What Practices Constitute Torture?:
US and UN Standards

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ABSTRACT

This article is a response to the attempts of the US government to redefine torture in a highly restrictive sense and at the same time distinguishing it from other forms of cruel inhuman or degrading treatment (CIDT). To this end, the author undertakes a short analysis of the understanding of the concept of torture and CIDT by the present US Government and asks whether this interpretation corresponds to the definition of torture in Article 1, Convention against Torture (CAT). An analysis of the techniques authorized by US Secretary of Defense Donald Rumsfeld for the interrogation of Guantanamo detainees is also carried out in light of applicable UN standards and international case law.

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I. INTRODUCTION

In the fight against global terrorism, governments have developed a number of arguments and practices to circumvent the absolute prohibition against torture and other cruel, inhuman, or degrading treatment (CIDT), as laid down in Articles 1 and 16 of the UN Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),\(^1\) Articles 7 and 10 of the International Covenant on Civil and Political Rights (ICCPR),\(^2\) and respective provisions of regional human rights treaties. The following article does not enter the ongoing debate regarding US efforts to justify the use of torture in the “ticking bomb scenario.”\(^3\) Similarly, this article does not deal with the practice of requesting diplomatic assurances from states well known for systematic use of torture as a means of circumventing the non-refoulement principle, or outsourcing torture to non-state actors or to places of detention outside US jurisdictions.\(^4\) Rather, this article responds to US attempts to re-define torture in a highly restrictive sense while simultaneously distinguishing it from other forms of CIDT.

On 26 June 2004, the United Nations International Day in Support of Victims of Torture, President Bush reaffirmed US commitment to worldwide elimination of torture: “America stands against and will not tolerate torture. We will investigate and prosecute all acts of torture and undertake to prevent


other cruel and unusual punishment in all territory under our jurisdiction.”

In its second periodic report to the UN Committee Against Torture (Committee) of 29 June 2005, the US government stressed its unequivocal opposition to the use and practice of torture:

No circumstance whatsoever, including war, the threat of war, internal political instability, public emergency, or an order from a superior officer or public authority, may be invoked as a justification for or defense to committing torture. This is a longstanding commitment of the United States, repeatedly reaffirmed at the highest level of the U.S. Government.6

The following article undertakes a short analysis of the current US government’s understanding of torture and CIDT, and whether this interpretation corresponds to the definition of torture in Article 1 CAT. The article also looks at the criteria distinguishing torture from CIDT and analyzes the extent to which the proportionality principle applies to CIDT. Finally, this article analyzes the techniques authorized by US Secretary of Defense Donald Rumsfeld for interrogating Guantanamo detainees in light of applicable UN standards and international case law.

II. DEFINITION OF TORTURE BY THE PRESENT US GOVERNMENT

The Unites States Code (Code) provides federal criminal jurisdiction over an extraterritorial act or attempted act of torture if (1) the alleged offender is a national of the United States or (2) if the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.7 Section 2340A of the Code makes it a criminal offense for any person outside the US to commit or attempt to commit torture.8 Section 2340 defines the act of torture as an “act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering that is incidental to lawful sanctions) upon another person within his custody or physical control.”9 The term “severe physical or mental pain or suffering” and reference to “lawful sanctions” in the Code confirm that the US intended to implement international obligations under Articles 1 and 4 CAT into federal law.

6. Id. ¶ 6.
8. Id. § 2340A(a).
9. Id. § 2340(1).
In the well-known memorandum of 1 August 2002, then Assistant Attorney-General for the Office of Legal Council at the US Department of Justice (DOJ) and current federal judge Jay S. Bybee, wrote to Alberto Gonzales, then Counsel to the President of the United States and now Attorney-General.\(^\text{10}\) The Bybee Memorandum provided a detailed legal analysis of the various elements included in the Section 2340 definition of torture.\(^\text{11}\) On the basis of its ordinary or natural meaning, as found in various dictionaries, Bybee concluded that the adjective “severe” means that “the pain or suffering must be of such a high level of intensity that the pain is difficult for the subject to endure.”\(^\text{12}\) Additionally, Bybee searched for other statutes that used the term “severe pain” and which, in his opinion, fit “most logically and comfortably into the body of both previously and subsequently enacted law” for the purpose of engaging in a comparative analysis.\(^\text{13}\) Bybee settled on statutes defining “severe” in the context of determining the existence of an emergency medical condition entitling a patient to health benefits. On the basis of this highly questionable comparative analysis, Bybee suggested that “severe pain,” as used in Section 2340A, “must rise to a similarly high level—the level that would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body functions—in order to constitute torture.”\(^\text{14}\) In addition, Bybee interpreted severe mental pain or suffering as requiring long-term mental harm lasting several months or years, as seen in mental disorders such as posttraumatic stress disorder. Bybee continued, “[i]n short, reading the definition of torture as a whole, it is plain that the term encompasses only extreme acts.”\(^\text{15}\) The Bybee Memorandum, which was widely used as a legal basis for far-reaching interrogation methods explicitly authorized against terrorist suspects, concluded by stating that “even if an interrogation method might violate Section 2340A, necessity or self-defense could provide justifications that would eliminate any criminal liability.”\(^\text{16}\)


\(^{11}\) Bybee Memorandum, supra note 10.

\(^{12}\) Goldman, supra note 10, at 5.

\(^{13}\) Bybee Memorandum, supra note 10.

\(^{14}\) Id. at 6.

\(^{15}\) Id.

\(^{16}\) Id. at 46. The Bybee Memorandum went on to state:

If a government defendant were to harm an enemy combatant during an interrogation in a manner that might arguably violate Section 2340A, he would be doing so in order to prevent further attacks on the United States by the al Qaeda terrorist network. In that case, we believe that he could argue that his actions were justified by the executive branch’s constitutional authority to protect the nation from attack.
Recognizing that “Congress enacted the criminal prohibition against torture to implement CAT,” Bybee further examined the text and history of Article 1 CAT. He recalled that the US government proposed inserting the word “extremely” before the words “severe pain or suffering,” and that the UK government suggested an even more restrictive definition. Nevertheless, Bybee avoided the conclusion that, by not accepting such far-reaching amendments, the majority of the states drafting the Convention expressed the legal opinion that “severe pain” rather than “extremely severe pain” was sufficient to reach the level of torture. Furthermore, Bybee did not address the practices and case law of the Committee in the state reporting, inquiry, and complaints procedures. Rather, he used the US position, taken during the drafting of Article 1 CAT, to arrive at the wrong conclusion that “CAT’s text, ratification history and negotiating history all confirm that Section 2340A reaches only the most heinous acts.”

Secretary Rumsfeld used the Bybee Memorandum as the legal basis and justification for the infamous interrogation techniques applied to suspected terrorists at Guantánamo detention facilities. In a memorandum dated 2 December 2002 (December Memorandum), Secretary Rumsfeld explicitly authorized interrogation techniques such as the use of stress positions for up to four hours, detention in isolation up to thirty days, interrogation for up to twenty hours, hoooding, forced grooming, deprivation of light and auditory stimuli, removal of clothing and all comfort items, and the use of phobias to induce stress. Alberto Mora, then General Counsel of the Navy, labeled these interrogation techniques as CIDT that could, in particular circumstances, amount to torture. Mora repeatedly warned William

17. Id. at 14.
21. Memorandum from Alberto Mora, General Counsel of the Navy to the Inspector General, Department of the Navy, subject: Statement for the Record: Office of General Counsel Involvement in Interrogation Issues, Ref: NAVIG Memo 5021 Ser 00/017 (18 June 2004) (hereinafter Mora Memorandum):

As described in the memo and supporting documentation, the interrogation techniques approved by the Secretary should not have been authorized because some (but not all) of them, whether applied singly or in combination, could produce effects reaching the level of torture.

Id. at 6.

[T]he interrogation techniques authorized in the December 2nd Memo constituted, at a minimum, cruel, inhuman, and degrading treatment. Further, depending on circumstances, the same treatment may constitute torture.

Id. at 12.
Haynes, the General Counsel of the Department of Defense, and Secretary Rumsfeld about the consequences of authorizing such techniques. As a result, Secretary Rumsfeld, on 15 January 2003, rescinded the December Memorandum and established a Working Group on Detainee Interrogations headed by Air Force General Counsel Mary Walker. Based on the Working Group’s final report (Working Group Report), slightly revised interrogation techniques were approved by Secretary of Defense Memorandum for the commander of the US Southern command on 16 April 2003 regarding these “Counter-Resistance Techniques in the War on Terrorism.” These techniques include exposure to extreme temperatures, deprivations of light and auditory stimuli, environmental manipulation, sleep adjustment, removal of comfort items, and isolation. These revised techniques were based on the Bybee Memorandum, which was not superseded by another DOJ memorandum until 30 December 2004.

In his warnings, Mora also cited a January 2003 Memorandum drafted by Deputy Director John Yoo from the Office of Legal Counsel on Interrogation Techniques (Yoo Memorandum) and submitted it to Air Force General Counsel Walker, Chair of the Working Group on Detainee Interrogations. In Mora’s opinion, the Yoo Memorandum was as equally flawed as the Bybee Memorandum. In particular, he believed that “the memo explicitly held that the application of cruel, inhuman, and degrading treatment to the Guantanamo detainees was authorized with few restrictions or conditions.” Nevertheless, the Yoo Memorandum served as the legal basis for the Working Group Report, which contained the revised interrogation techniques authorized by Secretary Rumsfeld on 16 April 2003. SouthCom Commander General Hill and Guantanamo Commander General Miller were explicitly authorized to implement the revised interrogation techniques. However, the authorization was secretly made; it was so secretive that even Mora, General Counsel of the Navy, only learned about it more than one year later.

It was only in the aftermath of the Abu Ghraib torture scandal in 2004 that the Bybee Memorandum and Yoo Memorandum were officially with-
drawn by the DOJ. The DOJ withdrew the Yoo Memorandum in June 2004, and replaced the Bybee Memorandum with a new Memorandum prepared by Daniel Levin, Acting Assistant Attorney General (Levin Memorandum), and submitted it to James B. Comey, Deputy Attorney in December 2004. The Levin Memorandum clearly states that it “supersedes the August 2002 Memorandum in its entirety.” It responded to harsh criticism, both from within the US government and from other sources, and explicitly disagreed with statements in the Bybee Memorandum limiting “severe pain” to “excruciating and agonizing pain” or to pain “equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.” The Levin Memorandum also rejected the assertion that severe mental pain or suffering must necessarily cause prolonged mental harm. Additionally, the Levin Memorandum stressed the distinction between specific intent and motive: “There is no exception under the statute permitting torture to be used for a ‘good reason.’ Thus, a defendant’s motive (to protect national security, for example) is not relevant to the question whether he has acted with the requisite specific intent under the statute.” Similar to the Bybee Memorandum, the Levin Memorandum assumed that the decisive criterion for distinguishing torture from CIDT is the intensity of the pain or suffering inflicted on the victim. By focusing only on the criminal prohibition of torture and defining the borderline between torture and CIDT, all three memoranda create the impression that only torture is absolutely prohibited under US law.

While the Bybee and Yoo Memoranda were withdrawn following heavy public criticism, particularly after Abu Ghraib, the revised interrogation methods authorized by Secretary Rumsfeld on 16 April 2003 on the basis

29. Id. at 17, n.11.
31. See, e.g., Kathleen Clark & Julie Mertus, Torturing the Law: the Justice Department’s Legal Contortions on Interrogation, WASH. POST, 30 June 2004, at B3; R. Jeffrey Smith, Slim Legal Grounds for Torture Memos, WASH. POST, 4 July 2004, at A12; Anthony Lewis, Making Torture Legal, N.Y. REV. OF BOOKS, 15 July 2004. See also the harsh criticism by Goldman, supra note 10, at 4:

It would be difficult to construct legal arguments that could be more exquisitely antithetical to and utterly destructive of the underlying object and purpose of the Torture Convention than those contained in the Office of Legal Counsel’s opinion. By virtually sanctioning conduct equivalent to torture under the treaty and effectively laying out a roadmap of how to shield torturers from criminal prosecutions, the legal opinion virtually renders meaningless the United States’ adherence to that instrument.

32. Levin Memorandum, supra note 30, at 2, 5.
33. Id. at 14, n.24.
34. Id. at 17.
35. Id. at 6; see also Rouillard, supra note 10, at 39.
of these flawed legal opinions remained in force and continued to be applied in practice. In fact, it is doubtful whether the US government ever formally withdrew authorization of the revised interrogation methods. In October 2005, during the discussion of the so-called McCain Amendment to the Department of Defense Appropriations Bill prohibiting CIDT of US detainees worldwide, Senator McCain strongly criticized the widespread confusion surrounding applicable interrogation methods in the “War against Terror.”\(^\text{36}\) In its revised second periodic report to the Committee of 13 January 2006, the US government asserted, “[o]n March 17, 2005, the Department of Defense determined that the Report of the Working Group on Detainee Interrogations is to be considered as having no standing in policy, practice, or law to guide any activity of the Department of Defense.”\(^\text{37}\) No reference is provided, however, for this “determination.”\(^\text{38}\) Additionally, this removal of standing does not necessarily mean the “Counter-Resistance Techniques in the War on Terrorism” are no longer applied, because they were approved by Secretary Rumsfeld on the basis of the Working Group Report and are not known to have been explicitly rescinded.

One could argue, however, that the Detainee Treatment Act of 31 December 2005 (DTA), which introduced uniform standards for the interrogation of persons under the detention of the Department of Defense, superseded the revised interrogation techniques authorized by Secretary Rumsfeld.\(^\text{39}\) According to Section 1002(a), no person under the effective control of the Department of Defense shall be subject to any technique of interrogation not authorized by the US Army Field Manual.\(^\text{40}\) The return to the Army Field Manual as the only legal basis of interrogations was one of the main aims of the McCain Amendment. However, the Pentagon intends to issue a new Army Field Manual excluding the protection of common Article 3 of the Geneva Conventions against humiliating and degrading treatment.\(^\text{41}\) For the first time in US history, Section 1003(a) of the DTA provides the general rule that “[n]o individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.”\(^\text{42}\)

\(^{36}\) See Report on the Situation of detainees at Guantanamo Bay, supra note 4, ¶ 48.


\(^{38}\) In the original version of the US report dated 29 June 2005, more than three months after the alleged determination by the DoD, this sentence was not included; see id. ¶ 63.


\(^{40}\) Id. § 1002(a).


\(^{42}\) DTA, supra note 39, § 1003(a).
general prohibition of CIDT is, however, restricted by an explicit reference to the US reservations to CAT and by the Graham-Levin Amendment, according to which “no court, justice, or judge shall have jurisdiction to hear or consider . . . any action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba.\textsuperscript{43}

III. DEFINITION OF TORTURE UNDER ARTICLE 1 CAT

A. Purpose of this Legal Definition

Article 1(1) CAT defines torture as follows:

For the purposes of this Convention, 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.\textsuperscript{44}

In addition to the involvement of a public official, at least by acquiescence, this definition contains three essential criteria:

- Infliction of severe physical or mental pain or suffering;
- With intention; and
- For a specific purpose, such as extracting a confession or information.

\textsuperscript{43.} DTA, supra note 39, § 1005 (e)(1). Prior to publication of this article, the United States Supreme Court delivered an opinion in Hamdan v. Rumsfeld. See 548 U.S. ____ (2006), U.S. Lexis 5185. The Court held that § 1005 (e)(1) of the DTA bars federal court jurisdiction only with respect to claims filed after the effective date of the Act. Consequently, federal courts retain jurisdiction to hear cases pending during enactment. In response to Hamdan, the Pentagon released a memorandum instructing Department of Defense personnel to review “relevant directives, regulations, policies, procedures and practices. . . to ensure they comply with Common Article 3.” See US Department of Defense, Office of the Secretary of Defense, Memorandum for Secretaries of the Military Department (7 July 2006). However, the Bush administration recently urged Congress to pass legislation that would narrowly define the rights granted to detainees by Common Article 3. Kate Zernike, \textit{White House Prods Congress to Curb Detainee Rights}, \textit{N.Y. Times}, 13 July 2006, at A1. Consequently, the status of detainee rights under Common Article 3 of the Geneva Convention is unclear as of the date of publication.

\textsuperscript{44.} CAT, supra note 1, art. 1(1).
The legal definition of torture in the Convention became necessary because some of its obligations, such as the need to enact a domestic criminal prohibition of torture with adequate sanctions, only relate to torture, whereas other obligations, such as the duty to prevent and investigate torture, apply equally to other forms of CIDT prohibited by Article 16 CAT.

Article 16(1) CAT reads as follows:

Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture or references to other forms of cruel, inhuman or degrading treatment or punishment. 45

The words “which do not amount to torture” in Article 16 CAT indicate that torture is a particularly serious and reprehensible form of CIDT. However, this does not necessarily mean that the intensity of the pain or suffering inflicted is the decisive criterion distinguishing torture from CIDT. The following sections of this article analyze the different criteria of Article 1(1) CAT in light of the Travaux Préparatoires (TP), 46 the practice of the Committee and other international or regional treaty monitoring bodies, and relevant legal literature.

B. Conduct

According to Article 1 CAT, “torture” is “any act by which severe pain or suffering is intentionally inflicted on a person.” 47 The UN Commission on Human Rights (UNCHR) conducted various working group deliberations based on a draft Convention submitted by Sweden to the thirty-fourth Session of the UNCHR in 1978. 48 In addition to the Draft Convention, the UN presented states with a draft text submitted by the International Association of Penal Law (IAPL). 49 Whereas Article 2 of the IAPL draft refers to “any...
conduct. Article 1 CAT is based on Article 1 of the 1975 UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment as well as the Swedish draft. Both documents used the term “act,” which might give rise to a narrower interpretation excluding omissions. Nothing in the TP indicate, however, that the drafters intended a narrow interpretation that would exclude conduct such as intentional deprivation of food, water, and medical treatment from the definition of torture. Indeed, in the Greek Case, one of the main sources of inspiration for Article 1 CAT, the European Commission of Human Rights (Commission) held that “the failure of the Government of Greece to provide food, water, heating in winter, proper washing facilities, clothing, medical and dental care to prisoners constitutes an ‘act’ of torture in violation of article 3 of the ECHR.” States have a legal duty arising from various human rights to provide detainees with adequate food, water, medical care, and clothing. Therefore, it would, as one commentator suggested, be “absurd to conclude that the prohibition of torture in the context of Article 1 does not extend to conduct by way of omission.”

C. Infliction of Severe Pain or Suffering

Our common heritage attaches a special stigma to torture as a particularly grave human rights violation. During the drafting of Article 1 CAT, therefore, states generally agreed that only conduct causing severe pain or suffering, whether physical or mental, amounts to torture. The word “severe” can be found in the 1975 Declaration as well as in both the Swedish and IAPL drafts. Only the USSR proposed deleting the word “severe,” but no convincing reasons were provided for this surprising proposal. On the other hand, the US and UK governments pushed to strengthen the required intensity of pain or suffering by adding the word “extremely” before “severe.” Finally, the

50. Id. art. 2.
Swiss government advocated that no distinction should be made between torture and inhuman treatment with respect to severity of suffering.\textsuperscript{56}

These different opinions, at least to some extent, mirror the different approaches taken by the Commission and the European Court of Human Rights. In the \textit{Greek Case}, the Commission took the position that the severity of pain or suffering distinguishes inhuman treatment, including torture, from other treatment, whereas the purpose of such conduct is the critical distinguishing criterion between torture and inhuman treatment.\textsuperscript{57} Using this definition, the Commission easily qualified the five combined deep-interrogation techniques used by British security forces against suspected terrorists in Northern Ireland, wall-standing in a “stress position,” hooding, subjecting to noise, and deprivation of sleep, food and drink for longer periods of time, as torture.\textsuperscript{58} This approach corresponds to the Swiss position during the drafting of Article 1 CAT.

The UK and US position, on the other hand, takes the more cautious approach of the Court of Human Rights, as seen in the \textit{Northern Ireland Case}. In that case, the Court held:

In order to determine whether the five techniques should also be qualified as torture, the Court must have regard to the distinction, embodied in Article 3, between this notion and that of inhuman or degrading treatment. In the Court’s view, this distinction derives principally from a difference in the intensity of the suffering inflicted. 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.\textsuperscript{59}

In other words, the Court concluded that severity of suffering, and not the specific purpose of the actor, as assumed by the Commission, was the decisive criterion for distinguishing torture, to which a “special stigma” is attached, from other forms of inhuman or degrading treatment.

In its reasoning, the Court also made reference to the last sentence of Article 1 of the 1975 Declaration, according to which torture constitutes an

\textsuperscript{56} Id.
\textsuperscript{57} Greek Case, \textit{supra} note 52, at 186:

It is plain that there may be treatment to which all these descriptions apply, for all torture must be inhuman and degrading treatment, and inhuman treatment also degrading. The notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable. The word “torture” is often used to describe inhuman treatment, which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment.


“aggravated” and deliberate form of cruel, inhuman, or degrading treatment or punishment. 60 This sentence was deleted during the drafting of Article 1 CAT. Similarly, the UK and US proposals to qualify the intensity as “extremely severe pain or suffering” were defeated. These facts indicate that the UN wished to follow the approach taken by the European Commission over the approach taken by the Court which, moreover, was subjected to strong criticism in the public and in legal literature. 61

Additionally, the fact that the UN appears to take the Commission’s approach has important consequences with regard to making distinctions between justifiable and non-justifiable treatment that causes severe suffering. According to the Commission, inhuman treatment covers at least such “treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable.” 62 In other words, there may be some purposes for which deliberately causing severe suffering is justified and, therefore, is not inhuman treatment. Examples of such treatment include the use of force by police in the exercise of law enforcement, such as lawful arrest of a person suspected of having committed a crime, preventing a person lawfully detained from escaping, quelling a riot or insurrection, dissolution of a violent demonstration, defending a person against crime and unlawful violence, 63 and the use of force by the military in case of armed conflict. Whether use of force is justified or must be qualified as inhuman treatment depends on the particular circumstances of a given situation, to which the principle of proportionality needs to be applied. However, if severe pain or suffering is caused for any purpose listed in Article 1 CAT, no justification is permitted and, consequently, no proportionality test is applied. This interpretation presupposes a strict interpretation of the list of purposes in Article 1 CAT. As already stressed by Burgers and Danelius, the words “such . . . as” in Article 1 CAT “imply that the other purposes must have something in common with the purposes expressly listed.” 64

It follows that the severity of pain or suffering, although constituting an essential element of the definition of torture, is not a criteria distinguishing

60. Id.
62. But see Boulebaa, supra note 53; see also Ingelse, supra note 53.
63. The list of purposes in Article 2(2) ECHR might even justify lethal use of force by the police. But see Nigel S. Rodley, The Treatment of Prisoners Under International Law 84 (2d ed. 1999), according to whom “the direct benefit of the recipient” seems to be the only legitimate objective of intentionally inflicting severe pain or suffering on a person. On the discussion about the justifiability and proportionality in relation to inhuman and degrading treatment in reaction to the Commission’s holding in the Greek Case see, e.g., Report on Torture, 35 (2d Duckworth & Amnesty International Publications 1975).
64. Burgers & Danelius, supra note 18, at 118.
torture from cruel and inhuman treatment. In principle, every form of cruel and inhuman treatment, including torture, requires the infliction of severe pain or suffering. Only in the case of particularly humiliating treatment might the infliction of non-severe pain or suffering reach the level of degrading treatment or punishment in violation of Article 16 CAT. Whether cruel or inhuman treatment can also be qualified as torture depends on the fulfillment of the other requirements in Article 1 CAT; mainly whether inhuman treatment was used for any purpose spelled out therein.

The practice of the Committee confirms this interpretation. Using CAT’s individual complaints procedure, the Committee cited Serbia and Montenegro with three violations of Article 2(1) in connection with Article 1. All three violations concerned Serbian citizens of Romani origin. The first case, Dragan Dimitrijevic v. Serbia and Montenegro, was submitted by a man who was arrested in 1999 in connection with a criminal investigation. The complainant alleges he was taken to the local police station in Kragujevac, handcuffed to a radiator and a bicycle, beaten up by several police officers who kicked and punched him all over his body, and insulted him on the basis of his ethnic origin and “gypsy mother.” As a result of the ill-treatment, the complainant stayed in bed for several days, sustained injuries on both arms, both legs, and his back, and suffered an open wound on the back of his head. The Committee based its 24 November 2004 decision on the allegations of the complainant, which were substantiated by written testimonies of family members, because the state party provided no information in rebuttal. The Committee held that the treatment described could be “characterized as severe pain or suffering intentionally inflicted by public officials in the context of the investigation of a crime” and that the facts, as submitted, “constitute torture within the meaning of article 1 of the Convention.” Without discussing the obligations arising from Article 2(1)CAT, the Committee concluded that the facts before it disclosed a violation of that article in connection with Article 1.

In the case of Jovica Dimitrov v. Serbia and Montenegro, the complainant was arrested at his home in the Serbian province of Vojvodina and taken to the local police station. The arresting officer presented no arrest warrant and did not inform the complainant of the reason for taking him into cus-

65. See Nigel Rodley, The Definition(s) of Torture in International Law, 55 CUR’NT LEG. PROBS. 467, 491 (2002), “[s]o I maintain my preference for suppressing the element of aggravation in the understanding of the notion of torture.”
67. Id.
68. Id. § 5.3.
69. Id. § 6.
tody. The complainant alleged that during interrogation the arresting officer struck him repeatedly with a baseball bat and a steel cable and kicked and punched him all over his body causing him to lose consciousness on several occasions. According to the complainant, apart from brief breaks, the ill-treatment lasted for fourteen hours and left him with numerous injuries. Following his release, the complainant returned home and spent the next ten days in bed.

In its decision of 3 May 2005, the Committee concluded that “due weight must be given to the complainant’s allegations and that the facts, as submitted, constitute torture within the meaning of Art. 1.” In coming to this conclusion, the Committee noted the complainant’s description of his ill-treatment, “which can be characterized as severe pain or suffering intentionally inflicted by public officials in the context of the investigation of a crime,” as well as his sister’s statement and the medical report. It also noted the state party’s failure to adequately address the claim and respond to the allegations. As in Dragan Dimitrijevic, the Committee found that the facts disclosed a violation of Article 2(1) CAT in connection with Article 1 CAT without entering into any discussion of the respective obligations arising from Article 2(1).

In the case of Danilo Dimitrijevic v. Serbia and Montenegro, the complainant was arrested in 1997 at his home in Novi Sad and taken to the police station in Kraljevica Marka Street. The arresting officer presented no arrest warrant and did not inform the complainant of the reason for taking him into custody. The complainant assumed the arrest was related to a criminal case that was already pending against him. At the police station the complainant was locked into one of the offices. An unknown man in civilian clothes entered the office thirty minutes later and ordered the complainant to strip to his underwear, handcuffed him to a metal bar, and beat him with a police club for approximately one hour. He sustained numerous injuries, in particular on his thighs and back. During the beating, a police officer entered the room and, while not taking part in the abuse, did not stop it. During the next three days the complainant was kept in the same room and denied access to a medical doctor, and in addition denied food, water, and use of the lavatory.

In its decision of 29 November 2005 the Committee concluded that the complainant’s description of the treatment in detention could be characterized as:

71. Id. § 7.1.
72. Id.
73. Id.
severe pain or suffering intentionally inflicted by public officials for such purposes as obtaining from him information or a confession or punishing him for an act he has committed, or intimidating or coercing him for any reason based on discrimination of any kind in the context of the investigation of a crime.\footnote{75}

In reaching this conclusion, the Committee cited the observations of the investigating judge with respect to the complainant’s injuries and photographs of those injuries provided by the complainant. The Committee observed that the state party did not contest the facts presented by the complainant and that the medical report prepared after the examination of the complainant and pursuant to an order of the Novi Sad District Court Judge was not integrated into the complaint file and could not be consulted by the complainant or his counsel. The Committee concluded that the facts, as submitted, constituted torture within the meaning of Article 1 CAT, and found a violation of Article 2(1) in connection with Article 1. The Committee did not consider whether there was a violation of Article 16 CAT because the treatment suffered by the complainant under Article 1 CAT exceeded the treatment encompassed in Article 16 CAT.\footnote{76}

\textit{Hajrizi Dzemajl et al. v. Yugoslavia} is the only case where the Committee found a violation of Article 16 CAT.\footnote{77} \textit{Hajrizi Dzemajl} concerned the burning and destruction of Romani houses by private Montenegrins with the acquiescence of the local police. Although the applicants alleged a violation of torture, the Committee, without reasoning, found that the acts constituted CIDT by acquiescence in violation of Article 16 CAT.\footnote{78} One explanation for this distinction could be that the victims were not in detention and, therefore, the purpose for the ill-treatment, as spelled out in Article 1 CAT, would not apply.\footnote{79}

Examination of the reports submitted by Israel under CAT’s state reporting procedures provides another good basis for assessing the Committee’s approach as to the definition of torture and other forms of ill-treatment.\footnote{80} In 1987, the government of Israel appointed the Landau Commission of Inquiry, headed by former Supreme Court President, Justice Moshe Landau, to examine the General Security Service’s (GSS) interrogation methods for terrorist suspects. The guidelines on interrogation, which were set by the Landau Commission and adopted by the Israeli authorities, determined that

\begin{itemize}
\item \footnote{75}{Id. § 7.1.}
\item \footnote{76}{Id. § 7.2.}
\item \footnote{78}{Id. § 9.2.}
\item \footnote{79}{But see id. at Annex for the dissenting opinion of Committee members Marino and González Pohlete who stress the particular severity of the suffering.}
\item \footnote{80}{See also Rodley, \textit{The Definition(s) of Torture}, supra note 65, at 83; \textit{Ingelese}, supra note 53, at 226.}
\end{itemize}
the use of a moderate degree of pressure, including physical pressure, is
unavoidable where interrogators are dealing with dangerous terrorists who
represent a grave threat to the state of Israel and its citizens.\textsuperscript{81} The Landau
Commission identified several different measures to ensure disproportionate
pressure would not be used on detainees. First, interrogators must weigh
specific measures against the degree of anticipated danger.\textsuperscript{82} Second, the
physical and psychological means of pressure must be defined and limited
in advance by issuing binding directives.\textsuperscript{83} Finally, the binding directives
must be strictly supervised.\textsuperscript{84} In a second section of its report, the Landau
Commission precisely detailed the forms of pressure permissible to the
GSS interrogators. This section was kept confidential out of concern that
the interrogation would be less effective if the suspects knew of the narrow
restrictions binding the interrogators.\textsuperscript{85}

In its conclusions and recommendations regarding the Landau Com-
misson Report, the Committee stated that sanctioning “moderate physical
pressure” as a lawful method of interrogation was “completely unac-
tetable” because it created “conditions leading to the risk of torture or cruel,
or inhuman, or degrading treatment.”\textsuperscript{86} The Committee noted that the secrecy
surrounding the crucial standards of interrogation was a “further condition
leading inevitably to some cases of ill-treatment.”\textsuperscript{87}

In a special report submitted in February 1997, Israel explained the
“Landau Rules” and stressed that the guidelines were “designed to enable
investigators to obtain crucial information on terrorist activities and organiza-
tions from suspects who, for obvious reasons, would not volunteer information
on their activities, while ensuring that the suspects are not maltreated.”\textsuperscript{88} The
report also referred to two controversial decisions of the Supreme Court of
Israel in December 1995 and November 1996. In both cases, the Court, on
the request of two suspected terrorists detained by GSS, issued an interim
injunction forbidding GSS from using any force throughout the investiga-

\textsuperscript{81}. But cf. Addendum: Consideration of the Reports of States Parties Under Article 19 of the
\textsuperscript{82}. Id. ¶ 9.
\textsuperscript{83}. Id.
\textsuperscript{84}. Id.
\textsuperscript{85}. Id. ¶ 10.
\textsuperscript{86}. Summary of the Public Part of the 184th Meeting, U.N. Comm. Against Torture, 12th
\textsuperscript{87}. Id. ¶ 4(b); see also Summary of the Public Part of the 183rd Meeting, U.N. Comm.
Against Torture, 12th Sess., U.N. Doc. CAT/C/SR.184 (1994); see also Report to the
A/49/44 (1994).
\textsuperscript{88}. Addendum: Consideration of the Reports of States Parties Under Article 19 of the Con-
vention, Second periodic reports of States parties due in 1996, Israel, supra note 81, ¶ 3.
tion. The injunctions were later cancelled because GSS provided evidence that the detainees possessed extremely vital information, the disclosure of which would help save human lives and prevent serious terrorist attacks.\(^\text{89}\) However, the precise methods of interrogation used by the GSS were not revealed in the Court’s decisions or in the state report.

In its conclusions and recommendations of 9 May 1997, the Committee stated that it based its assessment of the interrogation methods on detailed accounts of NGOs that were neither confirmed nor denied by Israel.\(^\text{90}\) Although the combined methods were similar to those applied by British security forces in Northern Ireland, which were found by the Strasbourg organs to violate Article 3 ECHR,\(^\text{91}\) the Israeli government maintained that they had not violated Article 1 or 16 CAT because they did not cause severe suffering.\(^\text{92}\) The Committee strongly rejected this position:

> [T]he interrogation methods applied in the context of counter-terrorism strategies pursuant to the “Landau Rules,” which had been found by the Supreme Court to be constitutional, were “breaches of article 16 and also constitute torture as defined in Article 1 of the Convention. This conclusion is particularly evident where such methods of interrogation are used in combination, which appears to be the standard case.\(^\text{93}\)

During oral discussion of the special report, the Israeli delegation explicitly challenged the Committee’s conclusions and questioned its understanding of torture and cruel and inhuman treatment.\(^\text{94}\) The Committee, by stressing that the government had in fact admitted to hooding, shackling in painful positions, causing sleep deprivation, and shaking, maintained its position that the techniques violated Articles 1, 2 and 16 CAT.\(^\text{95}\) Again, however, the Committee refrained from making a clear distinction between torture and


\(^{91}\) Examples are: restraining in very painful conditions; hooding under special conditions; sounding of loud music for prolonged periods; sleep deprivation for prolonged periods; threats, including death threats; violent shaking; and using cold air to chill.


other forms of ill-treatment. The absence of a clear distinction may indicate that the Committee does not consider the severity of pain or suffering a decisive criteria in distinguishing torture from inhuman treatment.

On 6 September 1999, the Supreme Court of Israel held that the interrogation methods involving physical force used by GSS and its successor, the Israel Security Agency, violate Israeli law and the individual's constitutional right to dignity. In particular, the Court rejected the following methods: shaking, forcing detainees to crouch on the tips of their toes at length, painful handcuffing, seating suspects in the “Shabach” position, covering a suspect's head with an opaque sack during interrogation, playing loud music while in the “Shabach” position, and intentional prolonged sleep deprivation. However, the Court based its judgment exclusively on domestic Israeli law and made no reference to CAT or other sources of international law.

In its third periodic report of 2001, the government of Israel referred at length to the Court's judgment, but at the same time maintained its position that the “Landau Rules” for interrogation, which were found by the Court to violate the constitutional right to dignity, did not constitute either torture or cruel, inhuman, or degrading treatment in the sense of CAT. In its conclusions and recommendations of 25 September 2002, the Committee, while welcoming and acknowledging the importance of the Court's judgment, nevertheless expressed several regrets. First, the Committee regretted that the ruling did not contain a definite prohibition of torture. Second, the Committee regretted that the Court prohibited only intentional sleep deprivation without also prohibiting incidental deprivation resulting from interrogation. Finally, the Committee disagreed with the Court that interrogators who use physical pressure in extreme circumstances, such as “ticking bomb cases,” might not be criminally liable.

Taking these three reports together, one might conclude the Committee applies a fairly strict interpretation of torture and other forms of ill-treatment

97. Id. ¶ 14.
98. For a detailed and critical analysis see Andreas Laursen, Israel’s Supreme Court and International Human Rights Law: The Judgement on “Moderate Physical Pressure,” 69 NORDIC J. INT. L. 413, 426 (2000).
99. Addendum: Consideration of Reports Submitted by States Parties under Article 19 of the Convention: Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: 3rd Periodic Reports Due in 2000, Israel, supra note 96, ¶ 47.
prohibited by Article 16 CAT. This interpretation is similar to the approach of the Commission in the Greek and Northern Ireland cases. There is no evidence indicating that the Committee views severity of suffering as a criteria distinguishing torture from cruel and inhuman treatment. Indeed, the Committee found a violation of Articles 1 and 16 CAT because the other criteria, such as intent and purpose of extracting information, were met.

Pursuant to Article 20 CAT, the Committee investigates systematic practices of torture.\textsuperscript{101} The Committee has only qualified specific methods of torture in a few instances. For example, with respect to Turkey, in 1992 the Committee found that solitary confinement in so-called “coffins,” constituted a “kind of torture.”\textsuperscript{102} The “coffins” used in Turkey were 60 by 80 centimeter cells with inadequate ventilation and no light, where detainees could only stand or crouch.\textsuperscript{103}

Additionally, the Committee made specific findings of torture in the 2001 summary account of the results of the inquiry proceedings on Peru.\textsuperscript{104} In that inquiry, six prominent guerrilla leaders were forced to spend sentences, ranging from thirty years to life, in complete solitary confinement at the prison on the El Callao naval base.\textsuperscript{105} The prisoners were kept in isolation for twenty-three hours a day in soundproofed cells. For one hour a day they could go outside, alone, to a small yard surrounded by high walls. Once a month they were allowed visits by close family members for half an hour. In the Committee’s view, sensorial deprivation and almost total prohibition of communication “cause persistent and unjustified suffering which amounts to torture.”\textsuperscript{106} Additionally, the Committee found instances where Peru arrested and detained persons for up to thirty five days in various locations under the authority of the Ministry of Interior, and, in certain circumstances, detainees were forced to spend the night in interrogation rooms lying handcuffed on the floor.\textsuperscript{107} Although the precise conditions in these detention facilities were not revealed in the summary account, the Committee members expressed the view that

\begin{quote}

a long period of detention in the cells of the detention places referred to above, i.e. two weeks, amounts to inhuman and degrading treatment. Longer periods of detention in those cells amount to torture. Moreover, the practice of forcing
\end{quote}

\begin{enumerate}
\item[101.] CAT, supra note 1, art. 20.
\item[103.] Id.
\item[105.] Id. ¶ 185.
\item[106.] Id. ¶¶ 42–43.
\item[107.] Id. ¶ 177.
\end{enumerate}
persons under interrogation to spend the night in the interrogation rooms lying handcuffed on the floor also amounts to torture.\textsuperscript{108}

Mexico is the first country that permitted the Committee to publish a detailed report of the inquiry procedure.\textsuperscript{109} The Committee concluded that “the police commonly use torture and resort to it systematically as another method of criminal investigation, readily available whenever required in order to advance the process,” and specified that the purpose of torture was nearly always to obtain information or a confession.\textsuperscript{110} The torture methods identified in the report were manifold and included handcuffing detainees behind the back; blindfolding; deprivation of sleep, food, water, and lavatories; mock executions; administering electric shocks; placing a plastic bag over the head to simulate asphyxiation; and pouring water with irritants such as carbonic acid or chili powder into the mouth or nose while pressure is applied to the victim’s stomach.\textsuperscript{111} In one prison, the Committee also considered certain punishments and ill-treatment, such as the use of physical restraints for days at a time, and putting inmates undressed in a freezing, air-conditioned room for extended periods, as torture.\textsuperscript{112} Finally, in the 2004 summary account of the results of the inquiry procedure concerning Serbia and Montenegro, the Committee concluded that torture was systematically practiced in Serbia prior to October 2000. However, under the new regime, the incidence of torture dropped considerably, and the Committee no longer considered torture systematic.\textsuperscript{113} The torture methods applied during the Milosevic regime were not further explained.

As the ICCPR\textsuperscript{114} does not contain any definitions of the concepts covered by its Article 7 and as no legal consequences derive from the precise qualification of a particular practice, the Human Rights Committee does not consider it necessary to draw sharp distinctions between the various prohibited forms of treatment or punishment.\textsuperscript{115} In the case of \textit{Megreisi v. Libyan Arab Jamahiriya}, the Committee established that “incommunicado”

\begin{itemize}
\item \textsuperscript{108} \textit{Id.} \textsuperscript{¶} 178.
\item \textsuperscript{109} \textit{Report on Mexico/Produced by the Committee under Article 20 of the Convention [Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment]; and Reply from the Government of Mexico, U.N. Comm. Against Torture, 30th Sess., U.N. Doc. CAT/C/75 (2003).}
\item \textsuperscript{110} \textit{Id.} \textsuperscript{¶} 218.
\item \textsuperscript{111} \textit{Id.} \textsuperscript{¶¶} 143–44.
\item \textsuperscript{112} \textit{Id.} \textsuperscript{¶} 165.
\item \textsuperscript{114} ICCPR, supra note 2.
\end{itemize}
detention in a secret location for more than three years constitutes per se torture and cruel and inhuman treatment.\textsuperscript{116}

D. Intent

Article 1 CAT requires that the perpetrator intentionally cause severe pain or suffering before the treatment qualifies as torture. Purely negligent conduct, therefore, can never be considered torture. For example, when a detainee is forgotten by prison guards and slowly starves to death, the detainee certainly endures severe pain and suffering, but the conduct lacks intention and purpose and, therefore, can “only” be qualified as cruel or inhuman treatment. During the drafting of CAT, the US argued for the stronger requirement of “deliberately and maliciously” inflicting extremely severe pain or suffering.\textsuperscript{117} Since the US proposal was not adopted, the US government ratified the Convention with the explicit “understanding” that, “in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering.”\textsuperscript{118} This interpretation does not seem to go beyond the intent requirement spelled out in the text of Article 1 CAT.

Intent must intend that the conduct inflict severe pain or suffering and intend that the purpose be achieved by such conduct. This follows from the clear wording of Article 1 CAT: “is intentionally inflicted on a person for such purposes as. . . .” If severe pain or suffering is inflicted, for instance, in the course of a fully justified medical treatment, such conduct cannot constitute torture because it lacks both the purpose and intent enumerated in Article 1 CAT.\textsuperscript{119}

E. Purpose

The requirement of a specific purpose is the most decisive criteria distinguishing torture from cruel or inhuman treatment.\textsuperscript{120} That ill-treatment only

\begin{itemize}
  \item \textsuperscript{118} See \textit{CAT}, supra note 1, at Reservations and Understandings Upon Ratification, \textit{available at} http://www.hri.ca/fortherecord1998/documentation/reservations/cat.htm.
  \item \textsuperscript{119} \textit{BURGES \& DANJUER}, supra note 18, at 119, speak in this respect of an “unintended side-effect of the treatment.”
  \item \textsuperscript{120} This interpretation is based on the case law of the European Commission of Human Rights, see, e.g., \textit{Report of the Commission of 25 January 1976, supra note 58}, and has been confirmed by the International Criminal Tribunal for the Former Yugoslavia
\end{itemize}
What Practices Constitute Torture?

amounts to torture if it serves a specific purpose seemed to be uncontroversial during the drafting of Article 1 CAT. Opinions differed, however, as to the precise list of purposes therein.\textsuperscript{121} Switzerland wished to add non-therapeutic medical or scientific experiments,\textsuperscript{122} Portugal wanted the use of psychiatry for the purpose of prolonging the confinement of a person,\textsuperscript{123} and the UK delegation wished to include “gratuitous torture”\textsuperscript{124} and delete discrimination as a specific purpose.\textsuperscript{125} Most delegations agreed that the list of purposes in Article 1 CAT was meant to be indicative rather than exhaustive, but the General Assembly did not adopt the US proposal that any purposes or motives, regardless of whether or not they were mentioned in Article 1 CAT, would suffice.\textsuperscript{126}

Article 2 of the Inter-American Convention to Prevent and Punish Torture has wider application than Article 1 CAT because it adds the words “or for any other purpose.”\textsuperscript{127} A proposal to add this clause to the definition of torture in the 1975 UN Declaration was defeated.\textsuperscript{128} These words are also missing in Article 1 CAT despite efforts of the US and other delegations to broaden the definition. A grammatical interpretation as well as the TP lead to the conclusion that the words “for such purposes as” must be understood in a narrow sense. Not every purpose is sufficient; only a purpose that has “something in common with the purposes expressly listed.”\textsuperscript{129}

The purposes listed in Article 1 CAT include:

- Extracting a confession;
- Obtaining information from the victim or a third person;

\hfill
\textsuperscript{121} See, e.g., \textit{Burgers & Danielius, supra note 18}, at 118; see also \textit{Boleslava, supra note 53}, at 27.
\textsuperscript{122} \textit{Summary Prepared by the Secretary General in Accordance with Commission Resolution 18 XXXIV, supra note 117}, ¶ 37.
\textsuperscript{123} Id. ¶ 34.
\textsuperscript{128} \textit{Boleslava, supra note 53, at 22.}
\textsuperscript{129} \textit{Burgers & Danielius, supra note 18, at 118.}
• Punishment;
• Intimidation and coercion; and
• Discrimination.

As Burgers and Danelius rightly observe, these purposes are not necessarily illegitimate, but are directly linked to “the interests or policies of the state and its organs.”130 All purposes listed in Article 1 CAT, as well as the TP of the Declaration and the Convention, refer to a situation where the victim of torture is a detainee or a person “at least under the factual power or control of the person inflicting the pain or suffering,”131 and where the perpetrator uses this unequal and powerful situation to achieve a certain effect, such as the extraction of information, intimidation, or punishment. The “ideal” environment for torture is prolonged incommunicado detention in a secret place; in such a situation, the victim is totally subordinated to the will and power of the torturer, strongly resembling the condition of slavery. Both torture and slavery can be described as direct and brutal attacks on the core of human dignity and personality. This link between the right to human dignity and the absolute prohibition of torture and slavery was established most convincingly in Article 5 of the African Charter of Human and Peoples’ Rights.132

F. Powerlessness of the Victim

It follows that torture, as the most serious violation of the human right to personal integrity, presupposes a situation of powerlessness of the victim, which usually means deprivation of personal liberty. CAT does not generally or absolutely prohibit the intentional infliction of severe pain or suffering by a public official. If a police officer, for example, deliberately shoots the legs of a person in order to effect a lawful arrest or prevent the escape of a person lawfully detained, or uses physical force for the purpose of breaking up an unlawful demonstration or quelling a riot, he or she might intentionally inflict severe pain on the person concerned. However, these

130. Id. at 119; see also INGESE, supra note 53, at 211.
131. BURGERS & DANIELUS, supra note 18, at 120; see also Rodley, The Definition(s) of Torture, supra note 65, at 484: “It is no accident that the purposive element of torture reflects precisely state purposes or, at any rate, the purposes of an organized political entity exercising effective power.”
132. See also Charter of the Fundamental Rights of the European Union, 2000 O.J. (C 364/01).

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.
acts can never amount to torture because they do not fall into the category of purposes envisaged by Article 1 CAT. Whether the use of force amounts to cruel, inhuman, or degrading treatment depends on the proportionality of the force applied in relation to the lawful goal to be achieved. When a person is arrested, or similarly under the direct power or control of the police officer, the further use of physical force for the purpose of intimidation, punishment, or discrimination might be torture.

Even though the prohibition of torture and other CIDT are laid down in international human rights law as absolute human rights, the principle of proportionality nevertheless might apply, as seen in the examples above. Yet, proportionality only applies for defining the scope of the right not to be subjected to CIDT, and not for the right to be free from torture. If severe physical or mental pain or suffering is intentionally inflicted for lawful purposes outside the scope of Article 1 CAT in a proportional manner, then this conduct is a justified use of force and does not amount to CIDT. If the use of force is not absolutely necessary for achieving such purpose, the treatment might be qualified as CIDT. If the victim is powerless and the same force is applied for any of the purposes listed in Article 1 CAT, leading to severe pain or suffering, the conduct amounts to torture and can never be justified by applying the principle of proportionality, not even in the “ticking bomb” scenario. The powerlessness of the victim was an essential criteria in the minds of the Convention’s drafters when they introduced the legal distinction between torture and CIDT.

IV. CIDT AND THE PRINCIPLE OF PROPORTIONALITY OUTSIDE DETENTION

Burgers and Danelius argue that in view of the history of CAT, the victims of acts referred to in Article 16 CAT “must be understood as consisting of persons who are deprived of their liberty or who are otherwise under the factual power or control of the person responsible for the treatment or punishment.”133 This interpretation excludes excessive use of police force outside detention or similar direct control from the scope of the Convention. Arguably, the TP show that detention and similar direct control were meant only to constitute a precondition for the qualification of torture, as defined in Article 1 CAT. The Committee followed this interpretation when concluding that excessive use of force to dissolve riots or demonstrations violates Article 16 CAT.134

133. BURGERS & DANIELIUS, supra note 18, at 149.
134. See also INGELE, supra note 53, at 286.
During the discussion of the German report in 1993, the German representative explained, in relation to Article 16 CAT, that the use of violence by the police is subject to the principle of proportionality.\textsuperscript{135} Cyprus reported under Article 16 CAT about casual brutality by police officers.\textsuperscript{136} With respect to the Netherlands, in particular the Antilles, the Committee expressed concern about the severity and relatively high number of cases of police brutality.\textsuperscript{137} Similar concerns were raised in relation to Argentina.\textsuperscript{138} In 1997, the Committee expressed concern about the use of dogs for crowd control by Danish police during public demonstrations.\textsuperscript{139} Switzerland was criticized for frequent allegations of ill-treatment in the course of arrests;\textsuperscript{140} the United Kingdom for the continued use of plastic bullet rounds as a means of riot control;\textsuperscript{141} Canada for the inappropriate use of pepper spray and force by police authorities to break up demonstrations and restore order;\textsuperscript{142} Bolivia for excessive and disproportionate use of force and firearms by the National Police and the armed forces in suppressing mass demonstrations;\textsuperscript{143} and the Czech Republic for excessive use of force by law enforcement officials during and after demonstrations.\textsuperscript{144} These examples clearly show that the Committee and states parties interpret Article 16 CAT as applying to the use of force by law enforcement officers outside the situation of detention or similar direct control. Since the police are entitled to use physical force and arms for lawful purposes, the principle of proportionality must be applied when determining whether the use of force was excessive. Only use of force resulting in severe pain or suffering and which, in the particular circumstances of a given case, is considered to be excessive and non-proportional in relation to the purpose to be achieved, amounts to inhuman or cruel treatment or punishment. If such force is used in a particularly humiliating manner, it may be qualified as degrading treatment even if less severe pain or suffering was inflicted.

\textsuperscript{138} Report of the Committee Against Torture, supra note 136, ¶ 64.
\textsuperscript{140} Report of the Committee Against Torture, supra note 136, ¶ 90.
\textsuperscript{141} Report of the Committee Against Torture, 21st Session (9–20 Nov. 1998), 22nd Session (26 Apr.–14 May 1999), supra note 137, ¶ 76(g).
\textsuperscript{143} Id. ¶ 95(l).
\textsuperscript{144} Id. ¶ 113(C).
On the other hand, even infliction of severe pain or suffering by the police is not torture if it was inflicted outside a situation of detention or similar direct power and control over the victim. This seems to be the decisive reasoning behind the Committee’s conclusions in Hajrizi Dzemajl et al. v. Yugoslavia. Hajrizi Dzemajl concerned a racist pogrom against a Roma settlement that resulted in intense fear and mental suffering for the victims. The Committee considered the claims of the applicants only under Article 16, finding a violation by acquiescence.

The prohibition of excessive use of force also applies to the military. For example, in its conclusions on the report of the Ukraine in 1997, the Committee considered the systematic mistreatment and beatings of recruits in the armed forces a flagrant violation of Article 16 CAT. Similarly, in the context of discussing the report of Poland in 2000, the Committee expressed concern about the persistence of the practice of the so-called “fala,” whereby new army recruits are subjected to abuse and humiliation.

V. DOES THE PROPORIONALITY PRINCIPLE ALSO APPLY TO THE INTERROGATION OF DETAINES?

Having concluded that the prohibition of CIDT applies to the use of force by the police and military forces outside the situation of detention and direct control, and that the principle of proportionality applies to such use of force, the question arises whether the principle of proportionality should be equally applied to detainees in ticking bomb or similar extreme scenarios. Is the interrogation of a detainee not as legitimate a purpose of policing as dissolving a demonstration or effecting the arrest of a suspected criminal? Do the interrogation methods authorized by Secretary Rumsfeld against suspected terrorists for the purpose of obtaining information about future terrorist attacks not cause less severe pain or suffering than shooting into the legs of a person for the purpose of preventing his or her escape from prison? Do we not apply double standards?

Indeed, the US government has repeatedly raised these questions, and they deserve a convincing answer. These questions appear to underlie the

146. Id, ¶ 3.3.
149. See also Nowak, Challenges to the Absolute Nature of the Prohibition of Torture and Ill-Treatment, supra note 4, at 676.
messages of the various memoranda prepared by the OLC as the legal basis for authorizing advanced interrogation methods: as long as interrogation techniques do not reach the level of torture as defined in the memoranda, other forms of ill-treatment, if applied in a proportional manner, might be justified for the legitimate purpose of defending the homeland and for preventing future terrorist attacks. US officials usually refer to US reservations concerning Articles 16 CAT and 7 ICCPR, according to which CIDT should be interpreted in the same manner that cruel and unusual punishment is treated by the Fifth, Eighth and/or Fourteenth Amendments to the US Constitution.\footnote{150. See CAT, supra note 1, at Reservations and Understandings Upon Ratification, available at http://www.hri.ca/forthelaw1998/documentation/reservations/cat.htm.}

On the basis of the above considerations concerning the definition of torture in Article 1 CAT and its distinction from CIDT in Article 16 CAT, the answers to the questions regarding the absolute prohibition of CIDT posed by the US government would be as follows:

- The US reservations concerning Articles 16 CAT and 7 ICCPR are incompatible with the object and purpose of both treaties and have, therefore, been declared null and void by the respective UN treaty monitoring bodies, i.e., the Human Rights Committee and the Committee against Torture.\footnote{151. See, e.g., Report of the Committee Against Torture, 23rd Session (8–19 November 1999), 24th Session (1–19 May 2000), U.N. GAOR, 55th Sess., ¶ 179(b), U.N. Doc. A/55/44 (2000).} The prohibition of CIDT in the sense of these two provisions is, therefore, fully applicable to the US.

- The right not to be subjected to CIDT is as absolute a human right as the right not to be subjected to torture. The principle of proportionality, therefore, does not mean that a little CIDT may be applied for a legitimate purpose. It only applies for the purpose of defining the scope of this right. While excessive use of force by law enforcement officials for the purpose of dissolving a demonstration or preventing the escape of a detainee amounts to CIDT, non-excessive (proportional) use of force does not amount to CIDT even when it causes severe pain or suffering.

- The main distinction between torture and CIDT is the intent. It is not the intensity of pain or suffering that distinguishes torture from CIDT, but the purpose of the ill-treatment and the powerlessness of the victim in a situation of detention or similar direct control. In other words, a law enforcement official is entitled to use force that causes light or even severe pain or suffering in order to effect the arrest of a person suspected of having committed a criminal offense.
But when the person has been arrested, handcuffed, detained, or otherwise brought under the direct control of the official, no further use of force or infliction of pain is permitted. Even non-severe pain or suffering, if inflicted in a humiliating manner, might amount to degrading treatment. If severe pain or suffering is inflicted on a detainee for any of the purposes listed in Article 1 CAT, this not only amounts to cruel and inhuman treatment, but also constitutes torture.

- The principle of proportionality is inapplicable to a situation of detention or absolute control over the victim, even in the ticking bomb scenario, to ensure the absolute protection of human dignity and the integrity of the human person. The absolute and non-derogable prohibition of torture and other forms of CIDT was introduced into international human rights law as a reaction to the Nazi Holocaust. History tells us that allowing torture or CIDT in exceptional circumstances means balancing human dignity against state interests. Whenever torture or CIDT has been authorized because of exceptional circumstances, it soon spread like an epidemic disease and became a systematic practice.

VI. ASSESSING THE RUMSFELD INTERROGATION METHODS IN LIGHT OF INTERNATIONAL CASE-LAW

In his remarkable Memorandum of June 2004, Alberto Mora recalled telling William Haynes that the “British Government had applied virtually the same interrogation techniques against Irish Republican Army detainees in the ‘70s.” The five deep interrogation techniques used by British security forces in Northern Ireland consisted of wall-standing in a “stress position,” hooding, subjection to noise, and deprivation of sleep, food and drink for long periods. The Commission, after hearing hundreds of witnesses, categorized these techniques as torture. The European Court of Human Rights, in the split and highly controversial decision of January 1978, held that the techniques did not rise to the level of torture, but did undoubtedly amount to inhuman and degrading treatment in violation of Article 3 ECHR. There are good reasons to believe that the Court today would consider similar treatment torture. Indeed, in Selmouni v. France, the Court held that the severity test articulated in the Northern Ireland case should be interpreted within the meaning of Article 1 CAT, that the ECHR was a “living instru-

152. Mora Memorandum, supra note 21, at 12.
ment," and that certain acts classified previously as inhuman or degrading could be classified differently in the future.\textsuperscript{153}

Another well-known case comparable to the Rumsfeld interrogation techniques concerned the Israeli interrogation guidelines prepared by the Landau Commission. In 1997, the Committee labeled the Israeli interrogation methods applied in the context of counter-terrorism strategies as torture under Article 1 CAT. Two years later, the Supreme Court of Israel, which previously found these interrogation techniques constitutional, changed its approach and concluded that certain techniques, such as shaking detainees, the "frog crouch," painful handcuffing, the "Shabach" position, hooding, use of loud music, and sleep deprivation, violated the individual's constitutional right to dignity.

If one compares these two cases with Secretary Rumsfeld's interrogation techniques, it is not difficult to arrive at similar conclusions. "Change of Scenery Down," which is one of the techniques explicitly authorized by Secretary Rumsfeld in April 2003, includes "exposure to extreme temperatures and deprivation of light and auditory stimuli."\textsuperscript{154} As Mora raised with Haynes in December 2002, such techniques lack any precise definition as to possible limits: "What did deprivation of light and auditory stimuli mean? Could a detainee be locked in a completely dark cell? And for how long? A month? Longer?"\textsuperscript{155} Similarly, exposure to "extreme temperatures" for a prolonged period of time can certainly cause severe pain and suffering amounting to torture. In fact, some of the former Guantánamo detainees interviewed for the Guantánamo report stated that the prolonged exposure to extremely cold temperatures from excessive air-conditioning was particularly difficult to endure.

Under the international human rights standards applicable to the US, use of these interrogation techniques has the following legal results:

- Since Guantánamo detainees are deprived of their liberty and under the direct control of US authorities, the principle of proportionality does not apply.
- Even use of force that causes non-severe pain or suffering can be considered degrading treatment, if it is applied in a humiliating manner. A typical example is the forced removal of clothes for the purpose of humiliation.

\textsuperscript{153.} Selmouni v. France, Appl. No. 25803/94, 1999–V Eur. Ct. H.R. 155, at 182 et seq.; Rouillard, supra note 10, at 36, comments this judgment as follows: This judgment of the European Court of Human Rights certainly flies in the face of the argument presented by the Office of Legal Counsel, which relies solely on a quarter-century-old opinion favorably to its argument, but fails to mention the evolution of the law in the last decade.

\textsuperscript{154.} See The Guantánamo Report, supra note 4, ¶ 50.

\textsuperscript{155.} Mora Memorandum, supra note 21, at 7.
• Non-intentional use of force or force without a specific purpose leading to severe pain or suffering can be considered cruel or inhuman treatment.

• Any intentional use of force against a Guantánamo detainee for a specific purpose, such as extracting information about future terrorist attacks, that inflicts severe physical or mental pain or suffering amounts to torture. Whether a particular interrogation technique causes severe pain or suffering depends on various factors including the physical and mental condition of the person concerned. Most of the interrogation techniques authorized by Secretary Rumsfeld in December 2002 and April 2003 respectively, whether applied alone or in combination with other methods, carry the potential of inflicting severe pain or suffering and, therefore, can amount to torture. This explicit authorization, based on flawed legal analysis by the Office of Legal Counsel of the Department of Justice, violated the obligations of the US under Articles 7 and 10 CCPR as well as Articles 1, 2, and 16 CAT. 156

VII. CONCLUSIONS

• Torture is the most serious violation of the human right to personal integrity and dignity. It can be considered an aggravated form of CIDT. But the decisive distinction between torture and CIDT is not the intensity of the pain or suffering inflicted, but the powerlessness of the victim and the purpose for which the pain is being inflicted. Powerlessness means that the victim is under the direct control of the torturer; this usually means detention or a similar form of deprivation of personal liberty.

• CIDT can be inflicted inside or outside of detention. Inside detention, cruel and inhuman treatment means any infliction of severe pain or suffering on a detainee that lacks the other definition criteria of torture as spelled out in Article 1 CAT: intention, a specific purpose, and the involvement of a public official, at least by acquiescence. Examples of cruel and inhuman treatment of detainees not amounting to torture are negligent infliction of severe pain or suffering by a public official, “the forgotten prisoner,” or the intentional infliction of severe pain or suffering on a detainee who threatens or attacks a fellow detainee or a prison guard.

156. See Guantánamo Report, supra note 4, ¶ 87.
• Outside detention, cruel and inhuman treatment means the infliction of severe pain or suffering on a person by a public official without any justification or by excessive, or non-proportional, use of force. The proportional use of force by military, police, security and other law enforcement personnel for a legitimate purpose, such as arresting a suspected criminal, preventing the escape of a prisoner, dissolving a violent demonstration or quelling a riot, is not cruel and inhuman treatment even if the pain inflicted is severe.

• Degrading treatment is the infliction of any form of pain or suffering, severe or not, with the particular aim of humiliating the victim. It can take place in relation to a detainee or outside detention. Humiliation of detainees is often the result of discrimination on various grounds, such as ethnic, national, or social origin, color, gender, religion, sexual orientation, disability, or age.

• Torture is most commonly practiced during interrogation of detainees to extract a confession or information needed for intelligence, police, or criminal investigation purposes. The more powerless the victim is, the greater the risk of torture. The “ideal” situation for torture is prolonged incommunicado detention or enforced disappearance of the victim.

• In the “war against terror,” the current US government adopted various strategies to circumvent the absolute prohibition of torture and CIDT under international human rights law. Examples of such strategies include the practice of enforced disappearance in secret places of detention, the establishment of detention facilities outside US territory for the purpose of avoiding the applicability of constitutional and international human rights standards, the “extraordinary rendition” of suspected terrorists to countries known for their systematic torture practices or the outsourcing of interrogation functions to private companies.

• Another strategy of circumventing the absolute prohibition of torture is the attempt of the US government to restrict the concept of torture by means of legally unsound official opinions by the Office of Legal Counsel, such as the Bybee and Yoo Memoranda. On the basis of misleading and incorrect interpretations, the US government created the wrong impression that only extremely severe ill-treatment that leads to serious physical injuries or long-lasting mental harm amounts to torture. The respective Memoranda, which clearly contradict the case-law and practice of the competent international and regional human rights bodies, were explicitly withdrawn by the Department of Justice in the aftermath of the Abu Ghraib torture scandal.
Irrespective of their obvious contradiction with accepted international human rights standards, the respective opinions of the Office of Legal Counsel constituted the legal basis for the authorization of far-reaching interrogation methods by the US Secretary of Defense. If such interrogation techniques are used for the purpose of extracting intelligence information from detainees at Guantánamo Bay and similar detention facilities and lead to severe physical or mental pain or suffering, they amount to torture. A comparison with the case-law and practices relating to similar deep interrogation techniques against suspected terrorists in Northern Ireland and Israel show that any explicit authorization of the use of coercion soon reaches the threshold of torture.

Another strategy used by the US government to justify harsh interrogation techniques against suspected terrorists aims at putting the absolute prohibition of CIDT in question. According to this line of argument, a fair balance must be struck between the danger posed by a suspected terrorist and the interrogation techniques used. In the ticking bomb scenario, even fairly brutal interrogation methods might be justified as long as the threshold of torture, in the highly restrictive understanding of the Department of Justice, is not reached. This line of reasoning is based on a fundamental misunderstanding of the principle of proportionality in defining the scope of CIDT. While non-excessive use of force by law enforcement officials outside detention might be proportional and, therefore, fails to reach the level of CIDT, the principle of proportionality cannot be applied to a detainee in an interrogation situation because the detainee is powerless.