The High Price of American Exceptionalism:
Why the United States, unlike Europe, Institutionalized Torture after 9/11

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Abstract:

It is puzzling that the United States, which prides itself on respect for individual rights and the rule of law, could have successfully institutionalized a policy of torture following the 9/11 attacks. The Bush administration showed a steel-like determination to implement and preserve the policy, but the question is how it could do so despite the unequivocal prohibition of torture under international and American law. Part of the answer is that congressional statutes and judicial precedents have limited the ability of courts to prevent overseas torture; recent legislation, passed at the urging of the Bush administration, has limited this ability still further. Another part of the answer is that the United States, well before the inauguration of George W. Bush, deliberately chose to weaken the domestic force of international human rights law. In the 1990s the United States ratified the Torture Convention and the International Covenant on Civil and Political Rights, but accompanied its ratification by "reservations, understandings, and declarations," or "RUDs," that narrowed the scope of the treaty provisions prohibiting torture and blocked US judges from citing the treaties as a source of enforceable rights. The RUDs became the foundation on which the Bush administration lawyers constructed their rationalization of torture.

Europe illustrates the "road not taken." Although the Bush administration received quiet cooperation from some European authorities – most notably, in being permitted the use of interrogation "black sites" in Poland and Romania between 2003 and 2005 – there is nothing to compare with the systematic, centralized, and now transparent embrace of torture by the US government. The difference is striking when one recalls that Europe has a long history of confronting terrorism, and has been the target of several large-scale bombings since 9/11. A principal reason for the rejection of torture in Europe is that its governments long ago made the choice to bind themselves closely to international human rights law. Three treaties in particular have served as a powerful deterrent to torture: the European Convention on Human Rights, the European Convention for the Prevention of Torture, and the Rome Statute of the International Criminal Court. When a new administration takes office in Washington on January 20, 2009, it should reverse the US policy of human rights exceptionalism.

Note to conference participants: I apologize that I have not been able to prepare a new paper in time for the conference. What I have done in this document is to combine passages from two previously written papers – an article published in the *Harvard Human Rights Journal* in the spring of 2007 on the origins of the US torture policy, and an unpublished working paper describing and analyzing the success of the European human rights regime. This summer I will write a new paper that synthesizes, updates, refines, and shortens this material. In the meantime, I hope that this collage will give readers some sense of the argument I intend to make. Much of the following can be safely skimmed.

The High Price of American Exceptionalism: Why the United States, unlike Europe, Institutionalized Torture after 9/11

[New material]

Why did the United States move quickly and resolutely to institutionalize a policy of torture after the 9/11 attacks, while Europe by and large stayed clear of using torture as a counter-terrorist strategy, even after terrorist bombings in Istanbul, Madrid, and London? A large part of the answer is that over the last several decades Europe and the United States each built a very different relation to international human rights law. Europe created a network of powerful supranational institutions to monitor and correct human rights policies of individual states, and extended the reach of these institutions into domestic legal and policy processes. The United States, by contrast, took great care to prevent the incorporation of international human rights law into its domestic legal system. The result is that a number of significant barriers to the institutionalization of torture in Europe were absent in the United States. A longstanding policy of American "exceptionalism" on human rights helped clear a path for the torture policies of the Bush administration.

The moral of this story is that no amount of nationalist self-congratulation can substitute for strong international human rights protections. Torture may be "un-American," but that did not stop an American administration from using it, and continuing to use it long after its policies

were exposed to the public. Our true values are revealed by our actions, and thus, since actions are influenced by institutions, by our choice of institutions. This, we hardly need reminding, is the truth that animated the founding of the American republic. If the United States is serious about ending torture, it will integrate its domestic laws and policies into an international system of human rights guarantees. Until then, public condemnations of torture will continue to ring hollow.

[from "Playing by Our Own Rules: How US Marginalization of International Human Rights Law Led to Torture," *Harvard Human Rights Journal*, vol. 20 (Spring 2007): 89-141.]

Torture as US Policy after 9/11. That the United States has instituted a policy of coercive interrogation as part of the "Global War on Terror" is no longer in dispute. Beginning after September 11, coercive interrogation techniques were authorized at the highest levels of the administration, legally certified by attorneys in the White House and Department of Justice, conveyed to the Pentagon and Central Intelligence Agency ("CIA"), and communicated down the ranks to prison guards and interrogators. These methods have been used by the U.S. military, the CIA, private contractors employed by the Pentagon, and foreign security services to which the United States has sent captives under a policy known as "extraordinary rendition."[1]

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[1] There are many excellent accounts of these developments. Amnesty International ("AI") reports include, AMNESTY INT'L, HUMAN DIGNITY DENIED: TORTURE AND ACCOUNTABILITY IN THE "WAR ON TERROR," Oct. 27, 2004; AMNESTY INT'L, GUANTANAMO AND BEYOND: THE CONTINUING PURSUIT OF UNCHECKED EXECUTIVE POWER, May 13, 2005; Amnesty International's Supplementary Briefing to the UN Committee Against Torture, May 3, 2006. These and other AI reports on the same issue are collected at AI Documents on Torture in the "War on Terror," http://web.amnesty.org/pages/stoptorture-background-alldocuments-eng (last visited Dec. 24, 2006). Equally important reports by Human Rights Watch include HUMAN RIGHTS WATCH, THE ROAD TO ABU GHRAIB (June 2004); HUMAN RIGHTS WATCH, GETTING AWAY WITH TORTURE? COMMAND RESPONSIBILITY FOR THE U.S. ABUSE OF DETAINEES (April 2005); and HUMAN RIGHTS WATCH, "NO BLOOD, NO FOUL": SOLDIERS' ACCOUNTS OF DETAINEE ABUSE IN IRAQ (July 2006). These and other reports on the same issue can be found at U.S.

The government, though it balks at the word "torture," has acknowledged the use of coercive methods. In a highly publicized speech on September 6, 2006, President Bush defended what he called "an alternative set of procedures" used in a "CIA program for questioning terrorists."[2] He refused to describe the authorized techniques, but several of them are common knowledge: waterboarding (or near-drowning), sleep deprivation, forced standing, stress positions, hypothermia, slapping, light and noise bombardment, and extreme isolation.[3]

These methods have been used by the armed forces as well as the CIA. They are not the only methods known to have been used. As the American Civil Liberties Union ("ACLU") reports, "detainees have been beaten; forced into painful stress positions; threatened with death; sexually humiliated; subjected to racial and religious insults; stripped naked; hooded and blindfolded; exposed to extreme heat and cold; denied food and water; deprived of sleep; isolated for prolonged periods; subjected to mock drownings; and intimidated by dogs."[4] Detainees transferred to foreign security services have been treated even more cruelly.[5] For some prisoners, the abuse has lasted years.[6]

Torture and Abuse of Detainees, http://hrw.org/campaigns/torture.htm (last visited Dec. 24, 2006). *See also* DANNER, TORTURE AND TRUTH (2004).

[2] Press Release, President George W. Bush, President Discusses Creation of Military Commissions to Try Suspected Terrorists (Sep. 6, 2006), *available at* http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html.

[3] CIA officials, speaking off the record, have identified these as officially authorized methods. *See* Brian Ross & Richard Esposito, *CIA's Harsh Interrogation Techniques Described*, ABC NEWS, Nov. 18, 2005, http://abcnews.go.com/WNT/Investigation/story?id=1322866; Dana Priest, *Covert CIA Program Withstands New Furor: Anti-Terror Effort Continues to Grow*, WASH. POST, Dec. 30, 2005, at A1; Dana Priest, *Officials Relieved Secret Is Shared*, WASH. POST, Sep. 7, 2006, at A17.

[4] AMERICAN CIVIL LIBERTIES UNION [ACLU], ENDURING ABUSE: TORTURE AND CRUEL TREATMENT BY THE UNITED STATES AT HOME AND ABROAD 1 (2006), *available at* http://www.aclu.org/safefree/torture/torture_report.pdf.

[5] *See* David Weissbrodt & Amy Bergquist, *Extraordinary Rendition: A Human Rights Analysis*, 19 HARV. HUM. RTS. J. 123; STEPHEN GREY, GHOST PLANE: THE TRUE STORY OF THE CIA

Much of this abuse is rightly called torture. By torture, I mean the intentional infliction of severe physical or mental pain or suffering. This language comes from the canonical first article of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Torture Convention").[7] The claim that [many of the techniques being used constitute] torture will strike many readers as obvious. Others will be persuaded if they read testimonies of the victims and learn more about the methods used. One has to get past the generic descriptions that have become the standard currency of media reports. These descriptions, often taken from the officials who authorized the methods, can be misleadingly benign, and leave readers in ignorance about the methods' real effects.[8] That the techniques are intended to cause severe pain or suffering is suggested by the administration's own insistence that tough measures are needed to obtain information from detainees, especially those

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TORTURE PROGRAM (2006); STEPHEN GREY, GHOST PLANE: THE TRUE STORY OF THE CIA TORTURE PROGRAM (2006); Jane Mayer, *Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program*, NEW YORKER, Feb. 14, 2005, at 106; AMNESTY INT'L, BELOW THE RADAR: SECRET FLIGHTS TO TORTURE AND "DISAPPEARANCE," Apr. 5, 2006; Gordon Thomas, *Torture Flights: The Shocking Facts*, CAN. FREE PRESS, May 25, 2006, *available at* http://www.canadafreepress.com/2006/thomas052506.htm.

[6] This is true of several prisoners at Guantanamo Bay. *See* Jeff Tietz, *The Unending Torture of Omar Khadr*, ROLLING STONE, Aug. 24, 2006, at 60; David Rose, *Inside Guantanamo: How We Survived Jail Hell*, OBSERVER, Mar. 14, 2004, at 5.

[7] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1(1), Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Torture Convention] (defining torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.").

[8] *See* Darius Rejali, Op-Ed., *A Longstanding Trick of the Torturer's Art*, SEATTLE TIMES, May 14, 2004, at B9; Tom Malinowski, Op-Ed., *The Logic of Torture*, WASH. POST, June 27, 2004, at B7. For example, the now-familiar phrase learned from CIA officials to describe waterboarding may seriously understate the cruelty of this procedure. The media has described waterboarding as a technique in which "the prisoner is made to believe he will drown." *See* James Risen, David Johnson, & Neil Lewis, *Harsh CIA Methods Cited in Top Qaeda Interrogations*, N.Y. TIMES, May 13, 2004, at A1. Yet prisoners who suffered this technique in South American prisons "had been held under water until they had in fact begun to drown and lost consciousness, only to be revived by their torturers and submerged again. It is one of their worst memories." JENNIFER K. HARBURY, TRUTH, TORTURE, AND THE AMERICAN WAY 15-16 (2005).

purportedly trained to resist interrogation.[9] Several of the techniques--including sleep deprivation, forced standing, and waterboarding--are infamously associated with the Gestapo, Stalin's secret police, and the Inquisition.[10] Many detainees in U.S. custody have died as a result of their treatment.[11]

The government insists that it does not torture, yet it uses methods that it calls torture when practiced by other governments. In Jordan, for example, the State Department observes that "the most frequently alleged methods of torture are sleep deprivation, beatings, and extended solitary confinement."[12] In State Department reports on other countries, sleep deprivation, waterboarding, forced standing, hypothermia, blindfolding, and deprivation of food and water are specifically referred to as torture.[13] The refusal to associate the United States with "torture" is reinforced by the mainstream U.S. media, which carefully avoids the word when reporting on

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[9] Press Release, President George W. Bush, *supra* note 2.

[10] *See* Adam Hochschild, Op-Ed., *What's in a Word? Torture*, N.Y. TIMES, May 23, 2004, §4, at 11; Tom Malinowski, *Call Cruelty What It Is*, WASH. POST, Sep. 18, 2006, at A17; Dan Eggen, *Cheney's Remarks Fuel Torture Debate: Critics Say He Backed Waterboarding*, WASH. POST, Oct. 27, 2006, at A9.

[11] In a February 2006 report, Human Rights First estimated that nearly 100 detainees had died in U.S. custody since August 2002, and had identified eight detainees who were tortured to death. HUMAN RIGHTS FIRST, COMMAND'S RESPONSIBILITY: DETAINEE DEATHS IN U.S. CUSTODY IN IRAQ AND AFGHANISTAN 1 (Feb. 2006). The U.S. government classifies thirty-four detainee deaths as confirmed or suspected homicides. *Id.*

[12] DEP'T OF STATE, 1999 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: JORDAN 2125 (2000).

[13] *See* DEP'T OF STATE, 1999 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: IRAN (2000); DEP'T OF STATE, 1999 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: LIBYA (1999); DEP'T OF STATE, 1999 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: TUNISIA (1999); DEP'T OF STATE, 2005 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: EGYPT (2006).

U.S. interrogation and abuse.[14] The euphemistic language of the government and the media is one reason why it still seems bold to refer to U.S. practices as torture. [….]

Americans need to ask themselves how the United States could adopt a policy of torture, and why, in particular, our legal system failed to prevent it. We all know that the terrorist threat made coercive interrogation newly respectable in the eyes of some public officials, that a general climate of fear and anger following the attacks of September 11 weakened public opposition to torture, and that the Republican majority that controlled Congress until January 2007 chose, for both strategic and ideological reasons, to keep loose reins on the executive branch. However, we expect the law to protect fundamental human rights against bureaucratic zeal, partisan calculations, and shifts in public sentiment. The terrorist attacks of September 11 may have increased the temptation to authorize torture, but an effective legal regime is one that prevents torture precisely when its use becomes most tempting. Since we normally expect the law to erect impregnable barriers against the use of torture, we must ask why, in this case, the barriers gave way so easily. What makes the question even more acute is the emphatic prohibition of torture in both domestic and international law.

Coverage of the torture outbreak has rightly focused attention on decisions by President Bush and his advisors. The administration authorized physical and psychological coercion to extract information from prisoners, defending its policy with novel legal doctrines and tactics. Its choices, which break with decades of official U.S. policy and have provoked widespread shock and dismay among legal scholars and practitioners, are the proximate cause of the torture epidemic.

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[14] *See* Timothy Jones & Chuck Rowling, *Abuse vs. Torture: How Social Identity, Strategic Framing, and Indexing Explain U.S. Media Coverage of Abu Ghraib* (Nov. 3, 2005) (unpublished paper presented to the Southern Political Science Association, on file with author).

Yet a full explanation of the problem must extend beyond the choices of administration officials. The American philosophy of government is premised on the Madisonian truth that fundamental rights, beginning with the right against government brutality, must not depend on the individual rectitude of public officials.[15] Fundamental rights must be insulated from the misguided impulses of political leaders by strong institutional protections. The much-vaunted virtue of the American political system is not the moral infallibility of its public officials, but their voluntary submission to the discipline of wise institutions. [….] Yet our political institutions have not performed as expected: the ability of the Bush administration to adopt torture, and to maintain its policy in the face of explosive revelations, defies the story Americans tell about themselves as members of a rights-protecting democracy. It is essential that we understand why the American legal and political system failed.

I shall argue that a principal (though not sole) cause of the failure was the longstanding refusal of the United States to incorporate international human rights law into its legal system. Well before the inauguration of George W. Bush and the events of September 11, the United States chose to loosen the binding force of its international human rights agreements. This choice had fateful consequences when the United States declared a "Global War on Terror" following the September 11 attacks. The U.S. marginalization of international human rights law made it far easier for Bush administration officials to institutionalize abusive treatment. Major legal obstacles that would otherwise have confronted the Bush administration had been removed by previous congresses and administrations. [….]

This Article focuses primarily on the reservations, understandings, and declarations ("RUDs") that the United States attached to its ratification in the early 1990s of two major

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[15] THE FEDERALIST NOS. 10, 47-51 (James Madison).

human rights treaties: the International Covenant on Civil and Political Rights ("ICCPR") and the Torture Convention. The RUDs had two main effects. First, they watered down several treaty obligations, including those regarding the prohibition, prevention, and punishment of torture and other forms of ill treatment. Second, they prevented U.S. courts from enforcing the treaties' provisions.

The danger of the RUDs should have been obvious at the time of their adoption. The problem was obvious to human rights groups, who criticized them strongly. Torture has hardly been absent from U.S. history. Both history and common sense indicate the folly of carving out loopholes in the international prohibition against torture and ill treatment. The experience of the last five years, when torture has received a level of concerted official support from the U.S. government not seen since the days of slavery, has made the danger of the RUDs fully manifest. As we shall see, the RUDs became a main pillar of the Bush administration's torture policy.

[….]

The Self-Exemption Policy and Its Consequences. The U.S. attitude towards international human rights law has long been ambivalent. On the one hand, the United States has made important contributions to the development of international human rights law; on the other hand, it has taken careful and concerted actions to minimize its own obligations under such law.[16] Underlying the policy of self-exemption is an assumption that the United States does not

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[16] For a recent discussion of the phenomenon, see generally the articles collected in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS (Michael Ignatieff ed., 2005). Andrew Moravcsik comments: "[T]he United States stands nearly alone among Western democracies in that it fails to acknowledge and implement domestically the global system of interlocking multilateral human rights enforcement that has emerged and expanded since 1945." Andrew Moravcsik, *The Paradox of U.S. Human Rights Policy*, *id.* at 148.

need human rights law. Our constitutional tradition and culturally ingrained respect for rights and liberties, it is believed, render the adoption of such law superfluous.[17]

U.S. reluctance to ratify human rights treaties is well documented. It has not ratified the American Convention; the International Covenant on Economic, Social and Cultural Rights; the Convention on the Elimination of All Forms of Discrimination Against Women; or the Convention on the Rights of the Child. It has ratified other human rights treaties only after considerable delay: the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention") after forty years, the ICCPR after twenty-six years, and the Convention on the Elimination of All Forms of Racial Discrimination after twenty-five years. Its ratification of the Torture Convention took a comparatively swift ten years.

But late is better than never, and the treaties ratified by the United States (however tardily) are important. The problem on which I shall focus is the *manner* of U.S. ratification. Its ratifications are accompanied by conditions that greatly dilute the significance of ratification. The "reservations, understandings, and declarations," or RUDs for short, cancel many of the most important legal effects intended by the treaties. They give the ratifications a misleading aspect: the United States makes a show of binding itself, but doesn't bind itself nearly as much as appears.

The RUDs are deliberately crafted to accomplish two main goals: first, to prevent the United States from acquiring any human rights obligations not previously recognized in U.S. law; and second, to prevent the human rights treaties from being incorporated into domestic U.S. law (more precisely, to bar U.S. courts from enforcing provisions of the treaties).

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[17] *See* Michael Ignatieff, *Introduction* to AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS, at 13-16.

The first goal is met by attaching self-exempting reservations to every substantive obligation in the treaty that potentially exceeds human rights protections already provided under U.S. law (usually meaning the U.S. Constitution as interpreted by the Supreme Court). This policy is revealed both by the content of the reservations and by the public justifications that accompanied their adoption. Richard Schifter, the Assistant Secretary of State for Human Rights and Humanitarian Affairs under the first President Bush, testified during Senate hearings on the ratification of the ICCPR that "[i]f the Congress desires to change existing domestic laws, it will undoubtedly want to do so by statute, in the customary legislative process. Accordingly we should reserve on those few provisions of the covenant which are not in accord with existing law."[18] Some of the more famous reservations deal with the death penalty and the prohibition against inhuman treatment. Because the ICCPR prohibits the death penalty for crimes committed by children under the age of eighteen,[19] and because at the time of U.S. ratification the Supreme Court still allowed the juvenile death penalty,[20] the Senate attached a reservation to its consent to ratification stating that the United States retains the right to execute "any person" except for pregnant mothers.[21] In ratifying both the ICCPR and the Torture Convention, the United States declared itself bound by the prohibition on "cruel, inhuman, or degrading treatment

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[18] *International Covenant on Civil and Political Rights: Hearing Before the S. Comm. on Foreign Relations*, 102nd Cong. 18 (1991) (statement of Richard Schifter, Assistant Sec'y of State for Human Rights and Humanitarian Affairs).

[19] ICCPR, art. 6(5).

[20] In 1989 the Supreme Court had upheld the constitutionality of the death penalty for murders committed by children aged sixteen and seventeen. *See* Stanford v. Kentucky, 492 U.S. 361 (1989). The Court did not declare the juvenile death penalty unconstitutional until 2005. *See* Roper v. Simmons, 543 U.S. 551 (2005).

[21] 138 CONG. REC. S4781-01 (daily ed. April 2, 1992) (U.S. Reservations, Declarations, and Understandings, International Covenant on Civil and Political Rights) [hereinafter U.S. RUDs to the ICCPR].

or punishment" only to the extent that such treatment or punishment is "prohibited by the Fifth, Eighth and/or Fourteenth Amendments."[22]

The second goal is met by appending to each human rights treaty (except the Genocide Convention and the Geneva Conventions) a declaration announcing that the treaty's substantive clauses are not self-executing. The non-self-executing clause means that the treaty's human rights obligations (even those left untouched by the Senate's reservations) do not join the body of domestic U.S. law enforceable by U.S. judges until and unless Congress enacts them in separate legislation.[23]

Under international law, treaty obligations are automatically binding between states.[24] Whether they automatically form part of *domestic* law varies from country to country. In some countries, treaties are "self-executing": they automatically become part of domestic law. In other countries, they are "non-self-executing": they do not become part of domestic law until the legislative branch enacts their terms through separate legislation.[25] The United States is an intermediate case. Even though Article VI of the Constitution states that all U.S. treaties form part of the "supreme Law of the Land," the Supreme Court has ruled that some treaties are self-

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[22] This language is taken from the first reservation to the Torture Convention.
[23] *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 734-35 (2004); *see also* Committee Against Torture, *United States of America, Consideration of Reports Submitted by States Parties under Article 19 of the Convention*, ¶ 60, U.N. Doc. CAT/C/28/Add.5 (Feb. 9, 2000) [hereinafter Torture Committee report] ("[T]he United States declared the substantive provisions of the [Torture] Convention . . . to be 'non-self-executing.' Thus, as a matter of domestic law, the treaty in and of itself does not accord individuals a right to seek judicial enforcement of its provisions.").
[24] Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331.
[25] MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 97-102 (4th ed. 2003).

executing while others are not.[26] The Senate has declared that the ICCPR, the Torture Convention, and CERD are not self-executing.

This practice is deeply troubling, and makes ratification seem an exercise in bad faith. One can defend the idea of making treaties non-self-executing when they take the form of peace agreements, military alliances, and trade pacts; since treaties of this type have as their purpose the creation of inter-state obligations, domestic obligations carry secondary importance. But the primary purpose of human rights treaties is to create domestic obligations, to restrict the ways in which governments may treat individuals under their power. When the Senate declares human rights treaties non-self-executing, it therefore defeats the purpose of ratification. The practice would be less objectionable if Congress moved punctually to pass implementing legislation, but Congress has not passed any implementing legislation for the ICCPR or CERD, and it has incorporated the Torture Convention only to a limited extent. The all-important practical consequence of the non-self-executing declarations is to block judges from applying human rights treaties in private causes of action.[27] With rare exceptions, U.S. judges do not refer to the ICCPR, the Torture Convention, or CERD.

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[26] *See* JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 67 (2nd ed. 2003).

[27] *See* Lori Fisler Damrosch, *The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties*, 67 CHI.-KENT L. REV. 515 (1991); Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341 (1995); Frank C. Newman, *United Nations Human Rights Covenants and the United States Government: Diluted Promises, Foreseeable Futures*, 42 DEPAUL L. REV. 1241 (1993); Jordan J. Paust, *Avoiding "Fraudulent" Executive Policy: Analysis of Non-Self-Execution of the Covenant on Civil and Political Rights*, 42 DEPAUL L. REV. 1257 (1993). For an argument that judges may sometimes apply human rights treaties, notwithstanding the non-self-executing clauses, see David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129 (1999). For the bolder argument that the non-self-executing clauses should not inhibit judges from enforcing human rights treaties, see John Lunstroth, *Regulating the Research Enterprise: Use of International Law for U.S. Citizens Injured in Human Subjects Experimentation*, 23 ISSUES IN LAW & MEDICINE (forthcoming 2007).

The RUDs keep the human rights treaties outside our legal system and legal culture, rendering them unenforceable law of little or no practical utility to ordinary people. Because judges do not consult the treaties, lawyers do not invoke them, and law students are not inclined to study them. For the same reasons, public officials do not internalize the treaties, and therefore the public does not learn about them either. The RUDs ensure that international human rights law remains alien territory, unknown and irrelevant, to most American citizens.

Equally as significant as the practical consequences of the RUDs are the underlying attitudes they express and encourage. Two assumptions are made plain: that the understanding of human rights encoded in our Constitution cannot be improved, and that the existing U.S. legal machinery for enforcing constitutionally recognized human rights cannot be improved. The rest of the world can learn from the United States, but not vice versa.

The U.S. RUDs to the ICCPR and Torture Convention have left individuals vulnerable to torture by the U.S. government.[28] I begin by discussing the effect of the non-self-executing declarations. I then turn to the reservations and understandings that restrict the scope of specific rights asserted in the treaties.

Effects of the Non-Self-Executing Declarations. First, the non-self-executing declarations meant that the ICCPR, the Torture Convention, and their unequivocal prohibition against torture and "cruel, inhuman or degrading treatment or punishment,"[29] as well as the obligation that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person,"[30] did not become part of our legal culture.

[28] There are credible arguments that the U.S. RUDs regarding torture and ill treatment are legally invalid. *See, e.g.* Paust, *Executive Plans and Authorizations* (arguing that such RUDs are "void *ab initio* as a matter of law").
[29] ICCPR, art 7.
[30] *Id.* art. 10(1).

Neither legal, political, and media elites nor ordinary citizens internalized these principles and formulas. The obligations are almost unknown, in marked contrast to the familiar rights clauses of the Fourth, Fifth, Sixth, and Eighth Amendments to the U.S. Constitution. Recently, lawmakers and legal scholars have been reminded of the treaty prohibition against cruel, inhuman or degrading treatment, because of the Bush administration's practice of legally excusing harsh treatment that falls short of what it calls torture. Yet it was not until December 2005 that Congress enacted a complete ban on "cruel, inhuman, or degrading treatment or punishment."[31] Meanwhile, the obligation under Article 10 of the ICCPR to treat all detainees with humanity and respect remains almost completely forgotten.

Second, the non-self-executing clauses make it difficult for torture victims to invoke the relevant treaty prohibitions in courts. Victims will find it very difficult to bring the government to account in federal courts for violating its obligations under the ICCPR and the Torture Convention. The Bush administration understands this principle well. When Guantanamo Bay inmates have sought to invoke the ICCPR in federal court proceedings, the administration has argued, and judges have agreed, that as a non-self-executing treaty, the ICCPR provides no justiciable rights.[32]

Third, because the non-self-executing clauses keep the treaties out of the courts, the executive branch is free to develop its own interpretations of treaty obligations. It is constrained neither by past judicial rulings nor by the anticipation of future ones. It is therefore in a position

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[31] Detainee Treatment Act of 2005, § 1003.

[32] *See* Brief of the Petitioner-Appellee at 28 n.6, Hamdan v. Rumsfeld, No. 04-5393 (D.C. Cir. Jan. 10, 2005) (arguing that the ICCPR "creates no justicially enforceable rights."). No judges, including those who have ruled in favor of Guantanamo Bay inmates, have applied the ICCPR or the Torture Convention. Until recently, the Bush administration argued that Guantanamo Bay inmates can present no justiciable rights whatever in federal court. The Supreme Court rejected this claim in *Hamdan v. Rumsfeld*, noting that foreign military detainees are granted certain justiciable rights under the Uniform Code of Military Justice, enacted into law by Congress.

to formulate very permissive interpretations, a prerogative which the Bush administration has exploited to the fullest. For example, until the December 2005 passage of the McCain amendment, the Bush administration asserted that the CIA had legal permission to inflict cruel, inhuman, or degrading treatment on overseas aliens.[33] Although such treatment is banned by Article 7 of the ICCPR[34] and Article 16 of the Torture Convention,[35] the administration used two separate arguments to claim that these prohibitions do not apply to U.S. treatment of overseas aliens. First, it argued that the prohibition applies only to individuals under U.S. jurisdiction and that non-U.S. citizens held captive by U.S. agents outside U.S. territory are not under the jurisdiction of the United States. Second, it pointed to the Senate's stipulation, when ratifying both treaties, that the prohibition applies only insofar as "cruel, inhuman or degrading treatment or punishment" means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution.[36] Since the Supreme Court has not made a practice of extending protection of the Fifth, Eighth, and Fourteenth Amendments to overseas aliens, the Senate's reservation implied that treaty protections against ill treatment similarly did not extend to overseas aliens.[37] However implausible these arguments may be,[38] no U.S. court has authority to overrule them.[39]

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[33] *See* Lichtblau, *Gonzales Says Humane Policy Doesn't Bind CIA*, N.Y. TIMES, Jan. 19, 2005, at A17.

[34] "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." ICCPR, art. 7.

[35] "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 . . . ." Torture Convention, art. 16(1).

[36] U.S. RUDs to the ICCPR; U.S. RUDs to the Torture Convention.

[37] *See* Letter from William E. Moschella, Assistant Attorney Gen., to Sen. Patrick Leahy (Apr. 4, 2005), *available at* http://www.scotusblog.com/movabletype/archives/CAT%20Article%2016.Leahy-Feinstein-

[In December 2005] Congress replied to the Bush administration's arguments by passing the McCain amendment, [which prohibits the "cruel, inhuman, or degrading treatment" of any person in the custody of the U.S. government]. Some might argue that this demonstrates the harmlessness of the non-self-executing declarations: when the need for implementing legislation became clear, Congress passed the requisite law (and used the opportunity to correct the administration's permissive interpretation of the relevant treaty provisions and reservations). However, a closer look at the McCain amendment demonstrates the lasting damage caused by the non-self-executing declarations. We must remember that the amendment was not adopted until thirteen years after ratification of the Torture Convention, twelve years after ratification of the ICCPR, and twenty months after the Abu Ghraib revelations. It followed the September 11 attacks by more than four years, during which time the Bush administration was free to apply its permissive interpretation of the relevant treaty provisions, unconstrained by judicial review. Indeed, the administration succeeded by various maneuvers in delaying passage of the eventual

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Feingold%20Letters.pdf. *See also* Gonzales' comments to the Senate Judiciary Committee in 2005

> As you know, when the Senate ratified the Convention Against Torture, it took a reservation and said that our requirements under Article 16 were equal to our requirements under the Fifth, Eighth and Fourteenth Amendment. As you also know, it has been a long-time position of the executive branch, and a position that's been recognized and reaffirmed by the Supreme Court of the United States, that aliens interrogated by the U.S. outside the United States enjoy no substantive rights under the Fifth, Eighth and 14th Amendment. So as a legal matter, we are in compliance.

Confirmation Hearing on the Nomination of Alberto R. Gonzales To Be Attorney General of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 63 (2006) (statement by Att'y Gen. Alberto Gonzales).

[38] Abraham Sofaer, who as Legal Advisor to the State Department under the First President Bush played a central role in drafting the RUDs to the human rights treaties, has argued vigorously against this interpretation of the reservation concerning ill treatment. *See* Abraham Sofaer, Editorial, *No Exceptions*, WALL ST. J., Nov. 26, 2005, at A11.

[39] The Supreme Court has affirmed the validity of the non-self-executing declarations: "[A]lthough the [ICCPR] does bind the United States as a matter of international law, the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts." *Sosa*, 542 U.S. at 735.

legislation for more than a year. Moreover, passage of the McCain amendment came at a heavy price: to conciliate administration opposition, negotiators inserted the two provisions we have noted above: one limiting the criminal and civil liability of U.S. agents accused of mistreatment, and another (the Graham-Levin amendment) denying Guantanamo Bay inmates the right to file new petitions challenging the conditions of their detention in U.S. courts. Thus the very same law that banned ill treatment of detainees prevented U.S. judges from enforcing that ban in Guantanamo Bay. Furthermore, as I discuss below, the ban on ill treatment was worded in a manner that opened the door to highly permissive interpretations by some members of the Bush administration. In brief, the non-self-executing declarations put the burden on Congress to reaffirm the U.S. prohibition of torture and other forms of ill treatment at a time when public support for the rights of terrorists and suspected terrorists was at a low ebb, [and] in the face of determined opposition from the executive branch. It is not surprising under these circumstances that Congress responded in an incomplete and ambiguous manner.

A fourth consequence of the non-self-executing clauses is that they remove an inducement to appropriately generous interpretations of our *constitutional* rights. If judges were in the habit of consulting international human rights treaties, we would expect the treaties to influence their interpretation of constitutional rights, the right against government brutality being one area in which such influence would presumably be felt. The constitutional ban on cruelty and ill treatment derives from the Eighth Amendment's prohibition of cruel and unusual punishment and the Fifth and Fourteenth Amendments' prohibitions against arbitrary deprivation of life and liberty. The language in these clauses is spare; we depend on responsible constructions by humane judges to uphold the clauses' real meaning. That meaning finds fuller elaboration in the formulas of contemporary international human rights law that "no one shall be

subjected to torture or to cruel, inhuman or degrading treatment or punishment,"[40] and that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."[41] Judges used to applying these formulas would be steered toward the full meaning of the Fifth, Eighth, and Fourteenth Amendments.

It is not radical to suggest that familiarity with international human rights law can improve constitutional interpretation. If the framers of the Constitution and its amendments were animated by a vision of natural or human rights--that is, rights that human beings have because they are human--then we keep faith with their vision by consulting international human rights law to seek a deeper understanding of constitutional rights.[42]

Is torture prohibited by the Constitution? It would certainly appear to be, if the Constitution is read correctly.[43] The Fifth and Eighth Amendments, read together, make torture impermissible. Under the Eighth Amendment, the government may not inflict torture on duly convicted criminals.[44] Under the Fifth Amendment, it may not torture anyone else, for the Fifth Amendment prohibits the deprivation of liberty without due process of law, and torture obviously constitutes a denial of liberty.[45] As Justice Kennedy notes in a concurring opinion in *Chavez v. Martinez*, "[use] of torture or its equivalent in an attempt to induce a statement violates

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[40] ICCPR, art. 7; *see also* Torture Convention, art. 16.
[41] ICCPR, art. 10.
[42] As Gerald L. Neuman writes, "the Supreme Court has reason to examine international human rights norms and decisions interpreting them for the normative and functional insights that they may provide on analogous issues of constitutional right." Gerald Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT'L L. 82, 88 (2004).
[43] *See* Seth F. Kreimer, *Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror*, 6 U. PA. J. CONST. L. 278 (2003).
[44] *See* Hudson v. McMillan, 503 U.S. 1 (1992).
[45] *See* Rochin v. California, 342 U.S. 165 (1952).

an individual's fundamental right to liberty of the person."[46] Despite these encouraging precedents, however, the fact remains that the Supreme Court has not yet directly confronted the question whether torture may be used to extract information deemed necessary for national security. We must hope that it will declare torture constitutionally impermissible in all circumstances. If the Supreme Court were in the habit of consulting the ICCPR and the Torture Convention, it would be more likely to proclaim an absolute constitutional ban on torture, as well as a constitutional requirement to adopt practical measures reinforcing such a ban.[47]

A fifth consequence of the non-self-executing declarations is the exclusion from the body of judicially enforceable U.S. law of several procedural obligations designed to prevent abuse. These include obligations under the Torture Convention to teach government personnel that torture and ill treatment are illegal; to monitor training methods, interrogation protocols, and detention conditions for any signs of abuse; to guarantee that individuals who report suffering torture or ill treatment have their complaints promptly and impartially investigated by competent authorities; and to award fair and adequate compensation to victims of torture.[48]

Finally, the non-self-executing declarations undermine the ability of torture and abuse victims to seek civil remedies in U.S. courts. In an ominous decision handed down in February 2006, a federal district judge blocked a lawsuit by Maher Arar, a Canadian citizen sent by U.S. officials to be tortured in Syria.[49] The judge argued that a public trial posed a threat to national security because the proceedings might release information embarrassing to the Canadian

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[46] 538 U.S. 760, 796 (2003) (Kennedy, J., concurring in part and dissenting in part).
[47] This point assumes greater importance in the wake of the Military Commissions Act. The provisions of the Act which undermine the rights of foreign detainees against torture and ill treatment can be judicially overturned only upon a finding of unconstitutionality.
[48] Torture Convention, arts. 10-14.
[49] Doug Struck, *Canadian Was Falsely Accused, Panel Says*, WASH. POST, Sept. 19, 2006, at A1.

government, thereby harming U.S.-Canadian relations.[50] Arar would have been in a stronger position if he could have invoked the emphatic language of the ICCPR:

> Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.51

The non-self-executing declaration deprives torture victims of this important legal argument for the right to sue U.S. authorities.

Effects of the Reservations and Understandings. The Senate not only declared that the rights provisions of the ICCPR and Torture Convention would be non-self-executing. It also chipped away at the prohibition of abuse by means of specific reservations and understandings. In one way or another, these conditions created pockets of permissible ill treatment and even torture.

Reservations to both the ICCPR and the Torture Convention state that the United States is bound by the prohibition on "cruel, inhuman or degrading treatment or punishment" only insofar

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[50] Arar v. Ashcroft, 414 F. Supp. 2d 250, 282-83 (E.D.N.Y. 2003).
[51] ICCPR, art. 2(3).

as such treatment or punishment means "the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments."[52] Why was this reservation adopted? The natural inference is that, in the minds of the Senate, some cruel, inhuman, or degrading treatment or punishment *may be permitted* by the Constitution and should therefore remain legally available.

Examination of the ratification hearings confirms that this was indeed the reservation's intended meaning. Appearing before the Senate Foreign Relations Committee to explain the package of RUDs negotiated between the first Bush administration and the Senate, Department of State Legal Advisor Abraham D. Sofaer stated:

> The reason for this reservation is straightforward. The formulation used by Article 16 [of the Torture Convention] is ambiguous, particularly in its reference to 'degrading treatment.' Of course, our own 8th Amendment to the Constitution protects against cruel and unusual punishment . . . . We would expect, therefore, that our Constitution would prohibit most (if not all) of the practices covered in Article 16's reference to cruel, inhuman and degrading treatment or punishment.[53]

We can assume that Sofaer's real objection to the language of Article 16 was not its ambiguity but rather its breadth. The prohibition against "cruel, inhuman, or degrading treatment of punishment" is no more ambiguous than the prohibitions laid down in the U.S. Constitution against the denial of liberty without due process, the deprivation of equal protection of the laws, and "cruel and unusual" punishment. As a warning that Article 16 may prohibit too much,

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[52] This language is from the U.S. RUDs to the Torture Convention; the wording of the equivalent reservation to the ICCPR is almost identical.

[53] *Convention Against Torture: Hearing Before the S. Comm. on Foreign Relations*, 101st Congress 11 (1991) (statement of Abraham D. Sofaer, former Department of State legal advisor) [hereinafter *Torture Convention Hearing*] (emphasis added).

Sofaer cited a decision by the European Court of Human Rights that the "death row phenomenon" (whereby condemned prisoners may wait years before executions are carried out) constitutes "inhuman and degrading" punishment, although Sofaer was quick to note that the Torture Convention does not give foreign or international courts any authority over the United States.[54] To judge by Sofaer's statement, the main argument for the reservation to Article 16 was that the United States should not be governed by a prohibition *against degrading treatment*. It is an ignoble--one might say cowardly--argument. Its irresponsible character is underscored by recent revelations of forced nudity, sexual humiliation, and the desecration of religious symbols in U.S. detention centers around the world.[55]

More charitable explanations of the reservation are not persuasive. It may be argued that particular care must be taken where criminal penalties are prescribed. However, neither the ICCPR nor the Torture Convention mandates criminal prosecution for cruel, inhuman, or degrading treatment, as distinct from torture.[56] Or it may be thought that the original treaty prohibition would subject the U.S. government to the rule of foreign or international courts. However, the treaty prohibition does no such thing. The only implementing bodies created by the ICCPR and the Torture Convention are the Human Rights Committee and the Committee against Torture, respectively. These committees lack any authority to deliver legally binding

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[54] Addressing the question whether Article 16 condemns the death penalty itself, Sofaer reminded Senators that a separate "understanding" attached to the Convention preserves the right of the United States to continue this practice. *Id.* at 6, 11. When discussing the parallel reservation to the ICCPR, the administration also pointed to rulings by the European Court of Human Rights condemning corporal punishment and solitary confinement as inhuman or degrading. *See* the prepared remarks of Asst. Sec. of State Richard Schifter, *Id.* at 10.

[55] *See, e.g.* James Risen, *G.I.'s Are Accused of Abusing Iraqi Captives*, N.Y. TIMES, Apr. 29, 2004, at A15 (reporting instances of forced nudity and sexual humiliation); Katharine Q. Seelye, *Red Cross Reported Koran Abuses*, N.Y. TIMES, May 20, 2005, at A22 (reporting desecration of religious symbols).

[56] *See* ICCPR, art. 7; Torture Convention, arts. 4-9, 16.

judgments; the most they may do is to issue "views," "comments," and "findings," and their power to do even this is severely limited by procedural and resource constraints.[57] Moreover, the committees' authority to state views extends to the entire body of the treaties, so fear of their role is no reason to modify the prohibition on cruel, inhuman, or degrading treatment in particular.

The reservation became an important element in the Bush administration's legal rationalization of torture and ill treatment. As we have seen, the administration asserted that the Fifth, Eighth, and Fourteenth Amendments do not apply to the U.S. government's treatment of overseas aliens, and consequently that neither the ICCPR nor the Torture Convention protects overseas aliens from cruel, inhuman, or degrading treatment inflicted by the United States, provided that such treatment does not rise to the level of torture. Combined with the administration's vanishingly narrow definition of torture, this argument allowed it to defend practices that most people would call torture.

The reservation left another damaging legacy. In passing the McCain amendment in December 2005, Congress made the ban on ill treatment apply throughout the world, but also followed the original treaty reservation in stipulating that "the term 'cruel, inhuman, or degrading treatment or punishment' means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States."[58] *What is so reckless about this alteration is that the Supreme Court has never ruled whether cruel, inhuman, or degrading treatment (including torture), when used to gather intelligence in the name of national security, is a violation of the Fifth, Eighth, and*

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[57] *See* ICCPR, arts. 40-42; Torture Convention, arts. 19-21. In addition, the United States has declined to sign the voluntary treaty provisions (Optional Protocol to the ICCPR; Torture Convention, art. 22) that would allow the committees to hear complaints brought against it from individuals.

[58] Detainee Treatment Act of 2005, § 1003(d).

Fourteenth Amendments. The Eighth Amendment, which governs the punishment of convicted criminals, does not apply here. The relevant provision of the both Fifth and Fourteenth Amendments is the Due Process Clause, and the test devised by the Supreme Court for determining when rough treatment by government officials violates the Due Process Clause is whether such treatment "shocks the conscience."[59] This is a subjective test (how the treatment affects the conscience of the reasonable onlooker), unlike the objective test prescribed in the original treaty language (what treatment is actually inflicted on the detainee).

Leading administration officials appear to have taken the view that harsh interrogation methods do not shock the conscience--and therefore do not violate the McCain amendment--when their purpose is preventing terrorism. This view was strongly hinted by Vice President Cheney, when commenting on the meaning of the McCain amendment:

> There's a definition that's based on prior Supreme Court decisions and prior arguments, and it has to do with . . . three specific amendments to the Constitution. And the rule is whether or not it shocks the conscience. If it's something that shocks the conscience, the court has agreed that crosses over the line. Now, you can get into a debate about what shocks the conscience and what is cruel and inhuman. And to some extent, I suppose, that's in the eye of the beholder. But I believe, and we think it's important to remember, that we are in a war against a group of individuals and terrorist organizations that did, in fact, slaughter 3,000 innocent Americans on 9/11, that it's important for us to be able

[59] *Rochin*, 342 U.S. at 172.

to have effective interrogation of these people when we capture them.[60]

In response to the interviewer's next question, Vice President Cheney refused to say whether U.S. interrogators should use mock executions and waterboarding. When pressed, he confined himself to saying that "we don't engage in torture."61 Since this interview, it has become the settled doctrine of the administration that the "shock the conscience" test introduced by the McCain amendment creates a "context-dependent" and "flexible" standard, in which the permissible interrogation techniques vary according to the threat to be averted.[62]

Some of the other reservations and understandings attached to the Torture Convention go further, by watering down obligations to abstain from and to prevent torture itself. The Convention forbids states to send anyone to a foreign country "where there are substantial grounds that he would be in danger of being subjected to torture."[63] The Senate narrowed this prohibition by specifying that it applies only "if it is more likely than not that he would be tortured."[64] Thus an individual who faces a 10 percent or 20 percent or 30 percent risk of torture no longer has a right against deportation. That right is reserved to those whose risk of torture is over 50 percent.

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[60] *Nightline: Cheney Roars Back: The Nightline Interview During His Trip To Iraq* (ABC television broadcast Dec. 18, 2005) (transcript on file with author).

[61] *Id.*

[62] R. Jeffrey Smith, *Behind the Debate, Controversial CIA Techniques; Interrogation Options Seen as Vital*, WASH. POST, Sept. 16, 2006, at A3; *see also A Self-Inflicted Defeat*, Editorial, WALL ST. J., Sep. 14, 2006, at A20 (reporting that Attorney General Gonzales holds the view that "the 'shock' threshold may be higher with the likes of [Khalid Sheikh Mohammad]--who planned 9/11--than for ordinary detainees."). Mohammad is known to have been repeatedly subjected to waterboarding. Brian Ross & Richard Esposito, *CIA's Harsh Interrogation Techniques Described*, ABC NEWS, Nov. 18, 2005.

[63] Torture Convention, art. 3.

[64] U.S. RUDs to the Torture Convention, at II(2).

Worst of all, the United States took it upon itself to narrow the meaning of torture, removing the ugly stigma of that word from a range of practices covered by the treaty's original definition.[65] The Convention defines torture as the intentional infliction "of severe pain or suffering, whether physical or mental."[66] Initially, the Reagan administration had proposed attaching an understanding "that in order to constitute torture, an act must be a deliberate and calculated act of an extremely cruel and inhuman nature, specifically intended to inflict excruciating and agonizing physical or mental pain or suffering."[67] When the first President Bush resubmitted the treaty for Senate consent to ratification, he discarded this redefinition in favor of another definition, which the Senate adopted:

> [T]he United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or

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[65] *See* Sanford Levinson, *Brutal Logic: It's Bad, It's Disgusting, It's Wrong. But Is It Torture? Lawyers Have Some Explaining to Do*, VILLAGE VOICE, May 12-18, 2004, at 27 (calling attention to the significance of this action).
[66] Torture Convention, art. 1(1).
[67] President's Message to Congress Transmitting The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 24 WEEKLY COMP. PRES. DOC. 642 (May 20, 1988).

personality.[68]

The main effect of the substitute definition is to narrow the cases in which the intentional infliction of severe mental pain or suffering qualifies as torture. In his prepared statement to the Senate Foreign Relations Committee, Deputy Assistant Attorney General Mark Richard justified the change as follows: "Mental pain is by its nature subjective. Action that causes one person severe mental suffering may seem inconsequential to another person. Moreover, mental suffering is often transitory, causing no lasting harm."69 This, he argued, rendered the Convention's definition of mental torture too vague, and since the Convention criminalizes torture, the United States would need to provide a more precise definition to safeguard the rights of the accused.70 The solution was to specify the methods that constitute mental torture: those appearing as items one through four in the above substitute definition. In addition, the infliction of severe mental pain or suffering in the specified ways constitutes torture only if it is intended to produce prolonged mental harm.[71]

Richard's rationale depends on an untenable distinction between physical and psychological torment. If mental pain is subjective, so too is physical pain. In the world of torture, the line between the physical and the psychological carries little meaning. All pain is at root psychological-–an affliction of feeling whose defining characteristic is that it hurts. The mission of the torturer is to impose extreme hurt on the victim, whether by means of beatings, electric shocks, waterboarding, sleep deprivation, entombment, mock executions, threats against family members, or any other number of ingenious torments. The Torture Convention gets it

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[68] U.S. RUDs to the Torture Convention, at II(1)(a).
[69] *Torture Convention Hearing*, at 17.
[70] *Id.* at 12-14.
[71] U.S. RUDs to the Torture Convention, at II(1)(a).

right: whether the immediate vehicle is "physical pain" is surely not the issue, but rather the intention of the perpetrator to inflict severe pain or suffering on the victim. Unfortunately, the Senate's revision is an invitation to dream up alternate methods of inflicting severe mental pain or suffering not included on the list of prohibited techniques.

At the hearings, Human Rights Watch gave a prophetic warning:

> The range of acts that constitute torture is limited only by the imaginations of those who seek to perpetrate them. In recent years governments that practice torture increasingly have sought to devise methods that cause intense pain but leave no marks. The era of psychological torture appears to be ahead of us. It would be a mistake for the U.S. to interfere with the Committee Against Torture's ability to respond effectively to these new and ever more cruel torture techniques.[72]

We are obliged to ask: Does the Senate's revised definition cover [...] prolonged sleep deprivation? Live entombment or immurement?[73] Exploitation of individual phobias to instill terror? These are not idle questions. The move to exempt psychological techniques, aside from those named in the list, recalls the CIA's historical fascination with using psychological compulsion, including "mind control," as an interrogation strategy. One is led to ask whether the CIA sought this revision of the treaty.[74] Even if the CIA did not directly lobby for the change, its interrogation manuals and the Senate's redefinition of torture seem to emerge from a similar

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[72] *Torture Convention Hearing*, at 94.
[73] That is, confining a prisoner in a small space like a coffin without inflicting death.
[74] *See* ALFRED W. MCCOY, A QUESTION OF TORTURE: CIA INTERROGATION FROM THE COLD WAR TO THE WAR ON TERROR 100-01 (2006) (asking the same question).

ethos, one which holds that the use of psychological duress to extract information is less reprehensible than the infliction of physical pain.

The alleged distinction between physical and psychological methods bedevils contemporary discussions of torture. According to prominent government officials and some supporters of the administration, "torture" is an incorrect label for methods that are merely psychological, and the term "psychological" is made to cover a broad territory. Former CIA Director Porter Goss, who is reported to have approved the use of waterboarding, sleep deprivation, and stress positions,[75] asserted to Charles Gibson of ABC News that the CIA does not practice torture.[76] In the interview, Goss refused to state whether waterboarding constitutes torture, but defined torture as follows:

> Well, I define torture probably the way most people would--in the eye of the beholder. What we do does not come close because torture in terms of inflicting pain or something like that, physical pain or causing a disability, those kinds of things that probably would be a common definition for most Americans, sort of you know it when you see it, we don't do that because it doesn't get what you want.[77]

The editorial page of the *Wall Street Journal* recently stated:

> No one has yet come up with any evidence that anyone in the U.S. military or government has officially sanctioned anything close to "torture." The "stress

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[75] Dana Priest, *Covert CIA Program Withstands New Furor: Anti-Terror Effort Continues to Grow*, WASH. POST, Dec. 30, 2005, at A1).
[76] *CIA Director: "Torture is Counterproductive,"* (ABC television broadcast Nov. 29, 2005), *available at* http://abcnews.go.com/GMA/story?id=1353449.
[77] *Id.*

positions" that have been allowed (such as wearing a hood, exposure to heat and cold, and the rarely authorized "waterboarding," which induces a feeling of suffocation) are all psychological techniques designed to break a detainee.[78]

The revised definition also stipulates that, to constitute torture, the infliction of severe mental pain or suffering must be intended to cause prolonged mental harm. Therefore, if the damage is excruciating but short, it is not torture. Moreover, the prolonged harm must be intended. Therefore, the intentional infliction of severe mental pain or suffering in one of the specified ways, when it leads to prolonged mental harm not itself intended, is still not torture. The OLC torture memo provides what is unfortunately a correct interpretation of this provision: "[I]f a defendant has a good faith belief that his actions will not result in prolonged mental harm, he lacks the mental state necessary for his actions to constitute torture."[79]

By redefining torture, the Senate shifted the meaning of several obligations in the Convention. Because creative forms of mental torture are no longer "torture," the United States is no longer obliged under the Torture Convention to prosecute individuals who order or inflict such treatment,[80] it is not obliged to award compensation to victims of such treatment,[81] it is free to ship individuals to countries where they will probably suffer such treatment,[82] and it can introduce testimony extracted by such treatment into legal proceedings.[83]

The U.S. redefinition of torture is disturbing on several levels. It perpetrates an Orwellian distortion of language, allowing purveyors of carefully chosen methods of torture to

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[78] *A 'Tortured' Debate*, Editorial, WALL ST. J., Nov. 12, 2005, at A6.
[79] DANNER, at 121.
[80] Torture Convention, arts. 4-9.
[81] *Id.* art. 14.
[82] *Id.* art. 3.
[83] *Id.* art. 15.

claim that they do not torture, and causing the meaning of torture to become lost in a maze of categories and distinctions. What is thrown out in the Senate's elaborately self-protective language is any sense that torture *as such* is morally unacceptable. The new definition not only wreaks havoc on the English language; it is also legally suspect. Since long before the Senate ratified the Convention, torture has been recognized as a violation of customary international law. The Nuremberg and Tokyo Tribunals and the 1949 Geneva Conventions proclaimed it an international crime;[84] its status as a violation of customary international law was reaffirmed by the 1980 U.S. case of *Filártiga v. Peña-Irala*[85] and many subsequent rulings. The Senate cannot retroactively adjust a customary international law prohibition by substituting a new definition for the prohibited activity. One cannot redefine one's way out of a legal prohibition.

The Senate's redefinition of torture has had practical consequences. The new definition appears in the Torture Victim Protection Act[86] and now in the War Crimes Act as amended by the Military Commissions Act.[87] It is also reproduced in the 1994 Congressional Torture Statute,[88] one of the few steps taken by the United States to incorporate the provisions of the Torture Convention into domestic law. The Torture Statute requires prosecution of any U.S. citizen (or foreigner found on U.S. territory) who commits, attempts to commit, or conspires to commit torture outside the United States.[89] Bush administration officials were quick to exploit the loopholes in the statutory definition of torture. Prodded by White House Counsel Alberto Gonzales' question, "Are we forward-leaning enough?", officials looked to the statutory

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[84] Nuremberg Charter, art. 6(b), (c); Tokyo Charter, art. 5(c); First, Second, Third, and Fourth Geneva Conventions.
[85] 630 F.2d 876 (2d Cir. 1980).
[86] 28 U.S.C. § 1350 (1992).
[87] Military Commissions Act, § 6(d)(1)(A).
[88] 18 U.S.C. §§ 2340-2340A (2004).
[89] 18 U.S.C. § 2340A (2004).

definition for any possible arguments that extreme interrogation methods such as waterboarding do not constitute torture.[90] These deliberations culminated in the OLC torture memo of August 1, 2002. This memo has merited almost universal condemnation for its blatant distortions of international and U.S. law, including of the Torture Statute itself.[91] But the dirty secret about the memo is that some of its shocking conclusions, especially where psychological torment is concerned, emerge from a straightforward reading of the statute's definition of torture.[92]

Blame for the bulk of the OLC torture memo's arguments and conclusions falls on its authors alone. Most of the analysis does not derive from the Senate's alterations to the treaty definition. But some of it does: the memo finds loopholes that the statutory definition actually contains.[93] The Senate's redefinition also had indirect effects. The memo builds an argument of legislative intent from the clear narrowing of the original treaty definition.[94] Moreover, the Senate, by resorting to a series of strained distinctions, arbitrary exemptions, and elevated thresholds, set an unfortunate precedent that the Bush administration lawyers all too eagerly followed. The administration lawyers carried the process of redefinition much farther than the Senate, but the Senate took the first steps.

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[90] R. Jeffrey Smith, *Behind the Debate, Controversial CIA Techniques; Interrogation Options Seen as Vital*, WASH. POST, Sept. 16, 2006, at A3

[91] For detailed criticisms, see José E. Alvarez, *Torturing the Law* 37 CASE WESTERN J. INT'L L. 175 (2006); Kim Lane Scheppele, *Hypothetical Torture in the "War on Terrorism,"* 1 J. NAT'L SECURITY L. & POL'Y 1 (2005); and David Luban, *Liberalism, Torture, and the Ticking Bomb*, *in* THE TORTURE DEBATE IN AMERICA 35 (Karen J. Greenberg ed., 2006). For a criticism by two conservative legal scholars, see Ruth Wedgwood & R. James Woolsey, Op-Ed, *Law and Torture*, WALL ST. J., June 28, 2004, at A10.

[92] This includes most (though not all) of the analysis in the memo's sections entitled "Prolonged Mental Harm" and "Harm Caused By Or Resulting From Predicate Acts." Memorandum from Jay Bybee, OLC Dir. and Assistant Attorney Gen., to Alberto Gonzalez, Counsel to the President, *Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A* (Aug. 1, 2002), *reprinted in* DANNER, TORTURE AND TRUTH (2004) [hereinafter OLC Torture Memo]

[93] *Id.*

[94] *Id.* at 127-32.

Not all U.S. RUDs attached to the human rights treaties are objectionable. Some seek to protect rights: for example, the right of free speech against treaty provisions requiring anti-hate speech legislation, and the right of privacy against perhaps overzealous injunctions to combat racial discrimination in the social sphere.[95] Other RUDs, procedural in purpose, appear entirely harmless.[96] My comments have been directed to those RUDs that were obviously inserted to weaken rights protections. Such RUDs form a sorry chapter in the history of the United States. They rest on a combination of moral complacency and moral cowardice that suggests a lack of commitment to human rights. They have succeeded in undermining human rights, and have allowed the United States to engage in the systematic use of torture.

[New material]

On the Other Side of the Atlantic. Europe has a long history of domestic terrorism, with some organizations such as the Provisional IRA and loyalist paramilitaries in Northern Ireland and ETA in Spain operating for decades. There is now added the menace of international Islamist terrorism. We know that the 9/11 attackers finalized their plans in Hamburg. Bombings in Istanbul, Madrid, and London claimed scores of lives, and police are still uncovering new terrorist plots.

Europe also has a history of responding to terrorism with torture. The French used torture on a massive scale during the Algerian War of Independence, with the stated purpose of preventing rebel-instigated terrorist attacks. Other countries making systematic use of torture as a counter-terrorist strategy have included Turkey, Russia, Britain, and Spain. Given this

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[95] *See* U.S. RUDs to CERD, at I(1); 140 Cong. Rec. S7634-02, at I(1)-(2) (daily ed. June 24, 1994) (U.S. Reservations, Declarations, and Understandings, International Convention on the Elimination of All Forms of Racial Discrimination).

[96] I have in mind the declarations that empower the monitoring committees to hear complaints against the United States from other states parties that make a similar declaration. *See* U.S. RUDs to the ICCPR; U.S. RUDs to the Torture Convention.

background, one might have expected that following the 9/11 attacks European officials would follow the US government in using torture as a core strategy in the fight against Islamist terrorism. However, this has not happened. Admittedly, the record is not clean. We know, for example, that some European governments facilitated CIA rendition air flights and that between 2003 and 2005 the CIA was allowed to operate clandestine interrogation cells in Poland and Romania. (I discuss this matter below.) But the secret prisons (as far as we know) were closed three years ago, and there has been nothing in Europe to approximate the centralized, systematic, and now transparent support of torture by the US government. The difference is striking.

How to explain the difference? A key factor is that long before the events of 9/11 European states bolted themselves into a strong international human rights regime. They committed themselves collectively to the protection of fundamental human rights, and made one another co-guardians of human rights within each national jurisdiction. They did this by creating powerful supranational regional institutions to monitor, evaluate, and enforce compliance with human rights norms. Unlike the United States, each country would *not* be an exclusive judge of its own human rights policy. Instead, each would be held accountable to the rest. The result has been a far-reaching, though still far from complete, improvement in human rights practices across the continent, and a set of significant gains in the struggle against torture.

[from "A Madisonian Argument for Strengthening International Human Rights Institutions: Lessons from Europe"]

The European human rights regime is a complex system embracing different regional organizations and a multitude of overlapping initiatives. The guiding principle is that the protection of human rights is a collective task – that all European states and all European citizens are simultaneously responsible for the protection of human rights in each national jurisdiction.

This principle has inspired unprecedented forms of transnational cooperation in the human rights field, including the establishment of supranational institutions that exert increasing influence over domestic policy. [….]

In addressing this topic, I do not confine my attention to the 1950 European Convention on Human Rights (ECHR). Although the ECHR is rightly regarded as the linchpin of the system, it does not function alone. It is one of several human rights instruments of its parent body, the 47-member Council of Europe (CE), whose impact cannot be understood in isolation from the decisive contributions of the 27-member European Union (EU), the 26-member North Atlantic Treaty Organization (NATO), and the 56-member Organization for Security and Cooperation in Europe (OSCE). [….]

Although judicial torture was abolished throughout Europe by the end of the eighteenth century, ill-treatment often amounting to torture persisted in prisons, police stations, and military barracks. The imperial powers used severe forms of torture to maintain control of their overseas possessions.[97] The unrestrained cruelties of Hitler's Gestapo, Stalin's NKVD, and the Japanese Kempeitai caused general horror, and became a powerful spur to the human rights revolution following World War II.[98]

The unequivocal language of the European Convention on Human Rights (which closely follows that of the Universal Declaration of Human Rights, adopted on December 10, 1948) was intended to draw a sharp break with the past. Beginning in 1951, ratifying states have pledged in Article 3 that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment." The prohibition is stated in absolute terms: unlike most other rights asserted in the

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[97] On the history of modern torture in Europe, see Edward Peters, *Torture*, expanded ed. (Philadelphia: University of Pennsylvania Press, 1999); and Darius Rejali, *Torture and Democracy* (Princeton: Princeton University Press, 2007).
[98] Rejali, *Torture and Democracy*, chapters 3-5.

Convention, it admits no exceptions. The prohibition may not be suspended even during an emergency "threatening the life of the nation" (art. 15(2)). Moreover, it extends beyond torture to include all inhuman or degrading treatment or punishment, thus forbidding brutality in all its forms and removing the temptation to fiddle with the meaning of the word "torture."

Moreover, for the first time in human history the prohibition was to be enforced by a permanent international Commission and Court – the European Commission and European Court of Human Rights, both established by the original ECHR. Originally, some countries chose not to grant the right of individual petition or to recognize the jurisdiction of the Court, but their number gradually declined over the decades, and by the 1990s individual petition and Court jurisdiction became obligatory for new countries wishing to join the Council of Europe.[99] After 1998 the 11th Protocol to the ECHR eliminated the opt-out provisions entirely.

Britain, France, and Belgium kept their overseas empires until the early 1960s. France's massive use of torture during the Algerian War of Independence may be one reason why it did not ratify the Convention until 1974. Belgium ratified the Convention in 1955, but chose to forego the option, available under Article 63 of the original treaty, of applying the Convention to its African colonies.[100] Britain, becoming the first country to ratify the Convention in 1951, applied the Convention to most of its imperial territories,[101] but did not recognize the right of individual petition or the jurisdiction of the Court until 1966, and then only for Britain and

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[99] Michael D. Goldhaber, *A People's History of the European Court of Human Rights* (New Brunswick: Rutgers University Press, 2007), p. 5.
[100] *Yearbook of the European Convention on Human Rights (European Commission of Human Rights: Documents and Decisions) 1955-1956-1957* (The Hague: Martinus Nijhoff, 1959), p. 51.
[101] *Ibid.*, pp. 46-47.

Northern Ireland.[102] It came as a shock to the British government when in 1957 and 1958 Greece accused it before the Commission of human rights violations in Cyprus – then still a British colony. The second of these complaints, alleging violations of Article 3, was still being adjudicated when the independence of Cyprus in 1960 caused it to be dropped.[103] In fact, British torture in Cyprus was part of a larger pattern. The "Five Techniques" which were to become notorious in Northern Ireland had been used during the final years of the British Empire not only in Cyprus, but also in Palestine, Malaya, Kenya, Cameroon, Brunei, British Guiana, Aden, Borneo, and the Persian Gulf.[104] [….]

The landmark case of *Ireland v. UK* addressed the "Five Techniques" that the British government had authorized in 1971 during its anti-terrorist campaign in Northern Ireland. The techniques referred to wall-standing, hooding, loud noise, food deprivation, and sleep deprivation, although these descriptions understate the brutality of the treatment actually used. The Commission, hearing the case in 1976, found that the treatment constituted torture. The Court, ruling on appeal in 1978,[105] determined that the treatment did not amount to torture, but that it did constitute inhuman and degrading treatment and was therefore still a violation of Article 3.[106] Accounts by the victims make it clear that the Commission made the more accurate

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[102] A. W. Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford: Oxford University Press, 2001), p. 1099.
[103] Ibid., p. vii.
[104] Malcolm D. Evans and Rod Morgan, *Preventing Torture: A Study of the European Convention of the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (Oxford: Oxford University Press, 1998), p. 38.
[105] The UK had previously recognized the jurisdiction of the Court.
[106] Britain had ordered a halt to the Five Techniques in November 1971, but credible reports of their use surfaced throughout the 1970s. In 1979 laws were passed introducing new protections for suspected terrorists held in detention. See Evans and Morgan, *Preventing Torture*, p. 40.

assessment.[107] The Court suggested as much in *Selmouni v. France* (1999), stating that "the Court considers that certain acts which were classified in the past as 'inhuman and degrading treatment' as opposed to 'torture' could be classified differently in future." Though such comparisons are treacherous, the treatment inflicted on Selmouni does not seem obviously worse than that inflicted on the Northern Irish detainees.

Torture has long been a problem in Turkey, the subject of concerted campaigns by international human rights NGOs. Though a member of the Council of Europe since 1949, Turkey was to some degree sheltered from intergovernmental human rights criticism by Cold War politics. Two years after the 1980 military coup, five states (Denmark, Norway, Sweden, the Netherlands, and France) accused Turkey of torture before the Commission, but the case was withdrawn in 1985 because, some say, of diplomatic pressure from the United States.[108] Turkey did not permit individual petitions until 1987, nor did it recognize the jurisdiction of the Court until 1990. Thereafter, a large number of cases were filed in Strasbourg, especially from the Kurdish southeast.[109] In the 1996 case of *Aksoy v. Turkey*, the Court issued its first finding of torture. (Aksoy was tortured in 1992, filed his case in 1993, and was assassinated by Turkish

[107] *See* John Conroy, *Unspeakable Acts, Ordinary People: The Dynamics of Torture* (Berkeley: University of California Press, 2000).
[108] Goldhaber, *A People's History*, p. 132.
[109] The European defense of Kurdish human rights has inspired Kurdish enthusiasm for Turkey's integration into Europe. Stephen Kinzer reports that Kurds in southeastern Turkey harbor "a boundless, almost childlike" hope that the EU will rescue them from their troubles. (Kinzer, "Kurds in Turkey: The Big Change," *New York Review of Books*, January 12, 2006.) European integration offers a non-violent alternative to the path of armed struggle, presented by the PKK.

police in 1994.) Between 1995 and 2004 the Court issued 51 rulings against Turkey for violations of Article 3.[110]

Turkey was slow to take action, until its political landscape began to change at the turn of the century. In 1999 the government captured Abdullah Öcalan, leader of the insurgent Kurdish organization PKK, who called on his followers to abandon the use of violence. The same year the EU named Turkey an official candidate for membership in the Union, increasing the likelihood that eventual membership would be the reward of serious human rights reform. In the next few years, the government took steps to reduce the political power of the military and broaden rights for the Kurdish minority. Reforms accelerated after the Justice and Development party won national elections in 2002. New laws further enhanced civilian control of the military, expanded human rights training for the police, decreased the period of incommunicado detention, banned blindfolding of prisoners, and beefed up prosecution of officials guilty of ill-treatment. Human rights organizations agree that torture has decreased in Turkey, though it remains a severe problem.[111]

Russia remains a problematic case. A new Criminal Procedure Code, enacted in 2001, established several safeguards intended to prevent torture. According to an Amnesty International report from November 2006, the measures have had some positive effects, but police still regularly use torture to extract confessions from criminal suspects.[112] Lack of police

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[110] Thomas W. Smith, "Leveraging Norms: The ECHR and Turkey's Human Rights Reforms," in Zehra F. Kabasakal Arat, ed., *Human Rights in Turkey* (Philadelphia: University of Pennsylvania Press, 2007), p. 268.
[111] This information is taken from ibid, pp. 267-70; Goldhaber, *A People's History*, op. cit., pp. 131-32; and Frank Schimmelfennig, Stefan Engert and Heiko Knobel, *International Socialization in Europe* (Houndmills, UK: Palgrave/Macmillan, 2006), chap. 7.
[112] Amnesty International, "Russian Federation: Torture and Forced 'Confessions' in Detention," November 22, 2006. Available at http://www.amnesty.org.uk/news_details.asp?NewsID=17170.

training, pressure to produce convictions, and new ways of circumventing the anti-torture safeguards have lessened the impact of the 2001 reforms. In the meantime, torture remains widespread and systematic in Chechnya,[113] although the slowing pace of the conflict appears to have decreased the number of new victims.[114] In March 2007 the European Anti-Torture Committee took the rare step of issuing a public statement to condemn Russian authorities for allowing the continued use of torture in Chechnya.[115] Moscow denounced the criticism as "politically motivated."[116] Human rights advocates have protested the feeble response of the EU and the Council of Europe to continuing abuses in Chechnya.[117] Conventional wisdom holds that resurgent Russian nationalism, European dependence on Russian gas, and the lack of the incentive of EU membership are among the factors that reduce the leverage that European human rights institutions can bring to bear on Russia.

The European Court of Human Rights has by now developed a rich jurisprudence on Article 3. The prohibition against all inhuman and degrading treatment creates a wide buffer around torture. Among the practices held by the Court to violate Article 3 are: disproportionate use of force during arrest, inadequate accommodations for detainees with physical or mental

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See also Andrew E. Kramer, "Amnesty Says Russian Police Torture Suspects," *New York Times*, November 222, 2006.

[113] Human Rights Watch, "Chechnya: Research Shows Widespread and Systematic Use of Torture," November 13, 2006. Available at http://hrw.org/english/docs/2006/11/13/russia14557.htm.

[114] "Human rights activists note drop in kidnappings in Chechnya," *Interfax* (reproduced by *BBC Worldwide Monitor*ing), July 27, 2007.

[115] http://www.cpt.coe.int/documents/rus/2007-17-inf-eng.pdf.

[116] "Anti-Torture Committee Line May Sour Council of Europe's Image in Russia," *Russia & CIS General Newswire*, April 3, 2007.

[117] Alexander Petrov, "If Not the EU, Then Who?," *International Herald Tribune*, November 24, 2006; Kenneth Roth on Europe's Performance Protecting Human Rights on the Continent and Beyond: Speech to the Parliamentary Assembly of the Council of Europe. Strasbourg, April 19, 2007, available at http://hrw.org/english/docs/2007/04/20/russia15743.htm.

disabilities, inadequate medical care for detainees, housing of prisoners in overcrowded or unsanitary conditions, complete sensory deprivation, aggressive strip-searching, expulsion or threatened expulsion to countries where a person faces a significant danger of ill-treatment, premeditated destruction of homes without warning and without respect for the feeling of the homeowners, capital punishment following an unfair trial, corporal punishment of children by judicial authorities, and inadequate measures to prevent the domestic abuse of children.[118] Rulings of Article 3 violations have been issued not only against countries such as Turkey, Russia, Georgia, Bulgaria, Ukraine, and Moldova, but also Austria, Cyprus, Estonia, Finland, France, Greece, Italy, Latvia, Lithuania, the Netherlands, Slovenia, Spain, Switzerland, and the UK.[119]

Twenty years ago the Council of Europe created a remarkable new institution to help combat torture. The Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, entering into force in 1989 and now ratified by all CE members, sets up a Committee (informally the "Anti-Torture Committee") with the power to visit all places under the jurisdiction of member states where individuals are deprived of their liberty.[120] The purpose of the visits is to identify practices that violate Article 3 of the ECHR or create conditions conducive to its violation. In periodic visits, planned months in advance, and ad hoc visits, announced on short notice, the Committee enjoys unlimited access to detention centers

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118 See Clare Ovey and Robin C. A. White, J*acobs and White, The European Convention on Human Rights*, 4th ed. (Oxford: Oxford University Press, 2006), chap. 5.

119 For a list of recent ECtHR judgments, classified by subject, see http://www.echr.coe.int/ECHR/EN/Header/Case-Law/Case-law+information/Subject+matter+of+judgments/.

120 For a gripping insider account of the work of the Committee, see Antonio Cassese, *Inhuman States: Imprisonment, Detention and Torture in Europe Today*, trans. Jennifer Greensleaves (Cambridge: Polity, 1996). For comprehensive analysis, see Evans and Morgan, *Preventing Torture*, op. cit; and Rod Morgan and Malcolm Evans, *Combating Torture in Europe* (Council of Europe Publishing, 2001).

within the territory of the host state. After each visit, it collects its findings and recommendations in a report that serves as the basis for dialogue. Reports are confidential, but in case of a host state's non-cooperation or refusal to improve the situation the Committee can vote by a two-thirds majority to issue a public statement listing its concerns. The vast majority of states now publish the Committee's reports voluntarily. (Russia is the only country that refuses to publish the reports.)[121] Thus one can, for instance, easily download the Committee's report on its December 7-14, 2005, visit to Turkey, and read about particular abuses or suspicious practices in specific locations and the officials who did or did not raise obstacles to the Committee's investigations.[122]

The Committee has become a significant actor on the human rights scene. Strongly worded public statements on Turkey released in 1992 and 1996 confirmed widespread police torture and criticized the authorities for not halting its use. The statements increased pressure on Turkey to make genuine reforms. The Court increasingly refers to Committee reports in its rulings, and major criticisms issued by the Committee often find their way into the media. The two leading scholars of the Anti-Torture Committee give it high marks, praising the rigor of its investigations and quality of its reports and noting that many of its recommendations have been implemented by the countries concerned.[123] It has produced a wealth of information, threatening the secrecy on which abuse depends. While nothing of this nature can be proven, common sense indicates that the ECPT has contributed significantly to the prevention of torture and ill-treatment.

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[121] Amnesty International, "Russian Federation: Torture and Forced 'Confessions' in Detention," op. cit.

[122] http://www.cpt.coe.int/documents/tur/2006-30-inf-eng.htm.

[123] Morgan and Evans, *Combating Torture in Europe*, op. cit., pp. 155-59.

Fear of international terrorism following the attacks of September 11, 2001, and exacerbated by the Istanbul, Madrid, and London bombings, has put pressure on human rights, including the right not to be subjected to torture or ill-treatment. Press articles, now confirmed by the Marty report for the Council of Europe, have revealed that between 2003 and 2005 the CIA used secret prisons in Poland and Romania to torture suspected members of Al Qaeda and that several European governments assisted the US policy of extraordinary rendition under which terrorist suspects were shipped to be tortured overseas. The Council of Europe did not prevent these acts, but it helped bring them to light, and made them the focus of intense criticism by regional and national officials. It is safe to say that the European human rights regime prevented what would otherwise have been an even worse unraveling of human rights following September 11. *Ireland v. UK* established the bedrock principle that ill-treatment, let alone torture, may not be used even for the purpose of combating terrorism. The principle, though skirted, is not publicly defied. Contrast this to the United States, where authorities openly approve coercive interrogation, licensing methods that in fact constitute torture. The European human rights regime has made a difference.

Recent judicial decisions in the UK show how the European regime has exerted a restraining influence on public officials in the campaign against international terrorism. The UK Human Rights Act, entering into force in 2000, authorizes British judges to enforce provisions of the ECHR and even to challenge Parliamentary legislation found to be in violation of the Convention. In December 2004 the Appellate Committee of the House of Lords ruled that a law permitting the indefinite detention without trial of suspected foreign terrorists violated the

Convention prohibition on discrimination (because the law did not extend to British citizens).[124] In December 2005 it held that evidence obtained by torture could not be used in judicial proceedings, basing its ruling partly on the Convention.[125] In June 2007 it ruled that the ECHR applied to UK detention facilities abroad, thereby requiring the government to investigate credible allegations of ill-treatment by its armed forces in Iraq.[126] In April 2007 an immigration court blocked a deportation order against two Libyan nationals with alleged ties to terrorist organizations; the court held that the deportation would violate Article 3 of the European Convention, because the two men ran a serious danger of torture if returned home, notwithstanding assurances from the Libyan government that it would not subject them to ill-treatment.[127] Reflecting on these developments, the Lord Chief Justice of England and Wales has stated that "the Human Rights Act has unquestionably circumscribed both the legislative and

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[124] A v. Secretary of State for the Home Department, House of Lords, December 16, 2004, [2004] UKHL 56. The Lords did not, however, invalidate indefinite detention on principle. Parliament responded to the judgment by passing the Prevention of Terrorism Act of 2005, which authorizes a complicated system of "control orders" (restrictions on individual liberty up to the imposition of house arrest) for both citizens and non-citizens suspected of terrorist activity. Judges have invoked the ECHR to quash control orders in particular cases, but without terminating the system as a whole. (See Clive Walker, "Keeping Control of Terrorists without Losing Control of Constitutionalism," *Stanford Law Review*, vol. 59 [March 2007] pp. 1395-1463.) In October 2007 the Lords ruled that the imposition of an 18-hour curfew and the authorization of control orders based solely on secret evidence were both violations of the ECHR. Secretary of State for the Home Department v. MB (FC) (Appellant), October 31, 2007, [2007] UKHL 46.

[125] A v. Secretary of State for the Home Department, House of Lords, December 8, 2005, [2005] UKHL 71. As Kim Scheppele argues, however, the decision contains loopholes that limit its practical impact. See Scheppele, "The Metastasis of Torture: Circulating Coerced Information in the Anti-Terror Campaign."

[126] Al-Skeini v. Secretary of State for Defence, House of Lords, June 13, 2007, [2007] UKHL 26.

[127] DD and AS v. Secretary of State for the Home Department, Special Immigration Appeals Commission, April 27, 2005, Appeal No: SC/42 and 50/2005.

the executive action that would otherwise have been the response to the outbreak of global terrorism that we have seen over the last decade."[128]

In addition to the abovementioned measures, several European countries have ratified the Torture Convention, its Optional Protocol (which sets up a visiting regime somewhat similar to that of the ECPT), and the Rome Statute of the International Criminal Court. The Rome Statute defines torture as a war crime and (when committed as part of a widespread or systematic attack on a civilian population) a crime against humanity, and it gives the ICC jurisdiction over citizens and officials of member states. Twenty-six of the 27 countries belonging to the EU and 39 of the 47 countries belonging to the Council of Europe have ratified the Rome Statute.

The Virtues of Multilateralism. The system for the protection of human rights in Europe is a collective achievement, built over a long period of time. Successive protocols have strengthened the procedural mechanisms and expanded the substantive obligations of the European Convention of Human Rights, just as the Convention has widened its geographic reach from 13 to 47 countries. The burgeoning jurisprudence of the Court has raised the minimum standard of acceptable state conduct, new human rights treaties have supplemented the ECHR and its protocols, and non-judicial means of securing human rights have been developed. The CE and the OSCE have focused ever more exclusively on human rights, while the EU and NATO have made the protection of human rights one of their central goals, and all four organizations have become skilled at piggy-backing on each other's accomplishments. In much of the continent, domestic courts have become more assertive defenders of human rights, while government officials (legislative, executive, and judicial) make increasing reference to the

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[128] The Rt. Hon. The Lord Phillips, Lord Chief Justice of England and Wales, "Terrorism & Human Rights," University of Hertfordshire Law Lecture, October 19, 2006, available at http://www.judiciary.gov.uk/publications_media/speeches/2006/sp191006.htm.

ECHR. The representative assemblies of the EU, CE, and OSCE denounce countries by name for their human rights failings. The fact that national legislators and cabinet officials help staff the governing organs of the regional organizations reinforces the feedback loop between international institutions and individual states.

We have here a story of continual experimentation, adaptation, and improvement. Innovations have almost always taken the form of strengthening, rather than weakening, the enforcement of human rights. The result has been the transformation in the political culture of an entire continent. What explains this remarkable evolution?

A principal reason, I believe, is the collective nature of the enterprise. Europe demonstrates that states can do far more to strengthen domestic human rights by acting in concert than by acting apart. Certain vital protections of human rights are available only at the international level. That is why democratic states need international human rights institutions as much as international human rights institutions need democratic states. In the following paragraphs I identify some of the unique benefits of a multilateral approach.

A mutual pledge. When a country joins an international compact to protect human rights (whether a formal treaty like the ECHR or an informal agreement like the Helsinki Charter), it creates a new class of promisees. The domestic contract is welded to an international contract; leaders must answer not only to citizens and citizens to each other, but leaders and citizens to leaders and citizens of other countries.[129] The international contract adds solemnity to domestically affirmed human rights. It reminds citizens that their rights are also universal human rights, which other countries properly care about and are pledged to protect. Citizens,

[129] Here I mean citizens in the moral rather than legal sense. I include residents without formal citizenship status, because governments are bound to respect their human rights also, and because they (the non-citizen residents) have a duty to respect the human rights of others.

knowing that their rights have an additional set of guardians, can assert their rights with greater confidence.[130]

An international pledge authorizes countries to hold each other to their human rights commitments. This involves more than reminding countries of the verbal formulas in the international agreements they have ratified. It means ensuring that countries follow through on these commitments, studying their implications, adhering to their full meaning, and applying them in all circumstances. The ECtHR is only the most visible of the many European institutions that carry out this task.

The speck in my neighbor's eye. If there is hope for humanity, it lies in our talent for perceiving the faults of others. A democracy should harness this talent by inviting other countries to identify its human rights failings. An international human rights regime institutionalizes this service and makes it reciprocal. We exercise our talent for criticizing others, on condition that they return the favor. This arrangement is on full display in the European system.

Leading by example. Just as parents must clean up their own act to encourage good behavior in their children, so countries must honor the human rights standards they expect others to follow. International institutions use the altruistic desire of certain countries to improve other countries as leverage for improving the altruistic countries themselves. Several countries that ratified the ECHR did so in order to promote human rights abroad, not appreciating the domestic implications of their decision. Discussing the UK, Brian Simpson writes: "The negotiation of the ECHR was conceived to be an aspect of foreign, not domestic, policy. It was not until the two

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[130] This dynamic emerges powerfully in Goldhaber's stories of the individual plaintiffs behind the landmark cases of the European Court of Human Rights. See Goldhaber, *A People's History*, op. cit.

Cyprus cases of 1956 and 1957 that it was understood in official circles that the U.K. had committed itself to an institutional scheme of human rights protection from which it was politically impossible to disengage, and that this scheme could have serious effects on the activities of government…. Life, for the authorities, was never going to be quite the same again."[131]

The Dutch made the same calculation: "During the parliamentary discussion on the approval of the European Convention, the government gave as its opinion that the Convention's effect would be negligible as domestic law already complied fully with it."[132] The prediction was mistaken. Not only has the European Court ruled against the Netherlands on several occasions, but Dutch judges routinely cite the Convention in domestic cases. The fact that under Dutch law national judges can use the Convention but not the national bill of rights to overturn domestic legislation has magnified its importance. These are only two examples of a pervasive pattern. (A similar logic is clearly at work in the emergence of the European Anti-Torture Committee.)

Virtuous rivalry. Most states do not want to have a reputation as human rights violators. Close international monitoring and evaluation of a state's human rights policies increases pressure to enhance its reputation by actually having a good record. In the European system, reputations are also affected by a state's dedication to preserving the system itself, and by the importance it gives human rights in its foreign policy. Some states – especially Norway, Sweden, Denmark, and the Netherlands – have made it a matter of pride to promote human rights

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[131] A. W. Brian Simpson, "Britain and the European Convention," *Cornell International Law Journal*, vol. 34 (2001): 523-54, at 553-54.

[132] Leo Zwaak, "The Netherlands," in Blackburn and Polakiewicz, eds., *Fundamental Rights in Europe*, p. 595.

at the global and regional level (and therefore domestically as well).[133] International human rights institutions can exploit the rivalry between image-conscious states none of which wants to be seen as less dedicated than the others.

Mutual learning and assistance. International human rights institutions allow countries to share experience, expertise, and resources. We must remember that the international promotion of human rights is not always or even primarily an adversarial process. Many states genuinely want to improve their human rights records; but they need to learn now, and they need the resources that will enable them to do so. Capacity-building, education, and dialogue take up much of the actual work of the European human rights regime, and explain much of its success.

They made me do it. When citizens or officials express opposition to human rights protections, the domestic guardians of human rights can reply that their hands are tied. International agreements become what game theorists call a "pre-commitment strategy." International institutions take on the role of a strict cop or stern parent whose purpose cannot be altered. Antonio Cassese suggests that this is one reason for the success of the ECPT. In many European countries, he notes, "there are bureaucratic barriers to inspection; the force of tradition is a hindrance, but so is public opinion – since there is a general clamour to ensure that 'criminals' receive the severest punishment, but little interest in possible abuse to which they can be subjected. This may be why these countries have eventually realized that it is easier to delegate the monitoring of places of detention to an international body."[134]

Showing up is nine tenths of success. After decades of deepening institutionalization, the promotion of human rights occupies the attention and structures the daily work of large numbers

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[133] See Floribert H. Baudet, "The Netherlands and the Rank of Denmark: Prestige as Stimulus for Human Rights Policies," in Carole Fink, ed., *Les droits de l'homme en Europe depuis 1945/Human Rights in Europe since 1945* (Bern: Peter Lang, 2003).
[134] Cassese, *Inhuman States*, op. cit., p. 7.

of regional and national officials. (Some work on human rights full time; others must give it a large share of their attention because of the growing practice of human rights "mainstreaming.") These officials form a powerful and knowledgeable constituency, not easily circumvented, much less dislodged. They are committed for professional and often idealistic reasons to doing their job and doing it well. A large human rights bureaucracy is another legacy of strong international human rights institutions. So is the emergence of a powerful NGO sector devoted to human rights.[135]

Others to lift me when I fall. A country that has been committed to human rights in the past may one day elect a government indifferent or even hostile to human rights. The monitoring and enforcement mechanisms of the European human rights regime help prevent such a government from effecting a permanent or even temporary erosion of human rights. The fact of separate electoral systems in different countries means that a hostile government is unlikely to pull down the regime down as a whole, whereas there is a much greater chance that the regime will stop such a government from fulfilling its anti-rights agenda. Other countries can band together to head off the threat, with the crucial help of the system's powerful supranational institutions. They can coax the errant state back onto the democratic path, knowing that one day they may need similar assistance themselves. It is a crucial virtue of the system that, in proper Madisonian fashion, it separates decision-making power from partisan allegiances and strong group identities.

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[135] Rachel Cichowski, *The European Court and Civil Society* (Cambridge: Cambridge University Press, 2007).