevalent by the late seventeenth century.

\textsuperscript{68} Lea, supra note 2, at 115.

\textsuperscript{69} Id. at 115–16.

\textsuperscript{70} Peters, supra note 4, at 68. Torturers tied the accused's hands behind his or her back with a cord, which was connected to a rope attached to the ceiling. \textit{Id}. Officials raised the victim off the floor, then gradually lowered him or her back to the ground. \textit{Id}. They repeated this process at a rapid rate. \textit{Id}. Often, they attached weights to the victim's feet in order to increase the strain on his appendages and back muscles. \textit{Id}. The use of the strappado resulted in the dislocation of the victim's joints. Peters, supra note 4, at 68; Lea, supra note 2, at 90.

\textsuperscript{71} Peters, supra note 4, at 68. The technique involved placing the victim's calf between concave metal braces which were pressed together and then tightened by a screw, thus crushing the leg. The inner-edges of the brace were often serrated in order to increase the pain of the accused. \textit{Id}.

\textsuperscript{72} \textit{Id}.

\textsuperscript{73} \textit{Id}.

\textsuperscript{74} \textit{Id}.

\textsuperscript{75} Cesare Beccaria, On Crimes and Punishments (David Young trans., 1986) (1764).
criminal guilt. He pointed out that where guilt is certain, interrogation under torture is superfluous; where guilt is uncertain, the application of torture runs the risk of harming the innocent. Since most people are law-abiding, the imposition of torture in the latter situation poses a substantial risk of harming the innocent. In addition, according to Beccaria, the use of torture is contrary to the jurisprudential condemnation of self-incrimination. It placed the individual in the position of being "the accuser and the accused at the same time."

Most importantly, Beccaria argued that the use of torture is not likely to lead to truthful testimony. He wrote that it is dubious to posit pain as "the crucible of the truth, as though the criterion of truth lay in the muscles and fibers of a poor wretch." According to Beccaria, this is a "sure way to acquit robust scoundrels and to condemn weak but innocent people." He pointed out that interrogation under torture may lead to anomalous results. The guilty who are stout of heart, spirit, and constitution, and who are thus able to withstand torture, will receive an acquittal. In contrast, the weak but innocent, who confess due to fright, pain, and suffering will be convicted. Beccaria viewed torture as equally flawed with regard to uncovering the names of accomplices.

By the seventeenth century, the evidentiary edifice of which torture was an integral party began to crumble. Certainty was no longer the keystone of guilt and punishment. The torturing of individuals on suspicion in order to extract a confession provided a fatal fissure in the structure. This practice, in effect, permitted judges to inflict punishment on individuals based on circumstantial evidence. Judges soon asserted the right to mete out criminal

76 Id. at 29. Beccaria enumerated the functions of torture: confession; the resolution of contradiction; the discovery of accomplices; the purging of infamy; and the discovery of other crimes which the individual may have committed. Id.
77 Id.
78 Id.
79 BECCARIA, supra note 75, at 29.
80 Id.
81 Id.
82 Id.
83 Id.
84 BECCARIA, supra note 75, at 31, 32.
85 See id. at 32.
86 Id. at 31-32.
87 Id. at 33.
88 LANGBEIN, supra note 43, at 47.
89 Id. at 58.
penalties to individuals in cases in which the evidence did not amount to certainty as well as cases in which individuals did not confess under torture. This recognition of judicial competence and discretion coincided with the development of alternatives to capital punishment. The establishment of the prison, the workhouse, and the galley freed the criminal system of the pressure to achieve certainty of guilt. A mistake was no longer fatal.

A range of evidence might be used to establish guilt. The legitimacy of the system now rested on the logic, intuition, and common sense of a professional judiciary. Judges no longer were willing to tolerate either the rigidity of the system of proofs or the inhumanity of torture. In 1754, Frederick the Great abolished torture in Prussia and authorized conviction and punishment on less than full proof. This pattern was followed in Austria, Belgium, and France under Louis XVI in 1780. Denmark, Brunswick, and Saxony abolished torture in 1770; Poland in 1776; Tuscany in 1786; Lombardy and the Netherlands in 1789; Norway in 1819; Portugal in 1826; Greece in 1827; and Spain following the Napoleonic conquest in 1808.

The abolition of torture in the late eighteenth century was celebrated as marking the end of a long, cruel, and inhumane era. "It was a benchmark in the story of humanity, one which would remain forever unsullied . . . ." Moreover, despite its gruesome detail, the history of the eighteenth century " . . . remained one of the greatest moral lessons for mankind. . . ."

B. Torture In The First Half Of The Twentieth Century

The twentieth century ushered in an age which promised technological advancement and political progress. This optimistic vision, however, was darkened by the storm clouds of militaristic ideologies. Communist, fascist, and authoritarian governments all subordinated

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90 Id. at 47.
91 Id. at 28-44. Langbein argues that the revolution in the law of proof was the catalyst to the abolition of torture. It weakened the rationale for the use of torture and made the practice vulnerable to attack by civil libertarians and humanists. Id. at 69.
92 LANGBEIN, supra note 43, at 55-60.
93 Id. at 61-62.
94 Id. at 63-64.
95 PETERS, supra note 4, at 90-91.
96 Id. at 101.
97 Id. at 102.
98 Id. at 101-02. Torture, of course, continued to be applied against slaves in the American South. See KENNETH M. STAMP, THE PECULIAR INSTITUTION—SLAVERY IN THE ANTE-BELLUM SOUTH 171-91 (1956).
and sacrificed the individual to the aims of the powerful and unified nation-state. These regimes relied on terror and torture as central instruments of government.

The Russian Revolution which led to the rise of the Bolsheviks resulted in the replacement of callous royalty with Communist repression. Aleksandr I. Solzhenityn graphically documents the abusive techniques of interrogation which were practiced during the first forty years of Communist rule. He ironically notes that:

What had already become totally impossible under Catherine the Great, was all being practiced during the flowering of the glorious twentieth century—in a society based on socialist principles, and at a time when airplanes were flying and the radio and talking films had already appeared—not by one scoundrel alone in one secret place only, but by tens of thousands of specially trained human beasts standing over millions of defenseless victims.99

As early as January 1918, Lenin called for “purging the Russian land of all kinds of harmful insects.”100 The “insects” included a diverse group of religionists, Jews, socialists, monarchists, anarchists, and peasants resistant to collectivization.101 The major police organization charged with crushing this opposition was the All-Russian Extraordinary Commission for Combating Counter-Revolution and Sabotage (Cheka) which was established in December 1917.102 The Cheka was authorized to mete out summary justice in cases of armed


100 Quoted in 1 id. at 27.

101 See generally 1 id.

revolt and in areas under martial law.\textsuperscript{103} It also possessed the right to confine individuals in concentration camps.\textsuperscript{104} In practice, the Cheka went far beyond these limits and freely arrested and detained individuals.\textsuperscript{105} A Cheka arrest often included extreme violence and robbery.\textsuperscript{106}

Cheka investigators were responsible for compiling written indictments which were submitted to the Cheka Collegium, the organization’s administrative organ.\textsuperscript{107} The Collegium met in secret summary sessions in which they briskly disposed of cases by majority vote.\textsuperscript{108} The Cheka’s principle method of criminal investigation was interrogation under torture.\textsuperscript{109} Although the abuse of detainees was officially prohibited by the Soviet regime,\textsuperscript{110} the Cheka issued an instruction authorizing the application of “the old and proven remedy.”\textsuperscript{111} This translated into physical restraint for prisoners who refused to confess.\textsuperscript{112}

The practice of coerced interrogation was introduced again on a wide scale during the Stalinist era. Stalin’s communique stated that the “Party Central Committee considers that physical pressure should still be used obligatorily, as an exception applicable to known and obstinate enemies of people, as a method both justifiable and appropriate.”\textsuperscript{113} These abusive tactics helped to propel the Stalinist show-trials of alleged counter-revolutionaries.\textsuperscript{114} Torture was institutionalized.\textsuperscript{115} The livelihood of those conducting interrogations depended on their ability to extract confessions.\textsuperscript{116} Failure meant, at best, the loss of position and, at worst, imprisonment.\textsuperscript{117} The torture practiced in the Soviet Union, however, was no comparison to the frightening practices of the Nazi regime in Germany.

\textsuperscript{103} Id. at 173.  
\textsuperscript{104} Id. at 173–74, 183–84.  
\textsuperscript{105} Id. at 192–93.  
\textsuperscript{106} Id. at 192.  
\textsuperscript{107} LEGGETT, supra note 102, at 195.  
\textsuperscript{108} Id. at 195–96.  
\textsuperscript{109} Id. at 197.  
\textsuperscript{110} Id. at 147.  
\textsuperscript{111} Quoted in id. at 197.  
\textsuperscript{112} LEGGETT, supra note 102, at 197.  
\textsuperscript{113} Quoted in RUTHVEN, supra note 4, at 276.  
\textsuperscript{114} See generally id. at 218–78. The number of those who perished in the great purges of the 1930s is estimated at eight million. Id. at 236.  
\textsuperscript{115} Id. at 277–78.  
\textsuperscript{116} Id. at 275.  
\textsuperscript{117} RUTHVEN, supra note 4, at 275.
Nazi rule in the occupied territories was characterized by the "systematic rule of violence, brutality, and terror."

Those suspected of opposition to the German authorities were arrested and interrogated by the Gestapo through abusive methods. The Gestapo order provided that "[t]hird degree according to the circumstances, consist amongst other methods of very simple diet (bread and water), hard bunk, dark cell, deprivation of sleep, exhaustive drilling, also in flogging (for more than 20 strokes a doctor must be consulted)." Brutality was not confined to those suspected of opposition, but also extended to family members.

Many were transported to Germany to serve as slave labor. The International Military Tribunal (I.M.T.) at Nuremberg found that the workers destined for the Reich were "packed in trains without adequate heating, food, clothing, or sanitary facilities. . . . [T]he treatment of the laborers in Germany in many cases was brutal and degrading. . . . [P]unishments of the most cruel kind were inflicted on the workers." Conditions were even worse in the concentration camps. Concentration camps were often equipped with gas chambers and furnaces for the killing of inmates and the burning of their bodies. At Auschwitz, between May 1940 and October 1943, 2,500,000 persons were exterminated and an additional 500,000 died from disease and starvation. A 1945 United States Army report on the Flossenburg Concentration Camp documented the horrific conditions:

Hunger and starvation, rations, sadism, inadequate clothing, medical neglect, disease, beatings, hangings, freezings, forced suicides, shooting . . . all played a major role in obtaining their object. Prisoners were murdered at random; spite killings against Jews were common, injections of poison and shooting in the neck were everyday occurrences; epidemics of typhoid and spotted fever were permitted to run rampant as a means of eliminating prisoners; life in this camp meant nothing. Killing became a common

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118 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 411, 475 (1946) [hereinafter MAJOR WAR CRIMINALS].

119 Id. at 476.

120 Id.

121 Id.

122 Id. at 489.

123 MAJOR WAR CRIMINALS, supra note 118, at 489.

124 See id. at 478.

125 Id. at 478.

126 Id. at 495.
thing, so common that a quick death was welcomed by the unfortunate ones.\footnote{127}

The Nazis engaged in a series of unprecedented, gruesome medical experiments on concentration camp inmates.\footnote{128} These included high altitude experiments in which individuals were placed in a low-pressure chamber and the simulated conditions were adjusted so as to replicate the atmospheric conditions and pressures prevailing at high altitudes.\footnote{129} Various victims died and others suffered "grave injury, torture, and ill-treatment."\footnote{130} Many victims were forced to remain in tanks of cold water or were kept outdoors while naked for long periods.\footnote{131} In a series of experiments, inmates were infected with malaria,\footnote{132} mustard gas, and bacteria,\footnote{133} as well as with epidemic jaundice\footnote{134} and spotted fever.\footnote{135} At Ravensbrueck Concentration Camp, sections of bones, muscles, and nerves were removed and transplanted to other inmates.\footnote{136} The victims suffered "intense agony, mutilation, and permanent disability."\footnote{137} Another study conducted at Dachau of various methods of making sea water drinkable caused intense pain and suffering.\footnote{138} Between March 1941 and January 1945, sterilization experiments were conducted at Auschwitz and Ravensbrueck.\footnote{139} The purpose was to develop efficient methods of preventing conception.\footnote{140} These experiments involved X-rays, surgery, and various drugs; thousands suffered "great mental and physical anguish."\footnote{141}

Non-Germans were forced to submit to these tortures and barbarities without any type of trial.\footnote{142} They neither consented nor were permitted to withdraw from the experiments.\footnote{143}

\footnotetext{127}{Id. at 478.}
\footnotetext{128}{See 2 Trials of War Criminals Before the Nurnberg Military Tribunals Under Control Council Law No. 10 171, 174-75 (1950) [hereinafter 2 Trials of War Criminals].}
\footnotetext{129}{2 id. at 175.}
\footnotetext{130}{2 id.}
\footnotetext{131}{2 id.}
\footnotetext{132}{2 id. at 175-76.}
\footnotetext{133}{2 Trials of War Criminals, supra note 128, at 175-76.}
\footnotetext{134}{2 id. at 177.}
\footnotetext{135}{2 id. at 177-78.}
\footnotetext{136}{2 id. at 176.}
\footnotetext{137}{2 id. at 177.}
\footnotetext{138}{2 Trials of War Criminals, supra note 128, at 177.}
\footnotetext{139}{2 id.}
\footnotetext{140}{2 id.}
\footnotetext{141}{2 id.}
\footnotetext{142}{2 id. at 183.}
\footnotetext{143}{2 Trials of War Criminals, supra note 128, at 183.}
In many cases experiments were performed by unqualified persons; were conducted at random for no adequate scientific reason, and under revolting physical conditions. All of the experiments were conducted with unnecessary suffering and injury and but very little, if any, precautions were taken to protect or safeguard the human subjects from the possibilities of injury, disability, or death. In every one of the experiments the subjects experienced extreme pain or torture, and in most of them they suffered permanent injury, mutilation, or death, either as a direct result of the experiments or because of lack of adequate follow-up care.\footnote{2 id. The tribunal established ten principles to guide medical experimentation.  
1. Voluntary consent of the human subject.  
2. The experiment should yield fruitful results for the good of society.  
3. The experiment should be based and designed in accordance with the results of animal experimentation and a knowledge of the natural history of the disease.  
4. The experiment should be conducted so as to avoid unnecessary physical and mental suffering and injury.  
5. No experiment should be conducted where there is reason to believe that death or disabling injury will occur.  
6. The degree of risk should never exceed the humanitarian importance of the problem to be solved by the experiment.  
7. Proper preparations should be made and adequate facilities provided in order to protect the experimental subject against even the remote possibility of injury, disability or death.  
8. The experiment only should be conducted by scientifically qualified personnel. The highest degree of skill and care should be required through all stages of the experiment.  
9. During the course of the experiment, the subject should be at liberty to terminate the experiment.  
10. During the course of the experiment, the scientist in charge must be prepared to terminate the experiment at any stage, if he has probable cause to believe, in the exercise of good faith, superior skill and careful judgment that a continuation of the experiment is likely to result in injury, disability or death to the experimental subject.}

The democracies were not immune from infection by the virus of torture. In 1931, the United States National Commission on Law Observance and Enforcement issued a Report on Lawlessness in Law Enforcement.\footnote{145 Zechariah Chafee, Jr. et al., The Third Degree, in Wickersham Commission Reports, No. 11—Report on Lawlessness in Law Enforcement 13 (1931).} The report determined that the “third degree”—the inflicting of physical or mental pain to extract confessions or statements—was “widespread throughout the country.”\footnote{146 Id. at 153.}
The report noted that the third degree is "thoroughly at home in Chicago" and that suspects invariably were "subjected to personal violence." The methods included beatings with rubber hoses and telephone books, suspending prisoners upside down by handcuffs, and the administration of tear gas. These techniques were applied in a room designated as the "goldfish room," where suspects were abused or, as it was euphemistically termed, taken "to see the goldfish." Surveying the evidence, the Commission concluded that the practice of police torture is "shocking in its character and extent, violative of American traditions and institutions, and not to be tolerated."

II. INTERNATIONAL CONDEMNATION OF TORTURE

Although torture was not unknown in previous centuries, it was the Nazi atrocities which motivated the international community to take action to protect human rights. The United Nations Charter proclaimed that the protection of human rights was one of the organization's central purposes. The Universal Declaration of Human Rights, the foundation document of the contemporary human rights movement, proclaimed, in article 5, that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Several legally binding International Conventions reiterate this concept. According to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, one of the

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Physical brutality is extensively practiced. The methods vary. They range from beating to harsher forms of torture. The commoner forms are beating with the fists or with some implement, especially the rubber hose, that inflicts pain but is not likely to leave permanent visible scars. . . . Methods of intimidation are adjusted to the age or mentality of the victim [and] are frequently used alone or in combination with other practices. Authorities often threaten bodily injury. They have gone to the extreme of procuring a confession at the point of a pistol or through fear of the mob.

Id. at 125.

Id. at 126.

Chafee, supra note 145, at 126.

Id. at 155.

U.N. Charter, art. 1, ¶ 3; see also id. art. 55.


acts constituting genocide is the causing of "serious bodily or mental harm to members of the group." This arguably would encompass acts of torture committed with "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." The Standard Minimum Rules for the Treatment of Prisoners, adopted by the United Nations Economic and Social Council in 1957, also prohibits all cruel, inhuman or degrading punishment.

A new era had begun. The international community proclaimed that individuals enjoyed certain minimum rights which transcended geography, ideology, race, religion, and gender. The freedom from torture was a core right which was not to be compromised, even in times of public emergency. Nevertheless, regimes increasingly began to rely on torture as a device to deter and to detect political opposition.

A. Background: Torture In The Early Cold War Era

Ironically, it was France, the progenitor of the modern concept of human rights, which most starkly defied the international condemnation of torture. French forces, like the Russians and Germans, viewed torture as a mechanism for maintaining political control. They applied torture systematically against Algerian detainees in an effort to quell the Algerians' effort to break the chains of colonialism. Beginning in 1954, the French used torture to gather information concerning the organization, membership, and strategy of the guerilla forces of the Algerian National Liberation Front. Torture also was frequently employed to extract confessions from suspected terrorists.

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155 Id. art. 2.


158 See infra notes 177–215.


160 Id. at 80–82. Defendants were fearful of lodging allegations of torture. Courts rarely determined that such allegations possessed merit. Id. at 76–79. After 1955, French military and police forces operated under a state of emergency in Algeria which encouraged them to evade and to ignore legal restraints on the practice of torture. Id. at 65–66.
The French government initially denied that torture was being systematically practiced in Algeria. When confronted by irrefutable evidence, however, the government appointed a senior civil servant, M. Roger Wuillaume, to investigate the use of torture by the police in Algeria. Wuillaume’s report was based on the interrogation of sixty-one prisoners in four prisons and on confidential conversations with police officers and officials. Wuillaume found that forty detainees reported that they had been subjected to various forms of torture. The methods included: beatings with fists, sticks, and whips; immersion and suffocation under water; the infliction of electric shock to sensitive areas of the body, including the sexual organs; and the hanging of individuals by their feet in conjunction with the burning of the soles of their feet.

The British, like the French, resorted to the threat and use of torture to stem the rising tide of colonial unrest. In an effort to counteract the Irish Republican Army’s (IRA) demand for self-rule for the Catholic minority in Northern Ireland, the Royal Ulster Constabulary was authorized to intern suspected terrorists as well as those thought to be involved in aiding and abetting such activities. Between August 1971 and June 1972, approximately 3,276 persons were arrested or interned.

The Republic of Northern Ireland brought an application before the European Commission of Human Rights, and later requested the European Court of Human Rights to consider and confirm the Commission’s findings that the British were engaged in torture against IRA detainees. The Court reviewed the treatment of fourteen internees who had been subjected to in-depth interrogation. These interrogations involved the combined application of the so-called five techniques: wall-standing; hooding; subjection to noise; deprivation of sleep; and deprivation of food and drink. Specifically, detainees were forced to remain in a spreadeagle position against the wall. Their heads were covered with hoods while they were

161 Id. at 67.
163 Id. at 170.
164 Id. at 172–73.
165 See generally Report by Mr. Roderic Bowen, Q.C., on Procedures for the Arrest, Interrogation and Detention of Suspected Terrorists in Aden, 1966, CMND 3165.
167 Id. at 58.
168 See id. at 73–74.
subjected to continuous loud noise and deprived of sleep, food, and drink.\textsuperscript{169}

In March 1972, the Parker Committee issued a parliamentary report on British interrogation techniques in Northern Ireland.\textsuperscript{170} The committee’s report concluded that while long-term mental injury could not be scientifically ruled out, “there is no real risk of such injury if proper safeguards are applied in the operation of these techniques.”\textsuperscript{171} At the same time, these techniques permitted the police to obtain valuable information concerning the structure and membership of the IRA, the location of arms caches, and the identities of perpetrators of terrorist acts. The threat of these techniques also increased the effectiveness of ordinary interrogation techniques. The Parker Committee concluded that there was “no doubt that the information obtained by these . . . operations directly and indirectly was responsible for the saving of lives of innocent citizens.”\textsuperscript{172} The Parker Committee had little doubt that the five techniques were morally justifiable. The committee conceded that there was a risk that the innocent would be victimized by the British forces. The Parker Committee noted, however, that even under normal conditions, an individual who is erroneously arrested, or who ultimately is acquitted, is inevitably subjected to some measure of “discomfort, hardship and mental anxiety.”\textsuperscript{173}

The Parker Committee’s conclusion generally supported an earlier report which determined that the five techniques, while occasionally involving “physical ill-treatment,” did not constitute “brutal-

\textsuperscript{169} Id. at 59.

\textsuperscript{170} Report of the Committee of Privy Counsellors Appointed to Consider Authorised Procedures for the Interrogation of Persons Suspected of Terrorism, 1972, CMND 4901 [hereinafter Parker Committee]. The techniques had been used in Palestine, Malaya, Kenya, Cyprus, British Cameroons, Brunei, British Guiana, Aden, Borneo/Malaysia, the Persian Gulf, and Northern Ireland. Id. at 3.

\textsuperscript{171} Id. at 4. The risk of physical injury was considered negligible, other than in the case of a detainee suffering from ear damage. Id.

\textsuperscript{172} Id. at 6. The commission rejected the argument that this information could have been obtained by skilled interrogators. It argued that the techniques which had been effective during World War II would be unsuccessful in Northern Ireland. The British had fewer resources available, the detainees were more devoted to their cause and there was little likelihood that the use of microphones and stool pigeons would prove effective. Parker Committee, supra note 170, at 6.

\textsuperscript{173} Id. at 7. The Parker Commission recommended that the techniques only should be applied when necessary. Id. They also should be applied under the express authority of a United Kingdom Minister and in conformity with written guidelines. A skilled interrogator should conduct the examination and a doctor with psychiatric training should be present. Id. at 8–9.
The European Court of Human Rights, however, determined that the five techniques, while not constituting torture, caused intense physical and mental suffering and amounted to inhuman treatment. The techniques, according to the Court, also were degrading because they were calculated to cause feelings of fear, anguish, and inferiority and were capable of humiliating, degrading, and breaking the physical and moral resistance of detainees.

The use of torture had developed into a mechanism of political control. As torture techniques became more scientifically sophisticated, they tended to emphasize the infliction of psychological, rather than physical pain. The absence of lasting physical injury made it difficult for detainees to substantiate allegations of abuse. The trend towards the application of modern technology to abuse and neutralize a regime's political opponents culminated in the Soviet Union’s psychiatric abuse of political dissidents. Soviet law permitted prosecuting officials to refer an individual accused of criminal activity to a psychiatric commission. The forensic commission was to determine whether the individual was suffering from a mental illness. Where an illness was found to exist, the Commission submitted the case to a court to determine whether the individual should be confined for “compulsory measures of a medical character.”

This closed-door procedure often took place without either the knowledge or participation of the accused.

The psychiatric commissions which examined political offenders usually were comprised of psychiatrists who had been selected by government officials. All of these therapists were state employees.

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174 REPORT OF THE ENQUIRY INTO ALLEGATIONS AGAINST THE SECURITY FORCES OF PHYSICAL BRUTALITY IN NORTHERN IRELAND ARISING OUT OF EVENTS ON THE 9TH AUGUST, 1971, CMND 4823, at 23 [hereinafter COMPTON COMMITTEE]. "We consider that brutality is an inhuman or savage form of cruelty, and that cruelty implies a disposition to inflict suffering, coupled with indifference to, or pleasure in, the victim's pain. We do not think that happened here." Id.

175 Republic of Ireland v. United Kingdom, 2 E.H.R.R. at 79-80. The Court did not support the Commission's view that these techniques constituted torture.

Although the five techniques, as applied in combination, undoubtedly amounted to inhuman and degrading treatment, although their object was the extraction of confessions, the naming of others and/or information and although they were used systematically, they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood.

Id. at 80.

176 AMNESTY INTERNATIONAL, PRISONERS OF CONSCIENCE IN THE USSR: THEIR TREATMENT AND CONDITIONS 108 (1975) [hereinafter PRISONERS OF CONSCIENCE].

177 Id. at 108–10.
and most were affiliated with the Serbsky Institute, which was closely connected to the KGB (Committee of State Security). The system was pernicious. Political agitation and dissent against the government, as well as overt religious observance, were not only criminal, but also were considered manifestations of a mental disturbance. The commissions' diagnoses were deftly crafted to justify and legitimate the internment of dissidents; dissidents typically were diagnosed as suffering from "seeming normality" and "creeping schizophrenia." According to Soviet therapists, these pathologies were not apparent to those who lacked psychiatric training. The diseases afflicted "seemingly normal" individuals who, in fact, suffered from rapidly developing and latent mental defects. Psychiatrists who publicly challenged the validity of these diagnoses often were charged and convicted with "anti-Soviet slander" and were confined to prison camps.

Political dissidents adjudged of suffering from a psychiatric disorder were sentenced to Special Psychiatric Hospitals (SPH), reserved for dangerous offenders. The Ministry of Internal Affairs (MVD) controlled the hospitals. SPH internees were considered to be in need of treatment and possessed no protections or rights.

In 1973, Amnesty International (Amnesty) published a report designed to help launch its Campaign for the Abolition of Torture. The report noted that for the past two or three hundred years torture had been a relic which was of interest mainly to historians. Amnesty found, however, that torture had "suddenly developed a life of its own and [had] become a social cancer." Amnesty reported that regimes throughout the world were now relying on torture as a mode of governance. The report noted that much of this state-sponsored torture was carried out by elite military forces which had assumed responsibility for matters of internal security. Governmental leaders also had be-

178 Id. at 110–12, 118.
179 Id. at 113.
180 Id. at 116–17.
182 Id. at 119–20.
183 Id. at 121–22.
184 Id. at 125.
185 Id. at 124.
187 Id.
gun to speak of issues of domestic order in military terms. Opposition political forces increasingly were being portrayed as an internal threat to the nation. They were pictured as implacable and ruthless foes who were prepared to resort to any means to achieve their ends. Under these circumstances, governments argued that they had no choice other than to resort to drastic measures. Governments portrayed torture as a central weapon in this struggle for survival.\textsuperscript{188}

Amnesty International argued, however, that torture was inherently cruel and should be condemned without qualification. Amnesty, however, overlooked the fact that the major contemporary use of torture was as a means of political control and intimidation.\textsuperscript{189} The injustice of torture, according to the Amnesty report, rested on the fact that it "offends the notion of just punishment which is based on a fixed term of imprisonment for a specific offence. The duration of torture is completely open-ended and often has nothing to do with a specific offence."\textsuperscript{190} The report reminded readers that there is no act which was "more a contradiction of our humanity than the deliberate infliction of pain by one human being on another, the deliberate attempt over a period of time to kill a man without his dying."\textsuperscript{191}

In addition, Amnesty argued that when torture was employed, the means inevitably corrupted the end. Historically, torture had not been limited or contained. "[J]ust once' becomes once again—becomes a practice and finally an institution."\textsuperscript{192} First, torture was applied against a person who planted a bomb. Then, it was inflicted on people who might plant or might think of planting a bomb or who defend the right of individuals to plant a bomb. The report pointed out that in Algeria the use of torture could not be controlled and ultimately spread into France.\textsuperscript{193}

Amnesty cited sixty countries in which there was reliable evidence that torture was being practiced.\textsuperscript{194} Amnesty observed that in most countries the use of torture was correlated with a disregard for the rule of law. It was typically employed by regimes which had declared

\textsuperscript{188} Id. at 23.
\textsuperscript{189} Id. at 24–25. The Amnesty report conceded that torture may be more effective than other methods in extracting information. This was particularly likely in countries which lacked trained interrogators. Id. at 24.
\textsuperscript{190} FIRST AMNESTY REPORT, supra note 186, at 25.
\textsuperscript{191} Id. at 26.
\textsuperscript{192} Id.
\textsuperscript{193} See generally id. at 114–239.
states of emergency or states of siege. Under these circumstances, citizens often were arrested arbitrarily, detained, and given limited access to the courts. Free of legal restraint and desirous of punishing and discovering the names of the regime’s political opponents, the police or armed forces frequently abused those who were subjected to interrogation. 195 Amnesty also discovered a disturbing trend towards the internationalization of torture. The governments of industrialized countries reportedly supplied their allied regimes in the Third World with experts, training, information, and equipment. 196

B. Codes Of Conduct Prohibiting Involvement Of Professionals In Torture

In December 1973, Amnesty International convened the first International Conference on the Abolition of Torture. 197 Its goal was to educate the public and strengthen opposition to torture and to other forms of cruel and inhuman treatment or punishment. Amnesty aspired to awaken people to the fact that “[e]very time a helpless individual is being tortured, our own dignity and humanity is being diminished and degraded.” 198

The three hundred delegates declared that the use of torture is a violation of freedom, life, and dignity. Accordingly, the conferees urged governments to recognize that torture is a crime against humanity and called upon regimes to respect, implement, and improve the national and international laws prohibiting torture. The delegates concluded that it is “our fundamental duty as human beings to express what is surely the conscience of mankind and to eradicate this evil.” 199

Following the conference, Amnesty announced that it would work towards the implementation of several proposals, including codes of conduct which prohibited involvement in torture by health professionals, law enforcement personnel, and members of the legal profession. By the mid-1970s, substantial progress had been made towards the formulation of several codes prohibiting the involvement of professionals in torture. These codes of ethics were to be incor-

196 Id. at 240.
198 Id. at 11.
199 Id. at 9.
porated into the curricula of various training programs.\textsuperscript{200} The con­ferees hoped that the codes of conduct would create strong professional norms against torture which would in turn encourage individuals to resist the demands of regimes that participate in the abuse of detainees. They also hoped that professional associations would reinforce the codes of ethics by lending support to those who adhered to these professional standards, and by censuring those who participated in torture.\textsuperscript{201}

The codes were intended to remind professionals that they possess obligations and duties which transcend those imposed by their state. The process of torture depends on the willingness of individuals to involve themselves in, and to lend legitimacy to, this gruesome enterprise. Of course, the effectiveness of the codes ultimately rested on the willingness of professional associations to monitor and evaluate the ethical conduct of their members. The appropriate response, however, may not always be clear to professionals. For example, doctors may face punishment to themselves or their families if they refuse to involve themselves in torture. In another situation, a doctor may be able to efficiently extract information and thus spare a detainee from more severe punishment.\textsuperscript{202}

Health professionals, particularly doctors, were notorious for their involvement in torture. For instance, in 1986 the Chilean Medical Association issued a report which documented doctors' involvement in torture over the past fifteen years in Chile.\textsuperscript{203} In some cases, the physician is the member of the torture team that evaluates the capacity of the torture victim to resist punishment. On other occasions, the physician supervises torture by actively participating in it. Sometimes, the physician serves merely to legitimize the torture process by examining detainees before torture and by issuing certificates of good health after torture.\textsuperscript{204} Despite this activity, the Chilean medical profession remained indifferent towards their colleagues' activity.\textsuperscript{205} The 1986 report, however, called for the disci-

\textsuperscript{200} See generally Alfred Heijder & Herman Van Geuns, Professional Codes of Ethics (1976).

\textsuperscript{201} See Alfred Heijder, Professional Codes of Ethics Against Torture, in Professional Codes of Ethics, supra note 200, at 7.

\textsuperscript{202} See id.


\textsuperscript{204} Id. at 67.

\textsuperscript{205} Id. at 47–48.
pline and punishment of those physicians who had engaged in torture.

The 1975 Declaration of Tokyo of the World Medical Association pronounced that the doctor shall not countenance, condone, or participate in the practice of torture or other forms of cruel, inhuman, or degrading procedures. Paragraph two provides that a doctor shall not provide any premises, instruments, substances, or knowledge to facilitate such practices or to diminish the ability of the victim to resist. The doctor also should not be present during such cruel, inhuman, or degrading treatment. In addition, a doctor must have complete clinical independence in determining the proper care for a person for whom he or she is medically responsible. The World Medical Association also pledged to encourage the international community, national medical associations, and their fellow doctors to support doctors and their families “in the face of threats or reprisals resulting from a refusal to condone the use of torture or other forms of cruel, inhuman or degrading treatment.”

These basic principles were incorporated into the United Declaration on Principles of Medical Ethics. Principle 2 states that it is a gross contravention of medical ethics for health personnel, particularly physicians, to engage actively or passively in acts which constitute participation or complicity in, incitement to, or attempts to commit torture or other cruel, inhuman or degrading treatment.

Several other professional codes of conduct also

\[\text{Declaration Of Tokyo Of The World Medical Association, ¶ 1 (1975) reprinted in Professional Codes of Ethics, supra note 200, at 28 [hereinafter Declaration Of Tokyo].} \]

\[\text{Id. ¶ 2.} \]

\[\text{Id. ¶ 3.} \]

\[\text{Id. ¶ 4. Doctors, however, were not to provide artificial nourishment to a hunger-striker who refused nutrition. Id. ¶ 5.} \]

\[\text{Declaration Of Tokyo, supra note 206, ¶ 6.} \]


\[\text{Id. at princ. 2. Principle 3 states that it is a contravention of medical ethics for health personnel to be involved in any professional relationship with prisoners or detainees the purpose of which is not solely to evaluate, protect, or improve their physical or mental health. Principle 4(a) provides that it is a violation of medical ethics for health personnel, particularly physicians, to apply their knowledge and skills in order to assist in the interrogation of prisoners and detainees in a manner that may adversely affect the physical or mental health or condition of such prisoners or detainees and which is not in accordance with the relevant international instruments. Principle 4(b) states that it is a violation of medical ethics to certify, or to participate in the certification of, the fitness of prisoners or detainees for any form of treatment or punishment that may adversely affect their physical or mental health and which is not in accordance with the relevant international instruments. It also is unethical to} \]
incorporate these principles. For example, in 1980, the United Nations General Assembly adopted a Code of Conduct for Law Enforcement Officials.\textsuperscript{213} Article 2 provides that law enforcement officials should respect and protect human dignity and maintain and uphold the human rights of all persons.\textsuperscript{214} Article 5 states that no law enforcement official may inflict, instigate, or tolerate any act of torture or other cruel, inhuman, or degrading treatment or punishment. Such acts may not be justified on the basis of superior orders or exceptional circumstances, such as a state of war or other public emergency.\textsuperscript{215} Article 6 provides that law enforcement officials shall protect the health of persons in their custody and take immediate action to secure medical attention whenever required.\textsuperscript{216} Article 8 imposes an affirmative duty upon law enforcement officers to "prevent and rigorously oppose" violations of the code.\textsuperscript{217} Officials who have reason to believe that a violation of the code has occurred, or is about to occur, are to report the matter to their superior authorities and, where necessary, to other appropriate authorities or agencies.\textsuperscript{218}

The international legal profession failed to adopt a similar code of conduct. Amnesty International, in consultation with the International Commission of Jurists, formulated a Code of Ethics for Lawyers, Relevant to the Protection of Persons Subjected to Torture.\textsuperscript{219} The code provides that a defense lawyer representing an individual allegedly subjected to torture should raise such allegations before the competent authorities, unless instructed to the contrary by his client.\textsuperscript{220}

In addition, the code imposes a duty upon a prosecuting lawyer to introduce into evidence only those statements which he believes


\textsuperscript{214}Id. art. 2.

\textsuperscript{215}Id. art. 5.

\textsuperscript{216}Id. art. 6.

\textsuperscript{217}Id. art. 8.


\textsuperscript{219}Draft Principles for a Code of Ethics for Lawyers, Relevant to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, reprinted in Professional Codes of Ethics, supra note 200, at 6, 31 [hereinafter Code of Ethics for Lawyers].

\textsuperscript{220}Id. \textsuperscript{1}1(1). Given the caveat regarding contrary client instructions, one might be questioned whether the wishes of the client should take precedence over a lawyer's responsibility as an officer of the court to uphold the requirements of the law. Id.
are made freely and obtained without the use of torture or other cruel, inhuman, or degrading treatment or punishment. In case of any doubt, the prosecutor must reject the statement.\textsuperscript{221} The code also specifies that a judge or other judicial authority should reject those statements made by an accused person or witness which are likely to have been made as a result of torture or other cruel, inhuman, or degrading treatment or punishment.\textsuperscript{222}

The classic example of a professional association taking action to combat torture is the World Psychiatric Association’s (WPA) condemnation of the abuse of psychiatry in the Soviet Union in 1977.\textsuperscript{223} In January 1983, facing the imminent suspension of its membership from the WPA, the All Union Society of Psychiatrists and Narcologists of the Soviet Union, resigned its membership from the organization.\textsuperscript{224} Soviet psychotherapists permitted a U.S. delegation to visit in 1989.\textsuperscript{225} During the visit of this delegation, a new Independent Association of Psychiatrists was established which vowed to prohibit the future abuse of psychiatry in torture and to assist in the rehabilitation of past victims.\textsuperscript{226} All individuals detained unjustifiably in psychiatric institutions were reportedly released.\textsuperscript{227}

C. \textit{The United Nations Declaration On Torture}

On December 9, 1975, the United Nations General Assembly took an historic step towards the eradication of torture when it adopted the non-binding Declaration on the Protection of all Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (United Nations Declaration on Tor-
The Declaration was proclaimed as a "guide-line for all States and other entities exercising effective power." The latter presumably encompassed governments which had not yet received legal recognition.

Article 1 attempts to provide a comprehensive definition of torture. It states that torture requires the infliction of severe pain or suffering, whether physical or mental, thus, encompassing psychologically traumatic actions, such as forcing an individual to witness the torture of his or her spouse. Severe pain or suffering, however, is a relative notion which can differ among individuals and cultures. Presumably, article 1 prohibits acts which are reasonably likely to cause intense pain to a reasonable person as well as acts which cause severe pain to the particular victim who is subject to abuse. Article 1 also specifies that it applies only to such harm which is intentionally inflicted at the instigation of a public official. In addition, the latter provision hopefully encompasses constructive intent, i.e., acts of torture which a public official should have known were likely to occur. The limitation of the Declaration to public officials was probably based on the belief that domestic law already adequately punished torture by private individuals.

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229 Id. pmbl.
230 Id. art. 1. The text reads as follows:

1. For the purpose of this Declaration, torture 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 in or incidental 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.

Id.
231 Id.
232 Declaration Against Torture, supra note 228, art. 1.
233 Id.
234 Article 1 "does not include pain or suffering arising only from, inherent in, or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners." Id.; see also Standard Minimum Rules for the Treatment of Prisoners, supra note 156 and accompanying text. The Standard Minimum Rules, however, include some provisions which may permit the abuse of prisoners. See Standard Minimum Rules for the Treatment of Prisoners, supra note 156, arts. 32(1), 32(2).
The Declaration specifies that torture is an act which is carried out for such purposes as obtaining information or a confession, or for punishment or intimidation.\(^{235}\) The latter qualification appears superfluous. It is the severity of the pain, rather than the purpose for which it is inflicted, which is controlling.\(^{236}\) At any rate, the enumeration of certain purposes was probably not intended to be exhaustive.

Article 2 merely affirms that “torture or other cruel, inhuman or degrading treatment or punishment is . . . a violation of [ ] human rights and fundamental freedoms.”\(^{237}\) Article 3 specifies that “no State may permit or tolerate torture or other cruel, inhuman or degrading treatment or punishment.”\(^{238}\) Such acts may not be justified by exceptional circumstances.\(^{239}\) Article 4 requires states to “take effective measures to prevent torture and other cruel, inhuman or degrading treatment or punishment. . . .”\(^{240}\) The prohibition against such acts is to be stressed in the training of law enforcement personnel and other public officials.\(^{241}\)

Each state must also criminalize torture under its domestic law.\(^{242}\)

Any person who alleges that he has been subjected to torture or other cruel, inhuman or degrading treatment or punishment by or at the instigation of a public official shall have the right to complain to, and to have their case impartially examined by, the competent authorities of the State concerned.\(^{243}\)

Article 9 provides that “whenever there is reasonable ground to believe that an act of torture . . . has been committed, the competent authorities of the State concerned shall promptly proceed to an impartial investigation.”\(^{244}\) Additionally, article 9 states that crimi-
nal proceedings should be initiated against those who allegedly committed acts of torture.\textsuperscript{245} Article 10 adds, "allegation[s] of other forms of cruel, inhuman or degrading treatment or punishment shall be subject to criminal, disciplinary or other appropriate proceedings."\textsuperscript{246}

There is no provision which specifies the punishment or punishments appropriate for those found guilty of torture. Although the victims of torture are entitled to redress and compensation, there is no discussion of the form or procedural requirements for this compensation.\textsuperscript{247} Article 12 excludes statements obtained in contravention of the Declaration from evidence.\textsuperscript{248} This general provision fails to fully grapple with evidentiary and procedural issues such as harmless error, cross-examination based on prior inconsistent statements, and standing.\textsuperscript{249}

In 1977, the United Nations General Assembly called upon Member States to make unilateral declarations expressing their intent to comply with the United Nations Declaration on Torture.\textsuperscript{250} The General Assembly urged states to give maximum publicity to these unilateral declarations.\textsuperscript{251} The General Assembly later established the United Nations Voluntary Fund for Victims of Torture in order to assist the victims of governmental abuse.\textsuperscript{252}

The United Nations Declaration on Torture was the first international condemnation of torture. Nevertheless, the drafters failed to appreciate that torture had become a central mechanism of political control.\textsuperscript{253} In states where torture was an infrequent occurrence, it presumably was subject to legal challenge and control.\textsuperscript{254} The practice of torture in "terror-states," however, usually was associated with

\begin{itemize}
\item \textsuperscript{245} Id.
\item \textsuperscript{246} Id. art. 10.
\item \textsuperscript{247} Id. art. 11.
\item \textsuperscript{248} Id. art. 12.
\item \textsuperscript{249} Declaration Against Torture, supra note 228, art. 12.
\item \textsuperscript{251} Id.
\item \textsuperscript{253} See generally First Amnesty Report, supra note 186.
\item \textsuperscript{254} One must, however, take into account the obvious difficulties of proof, the reluctance of victims to lodge complaints, and the tendency of governments to deny responsibility for criminal acts.
\end{itemize}
an abrogation of human rights and a denial of due process. Such regimes consciously deployed torture to deter dissent and to punish opponents. It was unrealistic to depend upon domestic mechanisms to control torture and other cruel, inhuman, or degrading treatment or punishment. The use of torture by these regimes could only be curtailed through international action and procedures.

D. The Modern “Terror-States”

In 1976, Amnesty International published a report on allegations of torture in Brazil. In 1964, the Brazilian military staged a coup and passed a series of national security laws which authorized arbitrary and lengthy detention of people suspected of political offenses and limited the due process rights of detainees. The Brazilian military relied heavily on torture to extract confessions and intimidate opponents of the regime. Amnesty International reports that one-third of the families in Brazil had been victimized by government repression. Torture was elevated to a science and was a prominent part of the military training regime. The government conducted experiments on homeless people who were gathered up and used as human “guinea pigs.” The Catholic Church in Brazil published a report which painstakingly documented the use of torture in its country. The study determined that almost one hundred different techniques of torture had been utilized.

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256 See generally id.
257 See generally id.
258 See id. at 7.
260 Id. at 8.
261 Id.
262 Id. at 16–20.
263 Id. at 70.
264 Id.
265 Id. at 70.
266 Torture in Brazil: A Report by the Archdiocese of São Paulo 13–15 (Joan Dassin & Jaime Wright trans., 1986) [hereinafter Torture in Brazil]. One of the chief instructors was a former U.S. police officer, Dan Mitrione. Id. at 14.
267 See generally id.
268 Id. at 16.
In 1984, an Argentinean commission issued a report which documented the repression which had been visited upon the country by the military junta.269 During the so-called "dirty war," over twelve thousand citizens were detained, tortured, and killed.270 The Argentinean military, like their Brazilian counterparts, viewed themselves as involved in a cataclysmic confrontation with the forces of communism.271 This invisible enemy was not easily detected. As a result, the military swept vast numbers of citizens off the street who, under the stress of torture, often falsely implicated their friends, relatives, co-workers, and teachers.272

Common torture methods, many of which were documented in an Amnesty report, included electric shocks; constant beatings with fists and truncheons; burning with cigarettes; deprivation of food, drink, and sleep; sexual abuse; and attacks by dogs.273 Another technique involved the immersion of the victim's head in water while his or her head was covered by a cloth hood. When wet, the hood stuck to the nose and mouth, making breathing practically impossible.274 The victims were tortured in the most humiliating ways possible. The purpose of the torture was not to discover information, but rather to break the victims both spiritually and physically, as well as to give pleasure to their torturers. Most of those who survived the torture were killed.

The South African government also practiced torture under several circumstances. Since 1948, the National Party had adopted a series of anti-terrorist measures which provided the government with a series of draconian powers consisting of detention, prosecution, and punishment.275 In 1978, Amnesty International concluded that torture was "used almost on a routine basis by security police and the Government, by failing to remedy the situation, appears to condone the practice."276 The practice of indefinite incommunicado detention of those suspected of involvement in terrorist activity

270 Id.
271 Id. at 442–45.
272 Id. at 66–61.
274 Id. at 37.
276 Id. at 56.
permitted the police to engage in the unsupervised interrogation and abuse of detainees.\(^{277}\) Often the police lost control, thus resulting in the death of several detainees.\(^{278}\) After eleven political detainees died in custody, the Minister of Justice suggested that they committed suicide.\(^{279}\) Various methods of torture have been documented, including physical beatings, electric shock, sleep deprivation, solitary confinement, and being forced to wear shoes containing small stones while being made to stand for long periods, or being forced to assume a sitting position on an "invisible chair."\(^{280}\) Some detainees also have alleged that officials threatened them and their families with murder.\(^{281}\)

Although Argentina, Brazil, and South Africa are representative of the "torture states" of the 1970s, they do not stand alone. For instance, according to Amnesty International, Idi Amin's government in Uganda practiced "[w]idespread arbitrary arrest, detention without trial, torture, and large scale killings by the security forces. . . ."\(^{282}\) The government not only encouraged these practices, but employed torture in an arbitrary and senseless fashion.\(^{283}\) The methods were direct and effective: whippings; beatings with wooden mallets, hammers, and iron bars; the placing of pins under finger and toe nails; the gouging out of eyes; electric shock; and sexual abuse.\(^{284}\) Most sobering was the fact that the industrialized democracies were complacent towards the torture which occurred in Uganda. A 1980 Amnesty International report documented that British firms had been providing special security equipment to Ugandan security forces.\(^{285}\)

The United States provided extensive training and advice to security forces of allied regimes in techniques of torture in order to further the cold-war campaign against Communism.\(^{286}\) In a 1985 article, Professor James David Barber of Duke University, Chair of the Board of Directors of Amnesty International USA, criticized the

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\(^{277}\) *Id.* at 56–57.

\(^{278}\) *Id.*

\(^{279}\) *Id.* at 57.

\(^{280}\) *Amnesty International, Political Imprisonment in South Africa*, *supra* note 275, at 58.

\(^{281}\) *Id.*

\(^{282}\) *Id.* at 19.

\(^{283}\) *Id.*

\(^{284}\) *Id.* at 13–15.

\(^{285}\) *Amnesty International (British Section), The Repression Trade*, 5, 24 (1980).

United States' willingness to condone torture. Specifically, he criticized the U.S. policy to increase aid to foreign nations who have demonstrated a decline in torture cases.287 Barber criticized the notion that torture should be tolerated until economic development, social progress, and national unity are achieved.288 He also dismissed the tendency to rationalize the abuse of individuals on the grounds of cultural relativity.289 He argued that respect for the individual was an absolute norm which should never be subordinated to collective norms.290 Barber also denied that the torture practiced by U.S. allies is less severe than that perpetrated in Communist states.291 The United States' greatest obligation, in Barber's view, was to focus on those nations in which the United States possessed the greatest influence to do the most good.292 Barber's article reflected a growing alarm over the fact that the international community appeared to be turning a blind eye to the practice of torture.293 Thus, human rights activists called for additional international action to combat the wide-spread use of torture.

III. THE UNITED NATIONS CONVENTION AGAINST TORTURE

A. A Renewed Attack On Torture

In 1984, Amnesty International issued a second report on torture.294 Amnesty persuaded the United Nations to adopt the 1975 Declaration on Torture. The organization recognized, however, that the Declaration had not been effective in halting the abuse of detainees.295 Amnesty's report contained allegations of torture and ill-treatment against ninety-eight countries.296 Between mid-1974 and

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287 JAMES DAVID BARBER, Rationalizing Torture, the Dance of the Intellectual Apologists, 17 WASH. MONTHLY 12, 13 (1985).
288 Id.
289 Id. at 15.
290 Id.
291 See id. at 15—16.
292 BARBER, supra note 287, at 16.
293 See generally id.
295 See generally id.
296 Id. Torture, of course, remains an international problem today. As the report states:

The methods vary: for example, the long-used falanga (beating on the soles of the feet, also called falaka); the use of quicklime inside a hood made from the inner tube of a tyre, as reported by Guatemalan torture victims; the Syrians' "black slave", an electrical apparatus that inserts a heated metal skewer into the bound victim's
1979, Amnesty’s Urgent Action Network intervened on behalf of 1,143 individuals considered to be in danger of abuse in thirty-two countries.297 Between 1980 and mid-1983, the Network launched urgent appeals on behalf of 2,687 individuals in forty-five countries.298

The Amnesty report argued that there was a need to adopt the legally-binding Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Following World War II, genocide had been declared a crime against humanity. Clearly, torture now was deserving of similar condemnation and punishment.299 Such a convention not only would enshrine the prohibition against torture as part of international law, but would overcome some of the Declaration’s glaring deficiencies.300 Amnesty criticized the Declaration’s exclusion of “lawful sanctions” from its purview;301 its failure to provide for universal jurisdiction over those accused of torture;302 as well as its differential treatment of torture and less severe forms of degrading treatment or punishment.303 Amnesty also argued that an international organ must be empowered to receive complaints of torture and ill-treatment and authorized to conduct mandatory on-site inspections.304

Amnesty pointed out that torture is usually part of the state-controlled machinery to suppress dissent,305 and that such abuse must be attacked on a transnational level.306 Absent international pres-

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297 Id. at 2–3.
298 SECOND AMNESTY REPORT, supra note 294, at 3. The Urgent Action network was established in 1974. Id. at 2. It organized speedy responses to allegations of mistreatment by the 30,000 people in 47 countries who participated in the network. Id.
300 See supra notes 228–49 and accompanying text.
301 See Declaration Against Torture, supra note 228, art. 1.
302 Universal jurisdiction would authorize any State to prosecute an individual who engaged in acts of torture. SECOND AMNESTY REPORT, supra note 294, at 3.
303 Id.
304 SECOND AMNESTY REPORT, supra note 294, at 3.
305 Id. at 4–5.
306 Id. at 3–4.
sure, Amnesty argued that regimes resort to torture as a means of combating guerilla warfare, intimidating those who are agitating for change, or as a device for ferreting out opposition.\textsuperscript{307} Although torture promises to yield quick results, it is an edifice built on a foundation of erroneous allegations, false confessions, and abuse of the innocent.\textsuperscript{308} In those states that practice torture, the legal maxim that the punishment must fit the crime is replaced by a perverse philosophy that permits the arbitrary punishment and torture of many innocent individuals.\textsuperscript{309}

The Amnesty report noted that the abuse of detainees quickly becomes institutionalized as elite units are formed which are trained in the use of torture.\textsuperscript{310} The report described how in Greece, young conscript soldiers from anti-Communist families were selected for the military police.\textsuperscript{311} Only the most dedicated and determined of this group were then schooled in torture. They were indoctrinated to view themselves as an elite unit with a special mission to combat the forces of immorality and Communism.\textsuperscript{312} Trainees were also innured to pain and to the use of violence.\textsuperscript{313} They were regularly beaten during their training and, at times, the enlistees were ordered to beat one another.\textsuperscript{314} The trainees were forced to undergo humiliating experiences—eating the straps of their berets, kneeling and swearing allegiance to portraits of their commanding officers, and feigning sexual relations with a female in front of their comrades.\textsuperscript{315} The trainees, most of whom were from poor, rural areas, also were provided with a strong self-interest in remaining in torture units.\textsuperscript{316} Torturers were provided with automobiles and vacations, guaranteed employment after military service, and were permitted to wear long-hair.\textsuperscript{317} Those who were reluctant to engage in torture were ridiculed and threatened with the loss of their position and with imprisonment.\textsuperscript{318} Many slang words or euphemisms were cre-

\begin{thebibliography}{99}
\item\textsuperscript{307} Id. at 4.
\item\textsuperscript{308} Id. at 7.
\item\textsuperscript{309} \textit{Second Amnesty Report}, supra note 294, at 7–8.
\item\textsuperscript{310} Id. at 10.
\item\textsuperscript{311} Id.
\item\textsuperscript{312} Id.
\item\textsuperscript{313} Id.
\item\textsuperscript{314} \textit{Second Amnesty Report}, supra note 294, at 10.
\item\textsuperscript{315} Id.
\item\textsuperscript{316} Id.
\item\textsuperscript{317} Id.
\item\textsuperscript{318} Id.
\end{thebibliography}
ated by the trainees to describe their work.\textsuperscript{319} For example, Chilean former detainees explained several terms used—translated into English these terms are: the “parrot’s perch” (body suspension), “the grill” (electric shock), and the “bath” (holding the victim’s head under water).\textsuperscript{320}

By the 1980s, it was apparent that torture left a lasting physical and psychological impact on its victims.\textsuperscript{321} Studies indicated that each technique of torture resulted in a specific set of consequences (sequelae).\textsuperscript{322} For instance, the induction of convulsions by passing an electric shock through the brain induced short-term mental confusion and mental impairment.\textsuperscript{323} When repeated, electric shock treatment resulted in dementia and incontinence.\textsuperscript{324} Victims also typically experienced apathy, aboulia (inability to make a decision), and electricity phobia.\textsuperscript{325} They also often perceived that their bodies were being penetrated by pins and needles, that their hands were torn off, that their heads were bursting, and that they were swallowing their tongues.\textsuperscript{326}

Even the most unintrusive techniques were found to leave lasting psychological scars.\textsuperscript{327} For instance, sensory deprivation frequently led to anxiety, hypochondria, and hysteria.\textsuperscript{328} Less frequent reactions included phobias, depressions, emotional fatigue, and obsessive-compulsive reactions. Such anxiety “can lead to stomach, heart and genito-urinary ailments as well as tremors and sleep disturbances.”\textsuperscript{329}

A 1982 Amnesty International mission to Chile described the impact of torture on a thirty-one year old factory worker who one year earlier had been abused by security forces.\textsuperscript{330}

She had swelling and discoloration in places where she had received blows, and there were small black scabs where

\begin{footnotes}
\item[319] Second Amnesty Report, supra note 294, at 24.
\item[320] Id.
\item[323] Id.
\item[324] Id.
\item[325] Id.
\item[326] First Amnesty Report, supra note 186, at 60.
\item[327] Id.
\item[328] Id.
\item[329] Id.
\item[330] Second Amnesty Report, supra note 294, at 24.
\end{footnotes}
electrodes had been applied. . . . She had almost no appetite initially after her release and suffered for about 20 days from nausea but did not vomit. She developed a urinary tract infection. Her genitals became inflamed two months, and again four months, after her release. Among other symptoms, she experienced abdominal pain and headaches when she menstruated, persistent headaches in the back of the head and around the temples, impaired memory, difficulty in concentrating, dizziness, insomnia, nightmares, depression to the point of feeling suicidal, proneness to weeping, and anxiety attacks triggered especially by loud noises.\textsuperscript{331}

Another case involved a Sri Lankan cigar manufacturer, who in September 1981 committed suicide a few months after being released from detention.\textsuperscript{332} The security forces allegedly had driven needles into both his toes and heels.\textsuperscript{333} The medical expert who examined the victim reported that he was unable to talk and expressed himself through pantomime.\textsuperscript{334} He also had difficulty passing urine and the doctor found evidence of blood clotting in both big toes and on his heels.\textsuperscript{335} The doctor told Amnesty International that the patient had suffered hysterical attacks and was disturbed psychiatrically as a result of the abuse which he had suffered.\textsuperscript{336}

An international consensus clearly had developed for the adoption of a legally binding instrument prohibiting torture. In 1977, the World Council of Churches issued a statement which, in part, called upon its members to work towards a legally-binding convention against torture.\textsuperscript{337} The Council bemoaned that “[t]oday, we stand under God’s judgment, for in our generation the darkness, deceit and inhumanity of the torture chamber have become a more widespread and atrocious reality than at any other time in history.”\textsuperscript{338} The statement recognized that members of the World Council often differed over the nature, importance, and hierarchy of human

\textsuperscript{331}Id.
\textsuperscript{332}Id. at 25.
\textsuperscript{333}Id.
\textsuperscript{334}Id.
\textsuperscript{335}SECOND AMNESTY REPORT, supra note 294, at 25.
\textsuperscript{336}Id. at 25.
\textsuperscript{337}World Council of Churches, Statement on Torture (1977), reprinted in, TORTURE IN BRAZIL, supra note 266, at 230, 233.
\textsuperscript{338}Id. at 231.
rights. Despite these differences, the World Council of Churches observed that there was universal agreement that torture was to be condemned and prohibited.339

B. The Convention Against Torture

In 1977, the United Nations General Assembly took the first step towards the drafting and adoption of a legally-binding instrument on torture. Recognizing that additional international efforts were required to protect individuals from torture, the General Assembly requested the Commission on Human Rights draft a Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention or Convention Against Torture). The Commission on Human Rights used the principles enunciated in the 1975 Declaration as a guide for the Convention.340

On December 10, 1984, the thirty-sixth anniversary of the adoption of the Universal Declaration of Human Rights, the United Nations General Assembly adopted by consensus the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.341 General Assembly President Paul J.F. Lusaka of Zambia proclaimed that the Convention Against Torture "represents a major step towards creating a more humane world."342 Mr. Go’mez-Gómez of Colombia added that the Convention’s passage "implies a triumph of the human being’s victory over brutality and violence. . . . It must not be possible in the present era . . . for anyone to repeat Nietzsche’s cynical comment that ‘the State is the coldest of cold monsters.’”343 Richard Shifter of the United States termed the vote a “significant achievement” which indicates that “[i]t is no longer acceptable, in the eyes of the international community, for a government to claim that the way it treats its own citizens is solely an internal matter if the treatment in question violates the provisions of international instruments which set human rights standards.”344

339 Id. at 232.
341 Convention Against Torture, supra note 1, at 197.
343 Id. at 1666.
344 Id. at 1667.
1. The Body of the Convention: Facts and Criticisms

Article 1 of the Convention virtually mirrors the definition of torture in the 1975 Declaration. According to the Convention, torture involves an act by which severe pain or suffering, whether physical or mental, is intentionally inflicted. Presumably, such acts are easily identified. The jurisprudence of the European Court of Human Rights in the case of the Republic of Ireland v. the United Kingdom, however, illustrates the opaque nature of the notion of severe pain and suffering. The European Commission on Human Rights ruled that the so-called five techniques utilized by the British against IRA guerrillas constituted torture. The European Court, however, while recognizing that the five techniques undoubtedly amounted to inhuman and degrading treatment, ruled that they "did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood." There also is a question of whether the international community should take cognizance of cases involving a single act of torture. The European Court only assumes jurisdiction over an administrative practice of cruel or inhuman treatment or punishment. This typically is established by demonstrating that torture or other acts of inhuman or

345 See supra notes 230–36 and accompanying text; Convention Against Torture, supra note 1. Article 1 of the Convention Against Torture states that:

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

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

346 The language of the Declaration which states that "torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment" is omitted. See Declaration Against Torture, supra note 228, art. 1.

347 There is no indication as to whether an objective or a subjective test is to be applied.


349 Id. at 79.

350 Id. at 80.

351 See id. at 81 (ruling that a single case of physical abuse does not constitute inhuman treatment within the European Convention for the Protection of Human Rights and Fundamental Freedoms).
degrading treatment or punishment have been applied regularly in the same location or locations, or have been applied by the same law enforcement officer or officers against the same type or group of detainees.\textsuperscript{352} The intent requirement in article 1 of the Convention Against Torture is much less complex and may be implied from the type of act or acts involved and their duration and severity.

Article 1 further defines torture as acts which are inflicted on a person for such purposes as obtaining information or a confession, inflicting punishment or intimidation, or to discriminate against an individual or group.\textsuperscript{353} These purposes clearly are illustrative rather than exhaustive. The demonstration of purpose or motive may prove valuable in assisting in the establishment of intent at trial.\textsuperscript{354}

The Convention’s definition of torture is limited to acts by a public official or persons acting in an official capacity.\textsuperscript{355} The latter phrase was not included in the Declaration and presumably encompasses individuals exercising de facto authority.\textsuperscript{356} While isolated acts of torture by private individuals may be addressed adequately by domestic law, the Convention does not cover vigilante groups or death squads.\textsuperscript{357} The Declaration specified that acts of torture must be committed at the instigation of a public official. The Convention broadens this provision by adding that acts inflicted with the consent or acquiescence of such persons also constitute torture.\textsuperscript{358} The latter clarifies that it is not necessary that a public official affirmatively act to inflict torture. It is sufficient that he or she tolerates or consents to an act or ongoing practice of torture.

Article 1 retains the Declaration’s exclusion of pain or suffering arising from, inherent in, or incidental to law sanctions. The definition, however, omits reference to the Standard Minimum Rules for the Treatment of Prisoners. This omission appears to indicate that the pain or suffering accompanying any lawful sanction, not just those penalties imposed upon detainees and prisoners, is excluded

\textsuperscript{352}The Greek Case (1969), 12 Y.B. EUR. CONV. 195.

\textsuperscript{353}The purpose of discrimination was not contained in the Declaration Against Torture.

\textsuperscript{354}The phrase “for such purposes as” indicates that the enumerated purposes are illustrative rather than exhaustive. Convention Against Torture, supra note 1, art. 1.

\textsuperscript{355}Convention Against Torture, supra note 1, art. 1; see Declaration Against Torture, supra note 228, art. 1(1).

\textsuperscript{356}See Convention Against Torture, supra note 1, art. 1; Declaration Against Torture, supra note 228, art. 1(1).

\textsuperscript{357}See Convention Against Torture, supra note 1, art. 1; Declaration Against Torture, supra note 228, art. 1(1).

\textsuperscript{358}Convention Against Torture, supra note 1, art. 1; see Declaration Against Torture, supra note 228, art. 1(1).
from the definition of torture. Lawfulness, however, is to be evaluated in accordance with international rather than domestic law. Otherwise, a state could defeat the purpose of the Convention by adopting draconian punishments.359

The Convention also clarifies that it is not intended to preempt more expansive provisions which may be contained in domestic law or other international instruments. Article 1(2) states that the definition of torture is "without prejudice to any international instrument or national legislation which does or may contain provisions of wider application."360 Article 2 requires each State Party to take effective legislative, administrative, judicial, or other measures to prevent acts of torture within any territory under its jurisdiction.361 Exceptional circumstances, such as a state of war, internal political instability, or other public emergency, may not be invoked to justify torture.362 A central provision of article 2, which was not included in the Declaration, states that superior orders may not be invoked as a justification of torture.363

Article 3 specifies that no State Party shall return or extradite a person to another state where there are substantial grounds for believing that the individual will be subject to torture.364 In determining whether to expel, return, or extradite a person, the second paragraph of article 3 instructs the competent authorities to take into account all relevant considerations. These considerations include the existence in the state concerned of a consistent pattern of gross, flagrant, or mass violations of human rights.365 This provision became the subject of controversy.

Article 4 requires each State Party to ensure that all acts of torture are offenses under its domestic criminal law. A State also shall make criminal an attempt to commit torture as well as complicity and participation in torture. This provision, unlike those of the Declaration, fails to penalize incitement to torture and does not require criminal punishment for cruel or inhuman treatment or punish-

360 Convention Against Torture, supra note 1, art. 1(2).
361 Id. art. 2(a); see Declaration Against Torture, supra note 228, art. 4.
362 Convention Against Torture, supra note 1, art. 2(2); Declaration Against Torture, supra note 228, art. 3.
363 Convention Against Torture, supra note 1, art. 2(3).
364 Id. art. 3(1).
365 Id. art. 3(2).
ment. Article 4 presumably would permit punishment of state officials who provide torture training and equipment to allied regimes.\textsuperscript{366} Article 4(2) states that each State Party shall make the offenses enumerated in article 4 punishable by “appropriate penalties which take into account their grave nature.”\textsuperscript{367} Article 4 fails to specify harsh penalties for high-level officials as well as for a pattern and systematic practice of torture. Additionally, article 4 fails to provide for a restriction on the applicable statute of limitations for torture and does not prohibit the granting of amnesties or pardons.

The Convention does not characterize torture as a crime against humanity which is subject to the jurisdiction of an international penal tribunal.\textsuperscript{368} It does, however, authorize a broad assertion of state jurisdiction over torture. Article 5 specifies that states shall provide for territorial jurisdiction as well as jurisdiction based upon the nationality of the offender and the victim. The provisions for nationality and passive personality jurisdiction go beyond the theories of jurisdiction recognized by most domestic legal systems.\textsuperscript{369} Article 5 also provides for universal jurisdiction over torture. A state is required to take measures to establish jurisdiction over offenses where the alleged offender is present within its jurisdiction and the state does not extradite the offender.\textsuperscript{370} In such cases, the state is

\textsuperscript{366}Id. art. 4(1); see Declaration Against Torture, supra note 228, art. 7. The Declaration also did not impose a criminal penalty on acts of cruel or inhuman treatment or punishment. Id. The American Convention To Prevent And Punish Torture, Dec. 9, 1985, O.A.S. Treaty Ser. No. 67, O.A.S. Doc. OEA/Ser. P, AG/doc. 2023/85/rev. 1, at 46, reprinted in 25 I.L.M. 519 (1986) [hereinafter American Convention Against Torture] states that States Parties shall take “effective measures to prevent and punish other cruel, inhuman, or degrading treatment or punishment.” Id. art. 7.

\textsuperscript{367}Convention Against Torture, supra note 1, art. 4(2).

\textsuperscript{368}Genocide Convention, supra note 154, arts. 1, 4.


\textsuperscript{370}Convention Against Torture, supra note 1, art. 5(2). Article 6 permits a State in whose territory a person alleged to have committed torture is found to take him or her into custody. The State is to notify the States with jurisdiction over the offender immediately that such person is in custody and of the circumstances which warrant his or her detention. The State(s)
obliged to submit the case to its competent authorities for prosecution.\textsuperscript{371}

Appreciating the possible reluctance of the offender’s home state to bring him or her to trial, the Convention attempted to broaden the number of states with jurisdiction over the offense of torture.\textsuperscript{372} While article 9 requires States Parties to afford one another the “greatest measure of assistance in connection with criminal proceedings” brought under the Convention, a state seeking to prosecute acts of torture, which occurred outside its territorial jurisdiction, will typically encounter difficulties in gathering witnesses and evidence. In many cases, where the victim is a citizen of another state, a regime’s concern with international comity and geo-political advantage will override the state’s interest in vindicating the prohibition against torture.\textsuperscript{373}

Article 8 requires that the offense of torture be included as an extraditable offense in any extradition treaty existing between State Parties.\textsuperscript{374} If a State Party, which makes extradition conditional on the existence of a treaty, receives a request for extradition from a state with which it does not have a treaty, the receiving state shall consider the international Convention as an adequate legal basis for extradition.\textsuperscript{375}

Article 10 requires each State Party to ensure that education and information regarding the prohibition against torture is included in the training of law enforcement personnel.\textsuperscript{376} The Convention also mandates that such material be included in the training of other persons, such as medical personnel, who may be involved in the custody, interrogation, or treatment of individuals subjected to any

\textsuperscript{371}Id. art. 7. The prosecuting authority is free to drop charges, plea bargain the case, or seek a lenient penalty. Article 7(2) does require that the authorities make their decision in the same manner as in the case of any other serious offense. The same standards for prosecution and conviction are to be used for those accused of torture, regardless of the basis of jurisdiction. Id. art. 7(2). All individuals accused of torture shall be treated fairly throughout the proceedings. Id. art. 7(3).

\textsuperscript{372}Of course, an offender would most likely be present in their state of nationality. Such a state clearly will be reluctant to prosecute the accused or will insure that he or she receives a mild punishment. A provision vesting jurisdiction in a regional or international penal court should have been incorporated into the Convention.

\textsuperscript{373}See, e.g., The Greek Case, supra note 352, at 196.

\textsuperscript{374}Convention Against Torture, supra note 1, art. 8(1).

\textsuperscript{375}Id. art. 8(2).

\textsuperscript{376}Id. art. 10; see Declaration Against Torture, supra note 228, art. 5.
form of arrest, detention, or imprisonment. Each State Party also must include the prohibition against torture in the rules or instructions issued in regard to the duties and functions of such persons. As in the Declaration, each State Party shall keep under systematic review interrogation rules, instructions, methods, and practices, as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention, or imprisonment. It would have been useful, however, if the Convention obligated the United Nations to provide technical assistance to regimes in the training of law enforcement personnel as well as the implementation of various legal and institutional reforms.

Article 12 imposes an affirmative duty upon each State Party to conduct a prompt and impartial investigation where there are reasonable grounds to believe an act of torture was committed in any territory under its jurisdiction. An individual who alleges that he or she was subjected to torture also shall be ensured the right to complain to competent authorities and to have his or her case efficiently and objectively examined. The complainant and witnesses are to be protected against ill-treatment and intimidation. The Convention, however, fails to require regimes to provide grievants a reasonable amount of time in which to file a complaint.

Article 14 retains the Declaration’s provision on redress and compensation. Unlike the Declaration, however, there is no provision for compensation in the case of cruel, inhuman, or degrading treatment or punishment. An additional clause in the Convention provides for the “means for as full rehabilitation as possible,” but includes no explanation of the form of such compensation or the procedures used to arrive at it.

Article 15 retains the provision that any statement which is made as a result of torture shall be excluded from evidence. The Convention, in contrast to the Declaration, does not extend the exclusionary rule to statements extracted as a result of other cruel, inhuman, or degrading treatment or punishment. The Convention, however,

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377 Convention Against Torture, supra note 1, art. 10(1).
378 Id. art. 10(2).
379 Id. art. 11; see Declaration Against Torture, supra note 228, art. 6.
380 Convention Against Torture, supra note 1, art. 12; see Declaration Against Torture, supra note 228, art. 9.
381 Convention Against Torture, supra note 1, art. 13; see Declaration Against Torture, supra note 228, art. 8.
382 Convention Against Torture, supra note 1, art. 14; see Declaration Against Torture, supra note 228, art. 11.
does permit a statement obtained through torture to be introduced in a proceeding against a person accused of torture. One issue not addressed is which party should bear the burden of proof on the issue of torture. In addition, no reference is made to the questions of harmless error, the use of otherwise inadmissible confessions as prior inconsistent statements, or standing.\footnote{Convention Against Torture, supra note 1, art. 15; see Declaration Against Torture, supra note 228, art. 12.}

Article 16 is the only provision of the Convention which addresses acts of cruel, inhuman, or degrading treatment or punishment which do not amount to torture. Articles 10 (training), 11 (systematic review of interrogation procedures and rules), 12 (impartial investigation), and 13 (right of complaint and of prompt and impartial investigation) are extended to cover such acts. There is no requirement, however, that acts of cruel, inhuman, or degrading treatment or punishment be criminally sanctioned or that victims should receive compensation. Furthermore, article 16 does not incorporate a prohibition on the expulsion, return or extradition of persons to States where they are likely to be subjected to cruel, inhuman, or degrading treatment or punishment. Nor is there any requirement that statements extracted as a result of such treatment or punishment should be excluded from evidence.\footnote{Convention Against Torture, supra note 1, art. 16(1).} The failure to strengthen article 16 appears to have been based on a belief that the concept of cruel, inhuman or degrading treatment or punishment was too vague a legal standard upon which to base legal culpability and judgments.\footnote{Report of the Working Group on a Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Question of the Human Rights of all Persons Subjected to any Form of Detention or Imprisonment, Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. E/CN.4/1984/72, at 7 (1984) [hereinafter 1984 Working Group Report].}

2. Enforcement Issues

The Convention's implementation provisions are remarkably complex. A Committee Against Torture (Committee) is established which consists of ten experts of high moral standards and recognized competence in the field of human rights. The Committee members are to serve in their personal capacity and shall be elected by the States Parties. In nominating and electing these experts, consideration is to be given to equitable geographical distribution and to the usefulness of the participation of persons possessing legal
expertise. Although the Committee members, in theory, are independent, they are nominated, financed, and elected by States Parties and are not likely to take bold or controversial initiatives.

Within one year following the ratification of the Convention, a State Party is obligated to submit a report detailing the “measures they have taken to give effect to [its] undertakings under . . . [the] Convention.” Thereafter, the State Party shall submit supplementary reports every four years on “any new measures taken and such other reports as the Committee may request.” Each report shall be considered by the Committee which “may make such general comments as it may consider appropriate” and shall forward these to the State Party concerned. The State Party may respond with any observations it chooses to make to the Committee. The Committee may, at its discretion, decide to include its “comments” together with the “observations” received from the State Party in the annual report which is to be submitted to the States Parties and to the General Assembly of the United Nations.

The reporting procedure is open to criticism and reflects the difficulty of balancing considerations of state sovereignty with United Nations enforcement of international obligations. States which practice torture are not likely to ratify the Convention. Countries which ratify the Convention merely will report their adherence to the statutory provisions which prohibit torture, and will not call attention to restrictive judicial interpretations of either these provisions or violations of the Convention. The Committee Against Torture is not authorized to conduct an independent investigation into the state reports, but rather, is limited to general comments. The threat of these comments being included in a report which is circulated to other States Parties and to the General Assembly poses little deterrent to a state’s practice of torture.

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386 Convention Against Torture, supra note 1, art. 17(1). The members of the committee are elected by secret ballot from a list of persons nominated by States Parties. Id. art. 17(2). Members are elected for a term of four years. Id. art. 17(5).

387 Id. art. 19(1).

388 Id.

389 Convention Against Torture, supra note 1, art. 19(3).

390 Id.

391 Id. art. 19(4). The State Party may request that the committee include a copy of the report submitted by the State Party in the committee’s annual report. Id.; see id. art. 24 (requirement of annual report).

392 The reporting procedure is modeled on that contained in the International Covenant on Civil and Political Rights, supra note 157, art. 40.
Article 20, however, provides an innovative enforcement procedure. This provision binds a State Party to the Convention unless the state proclaims that it does not recognize the Committee’s competence to enforce article 20. Article 20 specifies that if the Committee receives reliable information containing well-founded indications that torture is being practiced systematically in the territory of a State Party, the Committee shall invite the State Party to “co-operate in the examination of the information and . . . to submit observations with regard to the information concerned.” Based on this information, the Committee may designate one or more of its members to make a “confidential inquiry” and to “urgently” report his or her findings to the Committee. The Committee shall solicit the co-operation of the State Party concerned and may seek the State Party’s agreement to permit a visit to its territory. After examining all available information obtained, the Committee transmits its “findings” to the State Party together with any “comments or suggestions which seem appropriate in view of the situation.” All these proceedings are to be “confidential.” Upon completion of its inquiry, and after consultation with the State Party concerned, the Committee may include a summary account of the results in its annual report.

This optional procedure permits the Committee, on its own initiative, to investigate acts of torture. This inquiry may be based on information from a variety of sources. A state may ignore these charges and either refuse to co-operate with the committee, or dismiss the committee’s findings as biased. The threat of a critical summary account in the committee’s annual report is a modest sanction, particularly for a regime which is willing to engage in the practice of torture. Alternatively, a state may meet with the Committee in order to explain or to rebut the allegations. This permits the state to challenge the allegations thereby ensuring that its version is included in the Committee’s report. The provision for visitation to the State Party’s territory is unprecedented. Were a State Party to grant the Committee unlimited access to its prisons, it would be able

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393 Convention Against Torture, supra note 1, art. 20.
394 Id. art. 20(1).
395 Id. art. 20(2).
396 Id. art. 20(3).
397 Id. art. 20(4).
398 Convention Against Torture, supra note 1, art. 20(5).
to take precautionary steps to conceal acts of torture and to present itself in a positive light. 399

Article 21 provides an optional inter-state complaint provision. 400 This provision authorizes the Committee to receive and to consider communications from a State Party claiming another State Party is not fulfilling its obligations under the Convention. The Committee is authorized only to receive and to consider the complaint if both States Parties have declared that they recognize the competence of the Committee under article 21. 401 The limitation to states which have recognized the inter-state complaint procedures restricts the application of the provision. In addition, a state’s willingness to lodge a complaint likely will be circumscribed by geo-political considerations. Complaints are most likely to be lodged against ideologically dissonant regimes, politicizing and undermining the integrity of the complaint process.

A complex, time-consuming, and largely ineffectual process is established for processing inter-state petitions. The State Party lodging the complaint brings the matter to the attention of the State Party alleged to have failed to fulfill its obligations. Within three months after the receipt of the communication, the receiving state shall afford the complainant “an explanation or any other statement . . . clarifying the matter, which should include . . . reference to domestic procedures and remedies taken, pending, or available in the matter.” 402 If the complaint is not adjusted to the satisfaction of both States Parties within six months, either Party may refer the matter to the Committee. 403 This initial procedure may consume nine months. This limits the effectiveness of the process in addressing situations which demand a prompt response.

The Committee takes cognizance of the matter after insuring that all domestic remedies have been exhausted. But the exhaustion requirement is not applicable when the remedy is “unreasonably

399 A strong visitation procedure is contained in the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Nov. 26, 1987, Council of Europe Doc. H (87) 4, reprinted in 27 I.L.M. 1152 (1988), cited in Antonio Cassese, A New Approach To Human Rights: The European Convention For The Prevention Of Torture, 83 AJIL 128, 129 n.4 (1989). The European Convention establishes a committee which is empowered periodically to visit and to examine the treatment of persons deprived of their liberty. States Parties to the convention are required to cooperate with the committee in providing access and information. Id. arts. 7, 8.

400 Convention Against Torture, supra note 1, art. 21. This is modeled on the procedure in the International Covenant on Civil and Political Rights, supra note 157, art. 41.

401 Convention Against Torture, supra note 1, art. 21(1).

402 Id. art. 21(1)(a).

403 Id. art. 21(1)(b).
prolonged or is unlikely to bring effective relief to the victim."\textsuperscript{404} Where torture is being practiced in a state with the consent or toleration of governmental officials, however, it presumably would be futile to resort to domestic remedies.

The Committee is to hold closed meetings when investigating inter-state communications,\textsuperscript{405} and makes its offices available to the States Parties with the objective of reaching a "friendly solution of the matter on the basis of respect for the obligations provided for in the . . . Convention."\textsuperscript{406} The Committee may call upon the States Parties to supply all relevant information\textsuperscript{407} and the States Parties have the right to be represented before the Committee and to make oral or written submissions.\textsuperscript{408} The Committee submits a report within twelve months.\textsuperscript{409} In those instances in which a solution is reached, the Committee confines its report to a "brief statement of the facts and of the solution reached."\textsuperscript{410} Where no solution is reached, the Committee confines its report to a "brief statement of the facts" as well as "the written submissions and record of the oral submissions made by the States Parties."\textsuperscript{411} In every matter, the States Parties concerned receive the Committee's report.\textsuperscript{412} Under article 21, the Committee serves as an arbitor between the States Parties lacking the authority of a judicial opinion. This slow process may consume up to twelve months in pursuit of what may be an uncertain result. Nevertheless, there is value in a procedure which defuses state disputes and directs them into a nonviolent process of dispute resolution.

Article 22 provides for an optional individual petition procedure.\textsuperscript{413} A State Party may declare that it recognizes the competence
of the Committee to both receive and consider communications from, or on behalf of, individuals subject to its jurisdiction who claim to be victims of a violation of the Convention.\footnote{Convention Against Torture, supra note 1, art. 22(1).} States engaged in the gross and persistent violation of human rights, however, are not likely to agree to this procedure.

The Committee shall consider those communications which are anonymous, those which are considered to be an abuse of the right of submission, or those which are incompatible with the provisions of the Convention to be inadmissible.\footnote{Id. art. 22(2).} The Committee, however, may not consider communications which have been, or are being, examined under another international procedure of investigation or settlement.\footnote{Id. art. 22(5)(a).} The Committee also must refrain from exercising jurisdiction over a complaint where the petitioner has failed to exhaust all available domestic remedies.\footnote{Id. art. 22(5)(b). There is no requirement for the exhaustion of domestic remedies "where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief." Id.} It seems unrealistic to expect that individuals will disclose their names, pursue domestic remedies, or file an international complaint when they fear retribution. Provisions should be made for interested parties and non-governmental organizations to file petitions on behalf of victims of torture, particularly those who are deceased. The safety of those who file complaints also should be monitored by an international agency.

The Committee must bring any admissible communications to the attention of the State Party concerned.\footnote{Convention Against Torture, supra note 1, art. 22(3).} Within six months, the receiving state must submit "written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State."\footnote{Id. art. 22(6).} The Committee conducts closed meetings when reviewing communications,\footnote{Id. art. 22(4).} and considers such communications in light of all the information available by, or on behalf of, the individual as well as the State Party concerned.\footnote{Id. art. 22(7).} The Committee "shall forward its views to the State Party concerned and to the individual."\footnote{Id. art. 22(7).} The individual complaint procedure, although unduly
lengthy, permits the Committee to issue a statement of opinion concerning the merits of the complaint. Nevertheless, the Committee’s decision is not binding on the State Party.

It is not certain whether these complaint procedures may be invoked simultaneously. Clearly, a number of individual complaints would appear to constitute sufficient reason to trigger the Committee’s investigative procedure. Despite the far-reaching scope of the Convention’s enforcement procedures, they reflect the basic tension between state sovereignty and the international regulation of torture. Most states will not adhere to a Convention which does not respect their domestic jurisdiction. As a result, the drafters of the Convention merely required countries to submit reports. The optional procedures are complex, time-consuming, and do not fully resolve disputes. At best, they exert moral persuasion on states alleged to be engaged in the practice of torture. A stark contradiction thus continues to exist between the recognition that freedom from torture is a fundamental human right and the international community’s continuing deference to state sovereignty.

C. The Initial Impact Of The Convention

In 1985, a newly appointed “Special Rapporteur” examined the question of torture. In February 1986, the Special Rapporteur issued a report on the extent and causes of such abuse. The report noted that torture is the “plague of the second half of the twentieth century” and that the struggle against torture is one of the “leading themes within the international community.” The Special Rapporteur emphasized that with the passage of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment there can be “no disagreement whatsoever on the fact that torture is absolutely forbidden.” He noted that it is the “dehumanizing effect of torture—the destruction of exactly that which communication which already has been transmitted to the committee.” Convention Against Torture, supra note 1, art. 22(8).


424 See generally 1986 Rapporteur Report, supra note 359. At the time the report was issued at least 41 states had signed, but not ratified, the Convention.

425 Id. at 1.

426 Id.
makes man a human being—which may well explain the general condemnation of the phenomenon of torture.  

Nevertheless, the Special Rapporteur bemoaned the fact that there is a wide gap between the legal condemnation of torture and its widespread practice. He reported having received allegations of torture and other cruel, inhuman, or degrading treatment and punishment in forty countries. The Report states:

The Special Rapporteur has received an alarming amount of information about alleged torture. By its nature torture often takes place during interrogation in isolation and in secret places. Unless the victim is released or the body is found with marks of torture on it, it is almost impossible to obtain direct evidence of torture. Moreover, there are a considerable number of torture techniques which leave no traceable marks on the body. . . . Torture may happen everywhere and in fact—in varying degrees—it occurs in all types of society.

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The most saddening conclusion the Special Rapporteur feels compelled to draw is that torture, in many, if not all, cases, in considered to be the easiest and the fastest way to solve problems. It is indeed shocking to see how easily people fall into the practice of torture. . . . Due to a moral awakening and the recognition of the dignity of the individual human being, such practices have been abolished in national legislations. An examination of the present situation where torture is still widely practised, but officially denounced, can only lead to the conclusion that this moral awakening has not yet had tangible results for everybody. It is, therefore, all the more important that the international community, supported by world-wide public opinion, should continue and intensify its struggle against the plague of the second half of the twentieth century.

427 Id. at 2.
428 Id.
430 Id. at 3.
431 Id. at 35.
The Special Rapporteur attributed the widespread incidence of torture to lengthy detentions and unregulated interrogation procedures, particularly during situations of civil strife and states of emergency.\footnote{Id. at 2, 12, 24–25.} According to the Special Rapporteur, such abuses are particularly likely to occur under authoritarian governments which have abrogated the independence of the judiciary as well as the rule of law.\footnote{Id. at 3, 24–25.} Although the Special Rapporteur applauded the international legal prohibition of torture as an indispensable first step in combating torture, he bemoaned that it most likely would take several decades for the Convention Against Torture to be ratified by a significant number of states.\footnote{1986 Special Rapporteur Report, supra note 359, at 2.} He observed that more than legal reform is required because the eradication of torture in various authoritarian regimes necessitated profound socio-political and socio-economic reforms.\footnote{Id. at 25.} The Special Rapporteur also criticized the industrial democracies for contributing to the repressive practices of these governments by selling them police and paramilitary equipment, such as cattle prods and electric shock batons, and training foreign police in interrogation practices.\footnote{See id. at 30.} Unfortunately, exports and training are not prohibited in the Convention Against Torture.

In the short-term, the Special Rapporteur urged states to adopt legislative measures to combat torture.\footnote{Id. at 35.} Many of the Rapporteur’s suggestions mirror the provisions contained in the Convention Against Torture.\footnote{See generally Convention Against Torture, supra note 1.} These include legislative provisions for the criminal prosecution of those who engage in torture; the exclusion of evidence extracted under torture; the limitation of incommunicado interrogation to a maximum of seven days; and a strict protection of the right of habeas corpus.\footnote{See generally id.} In addition, the interrogation of detainees only should take place at official interrogation centers, and, if possible, interrogation should be tape-recorded. All security and law-enforcement personnel also should be instructed in, and provided with, a copy of the Code of Conduct of Law Enforcement Officials.\footnote{Id. at 35; see supra notes 213–18 and accompanying texts.} The Special Rapporteur further recommended that detainees be visited regularly by a commission charged with the re-
Responsibility of insuring that all detainees are housed in safe and well-maintained conditions. This commission should include medical personnel who are instructed and aware of their responsibilities under the Principles of Medical Ethics. The Special Rapporteur also urged states to conduct a judicial inquiry into all complaints of torture. When the complaint is deemed well-founded, the victim or his relative should receive compensation. Lastly, the Special Rapporteur suggested that export regulations should prohibit the transfer of material and equipment which may be used in the practice of torture.

In 1988, the Committee Against Torture issued its first annual report. In December 1991, the Committee reported that seventy-four states had signed or ratified the Convention Against Torture. As of 1989, seventeen had recognized the intra-state, individual petition procedure. A review of the Committee's activities reveals mixed results. The Committee began conducting hearings on state reports. At these hearings, the Committee subjected state procedures, regulations and statutes to exacting scrutiny and exerted constant pressure on states to conform their provisions to the requirements of the Convention Against Torture.

441 1986 Special Rapporteur Report, supra note 359, at 36; see supra notes 211–12 and accompanying texts.
442 1986 Special Rapporteur Report, supra note 359, at 56.

One constant concern was coordinating the activities of the Special Rapporteur and the Committee Against Torture. In fact, the two were complementary. The Special Rapporteur's mandate was not limited to States Parties to the Convention. In addition, he was able to act quickly since he was not limited by the Convention's procedures and requirements. See 1990 Committee Report, supra, at 5–6; G.A. Res. 44/144, U.N. GAOR, 44th Sess., Supp. No. 49, at 223, U.N. Doc. A/44/49 (1989) (welcoming the exchange of views that has taken place between the Committee Against Torture and the Special Rapporteur).

444 The 10 person committee included representatives from Canada, France, Mexico, Cameroon, Argentina, the Union of Soviet Socialist Republics, Bulgaria, Philippines, Denmark, and Switzerland. See 1991 Committee Report, supra note 444, at 63.
445 Id. at 59–62.
446 1989 Committee Report, supra note 444, at 40.
448 See 1989 Committee Report, supra note 444, 8–38.
On the other hand, state reports tended to be brief and failed to address whether the countries' legal codes had been modified to incorporate a number of the Convention's pertinent provisions. In many cases, states which had ratified the Convention conceded that they had not implemented the required statutory reforms. Some states admitted that internal socio-political conditions complicated the prohibition and investigation of torture.

The Committee, in examining the reports, tended to focus on countries' legal provisions rather than on their actual practices. For example, Mexico was described by the Committee as having submitted a "first-rate report," which "could serve as a model to other reporting states." Yet, in 1992, Amnesty International reported that Mexican authorities had engaged in the widespread practice of torture. Additionally, while the Committee accepted Chile's initial report in 1990, it chastised the Chilean government's practices. A year later, the newly-installed democratic regime in Chile submitted a new report to "rectify the report that had been submitted by the former Government and which had provided a distorted picture of the then-prevailing situation with regard to torture." Since 1973, the Chilean government institutionalized torture, applying it systematically to pressure political opposition.

States also failed to draw attention to restrictive anti-terrorist legislation or to the widespread incarceration and abuse of political prisoners. A small number of states did produce potentially embarrassing statistics. In the Philippines, for instance, the Philippines Commission on Human Rights, reported a total of seventy-two cases involving torture to the state prosecutor. Only three members of the military were convicted, and these individuals received punishments "ranging from temporary suspension to discharge from the military."
service.462 In addition, the five police officers convicted merely received a demotion and a forfeiture of pay.463

In its first four years, the Committee Against Torture received and considered only three individual petitions. A petition lodged against Austria was rejected.464 The Committee ruled that it was precluded from considering the matter since the European Commission of Human Rights was also considering the complaint.465 The petition was filed by a Turkish citizen of Kurdish origin who claimed he was tortured by governmental authorities.466 He subsequently fled Turkey and sought political asylum in France.467 The Committee ruled that the petition was inadmissible because the complainant had failed to exhaust his domestic remedies in Turkey.468 The Committee rejected the allegation that such procedures, on their face, would prove ineffective.469

Three Argentineans brought a complaint on behalf of their relatives whom Argentine military authorities allegedly tortured to death in 1976.470 The authors alleged that the Argentinean law of June 1987, which insulated members of the Argentinean militia from criminal liability, contravened Argentina’s obligation to take effective measures to prevent acts of torture.471 The Committee ruled that the petition was inadmissible since the Convention did not apply to acts which occurred prior to the Convention’s entry into force. The Committee, however, advised the Argentine government that it had a moral responsibility to provide a remedy to the torture victims.472

The Committee’s one significant decision was its refusal to endorse or devote its energies to amending the Convention Against Torture to incorporate an optional protocol sponsored by Costa Rica.473 The Costa Rican proposal provided for Committee visits to places of detention to insure that States Parties complied with the

462 Id. at 29–30.
463 1989 Committee Report, supra note 444, at 29–30. In Egypt, 450 complaints of torture had been lodged with the Office of Public Prosecutions. As of 1989, 44 officers had been prosecuted. Id. at 23.
464 1991 Committee Report, supra note 444, at 73.
465 Id.
466 Id. at 74.
467 Id.
468 Id.
469 1991 Committee Report, supra note 444, at 74. An examination of Turkey’s harsh treatment of Kurds would appear to support the claim that the pursuit of domestic remedies would be futile. See 1992 AMNESTY INTERNATIONAL REPORT, supra note 455, at 257–60.
471 Id.
472 Id. at 112.
requirements of the Convention. The Committee reached a consensus that the amount of work, the language barriers, and the financial costs involved, mitigated against the adoption of such a procedure. The Committee expressed general support, however, for those who were working towards the adoption of the proposed optional protocol.

The Committee Against Torture has few significant accomplishments. Nevertheless, the Committee has affirmed and reinforced global condemnation of torture and has served as a stimulus for domestic reform, such as the United States' Torture Victim Protection Act of 1991. The Act, adopted in 1992, created federal civil jurisdiction over acts of torture committed abroad by foreign officials. In countries throughout the world, however, such statutory reforms mask the continuing practice of torture.

D. Torture In The Contemporary Era

In his 1990 report on torture, the Special Rapporteur noted that the fight against torture had intensified and that "[t]he number of countries where torture is systematically applied may have decreased." On the other hand, he noted that torture "remains

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474 Id.
475 Id. at 4–5.
476 Id. at 4–5.
a common phenomenon in today's world." The Special Rapporteur's report enumerated allegations of torture against fifty-one countries.

The rationale behind torture has not changed. It is utilized to extract confessions and information as well as to punish, discipline, intimidate, and destroy the victim's personality. The basic techniques of torture also remain the same—beatings, electric shock, suspension of the body by the hands or feet, deprivation of food and sleep, and psychological abuse. Regimes use torture primarily as a method of political repression against opponents. Torture is particularly prevalent during periods of civil strife when a regime is combating armed, rural guerilla forces. Regimes also have employed torture in an effort to control ethnic strife and separatist movements. Use of torture has become particularly prevalent in states confronting threats from Islamic fundamentalists.

In some countries, the torture of political opponents has even spread to children. It is alleged that children were forced to watch their parents being tortured. In other cases, authorities interrogated children whose parents the authorities are seeking to locate.

In addition, torturers often single out women for rape and sexual abuse. There are documented cases of rape against human rights activists in the Philippines, Uganda, India, Guatemala, Greece, and

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479 Id.

480 1990 Special Rapporteur Report, supra note 478, at 5.


482 Id. at 20.

483 Id. at 21-25.


488 See Turkey Report, supra note 481, at 34.

489 Id.

Syria as well as in other countries. Women subjected to interrogation also report being threatened with sexual abuse unless they cooperate with authorities. Some women have been persecuted because they are relatives of a regime’s political opponents. These victims of rape and sexual abuse often are too ashamed and degraded to file complaints. In some societies, those who publicly reveal sexual assault risk ostracism and criminal charges of fornication.

Furthermore, torture frequently is used against “common criminals” in order to punish them and to extract confessions. Those suspected of criminal activity elicit little public support or sympathy. Thus, the police feel free to utilize harsh interrogation tactics. No country is immune—even in industrial and democratic countries there are documented cases of the abuse and torture of criminal suspects. In addition, there is an apparent trend of police officers arbitrarily detaining and abusing those who are viewed as social pariahs, including the homeless, homosexuals, transients, refugees, and foreign workers.

Allegations of torture have proven increasingly difficult to corroborate. Detainees are isolated and there are few eyewitnesses. The police often wear hoods to conceal their identities. Those who lodge complaints, as well as witnesses, frequently confront police threats and retribution. Police and prosecutorial authorities also tend to dismiss allegations of torture arbitrarily. In Turkey, allegations stated that 204 people died as a result of torture over a four year period. After an investigation into the allegations, the Chief of Staff concluded that only four people had died as a result of torture. Eighteen months later, following an analysis of fifty-three additional deaths, the Chief of Staff concluded that two had been caused by torture.

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491 Rape And Sexual Abuse, supra note 490, at 2-5.
492 Id. at 3-4.
493 “These women become substitutes for the men in their families, and the government agents torture and abuse them to punish and shame their male relatives to coerce these men into surrendering.” Id. at 4.
494 Id. at 6.
495 Id. at 6-7.
496 Turkey Report, supra note 481, at 32-33.
498 Id. at 7.
500 Id. at 27–28.
501 Turkey Report, supra note 481, at 46.
Public prosecutors are reluctant to charge law enforcement officers who are accused of torturing suspects. In addition, few of the officers that prosecutors do charge are convicted. Amnesty International reports that "[i]n light of some 10,000 police officers prosecuted in only five years, [the eighty-four convictions] indicate that only very few alleged torturers actually incurred punishment."\(^{502}\)

Furthermore, following the restoration of democracy, many regimes have proclaimed general amnesties which have insulated those who have engaged in torture from criminal prosecution and punishment.\(^{503}\)

**CONCLUSION**

The twentieth century ushered in an era in which torture was used as a mechanism of political control. This culminated in the atrocities of the Nazi regime. Following World War II, the United Nations adopted various international human rights documents which condemned torture. The practice of torture, however, had been injected into the body politic. It was viewed as an antidote for colonial unrest, Communist subversion, and agitation by political reformers. In the early 1950s, France resorted to torture to combat guerrilla activity in Algeria. British forces in Northern Ireland engaged in the mistreatment and abuse of detainees in order to extract confessions and information as well as to quell political opposition. These types of abuses led professional associations to adopt ethical codes of conduct which prohibited their members from engaging in torture and abuse. In addition, the United Nations endorsed the non-binding Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the first international instrument which explicitly prohibited torture.

The international ban on torture, however, fell victim to the exigencies of the cold war. The superpowers divided the world into various spheres of influence which were populated by authoritarian client regimes. These "terror states" maintained control through threat and intimidation and often relied upon torture as a major mechanism of governance. In the late 1970s, Amnesty International

\(^{502}\) Id. at 48–9.

reinvigorated its global campaign against torture and mobilized support for the international prohibition of torture. In 1984, the United Nations General Assembly responded by adopting the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The next year, a Special Rapporteur on torture was appointed to assist in combating and monitoring the incidences of torture throughout the world.

The Convention established a Committee Against Torture which supervises a system of state reports as well as optional provisions for committee visitations to detention centers and monitoring of interstate and individual complaints. It is too early to evaluate the impact of the Convention. It certainly has contributed to a global campaign against torture. The Convention also established a standard against which to judge the conduct of states. It does appear that the global incidence of torture has decreased, although there is particular cause for alarm over the continuing abuse of children, women, political dissidents, and common criminals.

The importance of eradicating torture cannot be over-emphasized. Freedom from torture is a core human right, and the struggle against torture provides an opportunity to reinforce respect for the human personality and civil liberties. The practice of torture cannot be eliminated without the sweeping reform of legal procedures and criminal justice systems throughout the world. So long as torture is practiced, condoned, or tolerated, all human rights are in jeopardy. It is the irony of our age that technological progress and sophistication have not been accompanied by an equally profound transformation in the standards of governance. The struggle against the pain of torture hopefully will fortify our appreciation of the commonality of all people and provide a bridge to a more humane future.