CAT AMONG PIGEONS: THE CONVENTION AGAINST TORTURE, A PRECARIOUS INTERSECTION BETWEEN INTERNATIONAL HUMAN RIGHTS LAW AND U.S. IMMIGRATION LAW

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I. INTRODUCTION

Tortures are just what they were, only the earth has shrunk and whatever goes on sounds as if it's just a room away. Nothing has changed...the body is and is and is and has nowhere to go.[1]

Gloria Hernandez[2] fled to the United States from a Latin American country several years ago to escape the violence of her ex-boyfriend, a rich and unctuous businessman. For years, he had trapped her in their house, continuously beating and raping her. Whenever Gloria tried to leave, he would threaten to kill her and her children. When she escaped to other regions of the country, he would track her down and force her to come back. When she sought the help of the police, they laughed at her, told her that she would have to deal with it herself, and returned her into the hands of her torturer. After he strangled her in front of her children, almost killing her, she sought an order of protection in the United States. Gloria's case is one of torture, an unsympathetic government that condoned the torture, and her flight to seek refuge. Her life and her story share characteristics with those of torture survivors all over the world.

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* I would like to thank Lynn Marcus, Marcy Miranda Janes, Ken Spafford, Morton Sklar, Barbara Butler, and Susan Myers for their useful suggestions, comments, and ideas. All mistakes are mine. A note on some of the terms used in this piece: I have used refugee and asylum-seeker interchangeably to refer to émigrés fleeing from torture, even though their technical definitions are distinct. I have used deportation throughout to refer to what is now termed "removal" and what was previously termed deportation or exclusion.

1. Wislawa Szymborska, *Tortures*, *in* POEMS NEW AND COLLECTED 202 (Stanislaw Baraczak & Clare Cavanagh trans., 1998).

2. Her name has been changed to protect her anonymity. These facts are based on a real case pending before an Immigration Judge in the United States. However, additional information has been withheld to preserve her anonymity.

Torture attacks the individual's personality and destroys the human spirit, leaving life-long scars. Sadly, torture is not a transgression of the past, but a shame of the present. While torture remains invisible to many, an estimated twenty to thirty percent of the world's fifteen million refugees are victims of torture.[3] This Note discusses the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and is primarily concerned with CAT's relationship with U.S. immigration law. Part II provides background on the Convention Against Torture and the history of the Convention in the United States. Part III discusses U.S. immigration law, its legislative, executive and judicial interpretations, and some of the provisions and policies that violate CAT and customary international law. It critiques the way in which the United States treats émigrés fleeing from torture. Part IV recommends changes to U.S. law and policy to ensure compliance with international law under CAT.

II. THE CONVENTION AGAINST TORTURE

A. History of Torture and the Torture Convention[4]

Most people in the United States associate torture with an ancient and forgotten past. Torture was used in medieval Europe up through the Inquisition to aggravate punishment, combat heresy, and extract confessions.[5] But by the late 18th century, torture was considered the antithesis of human rights in Europe.[6] Despite this early condemnation of torture, it was revenant after World War II; torture was again used by European colonialists, British anti-terrorist forces in Northern Ireland, the Greek military, Latin American military dictatorships,

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3. *See* AMNESTY INTERNATIONAL, TAKE A STEP TO STAMP OUT TORTURE 107 (2000) (studying world torture over the past three years) [hereinafter AI 2000 TORTURE STUDY]; INTERNATIONAL REHABILITATION COUNCIL FOR TORTURE VICTIMS (IRCT), 1997 ANNUAL REPORT PREFACE (1998). The IRCT defines torture as:

> the intentional infliction of severe pain or suffering for a specific purpose. Torture is used to obtain information or a confession, to punish, to take revenge, or to create terror and fear within a population. The aim of torture is not to kill the victim, but to break down the victim's personality.

International Rehabilitation Council for Torture Victims, *Facts About Torture*, *at* http://www.irct.org/about_the_irct/ torture.htm (last modified Aug. 13, 2001).

4. For a more complete history and background of CAT, see J. HERMAN BURGERS & HANS DANELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION (1988); *see also* DEBORAH E. ANKER, *An Introduction to Relief Under Article 3 of the Torture Convention*, *in* LAW OF ASYLUM IN THE UNITED STATES 465 (Paul T. Lufkin ed., 3d ed. 1999); David Weissbrodt & Isabel Hortreiter, *The Principle of Non-Refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties*, 5 BUFF. HUM. RTS. L. REV. 1 (1999).

5. *See* Manfred Nowak, *State of bondage*, UNESCO COURIER, Mar. 1994, at 28(5).

6. *See* BURGERS, *supra* note 4, at 10 (quoting EDWARD PETERS, TORTURE 74–75 (1985)).

African dictators, communist regimes,[7] and U.S. police departments,[8] to name a few.

Studies show that even today, widespread patterns of torture and ill treatment by government officials are present in seventy countries.[9] For example, judicial corporal punishment in the form of flogging, amputations, branding, and stoning, is practiced in numerous countries.[10] Many governments still allow, encourage, and even participate in gender-based domestic violence, rape, and female genital mutilation.[11] Torture is used in many developing and industrialized countries to combat terrorism, subversion, political opposition, and crime.[12]

In 1984, the United Nations addressed the worldwide problem of torture with the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, a multilateral treaty.[13] CAT arose out of a 1973 U.N. dialogue concerning the application of torture in authoritarian regimes and in anti-guerrilla warfare, and the use of torture as a tool to repress opposition by the autocratic regimes of Latin America.[14] A non-governmental campaign documenting the state of world torture, spearheaded by Amnesty International, persuaded many governments to bring the issue of torture to the international table.[15]

CAT attempts to support the worldwide struggle against torture and other inhumane forms of punishment,[16] and is founded upon the international recognition that a prohibition on torture is a fundamental principle that already

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7. *See* Nowak, *supra* note 5, at 28(5).

8. *See* Miranda v. Arizona, 384 U.S. 436, 445–46 (1996); *see also* AMERICAN CIVIL LIBERTIES UNION, ILLINOIS DIVISION, SECRET DETENTION BY CHICAGO POLICE (1959); Charles S. Potts, *The Preliminary Examination and 'The Third Degree,'* 2 BAYLOR L. REV. 131 (1950); David L. Sterling, *Police Interrogation and the Psychology of Confession*, 14 J. PUB. L. 25 (1965).

9. *See* AI 2000 TORTURE STUDY, *supra* note 3, at 2–3.

10. *See Report of the Special Rapporteur on Torture,* United Nations Commission on Human Rights, Economic and Social Council, 53d Sess., Agenda Item 8(a), U.N. Doc. E/CN.4/1997/7 (1997); AI 2000 TORTURE STUDY, *supra* note 3, at 25. Reports of the U.N. Special Rapporteur on Torture can be viewed at http://www.unhcr.ch.

11. *See* AI 2000 TORTURE STUDY, *supra* note 3, at 46–47; ANKER, *supra* note 4, at 480; Deborah Blatt, *Recognizing Rape as Method of Torture*, 119 REV. L. & SOC. CHANGE 821, 823 (1992); Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291, 297 (1994).

12. *See* Nowak, *supra* note 5, at 28(5).

13. G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51 at 197, U.N. Doc. A/39/51 (Dec. 10, 1984) [hereinafter Torture Convention].

14. *See* BURGERS, *supra* note 4, at 13.

15. *See id.*; *see also* AMNESTY INTERNATIONAL, REPORT ON TORTURE (1973).

16. Torture Convention, *supra* note 13; *see also* BURGERS, *supra* note 4, at 1; Weissbrodt & Hortreiter, *supra* note 4, at 6. Cruel and inhumane forms of punishment that cause severe pain and harm but that do not rise to the level of torture, such as severe sensory deprivation, are included in CAT. Torture Convention, *supra* note 13.

exists in customary international law and that applies to all countries.[17] This international norm is based on the perceived imbalance in power between individuals and states and the premise that human rights law should protect individuals in their relationships with despotic governments.[18] In addition to addressing states' responsibilities for what happens in their own territories, the international norms against torture prohibit countries from returning refugees in danger of torture.[19]

Like most other human rights treaties, CAT imposes reporting requirements on state parties.[20] Also, the Committee Against Torture, the designated U.N. treaty body for implementation of the treaty, must submit annual reports to the state parties and the U.N. General Assembly.[21] The Committee is made up of ten recognized experts in human rights, who serve in their individual capacities.[22] For those state parties that recognize the jurisdictional authority of the Committee Against Torture, individual complaints may be filed against states and between states for treaty violations.[23] Thus, the Torture Convention is a source of international human rights norms, as well as a source of specific procedures for the prevention and elimination of torture.[24]

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17. *See* BURGERS, *supra* note 4, at 1, 12, 114; ANKER, *supra* note 4, at 465–66. *See generally,* HURST HANNUM, MATERIALS ON INTERNATIONAL HUMAN RIGHTS AND U.S. CONSTITUTIONAL LAW 3–4 (1985). The prohibition on torture exists in almost every universal and regional human rights convention or declaration dealing with refugees, including the United Nations' Universal Declaration of Human Rights and International Convention on Civil and Political Rights (ICCPR). *See* BURGERS, *supra* note 4, at 10–11. U.S. federal courts have recognized freedom from torture as an accepted norm of customary international law. *See, e.g.,* Najarro de Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385 (5th Cir. 1985); Abebe-Jira v. Negero, 72 F.3d 844 (11th Cir. 1996); Paul v. Avril, 901 F. Supp. 330 (S.D. Fla. 1994); Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass. 1995); *see also* U.S. DEP'T OF STATE, INITIAL REPORT OF THE UNITED STATES OF AMERICA TO THE UN COMMITTEE AGAINST TORTURE ¶ 49, pt. I (1999) [hereinafter U.S. CAT REPORT].

18. *See* BURGERS, *supra* note 4, at 5 ("[T]he human being does not exist for the benefit of the State, but [ ] the State exists for the benefit of the human being.")

19. *See* BURGERS, *supra* note 4, at 125.

20. *See* Torture Convention, *supra* note 13, art. 19. See Roland Bank, *International Efforts to Combat Torture and Inhuman Treatment: Have the New Mechanisms Improved Protection?*, 8 EUR. J. INT'L L. 613 (1997), for a detailed analysis of international CAT procedures and effectiveness.

21. *See* Torture Convention, *supra* note 13, art. 24; BURGERS, *supra* note 4, at 4.

22. *See* BURGERS, *supra* note 4, at 4.

23. Torture Convention, *supra* note 13. Drafting is in progress for an Optional Protocol which would implement a visiting system. With such a system in place, the U.N. could visit countries in violation of CAT to investigate instances of torture. *See* Roland Bank, *Country-oriented procedures under the Convention Against Torture: Towards a new dynamism, in* THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING 145–46 (Philip Alston & James Crawford eds., 2000); Stefanie Grant, *The United States and the International Human Rights Treaty System: For Export Only?,* THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING 317, 324–25 (Philip Alston & James Crawford eds., 2000).

24. *See* ANKER, *supra* note 4, at 471.

B. The Convention Against Torture in the United States

The Convention against Torture was adopted by the General Assembly of the United Nations on December 10, 1984,[25] after seven years of drafting in which the United States participated.[26] CAT has 118 state parties to date.[27] The United States became a signatory to the Convention Against Torture in 1988 but did not deposit its instrument of ratification with the U.N. Secretary General until 1994. At that point CAT became binding on the United States.[28]

However, even after 1994, the Immigration and Naturalization Service (INS) and Executive Office for Immigration Review (EOIR) refused to enforce the non-refoulement provision of Article 3 of CAT, tagging it non-self-executing and citing a lack of implementing legislation.[29] In fact, the United States did not begin to enforce this part of the treaty until implementing legislation and regulations were promulgated in 1998 and 1999.[30] According to current United States law, the government must grant the torture victim non-refoulement or "withholding of removal" if such an individual qualifies for CAT relief.[31] This means that the person cannot be deported and is allowed to remain in the United States.[32] So, after ten years, the United States is finally exerting a measure of compliance with its obligations under the Convention Against Torture.

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25. *See* Torture Convention, *supra* note 13.

26. *See* BURGERS, *supra* note 4, at 32; *see also* Barbara Cochrane Alexander, Note and Comment, *Convention Against Torture: A Viable Alternative Legal Remedy for Domestic Violence Victims*, 15 AM. U. INT'L L. REV. 895, 903 (2000).

27. *See* Convention Against Torture Signatory Status, *at* http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/iv_boo/iv_9.html (last visited Mar. 4, 2001).

28. *See* Matter of H-M-V-, Int. Dec. 3365 (BIA Aug. 25, 1998) (name redacted); ANKER, *supra* note 4, at 466–67.

29. *See H-M-V-*, Int. Dec. 3365. Self-execution is a doctrine developed by the U.S. Supreme Court; when a rule of international law is too "vague," the court requires implementing legislation before it will apply the law. Although international law and treaties are supposed to automatically be part of U.S. law, pursuant to the Constitution, the Supreme Court has used this doctrine to avoid applying international law without express congressional legislation in place. *See also* Richard B. Lillich, *The Role of Domestic Courts in Enforcing International Human Rights Law*, *in* GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 228, 235 (Hurst Hannum ed., 2d ed. 1992) (Some critics declare that, because of the self-executing doctrine, most international human rights law has little direct impact on U.S. law.).

30. *See* Foreign Affairs Reform and Restructuring Act of 1998 (FARRA): United States Policy With Respect to the Involuntary Return of Persons in Danger of Subjection to Torture, 105 P.L. 277 § 2242(b), 112 Stat. 2681 (1998) (Requiring the United States to implement its obligations under Article 3 of CAT); INS Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478 (Feb. 19, 1999) (codified as amended at 8 C.F.R. §§ 3, 103, 208, 235, 238, 240, 241, 253, 507 (1999)).

31. *See* 64 Fed. Reg. at 8480 (Feb. 19, 1999); ANKER, *supra* note 4, at 471.

32. *See* 64 Fed. Reg. at 8480 (Feb. 19, 1999).

C. The Non-Refoulement (Non-Return) Principle

Non-refoulement is a principle of international law that prohibits return of refugees when they would face persecution in their countries of origin.[33] CAT confronts the reality of worldwide migration caused by torture by implementing non-refoulement to ensure that receiving countries treat refugees fleeing torture appropriately.[34]

The Convention defines torture and outlines party obligations by drawing on the non-refoulement provision of Article 33 of the 1951 United Nations Convention Relating to the Status of Refugees,[35] which the United States implemented with the Refugee Act of 1980.[36] Article 3 of CAT sets forth the principle of non-refoulement as applied to victims of torture.[37] It absolutely prohibits government parties from returning anyone to a country where he or she is at risk of torture.[38] This obligation on state parties has no exceptions, thus providing more protection than the Refugee Convention.[39] With the requirement of non-derogability, CAT acknowledges the seriousness of the problem of torture and the government's duty to avoid acquiescence or implication in the torture by not returning victims to their torturers.[40] Often governments are disinclined to grant asylum to refugees based on their country of origin, race or political orientation; CAT serves as absolute protection for these individuals to prevent deportation to danger.[41]

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33. In fact, the principle of *non-refoulement* is so widely accepted that it is recognized as a norm of customary international law. *See* Arthur C. Helton, *Applying Human Rights Law in U.S. Asylum Cases*, 3 INT'L CIV. LIBERTIES REP. 1, 2 (2000).

34. *See* Torture Convention, *supra* note 13, art. 3.

35. G.A. Res. 429(V), *opened for signature* July 28, 1951, art. 33, 19 U.S.T. 6223, 6259 (1954) (providing a definition of "refugee" and outlining states' obligations towards refugees under international law); Weissbrodt & Hortreiter, *supra* note 4, at 7; ANKER, *supra* note 4, at 468.

36. Pub. L. No. 96-212, 94 Stat. 102 (1980). U.S. relief under the Refugee Act is not absolute like relief under CAT and has several exceptions; for example, asylum-seekers with criminal histories may be returned despite valid claims of persecution.

37. *See* Torture Convention, *supra* note 13, art. 3. *See generally* Weissbrodt & Hortreiter, *supra* note 4, at 2.

38. *See* Torture Convention, *supra* note 13, art. 3. Specifically, to qualify under Article 3, the refugee must have "substantial grounds for believing that he would be in danger of being subjected to torture." *See id.* However, although CAT does stop removal to the country from which the individual escaped persecution, he may still be removed to a third country, if available. *See* MIDWEST IMMIGRANT RIGHTS CENTER, PRO BONO ASYLUM MANUAL 13-A (May 1999) [hereinafter MIRC MANUAL]; *see also* Andrew Dutton, *The Year of the CAT: Recent Changes to the Law May Offer Immigrants Further Relief From Removal*, asylumlaw.org, ¶ 5, *at* http://www.asylumlaw.org/legal_tools/united_states/legal_standards/us_CAT/us_CAT.htm (last visited Mar. 2, 2001).

39. *See* ANKER, *supra* note 4, at 468, 470.

40. *See id.*

41. *See* AI 2000 TORTURE STUDY, *supra* note 3, at 107. Of course, the protection is only as strong as the signatory state's willingness to follow the Convention.

D. The Definition of Torture[42] and the Standard of Proof Required Under CAT

The Convention Against Torture defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted...when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in official capacity."[43] Torture is usually an act, except when it can be characterized as an intentional omission, such as the withdrawal of food and water or lengthy exposure to extremely cold temperatures.[44] The victim of torture is considered to be someone who is deprived of her liberty and is under the actual power or control of the torturer, as when an individual is locked in a jail cell.[45] Torture is infliction of severe pain, defined as worse than inhuman treatment; however, such infliction does not need to rise to the level of extremely severe or systemic infliction of pain in order to constitute torture.[46] One scholar has more descriptively called torture, as defined by the Convention, "aggravated abuse with purpose."[47]

To further illustrate the first part of this definition, scholars have explained that severe physical pain could be inflicted by beating, kicking, or by means of canes, knives, cigarettes, or metal objects which transmit electrical shocks, to name a few.[48] Severe pain can be inflicted by physical or mental means, and may include acts of rape and domestic violence.[49] Mental torture can be inflicted by direct or implied threats that cause fear, including death threats or threats of serious injury against an individual or her family, or by forcing an

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42. *See generally* BURGERS, *supra* note 4 (analyzing international development of torture definition); ANKER, *supra* note 4, at 485–508 (analyzing elements of definition of torture).

43. Torture Convention, *supra* note 13, art. 1. The United States "understands" the definition of torture in the Torture Convention to mean:

> (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 sense or the personality.

U.S. Reservations to the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Sen. Resolution of Advice and Consent, 136 CONG. REC. S17486 (daily ed. Oct. 2, 1990) (ratified Nov. 20, 1994) [hereinafter U.S. Reservations].

44. *See* BURGERS, *supra* note 4, at 118.

45. *See id.* at 120.

46. *See* ANKER, *supra* note 4, at 486–87. Extremely severe or systemic infliction of pain was a proposed definition of torture that was rejected. *See id.* Therefore, a single, isolated act can constitute torture. *See* BURGERS, *supra* note 4, at 118.

47. ANKER, *supra* note 4, at 481.

48. *See* BURGERS, *supra* note 4, at 117.

49. *See* ANKER, *supra* note 4, at 486, 489–492, 506. Domestic violence and rape victims are under the physical and psychological control of their abusers, and these abusers have the purpose of intimidating their victims.

individual to watch the abuse or murder of loved ones.[50] Often, there is little distinction between physical and mental abuse, as when a detained individual suffers the withdrawal of basic necessities, through deprivation of food, water, or sleep, or through isolation in darkness.[51]

The definition of torture normally requires the involvement of a public authority.[52] Private acts of torture are specifically excluded from the definition, because the assumption was that a country's domestic legal system and "normal machinery of justice" would respond to such acts.[53] However, such machinery breaks down when scrofulous public officials either hire the private source of torture or tolerate the torture. In these situations, states are culpable, even without the direct involvement of the government or its agents.[54] If the government was not directly involved in the torture, for the inaction to be deemed "acquiescence," the government official must have been aware of the torturous activity and must have breached a responsibility to intervene.[55] For example, in Ms. Hernandez' case,[56] where a man viciously beats and rapes his girlfriend, threatens and attempts to kill her, and where law enforcement officials turn her away, this qualifies as torture because the government has demonstrated its unwillingness to control the abuser. Likewise, a Togolese woman who unwillingly experiences forced female genital mutilation by members of her tribe would have a similar claim.[57] The principle of state responsibility for private acts of violence that the government is unable or unwilling to control is a developing human rights norm that is inscribed in the Torture Convention.[58] A broad conception of the prohibition on return to torture, which includes a ban on deportations to countries where there is government acquiescence to torture, is meant to prevent as many acts of torture as possible.

Similarly, the United States adopted a generous definition of who is a torturer.[59] The United States also considers a public official to acquiesce to torture when he is aware of it and fails to act on his legal duty to prevent it.[60] Thus, willful blindness as well as actual knowledge would qualify as acquiescence to torture.[61] This more expansive interpretation might also include acts by unrecognized or

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50. *See* BURGERS, *supra* note 4, at 118.
51. *See id.*
52. *See* ANKER, *supra* note 4, at 500.
53. *See* BURGERS, *supra* note 4, at 120.
54. *See id.* at 28, 119–20; ANKER, *supra* note 4, at 501.
55. *See* 8 C.F.R. § 208.18(a)(7) (1999); BURGERS, *supra* note 4, at 1.
56. *See supra* note 2 and accompanying text.
57. *See* Matter of Fauziya Kasinga [sic], Int. Dec. 3278 (BIA June 13, 1996).
58. *See* ANKER, *supra* note 4, at 502–03. For example, states have a duty to protect citizens against non-state actors, including vigilante, paramilitary, guerrilla, and religious groups that have local control and are acting in a quasi-official capacity.
59. *See* U.S. CAT REPORT, *supra* note 17, ¶ 5, pt. II; ANKER, *supra* note 4, at 500–01.
60. *See* BURGERS, *supra* note 4, at 42.
61. *See* U.S. Reservations, *supra* note 43, at (II)(d).

unofficial groups that exercise de facto control over a country or parts of it and that the recognized government is unable or unwilling to control.[62]

Torture is aggravated abuse with *purpose*, but only intent is required, not maliciousness.[63] The definition includes a non-exhaustive list of possible illicit purposes, such as the extraction of information or a confession, intimidation, coercion, or discrimination;[64] however, almost any intentional infliction of severe pain would fit the definition, although it must have something in common with one of the enumerated purposes.[65]

Pain and suffering from legitimate punishment and lawful sanctions that do not violate the object and purpose of CAT do not fit the definition of torture.[66] This provision is one of the most controversial parts of the Torture Convention, because a prohibition on torture means little if countries can circumvent it by officially legitimating practices normally thought of as torture.[67] However, international criminal justice norms mandate that the punishment be proportional to the crime.[68] If a government sanction, such as mutilation, is so cruel and severe as to constitute torture under international law, there is no justification for such punishment, even if its ostensible purpose is to serve the greater good.[69] There is no such thing as lawful torture and the "lawful sanction" exception is not a shield for state liability.

Once a refugee meets this concatenated definition of torture, in order to invoke CAT and avoid return she must then present enough evidence to fulfill the standard of proof by showing a fear of such torture. A refugee from torture must show "substantial grounds" that she will be tortured if returned.[70] The Convention focuses on the possibility of future harm, although past torture would be strong

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62. However, the Board of Immigration Appeals rejected this interpretation in *Matter of S-V-*, Int. Dec. 3430 (BIA May 9, 2000) (name redacted).

63. *See* ANKER, *supra* note 4, at 486. Maliciousness is an evil intent to cause injury or pain. *See* BLACK'S LAW DICTIONARY 956 (6th ed. 1990).

64. *See* Torture Convention, *supra* note 13, art. 1; ANKER, *supra* note 4, at 499.

65. *See* BURGERS, *supra* note 4, at 46, 188; ANKER, *supra* note 4, at 469, 498; Cees Flinterman & Catherine Henderson, *Special Human Rights Treaties, in* AN INTRODUCTION TO THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS 125, 137 (Raija Hanski & Markku Suksi eds., Institute for Human Rights, Åbo Akademi University 2d ed. 1999); Kristen B. Rosati, *Article 3 of the United Nations Convention Against Torture: A Powerful Tool to Prevent Removal Just Became More Powerful*, 4 BENDER'S IMMIG. BULL. 4 (1999) [hereinafter Rosati, *Article 3*].

66. *See* 8 C.F.R. § 208.18(a)(3) (1999); ANKER, *supra* note 4, at 507; BURGERS, *supra* note 4, at 3. Therefore, under the controversial U.S. "understandings" to the Convention, the United States does not consider the death penalty to be torture. *See* U.S. Reservations, *supra* note 43; ANKER, *supra* note 4, at 494–95.

67. *See* BURGERS, *supra* note 4, at 121; ANKER, *supra* note 4, at 508.

68. For example, the punishment and torture of political prisoners often violates this norm. *See* BURGERS, *supra* note 4, at 121.

69. *See* BURGERS, *supra* note 4, at 122; ANKER, *supra* note 4, at 507.

70. *See* Torture Convention, *supra* note 13, art. 3; ANKER, *supra* note 4, at 509.

evidence of possible future torture.[71] Evidence of gross violations of human rights is very probative in a CAT case and "relevant to the standard of proof and assessment of harm."[72] Patterns of human rights violations serve as a warning to the adjudicating state party; however, evidence of such patterns is not determinative, and lack thereof is not preclusive.[73] In determining the likelihood of torture, the adjudicator may also consider the individual's membership in a persecuted minority or opposition group, and any risk arising from a specific act committed by the individual.[74]

In addition, the adjudicator must take "all relevant considerations" into account.[75] This gives the adjudicator the discretion to consider any other factors that increase the likelihood of torture. Other relevant considerations include, but are not limited to, information from non-governmental organizations, U.N. bodies, the U.N. Special Rapporteur on Torture, as well as the significance of a country's failure to ratify CAT.[76]

E. Advantages and Limitations

The Convention Against Torture may provide certain advantages to refugees in the United States over other forms of immigration relief. A CAT claim may be available to individuals who fear torture in their home countries, but who do not meet the specific U.S. qualifications for asylum or Section 241(b)(3) withholding of removal.[77] Also, because the CAT drafters recognized that torturers

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71. *See* 8 C.F.R. § 208.16(c)(3)(i) (1999); ANKER, *supra* note 4, at 470, 509–10; Arthur C. Helton, *Criteria and Procedures for Refugee Protection in the United States*, 1209 P.L.I. CORP. L. 215, 246 (2000); *see also* Chahal v. United Kingdom, 23 EUR. HUM. RTS. REP. 413 (1996) (holding that past torture is evidence of possible future torture, but present conditions are decisive).

72. ANKER, *supra* note 4, at 471; *see also* §208.16(c)(3); Matter of Ibañez, A74 129 892 (BIA Mar. 24, 2000) (upholding Immigration Judge's grant of CAT deferral based on determination that former Cuban political prisoner was more likely than not to be tortured on return, in significant part due to country condition reports showing evidence of mass human rights violations). *Ibañez* was cited in *Texas Vehicle Burglary Not Aggravated Felony, BIA Precedent Decision Holds; Unpublished Ruling Affirms Deferral of Removal Under CAT*, 77 INTERPRETER RELEASES 759, 760-61 (2000).

73. *See* BURGERS, *supra* note 4, at 128; ANKER, *supra* note 4, at 515.

74. *See* BURGERS, *supra* note 4, at 127.

75. *See* Torture Convention, *supra* note 13, art. 3; ANKER, *supra* note 4, at 513; BURGERS, *supra* note 4, at 127.

76. *See* ANKER, *supra* note 4, at 516.

77. *See id.* at 470–71; BURGERS, *supra* note 4, at 125 (Those seeking relief under the Torture Convention do not have to meet the definition of refugee.). "Refugee" is defined in Immigration and Nationality Act (INA) § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2000). See INA § 208, 8 U.S.C. § 1158 (2000), for qualifications for asylum. Withholding is available to an alien whose "life of freedom would be threatened...because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." INA § 241(b)(3)(A), 8 U.S.C. § 1231(b)(3)(A) (2000). Criminals, persecutors, and aliens who are considered a danger to national security are not eligible for withholding. *See* INA § 241(b)(3)(B), 8 U.S.C. § 1231(b)(3)(B) (2000).

inflict punishment for many different reasons,[78] applicants for CAT relief do not have to meet a nexus requirement, as do applicants for asylum.[79] They do not have to establish torture "on account of" one of the five asylum categories: race, religion, nationality, political opinion, or membership in a social group.[80] This is a significant difference because this "on account of" requirement is the most substantial barrier to relief for asylum applicants today.[81]

For example, CAT may serve to protect victims of severe gender-based harms, like domestic violence, rape, and female genital mutilation.[82] According to immigration practitioners specializing in CAT claims, there are a great number of Torture Convention cases that involve gender-based abuses.[83] Refugees from these harms can demonstrate that the government is unable or unwilling to control their attackers,[84] often because the police and judiciary see these as unimportant issues or because the government officials themselves have chauvinistic views about women. This new relief is invaluable, because gender is not an asylum category, and it is sometimes difficult for these victims to fit into another category, such as social group or political opinion.[85] The only barrier to gender-based CAT relief is the prejudices of adjudicators, who sometimes see marital rape, domestic violence, and "honor" assaults as less harmful forms of violence.[86]

As distinguished from other forms of immigration relief, CAT recognizes a refugee's difficulty in providing direct, objective proof.[87] CAT adjudicators are supposed to give victims the benefit of the doubt, avoid vigorous requirements for proof, and accept victim's explanations for scars or other injuries where causation cannot be conclusively established.[88] For example, the Committee Against Torture will accept the general veracity of applicants' stories that are sufficiently substantiated and reliable, even if they are not completely consistent.[89] This reflects the reality that many torture victims' stories may not be entirely internally consistent due to obvious stresses, and it may be very difficult for victims to remember and relate their complete history of torture.[90] Evidence of torture of

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78. *See* Alexander, *supra* note 26, at 916.

79. *See* ANKER, *supra* note 4, at 469.

80. *See* 8 C.F.R. § 208.4 (1999); U.S. CAT REPORT, *supra* note 17, ¶ 67, pt. II; ANKER, *supra* note 4, at 469; MIRC MANUAL, *supra* note 38.

81. *See* Alexander, *supra* note 26, at 914.

82. *See* ANKER, *supra* note 4, at 506–07.

83. Interview with Morton Sklar, Director of World Organization Against Torture, USA (May 22, 2001) (on file with author) [hereinafter Sklar Interview].

84. *See* ANKER, *supra* note 4, at 506–07.

85. *See supra* notes 79–81 and accompanying text. For example, it is often difficult for domestic violence survivors to convince the INS and immigration judges that they were abused because of their political opinion (such as feminism) or their social group (gender does not qualify) and not their gender alone. Moreover, it is often due to oppression and violence that women are unable to voice a political opinion in their home countries.

86. *See infra* notes 269–71 and accompanying text.

87. *See* ANKER, *supra* note 4, at 513.

88. *See id.* at 513, 517; BURGERS, *supra* note 4, at 51, 127.

89. *See* Dutton, *supra* note 38, ¶¶ 24–26.

90. *See* Weissbrodt & Hortreiter, *supra* note 4, at 14–15, 70:

persons similarly situated to the applicant should be ample proof of the likelihood of torture.[91]

Another advantage to CAT is that there are no bars to eligibility.[92] Whereas U.S. asylum law excludes certain aliens from relief on the basis of criminal behavior and national security,[93] CAT relief has no such limitations and past conduct has no effect on eligibility.[94] Thus, there is a no-exception rule to the prohibition on the return of individuals to torture. The United States follows the non-refoulement provision of CAT by giving the successful CAT applicants either withholding or deferral of removal.[95] Withholding of removal under CAT is similar to Section 241(b)(3) withholding.[96]

There are a couple of other advantages to CAT, including the absence of the "firm resettlement" exception that appears in U.S. asylum law.[97] Finally, CAT relief is easier to obtain than asylum relief because it is mandatory, rather than discretionary, and there is no one-year asylum filing deadline.[98] Because of the several advantages of CAT relief, CAT should always be considered as an alternative or additional possibility for relief for qualifying refugees in the United States.

In addition, CAT goes further to protect torture victims than other human rights treaties. CAT supplies universal criminal jurisdiction for prosecution of torturers.[99] Additionally, countries like the United States that have recognized the

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> [I]t would often be unreasonable and contrary to the intent of Article 3 to require full proof of the truthfulness of the applicant's proffered information....[Applicants] may...need to be interviewed several times in order for the interviewer to develop sufficient rapport to encourage the victim to tell what happened to him or her.

Id. at 70; Kisoki v. Sweden, Committee Against Torture, Communication No. 41/1996, at 9.3 (1996).

91. *See* ANKER, *supra* note 4, at 513.

92. *See* 64 Fed. Reg. 8478 (Feb. 19, 1999); U.S. CAT REPORT, *supra* note 17, ¶ 67, pt. II; *see also* ANKER, *supra* note 4, at 518–19; Kristen B. Rosati, *The United Nations Convention Against Torture: A Viable Alternative for Asylum Seekers*, 74 INTERPRETER RELEASES 1773, 1775–76 (1997) [hereinafter Rosati, *CAT I*]; MIRC MANUAL, *supra* note 38, at 13-A.

93. *See* INA § 241 (b)(3)(B), 8 U.S.C. § 1231(b)(3)(B) (2000).

94. *See* ANKER, *supra* note 4, at 469–70, 518; MIRC MANUAL, *supra* note 38.

95. *See* 8 C.F.R. §§ 208.16 & 208.17 (1999).

96. *See supra* note 77 and accompanying text. See also *infra* notes 114–15 and accompanying text for an explanation of deferral.

97. Asylum law requires that the refugee not be able to settle safely in any other region of the country from which she flees. *See* Kirsten Schlenger, *The Nuts and Bolts of Representing an Asylum Applicant*, 1080 P.L.I. CORP. L. 209, 250 (1998). However, the INS Torture Convention regulations note that evidence of safe relocation regions is relevant to the torture probability determination. 8 C.F.R. § 208.16(c)(3)(iii) (1999).

98. *See* Dutton, *supra* note 38, ¶7. However, the INS did impose a 90-day filing deadline upon enactment of the interim rule for motions to reopen based on CAT. *See* 64 Fed. Reg. 8478 (Feb. 19, 1999).

99. *See* Foreign Relations Authorization Act, Fiscal Years 1994 and 1995 § 506(a), 18 U.S.C. § 2340A (2001) (implementing law); Grant, *supra* note 23, at 325.

competency of the Committee Against Torture to adjudicate complaints between states under Article 21 of the Convention could theoretically file a complaint against another state on behalf of refugees.[100] Also, state parties, including the United States, must submit reports to the Committee Against Torture concerning their compliance with the treaty. Thus, U.S. practices with regard to refugees are held up to international scrutiny. For example, when the United States submitted its first report[101] to the Committee Against Torture, it was questioned regarding the detention and the treatment of immigrants.[102] Finally, in the United States the Torture Victims Protection Act (TVPA) provides victims with a civil cause of action for compensation.[103]

Generally, U.S. implementation of CAT has led to a greater awareness of the value of human rights treaties, especially within the civil rights community[104] and has encouraged the development of international human rights law in U.S. courts.[105] CAT guarantees rights that reach broader than the U.S. Constitution.[106]

While the advantages may make CAT relief seem more appealing when compared to an asylum application, the disadvantages are many. Most importantly, the Convention's definition of torture, although more expansive due to its lack of a requirement that the act be "on account of" one of certain grounds, is more limited than the asylum definition of persecution. Some physical, emotional, and mental abuse[107] would be considered cruel, inhuman, or degrading treatment or punishment, but will not rise to the level of torture under Article 3.[108]

Furthermore, although non-governmental groups may be considered agents of persecution for the purposes of asylum, the Torture Convention does not consider the acts of such groups to be torture unless the government was unwilling to control those groups.[109] This is perhaps the most significant limitation, because in many cases private militias or actors may engage in torture as a weapon of

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100. *See* U.S. CAT REPORT, *supra* note 17, ¶ 3, Introduction. But, the United States has refused to recognize the competency of the Committee Against Torture to adjudicate individual claims of torture against states. *See* AI 2000 TORTURE STUDY, *supra* note 3, at 131; ANKER, *supra* note 4, at 476.

101. This report was submitted four years late, and the United States was reprimanded for its tardiness. *See* Harold Hongju Koh, U.S. Assistant Secretary of State for Democracy, Human Rights and Labor, On-the-Record Briefing for the U.N. Committee Against Torture, Initial Report of the United States of America (Oct. 15, 1999) [hereinafter U.S. CAT Briefing].

102. *See id.*

103. *See* Pub. L. 102-256 (1992), now 28 U.S.C. § 1350 (2001); Grant, *supra* note 23, at 325.

104. *See* Grant, *supra* note 23, at 326.

105. *See* U.S. CAT REPORT, *supra* note 17, ¶ 50, at pt. I.

106. *See id.*

107. *See* Alexander, *supra* note 26, at 917.

108. *See* 8 C.F.R. § 208.18(a)(2) (1999); ANKER, *supra* note 4, at 470; U.S. CAT REPORT, *supra* note 17, ¶ 67, pt. II. Examples of cruel treatment that would not rise to the level of torture include short-term sensory deprivation and severe economic persecution.

109. *See* Burgers, *supra* note 4, at 1; ANKER, *supra* note 4, at 470; *see also* MIRC MANUAL, *supra* note 38.

political control, and may be acting in a quasi-official fashion.[110] For example, the Revolutionary Armed Forces of Colombia (FARC), a guerrilla group, controls large regions of Colombia. Nonetheless, the victims of these private actors will not meet the criteria because the official government does attempt to control such actors.[111]

In addition, there are significant barriers to CAT relief in the United States that are unique in the international community. For example, the refugee must prove that it is "more likely than not" that he would be tortured if returned.[112] This burden of proof is arguably higher than that generally accepted by the international community.[113] Also, if the applicant is ineligible for withholding of removal because of criminal convictions or some other excludable status,[114] he may only be eligible for deferral of removal. Deferral is a more tenuous form of relief that leaves the individual subject to INS detention and unlimited renewed deportation proceedings where the refugee must again establish a strong likelihood of torture.[115] Those subject to detention may only be released at the discretion of the INS District Director.[116]

The manner in which the United States treats refugees who are granted CAT relief makes this option less appealing than asylum. U.S. CAT relief does not confer derivative status to the applicant's family, which means that family members, including spouse, parents, and children, are not given permission to join the CAT applicant in the United States by means of the CAT application.[117] Also, in the United States, CAT relief does not provide any permanent immigration benefits, such as the legal permanent residence benefits of asylum. The CAT remedy is limited to non-return, although some applicants may obtain work authorization.[118] This difference makes the CAT benefit less secure, because the

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110. *See* Rosati, *Article 3, supra* note 65, ¶ 16 ("Of course, if these private groups operate with the explicit consent or acquiescence of the government, torture...falls within the Convention...."); *see also* Kristen B. Rosati, *The United Nations Convention Against Torture: A Detailed Examination of the Convention as an Alternative for Asylum Seekers*, 3 BENDER'S IMMIGR. BULL. 5 (Mar. 1, 1998) [hereinafter Rosati, *CAT II*]; ANKER, *supra* note 4, at 502.

111. *See* Matter of S-V-, Int. Dec. 3430 (BIA May 9, 2000) (name redacted).

112. This is the way the U.S. Congress and the executive branch have interpreted the phrase, "substantial grounds for believing that he would be in danger of being subjected to torture," although critics argue that this interpretation is erroneous. *See* Torture Convention, *supra* note 13, art. 3; Alexander, *supra* note 26, at 921 (In comparison, asylum law only requires a "reasonable possibility of persecution.").

113. *See* ANKER, *supra* note 4, at 511; *see also infra* notes 214–20 and accompanying text.

114. *See* INA § 241(b)(3)(B), 8 U.S.C. § 1231(b)(3)(B) (2000). Section 241(b)(3)(B) withholding of removal has exclusions for persecutors, terrorists, and criminals. *See* MIRC MANUAL, *supra* note 38.

115. *See* 64 Fed. Reg. 8478 (Feb. 19, 1999).

116. *See id.*

117. *See* Alexander, *supra* note 26, at 900.

118. *See id.* at 911; *see also infra* Part IV.B (Work authorization should be easier to obtain.).

government can move to reopen a CAT case for termination and deportation whenever a determination can be made that the danger of torture has diminished. In addition, the INS has a new streamlined process with which it can gain review and termination of CAT deferral,[119] leaving the immigrant more vulnerable to deportation and a return to danger.

However, the fact that CAT relief does not attempt to nationalize recipients may be regarded as an advantage for some who would like to return to their people and their homeland when the danger of torture is gone. Instead of becoming a U.S. national, these individuals can maintain their ties to their old country during their temporary stay in the United States. This may be especially important for many indigenous peoples, whose cultural integrity greatly depends on their proximity to family and ancestral lands.[120] The only problem is the lack of choice in the event that the United States finds that the refugee's country is now safe.

All of these negative limitations make CAT relief unappealing and inappropriate for many refugees. However, if no other options exist, CAT can be a life-saving alternative.

III. U.S. IMMIGRATION LAW: VIOLATIONS OF CAT AND CUSTOMARY INTERNATIONAL LAW

U.S. interpretation of its CAT obligations remains problematic. Each of the three branches of the U.S. government has done its part in recent years to guarantee restrictive immigration laws, many of which serve to perforate existing refugee protections under international treaties.[121] The result is that many eligible refugees are returned to danger, and the United States develops a reputation for flouting international law to the detriment of human rights.[122] The United States,

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119. It is easier to reopen a CAT deferral case than a withholding case; the process is streamlined so that the INS only has to show that it has new evidence that is relevant to the determination of the possibility of torture in order to schedule a hearing to terminate. *See* 8 C.F.R. § 208.17(d) (1999).

120. For example, although Mayan individuals may escape persecution in Guatemala to become refugees in the United States, the separation from their people, culture, and traditional lands may provoke a type of cultural genocide. *See* JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 101 (1996); *see also* U.N. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316, art. 27 (1966) (right to cultural integrity).

121. *See* Carolyn Patty Blum, *A Question of Values: Continuing Divergences Between U.S. and International Refugee Norms*, 15 BERKELEY J. INT'L L. 38, 39 (1997); Bobbie Marie Guerra, Comment, *A Tortured Construction: The Illegal Immigration Reform and Immigrant Responsibility Act's Express Bar Denying Criminal Aliens Withholding of Deportation Defies the Principles of International Law*, 28 ST. MARY'S L.J. 941, 947-48 (1997).

122. *See* WORLD ORGANIZATION AGAINST TORTURE, *Torture in the United States*, *in* REPORT ON CAT, pt. 2 & pt. 6 *at* http://www.woatusa.org/projects/catreport (last visited May 17, 2001) [hereinafter WOAT REPORT]. As a world leader, when the United States is renitent towards international human rights law, it encourages other countries with unfavorable human rights records to do the same.

through its three branches of government, does not live up to its obligations under CAT because it employs a formalistic approach towards solving refugee problems[123] – an approach with a paucity of respect for international law and one that is intolerant towards immigrants and refugees. This intolerance has manifested itself in restrictive entry policies, detention, and ill treatment of immigrants and refugees, intended to punish or deter individuals without lawful entry documents from coming to the United States.[124] Xenophobic and racist portrayals of immigrants and refugees by the media, politicians, and law enforcement encourage these policies.[125]

The formalistic approach of the U.S. government limits refugee flows by deferring to administrative decisions, by adopting a parsimonious reading of the law, and by enforcing an approach that is driven by the politics and foreign policy of the executive branch.[126] A more dynamic approach to refugee policy is necessary so that refugees are treated humanely and any uncertainties are resolved in favor of safety, justice, and fundamental human rights.[127]

A. Legislative Branch

The formalistic approach towards immigrants and refugees is demonstrated by the legislative branch of the U.S. government. In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA)[128] and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),[129] both of which contain provisions that contradict the guarantees and policies of CAT. These laws treat illegal immigrants differently than previous laws in significant ways, and they are, in part, a product of political pressure and the resolve of interest

123. *See* Peter Margulies, *Democratic Transitions and the Future of Asylum Law*, 71 U. COLO. L. REV. 3, 4 (2000) (defining the "formalistic" and "dynamic" approaches to refugee law) [hereinafter Margulies, *Asylum I*]; Peter Margulies, *Asylum in a New Era*, 14 GEO. IMMIGR. L.J. 843, 844 (2000) [hereinafter Margulies, *Asylum II*].

124. *See* Margulies, *Asylum I*, *supra* note 123, at 4 n.5. *See generally Protecting the Human Rights of Refugees, Asylum Seekers and Internally Displaced Persons*, Critique of the Draft Declaration, World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, U.N. Doc. A/Conf. 189/WG.1/3 (2001) (Such restrictions lead refugees "to resort to services of corrupt and dangerous human smuggling and trafficking syndicates that are able to circumvent routine migration controls—often with serious repercussion for the individuals involved.").

125. *See* Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L.J. 1111, 1140–41 (1998).

126. *See* Blum, *supra* note 121, at 39.

127. *Cf.* Margulies, *Asylum I*, *supra* note 123, at 7 (advocating a refined dynamic approach towards asylum adjudication).

128. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of 8, 18, 28, and 42 U.S.C. (1996)).

129. Pub. L. No. 104-208, 110 Stat. 3009-546 to 3009-724 (1997) (codified in various sections of 8 U.S.C. (Supp. 1997)).

groups to ban immigrants from the United States.[130] The new laws' harshest policies include mandatory and discretionary detention and expedited removal. For individuals escaping torture and seeking refuge in the United States, these policies have egregious results.[131]

1. Mandatory and Discretionary Detention

Current immigration laws require detention of certain refugees.[132] This includes refugees with past criminal convictions,[133] asylum-seekers subject to expedited removal and awaiting a credible fear determination,[134] refugees awaiting removal,[135] and other refugees who are arriving aliens thought to be inadmissible.[136] Additionally, the INS has the discretion to detain anyone else in

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130. *See* Rosati, *CAT II*, *supra* note 110, ¶ 1 ("Despite the horrors of persecution that many people face upon return to their home countries, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996...has erected yet another set of barriers to obtaining relief for legitimate refugees, through such methods as expedited removal, strict filing deadlines...."); Guerra, *supra* note 121, at 946.

131. *See* AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA, A BRIEFING FOR THE UN COMMITTEE AGAINST TORTURE 3, AI Index: AMR 51/56/00 (May 2000) (detailing U.S. laws and practices that ignore international law and harm refugees, like the increase in detention of immigrants in punitive conditions) [hereinafter AI CAT REPORT]. *See also* Amy Langenfeld, Comment, *Living in Limbo: Mandatory Detention of Immigrants under the Illegal Immigration Reform and Responsibility Act of 1996*, 31 ARIZ. ST. L.J. 1041, 1050–52 (1999) (explaining the punitive conditions of detention of asylum-seekers in prison with criminal populations).

132. *See* U.S. CAT Report, *supra* note 17, art. 16, pt. 2.

133. *See* INA § 236(c), 8 U.S.C. § 1226(c) (2000).

134. *See* INA § 235(b)(1)(B)(iii)(IV), 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (2000).

135. *See* INA § 241(a)(2), 8 U.S.C. § 1231(a)(2) (2000). Aliens who have been issued final orders of removal, but have also been granted withholding or deferral of removal under CAT, are still considered to be within this removal period, and may be detained for long periods of time. *See id.* However, recently the Supreme Court ruled that indefinite INS detention was unconstitutional in the context of individuals with orders of removal who could not be removed because no country would accept them. *See* Zadvydas v. Davis, 121 S.Ct. 2491 (2001). Similarly, individuals with orders of removal and a valid CAT claim should not be removed because of CAT's absolute non-refoulement provision. In other words, in the CAT context there is no country to deport the immigrant to either, because of the absolute prohibition on return, and *Zadvydas* should apply. In addition, several U.S. district courts have held the mandatory detention provisions unconstitutional, in the context of resident aliens, as violative of due process. *See* Rogowski v. Reno, 94 F. Supp. 2d 177 (D. Conn. 1999); Danh v. Demore, 59 F. Supp. 2d 994 (N.D. Cal. 1999); Van Eeton v. Beebe, 49 F. Supp. 2d 1186 (D. Or. 1999); Bouayad v. Holmes, 74 F. Supp. 2d 471 (E.D. Pa. 1999); Martinez v. Greene, 28 F. Supp. 2d 1275 (D. Colo. 1998). *But see* Parra v. Perryman, 172 F.3d 954 (7th Cir. 1999); Okeke v. Pasquarell, 80 F. Supp. 2d 635 (W.D. Tex. 2000); Diaz-Zaldierna v. Fasano, 43 F. Supp. 2d 1114 (S.D. Cal. 1999); Reyes v. Underdown, 73 F. Supp. 2d 653 (W.D. La. 1999); Galvez v. Lewis, 56 F. Supp. 2d 637 (E.D. Va. 1999).

136. *See* INA § 235(b)(2)(A), 8 U.S.C. § 1225(b)(2)(A) (2000); *see also* Donald M. Kerwin, *Throwing Away the Key: Lifers in INS Custody*, 75 INTERPRETER REL. 649, 653 (1998).

removal proceedings.[137] To avoid detention, those immigrants ordered removed must prove that they are not a danger to public safety or a flight risk.[138]

Under the mandatory detention law, asylum-seekers are jailed in INS detention facilities with criminal populations, waiting indefinitely for the result of their cases.[139] Many times these refugees are abused further while in U.S. custody.[140] International human rights organizations have raised serious concerns about the United States' treatment of detained asylum-seekers, many of whom also fall under CAT.[141]

Thus, some non-criminal refugees fleeing the country of persecution or torture arrive in the United States only to land in jail, sometimes subject to punitive conditions and a painfully long wait. Such is the story of Fauziya Kassindya, who fled from Togo at the age of 17 to escape forced female genital mutilation.[142] She requested asylum upon entry to the United States in 1994.[143] She remained in detention for sixteen months[144] in a maximum-security prison alongside hardened criminals.[145] She was subjected to gender-based abuse and harassment in detention.[146] Obviously, the abuse of refugees conflicts with CAT and basic norms of human rights. But more generally, international norms oppose any detention of refugees and require that refugees be released once they have established eligibility for refugee relief.[147] Lengthy detention under U.S. policy is in direct conflict with international norms and the spirit of CAT.

Moreover, detention can further aggravate post-traumatic stress disorder, an affliction of many torture victims.[148] Most immigrants in detention are mixed with the criminal population of jails and subject to the same punitive treatment, such as shackling and strip searches.[149] But more notably, the abuse that many refugees suffer in INS detention may, in and of itself, rise to the level of torture, in

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137. *See* INA § 236(a)(1), 8 U.S.C. § 1226(a)(1) (2000); *see also* Kerwin, *supra* note 136, at 653.

138. *See* 8 C.F.R. § 241.4 (d)(1), 65 F.R. 40540, 40542 (2000); *see also* Kerwin, *supra* note 136, at 654.

139. *See* Langenfeld, *supra* note 131, at 1052.

140. *See* AI CAT REPORT, *supra* note 131, at 36.

141. *See id.* at 34–37.

142. *See* Matter of Fauziya Kasinga [sic], Int. Dec. 3278 (BIA June 13, 1996); WOAT REPORT, *supra* note 122, pt. 6; FAUZIYA KASSINDJA & LAYLI MILLER BASHIR, DO THEY HEAR YOU WHEN YOU CRY (1998).

143. *See* Kasinga, Int. Dec. 3278.

144. *See id.* She was not detained under the new mandatory detention laws but under the discretionary detention law that has remained unchanged.

145. *See* WOAT REPORT, *supra* note 122, pt. 6.

146. *See id.*; KASSINDJA & BASHIR, *supra* note 142.

147. *See Executive Committee Conclusion No. 44,* UNHCR (1986).

148. WOAT REPORT, *supra* note 122, Exec. Summ. B4.

149. *See* Kerwin, *supra* note 136, at 661.

violation of CAT.[150] Female refugees, in particular, have faced mistreatment and harassment in INS confinement.[151]

The INS has issued detention standards to counter these problems, but they do not cover state and local jails, where many immigrants are detained.[152] The impact of the standards remains unclear,[153] and the INS has refused to issue them as regulations, making them difficult to enforce. Also, the INS standards do not consider the impact of detention on families.[154] Furthermore, the INS does not systematically track detainees, so there is no way to know exactly how many refugees and torture victims are actually being held in detention.[155] One study shows that, in 1998, when CAT was first implemented, most of the eighty people with CAT claims were confined.[156] Also, the World Organization Against Torture has observed that, while previously most CAT claims were brought in a motion to reopen in cases where deportation orders were already issued, most CAT cases today arise during deportation proceedings for detained aliens with criminal convictions.[157]

Augustine Ayoade had just such a CAT case. Mr. Ayoade was deported from the United States to Nigeria in 1998.[158] Because of family ties to the leader of the opposition political party, Mr. Ayoade was immediately arrested upon arrival in Nigeria and subjected to detention and torture for three months.[159] He escaped in April of 1998 and returned to the United States, only to be arrested by the INS for illegal reentry and placed in removal proceedings, despite evidence that his previous deportation had resulted in torture.[160] He filed a CAT petition, but was held in a criminal facility for over two years during the adjudication period.[161] In

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150. *See* WOAT REPORT, *supra* note 122, at Exec. Summ. B2. INS detention officials have abused torture victims in the following ways: shocking them with stun guns, harassing them and calling them racial epithets, assaulting them by beating and kicking, stuffing their heads in toilets, yanking out their pubic hairs, squeezing their tongues with pliers, refusing to issue sanitary napkins, and withholding medical assistance. *See id*; *see also, e.g.*, Bernard v. Calejo, 17 F. Supp. 2d 1311, 1315 (S.D. Fla. 1998) (holding that an INS detainee who was beaten and knocked unconscious by detention officials, receiving laceration to the face and stomach, had a right to sue under the Federal Tort Claims Act).

151. *See* WOAT REPORT, *supra* note 122, at Exec. Summ. B3.

152. *See* A1 CAT REPORT, *supra* note 129, at. 36.

153. *See id.*

154. *See* Kerwin, *supra* note 136, at 661.

155. *See* WOAT REPORT, *supra* note 122, at Exec. Summ. B4.

156. *See* Kerwin, *supra* note 136, at 652; William Branigin, *Deportation Bar Poses Difficulty For Agency; INS Must Keep Those Who Fear Torture,* WASH. POST, Apr. 30, 1998, at A15.

157. Sklar Interview, *supra* note 83.

158. *See* Morton Sklar, *New Convention Against Torture Procedures and Standards*, 99-107 IMMIGR. BRIEFINGS 1, 2 (1999).

159. *See id.*

160. *See id.*

161. *See id.*; Sklar Interview, *supra* note 83. He was finally released on parole, in part due to the Supreme Court decision in *Zadvydas v. Davis*, 121 S.Ct. 2491 (2001), but his case is still on appeal before the Third Circuit. Sklar Interview, *supra* note 83.

cases like those of Mr. Ayoade and Ms. Kassindja, international law and human compassion demand that refugees not be subjected to such harsh treatment at the hands of the U.S. government.

There are legitimate reasons for the detention of criminal aliens, particularly those who pose a danger to the community or who are a flight risk. Also, it may be appropriate to consider an individual's involvement in terrorist activities, before allowing release from INS detention. However, there are equally legitimate reasons for releasing those who do not pose a danger or a flight risk, and who have fled atrocities at home. Release from detention and work authorization would accelerate the refugee's transition into our society, as well as the healing process necessary for many refugees fleeing torture. Also, it is important to note that in no other context is the decision whether to release a detainee left in the unreviewable discretion of the law enforcement officer.[162]

2. "Catapult Removal": AKA Expedited Removal,[163] Reinstatement,[164] Administrative Removal,[165] & High-Sea Interdiction[166]

In fiscal year 1999, over 180,000 aliens were removed from the United States.[167] This stands in contrast to fiscal year 1996, before IIRIRA's changes took effect, when approximately 68,657 aliens were removed.[168] These numbers can be partly attributed to another new and harsh U.S. immigration policy that, critics argue, harms refugees fleeing torture—expedited removal.[169] Expedited removal means that immigration agents may summarily remove any refugee who arrives undocumented, or with fraudulent documents,[170] and who does not affirmatively express a desire to apply for refugee protections.[171] Arriving immigrants who do not understand that they must affirmatively "express [their] fear" and state their

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162. *See* Margaret H. Taylor, *The 1996 Immigration Act: Detention and Related Issues*, 74 INTERPRETER REL. 209, 222 (1997).

163. *See* INA § 235(b)(1)(A)(i), 8 U.S.C. § 1225(b)(1)(A)(i) (2000).

164. *See* INA § 241(a)(5), 8 U.S.C. § 1231(a)(5) (2000).

165. *See* INA § 238(b), 8 U.S.C. § 1228(b) (2000).

166. *See* Exec. Order No. 12,324, 3 C.F.R. 181 (1981–1983), 46 Fed. Reg. 48,109 (Sept. 29, 1981) (Reagan) (directing the Coast Guard to intercept vessels illegally transporting passengers from Haiti to the United States and forcibly repatriate passengers, when such interception occurs beyond the territorial sea of the United States); Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (May 24, 1992) (Bush) (same); Sale v. Haitian Centers Council, Inc., 509 U.S. 155 (1993) (holding that international refugee protections do not apply to actions taken by the Coast Guard on the high seas to return Haitian refugees).

167. *See* U.S. Immigration and Naturalization Service, 1999 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 4 (2001).

168. This figure includes aliens deported and excluded. *See* U.S. Immigration and Naturalization Service, 1996 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 171 (1997).

169. *See* WOAT REPORT, *supra* note 122, pt. 6; AI CAT REPORT, *supra* note 131, at 35.

170. *See* INA § 235(b)(1)(A)(i), 8 U.S.C. § 1225(b)(1)(A)(i) (2000); INA §§ 212(a)(6)(C) & (7), 8 U.S.C. §§ 1182(a)(6)(C) & (7) (2000).

171. *See* INA § 235(b)(1)(A)(i), 8 U.S.C. § 1225(b)(1)(A)(i) (2000).

claims of torture or persecution to the immigration agent they meet upon arrival in order to be screened for asylum or CAT claims, must rely on INS procedures to ensure that they are aware of their options.[172] Assuming that the immigration agent does refer for screening a refugee who expresses fear, the refugee is then allowed an initial screening by an asylum officer for "credible fear" of persecution or torture.[173] If the agent finds no "credible fear," the individual may request review by an immigration judge.[174] However, again immigrants must rely on the immigration agent to let them know they have a right to appeal. If the initial immigration agent does not refer the refugees for screening, or the asylum officer does not advise the refugees of the right to appeal, and they have no independent knowledge of U.S. immigration law, they will be deported without further consideration or review.[175] There is no judicial oversight for this expedited removal process,[176] or even review by the Board of Immigration Appeals,[177] if both the agent and the immigration judge find no "credible fear."[178] In cases where the INS makes a unilateral decision not to recognize certain harm as torture or persecution, many refugees face return with no opportunity to challenge the validity of the INS determination.[179] These immigration laws contain inadequate safeguards to prevent return of the refugees to their country of persecution. This directly conflicts with treaty obligations that require non-refoulement.[180]

Many times, expedited removal is triggered because immigrants arrive in the United States without proper documentation and they fail to immediately express fear of return. Requiring proper documentation from arriving refugees to avoid expedited removal punishes individuals for their status as refugees. Few refugees are able to obtain proper documentation before fleeing governmental torture or persecution.[181] Also, the requirement that arriving refugees affirmatively request specific protection punishes refugees for failing to know and understand complex U.S. immigration law, and for failing to speak up immediately upon

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172. *See* U.S. CAT REPORT, *supra* note 17, ¶ 78, pt. II. However, because there is no judicial review, there is no way to know whether the INS is actually following these rules and screening those immigrants who do express such a fear.

173. *See* INA §§ 235(b)(1)(A)(ii) & (B), 8 U.S.C. §§ 1225(b)(1)(A)(ii) & (B) (2000).

174. *See* INA § 235(b)(1)(B)(iii)(III), 8 U.S.C. § 1225(b)(1)(B)(iii)(III) (2000); U.S. CAT REPORT, *supra* note 17, ¶ 78, pt. II.

175. *See* INA § 235(b)(1)(B)(iii), 8 U.S.C. § 1225(b)(1)(B)(iii) (2000). Even if the refugee does apply for protection, credible fear is found, and the immigrant is not deported, the law still requires mandatory detention pending the decision. *See* INA § 235(b)(1)(B)(iii)(IV), 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (2000); 8 CFR § 253.3(b)(4)(ii) (1999). *See generally* discussion *supra* section III(A)(1).

176. *See* INA § 242 (a)(2)(A), 8 U.S.C. § 1252(a)(2)(A) (2000).

177. *See* INA § 235(b)(1)(C), 8 U.S.C. § 1225(b)(1)(C) (2000).

178. *See* U.S. CAT REPORT, *supra* note 17, ¶ 78, pt. II.

179. *See* WOAT REPORT, *supra* note 122, pt. 6.

180. *See id.*

181. *See* BURGERS, *supra* note 4, at 127; ANKER, *supra* note 4, at 517; Blum, *supra* note 121, at 48. Such documentation would necessarily come from the very government from which they fear torture.

arrival.[182] This is particularly harsh because, apart from experienced immigration attorneys, few people would know and understand which refugee protections are available and how to go about obtaining them. Additionally, many individuals escaping governmental torture and abuse find it hard to come forward and talk about what they have experienced to anyone, much less the first government official that they meet upon arrival in a foreign land.[183] Refugees suffering from post-traumatic stress disorder or depression may need time and treatment to be able to relate their stories; they may be unable to talk about their experiences right away.[184] The requirement that arriving refugees affirmatively request refugee protection punishes them for their status, and the very nature of their claim and reason for migration.

Similarly, the reinstatement provisions of the Immigration and Nationality Act (INA) require immediate reinstatement of removal orders upon illegal re-entry of an immigrant who had previously been deported.[185] Refugees subject to reinstatement have no chance for review, for example, for consideration of a CAT claim. Likewise, refugees found on the high seas are automatically returned with no analysis of their possible refugee status.[186] This "high-sea interdiction" is based on the principle of extra-territoriality, which states that international refugee standards do not apply to situations outside U.S. borders.[187]

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182. *See* Blum, *supra* note 121, at 48. This, of course, assumes a situation where the immigration agent fails to tell them that they may apply for refugee protections if they have a fear of persecution or torture.

183. *See* Michele R. Pistone and Philip G. Schrag, *The 1996 Immigration Act: Asylum and Expedited Removal—What the INS Should Do*, 73 INTERPRETER REL. 1565, 1572–73 (1996) ("Often, refugees are afraid to reveal the truth about their persecution to uniformed officers, fearing that government officials will relay the information to persecutors in their home country.")

184. *See* WOAT REPORT, *supra* note 122, pt. 6. Refugees who

> arrive without proper documents 'traumatized and exhausted' would have only a one-hour hearing to prove a 'credible fear' of being persecuted before being shipped back to their oppressors....The summary exclusion process does not take account of the serious psychological traumas and difficulties faced by legitimate refugees, and their reluctance or inability to reveal the facts of their case in a one-hour, expedited exclusion hearing before lower-level immigration inspection agents, who are not adequately trained to recognize and deal with victims of severe persecution and torture.

Id.; *see also* Pistone, *supra* note 183, at 1573:

> [Arriving refugees] may be suffering from the effects of post-traumatic stress disorder [ ], such as unresponsiveness, depression, mistrust of authority figures, and memory loss. Therefore, to minimize the likelihood that life-threatening mistakes are made, the INS should give arriving immigrants at least a few hours to rest before being asked pressing questions about their intentions in the U.S. or their persecution.

185. *See* INA § 241(a)(5), 8 U.S.C. § 1231(a)(5) (2000).

186. *See* WOAT REPORT, *supra* note 122, Exec. Summ. B4.

187. *See* Sale, 509 U.S. at 183; WOAT REPORT, *supra* note 122, at pt. 6.

Regardless of the validity of this principle, these provisions and policies violate CAT obligations.

CAT prohibits return of refugees fleeing torture, regardless of the manner in which the person is physically returned to the state of torture.[188] Therefore, it would also prohibit extradition of individuals facing torture upon return. This raises the problem of a possible conflict between CAT and U.S. extradition treaties with other countries. However, since non-return to torture is a fundamental right, and it is accepted as a principle of customary international law and human rights law,[189] a country could never breach an international obligation by following CAT.[190] In addition, if CAT was signed after an extradition treaty, this ratification could be considered a modification or supplement to the extradition treaty.[191] If CAT was signed before the treaty, the treaty is irrelevant; states cannot undertake obligations in violation of CAT.[192] In the United States, CAT need never be violated in the extradition context, because the Secretary of State has reserved discretion on extradition decisions.[193]

Finally, a recent study of the expedited removal process reveals that the process is being applied in a discriminatory fashion, that it lacks consistency and uniformity, and that immigration agent decisions in expedited removal proceedings are often unreliable and erroneous.[194] Such a flawed process is particularly harmful to asylum-seekers. Expedited removal and the other forms of refoulement are often applied discriminatorily in the United States.[195] Historically, the United States has racially discriminated against black and Hispanic refugees, especially when they flee from a regime that is supported by the U.S. government.[196] For example, the study showed that between April 1997 and July 1998, expedited removal was ordered in eighty-eight percent of Haitian cases.[197] Haitian refugees were regularly excluded on the basis of race during the "Papa Doc" and "Baby Doc" Duvalier regimes in Haiti.[198] Thus, while Haitians suffered massive persecution in their

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188. *See* BURGERS, *supra* note 4, at 126.

189. *See id.*

190. *See id.*

191. *See id.*

192. *See id.*

193. The problem is that there is no review of the Secretary of State's decision, so as to ensure compliance with CAT. *See* State Department Regulations on Torture, 22 C.F.R. 95.3 (1999); U.S. CAT REPORT, *supra* note 17, ¶ 71, pt. II.

194. This study was undertaken by the International Human Rights & Migration Project at Santa Clara University's Markkula Center for Applied Ethics. *See* Karen Musalo, et al., *The Expedited Removal Study: Report on the First Year of Implementation*, 75 INTERPRETER REL. 973, 974 (1998).

195. *See* WOAT REPORT, *supra* note 122, Exec. Summ. B4.

196. *See* Musalo, *supra* note 194, at 976 (i.e. Haiti, El Salvador). *See generally infra* notes 264–65 and accompanying text.

197. *See* Musalo, *supra* note 194, at 976.

198. *See* Haitian Refugee Center v. Civiletti, 503 F. Supp. 442 (S.D. Fla. 1980) (hereinafter Haitian Refugee Case); *see also* WOAT REPORT, *supra* note 122, Exec. Summ. B4, pt. 2, pt. 6.

country, they were singled out for automatic return by the United States.[199] In *Haitian Refugee Center v. Civiletti*, the federal district court for the Southern District of Florida found discrimination on the part of the INS, in that none of the 4000 Haitian asylum applicants were granted their petitions.[200] In general, immigration judges vacated negative credible fear rulings made by INS asylum officers and granted asylum in seventy-five percent of cases.[201] Obviously, political and racial discrimination against refugees violates CAT, as well as numerous other international treaties.[202]

Under the expedited removal law and other similar laws, many refugees are summarily returned to their countries, in violation of international law, to face certain torture or death.[203] This occurs in violation of CAT, even though the United States recognizes its Article 3 obligation of non-return.[204] Such policies violate international law and the spirit of human rights treaties such as CAT.

3. Congressional Interpretation and "[Mis]Understandings" of the Convention Against Torture

The United States Congress refuses to accept international understandings of certain provisions within CAT. This is a problem because international human rights treaties have meaning and reach that go beyond "the four corners of a document....They represent a set of values, *collectively* understood...."[205] Therefore, treaty parties such as the United States cannot choose to interpret the international law however they see fit, but must adopt the consistent, international understanding of the law.[206] Moreover, the U.S. Constitution defends the concept of making international law universal by making treaties the "supreme Law of the Land."[207] This does not mean that international law is superior to the U.S. Constitution,[208] only that the implementation of international law in the United States should never violate the Constitution, because the government does not have

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199. *See* Musalo, *supra* note 194, at 976.

200. *See* Haitian Refugee Case, 503 F. Supp. at 451.

201. *See* Musalo, *supra* note 194, at 976. This number is in contrast to the figure of sixteen percent reported by the INS. Once again, only those applicants who are aware of their right to appeal will have the opportunity for review before an immigration judge.

202. *See* U.N. International Convention on the Elimination of All Forms of Racial Discrimination, G.A. res. 2106 (XX), 660 U.N.T.S. 195 (1969), ratified by the United States on October 21, 1994.

203. *See* WOAT REPORT, *supra* note 122, Exec. Summ. B4.

204. *See* U.S. CAT REPORT, *supra* note 17, ¶ 62, pt. II. The United States did not mention expedited removal in its initial report to the U.N. Committee Against Torture. *See id.* ¶¶ 68–69.

205. Blum, *supra* note 121, at 38 (emphasis added).

206. *See id.*; ANKER, *supra* note 4, at 496.

207. *Compare* U.S. CONST. art. VI *with* James C. Hathaway & Anne K. Cusick, *Refugee Rights Are Not Negotiable*, 14 GEO. IMMIGR. L.J. 481 (2000) (reflecting on United States failure to implement international human rights law).

208. *See* Reid v. Covert, 354 U.S. 1, 16–17 (1957).

the authority to sign any treaties that conflict.[209] Even so, in practice, the government enforces international law within U.S. borders only to the extent that the international law fits within the confines of its domestic law.[210]

Although the United States purports to currently enforce CAT,[211] it has made several qualifications to its enforcement that weaken CAT's power.[212] Congress conditioned its ratification of the Convention Against Torture on certain "understandings."[213] One of these understandings was to define the "substantial grounds" standard such that a CAT applicant must show that torture is "likelier than not" to occur if he is returned to his home country.[214] In fact, in presenting the initial report to the Committee Against Torture, U.S. Assistant Secretary of State Harold Hongju Koh mistakenly asserted that "more likely than not" is the international standard; it is actually only the U.S. interpretation of "substantial grounds."[215] The international standard, as outlined by the Committee Against Torture, interprets "substantial grounds" to mean a risk "beyond mere theory or suspicion" but that "does not have to meet the test of being highly probable."[216] Thus the legislature's "understanding" changes the standard of proof required of the person seeking refuge in the United States,[217] and is a higher standard than that required for asylum.[218] It means that there has to be more than a reasonable possibility of persecution; it must be a fifty-one percent or more probability. Some

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209. *See id.*; 136 CONG. REC. S17,486 (daily ed. Oct. 27, 1990) (statement of Sen. Pell) ("Neither the Genocide Convention nor the Torture Convention require the United States to undertake any unconstitutional acts. Were that to be the case, the Senate would not give its consent to ratification....")

210. *See* HUMAN RIGHTS WATCH, 2000 WORLD REPORT, REPORT ON THE UNITED STATES, *at* http://www.hrw.org/wr2k/us.htm (last visited May 20, 2001) ("[T]he U.S. continued to exempt itself from many of its international human rights obligations...The U.S. failed to acknowledge international human rights law as U.S. law."). *See, e.g.*, Brief of the Office of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of Respondent, INS v. Stevic, 467 U.S. 407 (1983) (No. 82-973). In addition, the United States' failure to ratify the part of the Convention which recognizes the U.N. Committee's authority to adjudicate cases by individuals against states is evidence of the lack of respect for international law and international organizations. The United States did not cite these problems in its Report to the Committee Against Torture. *See* U.S. CAT REPORT, *supra* note 17.

211. *See* U.S. CAT REPORT, *supra* note 17, ¶ 49, pt. I.

212. *See* AI CAT REPORT, *supra* note 131, at 4–5.

213. *See* 64 Fed. Reg. 8478 (Feb. 19, 1999); U.S. Reservations, *supra* note 43; AI CAT REPORT, *supra* note 131, at 35; *see also* 136 CONG. REC. S17,486 (1990).

214. *See* AI CAT REPORT, *supra* note 131, at 35; ANKER, *supra* note 4, at 511.

215. *See* U.S. CAT Briefing, *supra* note 101.

216. Committee against Torture, *General Comment on the Implementation of Article 3 in the Context of Article 22 of the Convention Against Torture*, U.N. Doc. CAT/C1XX/Misc.1, 6 (1997).

217. *See* AI CAT REPORT, *supra* note 131, at 35; *see also* Blum, *supra* note 121, at 48.

218. *See* U.S. CAT REPORT, *supra* note 17, ¶ 64, pt. II; ANKER, *supra* note 4, at 510–11; MIRC MANUAL, *supra* note 38.

critics argue that this altered burden of proof contradicts the purpose of CAT.[219] Because the CAT remedy is meant to prevent the specific infliction of the severe harm of torture, it should have a more generous standard of proof.[220] Thus, the United States narrowed the opportunity for CAT relief by raising the standard of proof, potentially denying relief to refugees who would be eligible under international standards.

On the other hand, Congress has recently enacted laws that seek to incorporate CAT provisions in domestic law.[221] These laws give the United States jurisdiction to prosecute offenses of torture that occurred outside the United States when the torturer is found in the United States.[222] Also, the Torture Victims Protection Act (TVPA) provides victims of torture with a civil cause of action for compensation.[223] Some scholars argue that these legislative enactments give CAT more bite than other human rights treaties, such as the ICCPR.[224] Others feel that they do not go far enough.[225] Regardless, these laws do not afford additional protection for those seeking only to avoid torture.

B. Judicial Decisions: A Narrow, Grudging Approach to Refugee Protection[226]

The formalistic approach of the United States is further evidenced in decisions of the Supreme Court, which defer to administrative decisions and adopt a narrow reading of the law. The Supreme Court, in decisions interpreting treaty-

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219. *See* Weissbrodt & Hortreiter, *supra* note 4, at 55, 64:

> The wording of Article 3 is...clearly less exacting than...Article 33 of the Convention on Refugees, which requires a well-founded fear of persecution....As a general rule, State parties and international bodies should adopt the following approach: the more severe the ill-treatment the applicant faces, the lower the required degree of probability that the applicant will actually be subjected to such ill-treatment.

220. *See* Weissbrodt & Hortreiter, *supra* note 4, at 15–16 ("[T]he test for proving a danger of torture is substantially less exacting than the proof required under the other relevant treaties. This generous approach appears to be necessary, since Article 3 was created only as a safeguard against torture, one of the most severe forms of persecution."); WOAT REPORT, *supra* note 122, pt. 6. *Cf.* Kisoki v. Sweden, Committee Against Torture, Communication No. 41/1996, at 9.3 (1996). ("[C]omplete accuracy is seldom to be expected by victims of torture and that [ ] inconsistencies as may exist in the author's presentation of the facts are not material and do not raise doubts about the general veracity of the author's claims.")

221. *See* Foreign Relations Authorization Act, Fiscal Years 1994 and 1995 § 506(a), 18 U.S.C. §§ 2340-2340B (2001).

222. *See* § 2340A(b).

223. *See* 28 U.S.C. § 1350 (2000); Grant, *supra* note 23, at 325.

224. *See* Grant, *supra* note 23, at 324–25.

225. The Lawyers Committee for Human Rights is pressing for federal legislation that would criminalize torture; presently, the United States has no law which makes torture illegal *per se*. *See id.*

226. *See* INS v. Elias-Zacarias, 502 U.S. 478, 487 (1992) (Stevens, J., dissenting) (commenting on the "[t]he narrow, grudging construction of the concept of 'political opinion' that the Court adopts" in a political asylum case and its inconsistency with previous decisions).

based domestic laws, has ignored the international values of refugee protection in favor of hyper-technical analyses that severely limit protection for refugees.[227] For example, in *I.N.S. v. Elias-Zacarias*, the Supreme Court, in interpreting the "political opinion" basis for asylum, held that the adjudicating court must focus on the beliefs and characteristics of the victim.[228] This holding diverged from those of other courts in the United States and other countries that focus on the motivations of the political entity that inflicts the harm, not the victim.[229] The Supreme Court was sharply criticized by U.S. immigration advocates and legal scholars for its opinion in *Elias-Zacarias*, and for ignoring international law and authorities in reaching its decision.[230]

Such a parsimonious attitude toward refugee protection does not bode well for CAT's future in the United States. Like the Supreme Court, most other U.S. courts have been cautious about applying international law and norms to decisions when such norms have not been officially incorporated into U.S. law through legislation or regulations.[231]

However, there is one Supreme Court decision that favorably impacts certain refugees.[232] In *Zadvydas v. Davis*,[233] the Supreme Court held that indefinite INS detention of immigrants with final deportation orders was unconstitutional because it violates due process. The Court read a six-month limitation into the mandatory detention statute.[234] In the CAT context, this limitation should apply to

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227. *See* Blum, *supra* note 121, at 42:

> In both Stevic and Elias-Zacarias, the Court chose to ignore the clear mandates of the underlying United Nations treaties on which U.S. domestic legislative language was based. The political values promulgated in those international instruments require a more charitable interpretation of the law in order to effect protection from persecution. However, the Court's decisions accomplish the opposite result; their constrained and grudging analysis has served to constrict protection available for refugees, leaving them vulnerable to forcible return to persecution.

228. 502 U.S. at 482–83.

229. *See* Elias-Zacarias v. I.N.S., 921 F.2d 844, 850 (9th Cir. 1990), *rev'd*, 502 U.S. 478 (1992).

230. *See* DEBORAH E. ANKER, *Grounds of Persecution, in* LAW OF ASYLUM IN THE UNITED STATES 267, 273 (Paul T. Lufkin ed., 3d ed. 1999); Elias-Zacarias, 502 U.S. at 487 (Stevens, J., dissenting).

231. *See* Rosati, *CAT I*, *supra* note 92, at 1779. *See, e.g.*, INS v. Aguirre-Aguirre, 526 U.S. 415 (1999) (holding that courts should defer to the INS' broad interpretation of the ban on withholding for aliens who committed serious nonpolitical crimes.)

232. One other decision, *Sale v. Haitian Center Council*, 509 U.S. 155 (1993), contains elements that are somewhat favorable towards refugees. In a lawsuit by Haitian immigrants challenging the United States high-sea interdiction program, the Court declared that the judiciary may consider U.S. obligations under treaties in the decision-making process, even when such treaties are non-self-executing. *See id.* at 187. However, *Sale* did not strike down the high-sea interdiction program. *Id.*

233. 121 S.Ct. 2491, 2498–99 (2001).

234. *See id.* at 2494.

prevent detained refugees with a final order of deportation from being detained for lengthy periods of time.[235]

In addition, some lower courts have been willing to accept and apply international standards in their decisions.[236] For example, some courts have allowed lawsuits resulting from abuse of INS detainees, by applying international human rights principles.[237] In *Jama v. United States*, the plaintiffs, political asylum-seekers, sued the INS for severe abuse they suffered while in detention.[238] The U.S. District Court for the District of New Jersey held that plaintiffs could sue the United States and the private prison corporation for violating international law.[239] Like *Jama*, a few U.S. District Court cases, although exceptions to the narrow, grudging approach of the Supreme Court and other U.S. courts, provide support and authority for applying and upholding international law.[240] They may serve as guides in any future litigation involving interpretations of the Convention Against Torture or other international laws.

C. Executive Branch: Immigration & Naturalization Service (INS) and Executive Office of Immigration Review (EOIR)

The formalistic approach of the U.S. government is demonstrated by the actions of the executive branch, which enforces an approach driven by foreign policy and political pressures. The INS and EOIR have, with an obdurate resistance to CAT claims, failed to give many refugees fair and individualized determinations of their cases and have attempted to limit the opportunities for CAT relief. In 1998, before the CAT implementing legislation was in place, the Board of Immigration Appeals (BIA) held, in *Matter of H-M-V-*, that the Board did not have jurisdiction to consider CAT claims, that Article 3 was not a self-executing provision, and that the immigrant should be deported despite her CAT claim.[241] This decision conflicts with the U.S. initial report to the U.N. Committee Against Torture, which declared that the non-self-executing doctrine "in no way limits or circumscribes the international obligations of the United States under the Convention."[242] The *H-M-V-* decision also contradicted several previous immigration court cases, in which immigration judges held that non-refoulement cannot be denied to anyone who has a valid claim, even to those who committed

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235. *See* discussion *supra* section III(A)(1).

236. *See* Matter of Extradition of John Cheung, 968 F. Supp. 791, 802 (D. Conn. 1997) (applying international law and non-refoulement principles in considering extradition request from Hong Kong); United States v. Ekmunoh, 888 F. Supp. 369, 374 (E.D.N.Y. 1994) (applying international law principles to uphold reduced sentence of incarceration.)

237. *See, e.g.*, Jama v. United States, 22 F. Supp. 2d 353 (D.N.J. 1998).

238. *Id.* at 357; *see also* Penny Venetis, Jama v. United States*: A Guide for Human Rights Litigation*, INTERNATIONAL CIVIL LIBERTIES REPORT 2 (2000).

239. *See Jama*, 22 F. Supp. 2d at 361–66.

240. *See supra* note 236 and accompanying text.

241. *See* Int. Dec. 3365 (BIA Aug. 25, 1998).

242. U.S. CAT REPORT, *supra* note 17, ¶ 47, pt. I.

crimes.[243] Fortunately, congressional implementing legislation overruled this decision, and now immigration courts must consider CAT claims.[244]

Later, in *Matter of S-V-*, the BIA held that the Convention Against Torture does not extend to would-be victims of entities that the government is unable to control.[245] In this case, the CAT applicant was a native of Colombia, although he had been in the United States since he was five or six months old.[246] In his CAT claim seeking withholding of removal, he argued a fear of danger from non-governmental guerrilla, narcotrafficking, and paramilitary groups due to his connection with the United States and his inability to speak proper Spanish.[247] The Board found that the applicant could not demonstrate a danger of specific harm to him inflicted by the government or a group that the government is unwilling to control, as required by CAT.[248] The applicant only asserted a general fear—one felt by most Colombians.[249] Also, the BIA eliminated the alternative that the torturer could be a group the government is *unable* to control. This narrow interpretation of torture left out the possibility of relief for individuals from countries where the government cannot control non-governmental entities that occupy and control much of the territory and oppress and torture those within this territory.[250]

In another case, the BIA denied an Iranian woman a stay of removal pending adjudication of her CAT case, although there was proof of an order for her arrest and execution in Iran.[251] The Sixth Circuit Court of Appeals ordered withholding of deportation, delivered last-minute as her plane to Iran was taxiing for take-off. The Court held that the BIA was unreasonable in denying the petitioner a reasonable opportunity to present her CAT case.[252]

Thus, the BIA has shown itself as reluctant to consider CAT claims. This refusal to consider CAT claims violates U.S. international obligations requiring the United States to protect torture refugees. Moreover, the act of returning or extraditing refugees back into the hands of their torturers could constitute an

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243. *See* Matter of A-, at 13 (file number and name redacted) (IJ Feb. 19, 1997) (Phoenix) (holding non-refoulement cannot be denied because individual committed an aggravated felony or particularly serious crime; petitioner has since been granted CAT deferral); Matter of Diakite, A74 212 940, at 11 (IJ Dec. 11, 1997) (reasoning that CAT does not bar anyone from protection, even aggravated felons and former persecutors); Matter of N-L- (file number and name redacted) (IJ Nov. 17, 1997) (refusing to deport former persecutor under Article 3). Cases were cited in Rosati, *Article 3*, *supra* note 65, ¶ 35.

244. 105 P.L. 277 § 2242(b), 112 Stat. 2681 (1998).

245. Int. Dec. 3430 (BIA May 9, 2000).

246. *See id.*

247. *See id.*

248. *See id.*

249. *See id.*

250. *See id.* (Villageliu, Board Member, concurring).

251. *See* Sklar, *supra* note 158, at 3. (The BIA had denied a stay pending determination of the CAT case.)

252. *See id.*

Article 16 violation of CAT—the prohibition against cruel, inhuman and degrading treatment—as well as an Article 3 violation.[253] Article 16 requires state parties to prevent acts that would be cruel, inhuman or degrading,[254] and the purpose of the mistreatment is irrelevant;[255] thus the act of returning an individual to certain torture could arguably violate CAT as inhuman treatment.[256] Moreover, this act sends a message to the violating country that it may continue to torture. Thus, the BIA and the INS have contributed to U.S. violations of CAT.

The EOIR appears to be too politicized to manage fair adjudications. The Department of Justice's judicial selection process for immigration judges is highly politicized,[257] and most judges are former INS attorneys.[258] This problem is compounded by the EOIR's unfounded reliance on State Department reports in refugee cases.[259] For example, in one World Organization Against Torture USA case, the INS asked the State Department to investigate the immigrant's background.[260] The State Department investigator went to the wrong town, and replied to the INS with a letter stating that this immigrant did not exist.[261] The Immigration Judge allowed the INS to present this evidence at trial.[262] This case is now on appeal for the IJ's denial of CAT protection.[263]

Historically, the United States and its Department of State have valued foreign policy considerations over a neutral application of refugee protection. For example, the Reagan administration was widely criticized for applying a double standard in human rights policy to distinguish between "authoritarian" and "totalitarian" regimes.[264] This creates politically motivated imbalance and

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253. *See* BURGERS, *supra* note 4, at 125.

254. *See* Torture Convention, *supra* note 13, art. 16; BURGERS, *supra* note 4, at 148–49.

255. *See* BURGERS, *supra* note 4, at 150.

256. *See* ANKER, *supra* note 4, at 506; World Organization Against Torture USA Amicus Curiae Br. in Supp. of Resp't's Pet. for CAT Protection, Suriname Case (copy on file with author). Thus, CAT provisions may have implications for other U.S. immigration laws, involving the reunification of families, humanitarian parole, and voluntary departure, and whether the failure to apply these policies violates Article 16's prohibition on cruel, inhuman, or degrading treatment. *See* ANKER, *supra* note 4, at 472.

257. Sklar Interview, *supra* note 83.

258. *See* Lisa Getter, *Few Applicants Succeed in Immigration Courts*, L.A. TIMES, Apr. 15, 2001, at A20. A 2001 Los Angeles Times study reported on the unfairness and unreliability of immigration judges in a system where decisions depend more on who the judge is than on the merits of the case. *See id.* The EOIR was separated from the INS in an attempt to provide independence of the agencies, but the connection still remains even after the separation. *See id.*

259. Sklar Interview, *supra* note 83; Margulies, *Asylum I*, *supra* note 123, at 34–35.

260. Sklar Interview, *supra* note 83.

261. *See id.*

262. *See id.*

263. *See id.*

264. *See* Richard B. Bilder, *An Overview of International Human Rights Law*, *in* GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 3, 16–17 (Hurst Hannum ed., 2d ed. 1992) ("[M]any nations apply a double standard in their attitudes toward human rights,

unfairness in the system, demonstrated by discrimination against refugees from disfavored countries of origin.[265] Thus the EOIR and INS, under the U.S. Department of Justice, are not the only arms of the Executive Branch that treat refugees unfairly. The United States will continue to violate its CAT obligations until the government learns to accept international law and reject current anti-immigrant policies or until American citizens demand a change in government policies.

In its Initial Report to the U.N. Committee Against Torture, the United States declared that it is "committed to the full and effective implementation of its obligations under the Convention throughout its territory."[266] However, there are many steps that the United States still needs to take in order to actually fulfill its obligations under CAT. Many of these policies cost nothing and do nothing to weaken U.S. immigration laws. They can be accomplished through the issuance of regulations and the implementation of legislation, and through the individual work of immigration practitioners and judges. The following recommended steps would go a long way toward remedying the United States' failures in implementing CAT.

IV. RECOMMENDATIONS

In theory, CAT should be an effective source of relief for many refugees in deportation proceedings. For those victims of torture whose claims do not fit within the rubric of traditional asylum and withholding, a CAT claim may be an extremely useful tool.[267] However, steps must be taken by the United States and practitioners in the field to ensure the viability of CAT relief.

A. Improving Conditions for Arriving Refugees

Arriving refugees from torture should have access to representation, translation, family, medical care, and information on the immigration laws of this country. They should have a pre-screening interview with adequate safeguards, be educated about their options under the law upon arrival, and be given an adequate rest period before questioning begins.[268]

INS, border officials, and immigration judges should be educated on sensitivity when interviewing torture victims.[269] Instead of assuming that all applicants are lying,[270] U.S. adjudicators and immigration officials must be trained

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harshly condemning violations by political enemies but ignoring equally serious violations on the part of nations with which they wish to maintain good relations.")

265. *See* Blum, *supra* note 121, at 43–44; *see also* American Baptist Churches v. Thornburgh, 760 F. Supp. 796 (N.D. Cal. 1991) (class action lawsuit against United States for discriminatory application of asylum laws to deny claims from Salvadoran and Guatemalan refugees).

266. *See* U.S. CAT REPORT, *supra* note 17, ¶ 6.

267. *See* Rosati, *Article 3*, *supra* note 65.

268. *See* Pistone, *supra* note 183, at 1572–74.

269. *See id.*

270. *See* Matter of A-S-, Int. Dec. 3336 (BIA 1998) (name redacted) (Rosenberg, J., dissenting):

on issues of torture, post-traumatic stress disorder, and gender and sexual orientation-based abuses, to be able to fairly and effectively adjudicate these cases.[271]

B. Eliminating Detention for Most Torture Refugees and Permitting Work Authorization

Detention of torture victims should normally be avoided and reserved for occasions when the immigrant is a real threat to society or likely to flee.[272] Detention undermines the CAT legislation by aggravating the victim's harm. Many of those eligible for relief may choose to return to danger rather than sit in prolonged INS detention, sometimes under punitive conditions.[273]

However, if imposed, such detention should always comply with international norms, and nationally enforceable standards should be imposed. Detention should never be for an indefinite period of time and special treatment should be provided to refugees fleeing torture. At the very least, all CAT detainees should be granted a judicial hearing to review the detention decision.[274] Even those aliens granted relief under CAT who have criminal convictions should not be held in indefinite detention, as they have already served their sentences. There is no legitimate reason for further detention, particularly when they show evidence of rehabilitation and they are not a flight risk.[275]

In addition, there are alternatives to detention. Scholars have suggested a community sponsor and monitoring program and expansion of the Asylum Pre-Screening Officer (APSO) program.[276] Moreover, detention is expensive; monitored release is less costly in terms of economic outlay. Paroling torture refugees into the United States would be one of the most effective ways of accomplishing these goals.

> As a practical matter, a presumption, at worst of fraud and at best of inadequacy, has insinuated its way into all asylum adjudications made by the Board. I venture to guess that such a presumption exists in many adjudications of asylum claims conducted by Immigration Judges. By contrast, this is not consistent with the humanitarian nature of asylum determinations.

271. Sklar Interview, *supra* note 83.

272. Detention may be warranted in the case of some terrorist or criminal immigrants.

273. *See* Rosati, *Article 3*, *supra* note 65, ¶ 71; *see also* KASSINDJA, *supra* note 142, at 6 (After fourteen months of abuse in INS detention, Ms. Kassindja was ready to risk female genital mutilation at home, rather than sit in jail any longer).

274. Currently, potential CAT applicants are treated like all other pre-adjudication detainees. Hearings for all "arriving aliens" would solve this difficulty of identifying potential CAT applicants.

275. *See* Rosati, *Article 3*, *supra* note 65, ¶ 72.

276. *See* Kerwin, *supra* note 136, at 662. The monitoring program is similar to probation for immigrants in removal proceedings, in that it monitors participants and assures court appearances. *See id.* The APSO program allows asylum officers to recommend parole for detainees who are found to have a credible fear. *See id.*

Those CAT applicants who are released from detention should be automatically granted work authorization to allow for survival outside detention while their cases are pending. Because many torture victims and asylum-seekers flee their home countries without their families, many will not have a support network in the United States, and will need to work to provide for themselves.

C. Procedural Wrinkles and Proposed Changes to Immigration Legislation

The United States should adopt the burden of proof and evidentiary burden to prove torture used by the international community in CAT cases. Slight inconsistencies should not completely undermine a victim's story, considering the likelihood of post-traumatic stress disorder.[277] In the pre-screening interview, any sign of torture should qualify as credible fear, especially when the individual comes from a country known for severe human rights violations.[278]

Immigration judges must continue to make individual case-by-case determinations on whether the particular applicant's case meets the definition of torture. Strict rules about what constitutes torture may be unduly restrictive and unfair, because it is generally difficult to separate torture from lesser forms of punishment.[279]

The Immigration and Nationality Act must be amended to allow judicial review of the credible fear and detention decisions of immigration officers and judges,[280] Congress should also amend the INA to allow individuals who receive CAT withholding of removal to adjust to permanent residence status if desired. Those aliens with serious criminal histories or dangerous backgrounds will not qualify for CAT withholding but only deferral,[281] so denying this benefit to CAT withholding grantees does not serve any purpose. Allowing these individuals to become a part of our society would help to heal the wounds of their past, strengthen their ability to speak out against torture, and improve the human condition.

When CAT legislation was first passed, the INS issued regulations imposing a 30-day time limit on those with pending or adjudicated asylum claims to file CAT claims. This inflexibility harms refugees; time limits should be generous and flexible to avoid returning true torture victims. There are currently many time limit issues pending, concerning motions to reopen made after the deadline set by regulation.[282]

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277. *See* ANKER, *supra* note 4, at 517–18; Kisoki, Communication No. 41/1996, at 9.3; Ismail Alan v. Switzerland, Committee Against Torture, Communication No. 21/1995, at 11.3, U.N. Doc. CAT/C/15/D21/1995 (1996).

278. *See* Pistone, *supra* note 183, at 1572–74.

279. The U.N.'s Special Rapporteur for the Convention Against Torture has called the definition of torture a "grey area" in the law. *See* U.N. Doc E/ CN. 4/ 1986/ 15.

280. *See* WOAT REPORT, *supra* note 122, Exec. Summ. B6.

281. *See supra* notes 114–15 and accompanying text.

282. Sklar Interview, *supra* note 83. The deadline was June 29, 1999.

D. Criminal Prosecution of Torturers

One of the most troubling issues about CAT for government officials is that it requires them not to deport anyone who qualifies for CAT relief, even if they are torturers or persecutors themselves. Before CAT, the United States had solved this problem by either summarily excluding or deporting criminal aliens.[283] However, now those who qualify for CAT relief may not be returned. In *Chahal v. United Kingdom*, the European Court of Human Rights faced this problem in the case of a man who was a terrorist and security risk to Great Britain, but who could not be deported under the Convention.[284] The Court held:

> Article 3 enshrines one of the most fundamental values of democratic society....[T]he Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct....Article 3 makes no provision for exceptions and no derogation from it is permissible....[285]

So what may the United States do with individuals who receive CAT deferral of removal and have violent pasts or pose a threat to the nation's security? The question of how long the United States may hold them in detention in the interests of protecting the community remains unanswered. Obviously there are many constitutional and human rights issues to be considered when a refugee is faced with indefinite detention.[286]

One option that falls within the CAT framework is to prosecute torturers, terrorists, and other criminals in the United States or in a third country.[287] CAT gives all countries universal jurisdiction for the express purpose of prosecuting these crimes.[288] Thus far, the United States has failed to implement the criminal responsibility portions of CAT, and thus, torturers in the United States are not being held accountable.[289] In 1994, the United States enacted legislation that would allow for prosecution of torturers,[290] but in practice, this law is never used.[291] Several scholars and immigration experts argue that the United States has a duty to prosecute these cases itself or to extradite the individuals to a safe third country where they may be prosecuted.[292] The reasoning is that torturers should not be able to escape punishment by fleeing the jurisdiction.[293]

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283. *See* ANKER, *supra* note 4, at 475.
284. *See* App. No. 22441/93, 93 Eur. Ct. H.R. at 22, 23 Eur. H.R. 413 (1996).
285. *Id.* at 414.
286. Zadvydas, 121 S.Ct. 2491; Sklar Interview, *supra* note 83.
287. *See* ANKER, *supra* note 4, at 519.
288. *See* Flinterman & Henderson, *supra* note 65, at 137-38.
289. Sklar Interview, *supra* note 83.
290. *See* 18 U.S.C. § 2340A (2002) (extending criminal jurisdiction over acts of torture when the offender is present in the United States); U.S. CAT REPORT, *supra* note 17, ¶ 35, pt. 1.
291. Sklar Interview, *supra* note 83.
292. *See* Flinterman & Henderson, *supra* note 65, at 138; WOAT REPORT, *supra* note 122, Exec. Summ. B5; Sklar Interview, *supra* note 83.
293. *See* BURGERS, *supra* note 4, at 36, 62–63 ("*aut dedire aut punire*").

E. Embracing International Law

Practitioners should always attempt to argue international law and norms in their cases when applicable. Many U.S. judges are open to arguments based on international law[294] and can be convinced that it is important to look to norms of customary international law for guidance.[295] In addition, U.S. practitioners and adjudicators should look to CAT decisions in other countries and to those decided by the U.N. Committee Against Torture for guidance.[296]

The Committee's procedures for adjudicating CAT cases may be informative and helpful to U.S. adjudicators.[297] Also, although not discussed here, the American Convention on Human Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms are additional human rights instruments that implement the customary international law prohibition on torture.[298] Decisions of the implementing bodies of these conventions could also serve as guidance to U.S. adjudicators in their interpretation of CAT claims.[299] Decisions of the U.N. Human Rights Committee and reports of the U.N. Special Rapporteur on Torture may also be useful for interpretation and guidance in implementing CAT.[300]

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294. *See, e.g.*, Filartiga v. Pena Irala, 630 F.2d 876 (2d Cir. 1980) (finding that customary international law applies to aliens tortured abroad); Jama v. United States, 22 F. Supp. 2d 353 (D.N.J. 1998) (holding that suit could be filed against U.S. officials and companies for violations of customary international human rights law); Caballero v. Caplinger, 914 F. Supp. 1374 (E.D. La. 1996) (approving consideration of "international law principles" in immigrant detention issues); Venetis, *supra* note 238, at 5 n.xvi.

295. *See* The Paquete Habana, 175 U.S. 677, 700 (1900) (holding that customary international law is a part of U.S. law in the absence of any conflicting law); HANNUM, *supra* note 17, at 3–4; *see also* Galo-Garcia v. INS, 86 F.3d 916, 917 (9th Cir. 1996) (detained Nicaraguan immigrant petitioned for review of denial of nonreturn request under customary international law); Barrera-Echavarria v. Rison, 44 F.3d 1441, 1443 (9th Cir. 1993) (detained and excluded Cuban immigrant petitioned for a writ of habeas corpus seeking release from detention).

296. Although the BIA warns that Committee opinions are only advisory, it acknowledges that it may look to such opinions for guidance. *See* Matter of S-V-, Int. Dec. 3430 (BIA May 9, 2000) (name redacted); *see also* Rosati, *Article 3*, *supra* note 65, at 4 (The Committee cannot hear complaints against the United States, because the United States has not recognized its jurisdiction, but Committee decisions still may be useful tools of interpretation.)

297. *See* ANKER, *supra* note 4, at 476.

298. *See* Alexander, *supra* note 26, at 905.

299. *See id.* at 904–05. (The European Commission of Human Rights, the European Court of Human Rights, the Inter-American Commission on Human Rights, and the Inter-American Court of Human Rights have all been in place much longer than the Committee Against Torture.)

300. *See* ANKER, *supra* note 4, at 473. The International Covenant of Civil & Political Rights, monitored by the U.N. Human Rights Committee, also includes a prohibition on torture. *See* G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966); ANKER, *supra* note 4, at 475.

V. CONCLUSION

As Nobel Poet Laureate Wisawa Szymborska reminds us, "Tortures are just what they were....Nothing has changed." The international community moved a step forward by constructing a means of protection for potential and past victims of torture with the Convention Against Torture. The United States has taken the noble step in its effort to change the lives of those facing torture, by adopting the Convention Against Torture. However, to avoid taking two steps backwards, the United States, through its three branches of government, must begin to implement the Convention in a consistent and meaningful way. Policies such as mandatory detention and expedited removal must be applied in a way that respects the human rights of refugees. Compliance with the Convention can be accomplished through changes to immigration law, improved training of personnel, and through a more generous interpretation of CAT that is more in keeping with the international understanding. Thus, those escaping torture can benefit from the advantages that CAT relief has to offer. If the United States is to live up to its admirable resolve to reduce worldwide torture, it must take the necessary steps to implement and follow the Convention.