JOSHUA SONDHEIMER (SBN 152000)
MATTHEW J. EISENBRANDT (SBN 217335)
The Center for Justice & Accountability
870 Market Street, Suite 684
San Francisco, CA 94102
Tel: (415) 544-0444
Fax: (415) 544-0456
Email: jsond@cja.org

PAUL HOFFMAN (SBN 71244)
Schonbrun DeSimone Seplow Harris
& Hoffman LLP
723 Ocean Front Walk
Venice, CA 90291
Tel: (310) 396-0731
Fax: (310) 396-7040

Counsel for All Plaintiffs

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Jane Doe I, Jane Doe II, Helene Petit, Martin Larsson, Leeshai Lemish, and Roland Odar Plaintiffs, v. LIU QI, and DOES 1-5, inclusive Defendants.	Civil Action No. C 02 0672 CW EMC AFFIDAVIT OF INTERNATIONAL LAW SCHOLARS ON THE STATUS OF TORTURE, CRUEL, INHUMAN OR DEGRADING TREATMENT, CRIMES AGAINST HUMANITY, AND ARBITRARY DETENTION UNDER INTERNATIONAL LAW

1. The undersigned are professors who specialize in international law and international human rights.

A list of credentials for the undersigned is attached to this affidavit in Appendix A.

I. INTRODUCTION

2. Torture, cruel, inhuman, or degrading treatment, crimes against humanity, and arbitrary detention are each well-recognized violations of customary international law.[1] These acts have been condemned by international agreements and state practice. They have also been condemned by the United States through executive statements, legislative pronouncements, and judicial decisions. In sum, the prohibitions against torture, cruel, inhuman, or degrading treatment, crimes against humanity, and arbitrary detention are each "specific, universal, and obligatory." See Hilao v. Marcos: In re Estate of Ferdinand Marcos, Human Rights Litigation, 25 F.3d 1467, 1475 (9th Cir. 1994).

II. TORTURE CONSTITUTES A VIOLATION OF CUSTOMARY INTERNATIONAL LAW

3. The prohibition against torture has long been recognized in international law. According to the authoritative Restatement (Third) of the Foreign Relations Law of the United States §702(d) (1987) ("Restatement (Third)"), a state violates international law if it practices, encourages, or condones torture as a matter of state policy.

4. Torture may result from both physical and mental pain or suffering. See, e.g., J. Herman Burgers and Hans Danelius, The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 117, 118 (1988) ("The act of torture is defined as being the infliction of severe pain or suffering, whether physical or mental. The most characteristic and easily distinguishable case is that of infliction of physical pain . . . . The acts inflicting severe mental pain or suffering can be of very different kinds. One category consists of acts which imply threats or which create fear in the victim").

A. International Law Prohibits Torture

5. The prohibition against torture is recognized in all major international instruments. See, e.g., Universal Declaration of Human Rights, Dec. 10, 1948, art. 5, G.A. Res 217A (III), U.N. Doc. A/810, at

71 (1948) ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."). The International Covenant on Civil and Political Rights ("ICCPR"), adopted in 1966, prohibits torture. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171. More than 147 countries, including the United States, have ratified the ICCPR. Article 7 of the ICCPR provides that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." This provision is non-derogable – neither public emergency nor any other extenuating circumstance may be invoked as justification for such acts. Id. at art. 4(2).

6. The Human Rights Committee, which was established to monitor compliance with the ICCPR, has clarified the nature and scope of Article 7. In General Comment No. 20, the Committee indicated that Article 7 is designed to "protect both the dignity and the physical and mental integrity of the individual."[2] Human Rights Committee, General Comment No. 20, U.N. Doc. HRI/GEN/l/Rev.5 (2001), at para. 2. The determination of whether an Article 7 violation has occurred requires an assessment of all the circumstances of the case, "such as the duration and manner of the treatment, its physical or mental effects as well as the sex, age and state of health of the victim." Vuolanne v. Finland, Communication No. 265/1987, U.N. Doc. Supp. No. 40 (A/44/40) at 249, 256 (1989). Thus, subjective factors can aggravate the effect of certain treatment. See Sarah Joseph et al., The International Covenant on Civil and Political Rights 150 (2000). The Human Rights Committee has identified numerous acts that give rise to an Article 7 violation of torture.[3] See, e.g., Cariboni v. Uruguay, Communication No. 159/1983, U.N. Doc. CCPR/C/OP/2 at 189 (1990) (abducting petitioner, keeping him hooded, bound, and seated for extended periods of time, providing him with minimal food, and subjecting him to hallucinogenic substances and psychological abuse constitutes torture); Herrera Rubio v. Colombia, Communication No. 161/1983, U.N. Doc. Supp. No. 40 (A/43/40) at 190 (1988) (beating and near drowning, hanging the detainee by his arms, and threatening his family members constitutes torture); Muteba v. Zaire, Communication No. 124/1982, U.N. Doc. Supp. No. 40 (A/39/40) at 182 (1984) (beatings, mock executions, electric shocks, deprivation of food, and incommunicado detention

constitutes torture); Estrella v. Uruguay, Communication No. 74/1980, U.N. Doc. Supp. No. 40 (A/38/40) at 150 (1983) (abducting petitioner from his home, blindfolding him, and threatening him with amputation of his hands constitutes torture).

7. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Convention against Torture"), adopted in 1984, contains similar prohibitions against torture. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85. More than 128 countries, including the United States, have ratified the Convention against Torture. Article 1 defines torture as:

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Under the Convention against Torture, countries must take effective legislative, administrative, and judicial measures to prevent acts of torture. Significantly, Article 2(2) provides that "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."

8. The Committee against Torture, which was established to monitor compliance with the Convention against Torture, has recognized the absolute prohibition against torture. No circumstances, including terrorist threats or conditions of war, justify acts of torture. See, e.g., Committee against Torture, Israel's Second Periodic Report under the Convention against Torture, U.N. Doc. CAT/C/18/CRP1/ Add.4, at para. 134, quoted in Joseph, supra, at 151. ("The Committee acknowledges the terrible dilemma that Israel confronts in dealing with terrorist threats to its security, but as a State party to the Convention Israel is precluded from raising before this Committee exceptional circumstances as justification for acts prohibited by article 1 of the Convention. This is plainly expressed in article 2 of the Convention").

9. The prohibition against torture is also set forth in a variety of United Nations instruments and

statements. The U.N. Special Rapporteur on Torture, established by the U.N. Commission on Human Rights, has issued many official statements on this matter. For example, the Special Rapporteur has expressed concern about the use of intimidation as a form of torture and has indicated that threats to the physical integrity of the victim "can amount to cruel, inhuman or degrading treatment or even to torture, especially when the victim remains in the hands of law enforcement officials." Report of the Special Rapporteur on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. A/56/156 (2001), at para. 8. See also U.N. Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, Principle 6, G.A. Res. 43/173, 43 U.N. GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49, (1988) ("No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment"); Standard Minimum Rules for the Treatment of Prisoners, U.N. Doc. E/3048 (1957), amended E.S.C. res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977).

10. Regional agreements also prohibit torture. For example, the American Convention on Human Rights ("American Convention"), which the United States has signed, provides that "[n]o one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment." See American Convention on Human Rights, Jan. 7, 1970, art.5, 1144 U.N.T.S. 123. See also Inter-American Convention to Prevent and Punish Torture, Dec. 9, 1985, OAS Treaty Series No. 67.[4] The Inter-American Court on Human Rights, which reviews compliance with the American Convention, has noted that Article 5 prohibits torture and cruel, inhuman and degrading treatment "and that all persons deprived of their liberty should be treated with respect for the inherent dignity of the human person." Neira Alegria et al. v. Peru, 3 International Human Rights Reports 362, 382 (1996). See also Bamaca Velasquez v. Guatemala, 9 International Human Rights Reports 80, 137 (2002). The Inter-American Commission on Human Rights, which also monitors compliance with the American Convention, has made similar findings. See, e.g., Case 10.574 (El Salvador), Report No. 5/94 (February 1, 1994)

(applying electrical shocks to detainee, burning him with cigarettes, beating him, and putting a hood over his head constitutes torture).

11. The European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention"), which has been ratified by 43 states, provides that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment." European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 3, 213 U.N.T.S. 221. See also European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Nov. 26, 1987, E.T.S. No. 126. The European Court of Human Rights, which reviews compliance with the European Convention, has indicated that the prohibition against torture is one of the most fundamental values of a democratic society. This norm is non-derogable. As the European Court noted in Selmouni v. France, 29 E.H.R.R. 403, 440 (1999), "[e]ven in the most difficult circumstances, such as the fight against terrorism and organized crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment."[5] In Selmouni v. France, the European Court concluded that the petitioner was subject to torture as a result of severe and repeated police beatings that left marks on his entire body and as a result of humiliating treatment. Id. at 442-443. See also Aydin v. Turkey, 25 E.H.R.R. 251 (1997) (raping, beating, and blindfolding detainee constitutes torture); Aksoy v. Turkey, 23 E.H.R.R. 553 (1997) (stripping detainee with arms tied behind his back and suspending him by the arms constitutes torture).

12. Finally, the African Charter on Human and Peoples' Rights provides that "[a]ll forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited." See African Charter on Human and Peoples' Rights, June 27, 1981, art. 5, OAU Doc. CAB/LEG/67/3/Rev. 5 (1981). The African Commission on Human and Peoples' Rights, which was established to monitor compliance with the African Charter, has found various actions to constitute torture. See, e.g., Amnesty International et al. v. Sudan, Comm. Nos. 48/90, 50/91, 52/91, 89/93 (2000) (placing detainees in small cells, soaking them with cold water, and

subjecting them to mock executions constitutes torture).

B. The United States Recognizes the Prohibition against Torture

13. This prohibition against torture has been recognized by the United States in executive statements, legislative pronouncements, and judicial decisions.

14. As indicated, the United States has ratified the ICCPR and the Convention against Torture, both of which prohibit torture.[6] The United States has implemented its obligations under the Convention against Torture in several ways. In 1991, for example, Congress enacted the Torture Victim Protection Act, which establishes civil liability for acts of torture. See 28 U.S.C. § 1350 (Notes). In 1994, Congress imposed criminal liability for acts of torture, regardless of where such acts occur. See 18 U.S.C. § 2340A. In 1998, Congress enacted the Torture Victims Relief Act to provide financial assistance to victims of torture in the United States and abroad. See 22 U.S.C. § 2152 (History).

15. In October 1999, the United States Government issued its Initial Report to the Committee Against Torture describing its compliance with the Convention against Torture. In the Initial Report, the United States Government reiterated that torture is categorically denounced as a matter of policy and as a tool of state authority.

> No official of the government, federal, state or local, civilian or military, is authorized to commit or to instruct anyone else to commit torture. Nor may any official condone or tolerate torture in any form. No exceptional circumstances may be invoked as a justification of torture. United States law contains no provision permitting otherwise prohibited acts of torture or other cruel, inhuman or degrading treatment or punishment to be employed on grounds of exigent circumstances . . . or on orders from a superior officer or public authority, and the protective mechanisms of an independent judiciary are not subject to suspension. The United States is committed to the full and effective implementation of its obligations under the Convention throughout its territory.

Committee Against Torture, "Consideration of Reports Submitted By States Parties Under Article 19 of the Convention: United States of America" (Oct. 15, 1999), U.N. Doc. CAT/C/28/Add.5 (2000), at 5 ("Initial Report of the United States").[7] The Initial Report notes that "[e]very system of criminal law in the United States clearly and categorically prohibits acts of violence against the person, whether physical or mental, which would constitute an act of torture within the meaning of the Convention." Id.

at 26.

> Such acts may be prosecuted, for example, as assault, battery or mayhem in cases of physical injury; as homicide, murder or manslaughter when a killing results; as kidnapping, false imprisonment or abduction where an unlawful detention is concerned; as rape, sodomy, or molestation; or as part of an attempt or conspiracy, an act of racketeering, or a criminal violation of an individual's civil rights.

Id. Other specific issues raised in the Initial Report with respect to torture include police brutality, abuse of detainees, and substandard prison conditions. Id.

16. U.S. courts have also recognized the international prohibition against torture. In Filartiga v. Pena-Irala 630 F.2d 876, 880 (2d Cir. 1980), the Second Circuit indicated that:

> in light of the universal condemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world (in principle if not in practice), we find that an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations.

See also Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322 (N.D. Ga. 2002) (torture is a well-recognized violation of customary international law); Wiwa v. Royal Dutch, 2002 U.S. Dist. LEXIS 3293, *21 (S.D. N.Y. 2002) (torture constitutes fully recognized violation of international law); Doe v. Islamic Salvation Front, 993 F. Supp. 3, 8 (D. D.C. 1998) (international law prohibits torture); Doe v. Unocal, 963 F. Supp. 880, 890 (C.D. Cal. 1997) (international law prohibits torture); Abebe-Jira v. Negewo, 72 F.3d 844, 847 (11th Cir. 1996) (citing Filartiga precedent that official torture is now prohibited by the law of nations); Kadic v. Karadzic, 70 F.3d 232, 243 (2d Cir. 1995) ("[O]fficial torture is prohibited by universally accepted norms of international law . . . ."); Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass. 1995) (torture is a well-recognized violation of customary international law); Paul v. Avril, 901 F. Supp. 330 (S.D. Fla.1994) (imposing civil liability for acts of torture); Hilao v. Marcos: In re Estate of Ferdinand Marcos, Human Rights Litigation, 25 F.3d at 1475 (torture is a specific, universal, and obligatory norm of international law); Trajano v. Marcos: In re Estate of Ferdinand Marcos, Human Rights Litigation, 978 F.2d 493, 499 (9th Cir. 1992) ("And, as we have recently held, 'it would be unthinkable to conclude other than that acts of official torture violate customary international law.'");

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Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 716 (9 Cir. 1992) ("There is no doubt that the prohibition against official torture is a norm of customary international law . . . .").

17. Based on the foregoing review, it is evident that the prohibition against torture is a specific, universal, and obligatory norm under international law.

III. CRUEL, INHUMAN OR DEGRADING TREATMENT CONSTITUTES A VIOLATION OF CUSTOMARY INTERNATIONAL LAW

18. The prohibition against cruel, inhuman or degrading treatment is also recognized in international law. According to the Restatement (Third), supra, at § 702(d), a state violates international law if, as a matter of state policy, it practices, encourages, or condones cruel, inhuman, or degrading treatment or punishment.

19. There is a close relationship between torture and cruel, inhuman or degrading treatment. The difference between these two violations of international law can be measured by the severity of the act and the degree of suffering. "Degrading treatment" is an act that tends to humiliate the victim; "inhuman treatment" is the deliberate infliction of severe mental or physical suffering.[8] Torture constitutes the most aggravated form of severe physical or mental suffering.[9] See generally Nigel S. Rodley, The Treatment of Prisoners under International Law 77-78 (2d ed. 1999) ("So, for torture to occur, a scale of criteria has to be climbed. First, the behavior must be degrading treatment; second, it must be inhuman treatment; and third, it must be an aggravated form of inhuman treatment, inflicted for certain purposes"). In addition, torture requires purpose; cruel, inhuman or degrading treatment does not. Id. at 84-85.

20. In sum, determinations of whether torture or other cruel, inhuman or degrading treatment have occurred require an assessment of all the circumstances in the case, including the form and duration of mistreatment, the level of suffering, the physical and mental status of the victim, and the purpose of the perpetrator.[10]

A. International Law Prohibits Cruel, Inhuman or Degrading Treatment

21. The prohibition against cruel, inhuman or degrading treatment is recognized in all major international instruments. See, e.g., Universal Declaration of Human Rights, supra, at art. 5 ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"); ICCPR, supra, at art. 7 ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"). Article 16(1) of the Convention Against Torture also prohibits cruel, inhuman or degrading treatment:

> Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

22. The Human Rights Committee has affirmed the prohibition against cruel, inhuman or degrading treatment on numerous occasions. See, e.g., Tshishimbi v. Zaire, Communication No. 542/1993, U.N. Doc. CCPR/C/53/D/542/1993 (1996) (abducting petitioner and incommunicado detention constitutes cruel and inhuman treatment); Mukong v. Cameroon, Communication No. 458/1991, U.N. Doc. Supp. No. 40 (A/49/40) (1994) (incommunicado detention, depriving petitioner of food, and threatening with torture and death constitute cruel, inhuman and degrading treatment). The Committee has also found that physical beatings constitute cruel and inhuman treatment. See Henry v. Trinidad and Tobago, Communication No. 752/1997, U.N. Doc. CCPR/C/64/D/752/1997 (1999) (detainee beaten on the head, requiring stitches). See also Hylton v. Jamaica, Communication No. 407/1990, U.N. Doc. CCPR/C/51/D/407/1990 (1994); Linton v. Jamaica, Communication No. 255/1987, U.N. Doc. CCPR/C/46/D/255/1987.

23. The United Nations Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment prohibits cruel, inhuman or degrading treatment, and no circumstances may be invoked as justification for such acts. U.N. Body of Principles, supra, at Principle 6. The Body of Principles contains the following description of cruel, inhuman or degrading treatment.

> The term "cruel, inhuman or degrading treatment or punishment" should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him,

> temporarily or permanently of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time.

Id.

24. The prohibition against cruel, inhuman or degrading treatment is also recognized in all the regional instruments. For example, the American Convention on Human Rights provides that "[n]o one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment." American Convention, supra, at art. 5. The Inter-American Commission on Human Rights has found several acts to constitute cruel, inhuman or degrading treatment. See, e.g., McKenzie v. Jamaica, Case No. 12.023 (2000) (keeping prisoners in overcrowded conditions for 23 hours a day with inadequate sanitation, poor lighting and ventilation constitutes cruel, inhuman and degrading treatment); Valladares v. Ecuador, Case No. 11.778 (1998) (holding petitioner incommunicado for more than 22 days constitutes cruel, inhuman or degrading treatment); Congo v. Ecuador, Case No. 11.427 (1998) (holding detainee in a small isolated cell constitutes inhuman and degrading treatment).

25. The European Convention for the Protection of Human Rights and Fundamental Freedoms provides that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment."[11] European Convention, supra, at art. 3. The European Court of Human Rights has recognized that determinations of whether torture or other inhuman or degrading treatment have occurred depend on the unique circumstances of the case and the status of the individual victim. See, e.g., Tyrer Case , 2 E.H.R. R. 1 (1978). According to the Court, the distinction between torture and inhuman or degrading treatment derives principally from a difference in the intensity of the suffering inflicted. Ireland v. United Kingdom, 2 E.H.R.R. 25, 80 (1979). The word "torture" attaches a special stigma to deliberate treatment causing very serious and cruel suffering of particular intensity.[12] Id. The European Court has found various acts to constitute inhuman or degrading treatment. See, e.g., Tekin v. Turkey 31 E.H. R.R. 95 (2001) (blindfolding a prisoner, threatening him with death, providing no bed or blankets, denying food and liquids, stripping him naked and hosing him with cold water, and beating him with a truncheon constitutes inhuman and degrading treatment); Ribitsch v. Austria, 21 E.H.R.R. 573 (1996)

(beatings and abuse administered by police constitutes inhuman and degrading treatment); Assenov v. Bulgaria, 28 E.H.R.R. 652 (1998) (bruises received from beating would have been sufficient for article 3 violation if petitioner had proved state action); Ireland v. United Kingdom, 2 E.H.R.R. 25 (1979) (use of five interrogation techniques consisting of wall-standing, hooding, subjection to noise, sleep deprivation, and deprivation of food and water constitutes inhuman and degrading treatment).

26. Finally, the African Charter on Human and Peoples' Rights provides that "[a]ll forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited." African Charter, supra, at art. 5. The African Commission on Human and Peoples' Rights has found various actions to constitute cruel, inhuman or degrading treatment. See, e.g., Media Rights Agenda v. Nigeria, Comm. No. 224/98 (2000) (chaining detainee to the floor day and night in solitary confinement constitutes cruel, inhuman or degrading treatment); Huri-Laws v. Nigeria Comm. No. 225/98 (2000) (detaining petitioner in a dirty cell without charge and without access to medical attention constitutes cruel, inhuman or degrading treatment).

B. The United States Recognizes the Prohibition against Cruel, Inhuman or Degrading Treatment

27. This prohibition against cruel, inhuman or degrading treatment has been recognized by the United States through executive statements, legislative pronouncements, and judicial decisions.

28. Congress has adopted legislation that recognizes the prohibition against cruel, inhuman or degrading treatment as a human right. See 7 U.S.C. § 1733 (prohibiting agricultural commodities to countries that practice cruel, inhuman or degrading treatment); 22 U.S.C. § 262d(a)(1) (stating U.S. policy is to channel international assistance away from countries that practice cruel, inhuman or degrading treatment); 22 U.S.C § 2151n (prohibiting development assistance to countries that practice cruel, inhuman or degrading treatment); 22 U.S.C. § 2304 (prohibiting security assistance to countries that practice cruel, inhuman or degrading treatment).

29. In its Initial Report to the Committee against Torture, the United States affirmed its obligations

under Article 16 of the Convention against Torture, which prohibits cruel, inhuman or degrading treatment. According to the Initial Report, "Article 16 embodies an important undertaking by which States Parties to the Convention must act to prevent cruel, inhuman and degrading treatment or punishment not amounting to torture within territories under their jurisdiction." Initial Report of the United States, supra, at 64. The Initial Report also noted that the prohibition against cruel, inhuman or degrading treatment is consistent with the prohibition against cruel, unusual, and inhumane treatment as set forth in the United States Constitution.[13] Id. at 65. Among the acts characterized in the Initial Report as cruel, inhuman or degrading treatment were: police brutality, substandard prison conditions, improper segregation of prisoners, sexual abuse of detainees, abuse of the mentally retarded and mentally ill in public facilities, discrimination of inmates with disabilities, and non-consensual medical and scientific experiments. Id. at 65-70.

30. U.S. courts have also recognized the international prohibition against cruel, inhuman or degrading treatment.[14] See Mehinovic v. Vuckovic, 198 F. Supp. 2d at 1344 (cruel, inhuman or degrading treatment is well-recognized violation of customary international law); Wiwa v. Royal Dutch, 2002 U.S. Dist. LEXIS at *21 ("The international prohibition against 'cruel, inhuman, or degrading treatment' is as universal as the proscriptions of torture, summary execution, and arbitrary arrest . . . ."); Cabello v. Fernandez-Larios, 157 F. Supp. 2d 1345, 1362 (S.D. Fla. 2001) (cruel, inhuman or degrading treatment is a violation of customary international law); Jama v. U.S. Immigration and Naturalization Service, 22 F. Supp.2d 353, 363 (D.N.J. 1998) ("American Courts have recognized that the right to be free from cruel, inhuman or degrading treatment is a universally accepted customary human rights norm"); Doe v. Islamic Salvation Front, 993 F. Supp. 3, 8 (D.D.C. 1998) (international law prohibits cruel treatment); Xuncax v. Gramajo, 886 F. Supp. at 187 (cruel, inhuman or degrading treatment is a well-recognized violation of customary international law); Paul v. Avril, 901 F. Supp. at 330 (imposing civil liability for acts of cruel, inhuman or degrading treatment).

31. Based on the foregoing review, it is evident that the prohibition against cruel, inhuman or degrading

treatment is a specific, universal, and obligatory norm under international law.

IV. CRIMES AGAINST HUMANITY CONSTITUTE A VIOLATION OF CUSTOMARY INTERNATIONAL LAW

32. The prohibition against crimes against humanity was first recognized by the Charter of the International Military Tribunal at Nuremberg. See Restatement (Third), supra, at § 702, rpt. note 1. The Nuremberg Charter was adopted to ensure that serious human rights abuses committed during World War II by the military and political leaders of Nazi Germany were punished. See generally M. Cherif Bassiouni, Crimes against Humanity in International Criminal Law (2d ed. 1999). Under the Nuremberg Charter, acts constituting crimes against humanity included murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution on political, racial or religious grounds, or other inhuman acts committed against a civilian population. Charter of the International Military Tribunal, August 8, 1945, art. 6(c), 82 U.N.T.S. 284. In its ruling, the International Military Tribunal acknowledged the status of crimes against humanity under international law and convicted several defendants of this crime. See The Nurnberg Trial, 6 F.R.D. 69 (1946).

A. International Law Prohibits Crimes Against Humanity

33. Since the adoption of the Nuremberg Charter, the prohibition against crimes against humanity has been firmly recognized in several international instruments. In 1946, for example, the United Nations General Assembly affirmed the principles set forth in the Nuremberg Charter and the subsequent decision of the International Military Tribunal. See G.A. Res. 95, 1 GAOR U.N. Doc. A/64/Add.1, at 188 (1946). These principles were reaffirmed in 1968 with the adoption of a treaty to prevent the application of statutory limits, such as statutes of limitation, to crimes against humanity. See Convention on the Non--Applicability of Statutory Limits to War Crimes and Crimes Against Humanity, Nov. 26, 1968, art. 1(b), 660 U.N.T.S. 195, reprinted in 8 I.L.M. 68 (1969). See also Principles of International Co-Operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and

Crimes against Humanity, G.A. Res. 3074, U.N. Doc. A/9039/Add.1 (1973).

34. Recent developments have affirmed and expanded the scope of crimes against humanity under international law. In 1993, the United Nations Security Council established the International Criminal Tribunal for the former Yugoslavia ("ICTY") to prosecute serious violations of international law committed in that territory, including genocide, war crimes, and crimes against humanity. See Statute of the International Criminal Tribunal for the former Yugoslavia, U.N. Doc. S/RES/827 (1993), reprinted in 32 I.L.M. 1192 (1993). The International Criminal Tribunal for Rwanda ("ICTR") was established by the Security Council in 1994 to prosecute serious violations of international law in Rwanda. See Statute of the International Criminal Tribunal for Rwanda, U.N. Doc. S/RES/955 (1994), reprinted in 33 I.L.M. 1602 (1994). Both statutes expanded the list of enumerated offenses for crimes against humanity. These included murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution on political, racial, and religious grounds, or other inhumane acts. There are, however, significant differences between the two statutes. While the Statute for the ICTY requires a nexus between crimes against humanity and armed conflict, the Statute for the ICTR contains no such requirement. Even the ICTY itself has noted that the requirement of a nexus between crimes against humanity and another crime was unique to the Nuremberg Charter (and its own statute) and had been abandoned under customary international law. Prosecutor v. Tadic, Case No. IT-94-1, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995), at para. 140. Thus, crimes against humanity can now occur in the absence of an armed conflict. See generally Guénaël Mettraux, "Crimes against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda," 43 Harvard International Law Journal 237 (2002).

35. The International Criminal Tribunals for the former Yugoslavia and Rwanda have affirmed these developments and the status of crimes against humanity under international law. In Prosecutor v. Tadic, for example, the ICTY noted that "the customary status of the prohibition against crimes against humanity and the attribution of individual criminal responsibility for their commission have not been seriously questioned." Prosecutor v. Tadic, Case No. IT-94-1, (May 7, 1997), at para. 623.

36. The Rome Statute of the International Criminal Court provides the most current definition of crimes against humanity under international law. Article 7 of the Rome Statute defines crimes against humanity as any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

> (a) Murder;
>
> (b) Extermination;
>
> (c) Enslavement;
>
> (d) Deportation or forcible transfer of population;
>
> (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
>
> (f) Torture;[15]
>
> (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
>
> (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;[16]
>
> (i) Enforced disappearance of persons;[17]
>
> (j) The crime of apartheid;
>
> (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Because of its recent codification in the Rome Statute, Article 7 represents the most authoritative interpretation of crimes against humanity in international law. See generally Commentary on the Rome Statute of the International Criminal Court (Otto Triffterer ed., 1999).

37. The Rome Statute requires four elements for establishing a crime against humanity: (1) a violation of one of the enumerated acts; (2) committed as part of a widespread or systematic attack; (3) directed against a civilian population; and (4) with knowledge of the attack.[18] Significantly, even a single act by an individual, taken within the context of a widespread or systematic attack against a civilian

population, can constitute a crime against humanity. See Prosecutor v. Tadic, Case No. IT-94-1-T, (May 7, 1997), at para. 649 ("Clearly, a single act by a perpetrator taken within the context of a widespread or systematic attack against a civilian population entails individual criminal responsibility and an individual perpetrator need not commit numerous offences to be held liable"). Similarly, the knowledge requirement does not require individual knowledge of the entire attack in all of its details. Indeed, it is not even necessary to demonstrate that the perpetrator knew that his actions were inhumane or rose to the level of crimes against humanity. Knowledge can also be actual or constructive. Id. at para. 657.

B. The United States Recognizes the Prohibition of Crimes against Humanity

38. The United States has recognized the prohibition of crimes against humanity on several occasions. In a submission to the Trial Chamber of the ICTY, for example, the United States argued:

> The relevant law and precedents for the offences in question here – genocide, war crimes and crimes against humanity – clearly contemplate international as well as national action against the individuals responsible. Proscription of these crimes has long since acquired the status of customary international law, binding on all states, and such crimes have already been the subject of international prosecutions by the Nuremberg and Tokyo Tribunals.

Amicus Curiae Brief of the United States, Prosecutor v. Tadic, IT-94-I-T, Motion Hearing (July 25, 1995), quoted in Sharon Williams, "The Rome Statute of the International Criminal Court: From 1947 - 2000 and Beyond," 38 Osgoode Hall Law Journal 297, 313 (2000). While the United States recently announced it did not intend to become a party to the Rome Statute, it did so for reasons unrelated to the status of crimes against humanity under international law. Indeed, the United States has approved several United Nations resolutions recognizing the status of crimes against humanity under international law. See Cabello v. Fernandez-Larios, 157 F. Supp. 2d at 1360.

39. The prohibition of crimes against humanity has been recognized by several domestic courts as an established principle of customary international law. See Mehinovic v. Vuckovic, 198 F. Supp. 2d at 1352 ("Crimes against humanity have been recognized as a violation of customary international law since the Nuremberg trials and therefore are actionable under the ATCA"); Wiwa v. Royal Dutch Petroleum Co., 2002 U.S. Dist. LEXIS at *27 ("In sum, under the definition of 'crimes against

humanity' provided in Article 7 of the I.C.C. [Rome Statute], plaintiffs must demonstrate (1) violation of one of the enumerated acts, (2) committed as part of a widespread attack against a civilian population, (3) with knowledge of the attack."); Cabello v. Fernandez-Larios, 157 F. Supp.2d at 1360 (citing Princz v. Federal Republic of Germany, 26 F.3d 1166, 1173 (D.C. Cir. 1994)) (United States recognizes its legal obligation to condemn crimes against humanity); Quinn v. Robinson, 783 F.2d 776, 799-800 (9th Cir. 1986); In re Extradition of Demjanjuk, 612 F. Supp. 544, 566-8 (N.D. Ohio 1985).

40. Based on the foregoing review, it is evident that the prohibition of crimes against humanity is a specific, universal, and obligatory norm under international law.

V. ARBITRARY DETENTION CONSTITUTES A VIOLATION OF CUSTOMARY INTERNATIONAL LAW

41. Few concepts are more fundamental to the principle of ordered liberty than the right to be free from arbitrary detention.[19] This basic human right has been recognized by almost every multilateral and regional human rights agreement of the twentieth century.[20] It has also been affirmed in both national and international fora. According to the Restatement (Third), arbitrary detention constitutes a violation of customary international law. Restatement (Third), supra, at § 702(e). Detention is arbitrary "if it is not pursuant to law; it may be arbitrary also if it is incompatible with the principles of justice or with the dignity of the human person." Id. at § 702 cmt. (h).

A. International Law Prohibits Arbitrary Detention

42. The International Covenant on Civil and Political Rights provides that "[e]veryone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." ICCPR, supra, at art. 9(1). Significantly, Article 9(5) adds that "[a]nyone who has been the victim of an unlawful arrest or detention shall have an enforceable right to compensation." The Human Rights Committee has stated that Article 9 is applicable to all deprivations of liberty. Human Rights Committee, General Comment No. 8 (1982).

43. Several other U.N. organizations have also affirmed the prohibition against arbitrary detention.[21] For example, the U.N. Commission on Human Rights established a Working Group on Arbitrary Detention in 1991 to investigate cases of detention imposed arbitrarily or otherwise inconsistently with relevant international standards. See U.N. Commission on Human Rights Res. 1991/42. According to the Working Group, arbitrary detention is a violation of international law. The Working Group classifies cases of arbitrary detention in the following three legal categories:

> (a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his sentence or despite an amnesty law applicable to him) (category I);
>
> (b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (category II);
>
> (c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III).

Report of the Working Group on Arbitrary Detention, U.N. Doc. E/CN.4/1998/44 (1997).

44. The prohibition against arbitrary detention is recognized in each of the regional human rights systems. See American Convention on Human Rights, supra, at art. 7(3) ("No one shall be subject to arbitrary arrest or imprisonment."); European Convention for the Protection of Human Rights and Fundamental Freedoms, supra, at art. 5(1) ("Everyone has the right to liberty and security of the person."); African Charter on Human and Peoples' Rights, supra, at art. 6 ("Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.").

45. Significantly, the prohibition against arbitrary detention is not limited by a temporal component. For example, the Working Group on Arbitrary Detention does not focus on the length of the detention in determining whether a deprivation of liberty is arbitrary. Rather, it considers whether the detention falls

within one of the three categories set forth in its mandate. See, e.g., Report of the Working Group on Arbitrary Detention, U.N. Doc. E/CN.4/2002/77/Add.1 (2001). Thus, claims of arbitrary detention can be found even in cases lasting less than 24 hours. The Human Rights Committee, for example, has identified violations of Article 9 of the ICCPR in cases where the petitioner was detained for a relatively "short" period of time. See, e.g., Spakmo v. Norway, Communication No. 631/1995, U.N. Doc. CCPR/C/67/D/631/1995 (1999) (detention of approximately 8 hours); Tshionga a Minanga v. Zaire, Communication No. 366/1989, U.N. Doc. CCPR/C/49/D/366/1989 (1993) (detention of approximately 18 hours).

46. Similar findings have been made by the regional tribunals. In Quinn v. France, 21 E.H.R.R. 529 (1995), for example, the petitioner was detained by French authorities for a period of 11 hours in the absence of lawful authority. The European Court determined that this detention was in violation of Article 5 of the European Convention. See also Litwa v. Poland, 33 E.H.R.R. 1267 (2000) (detention of six hours and thirty minutes constitutes a violation of Article 5 even where detention was a "lawful" option under domestic law, but unnecessary under the circumstances). The Inter--American Commission on Human Rights has made similar determinations. In Loren Laroye Riebe Star v. Mexico, three individuals residing in Mexico were detained without access to a lawyer or judicial remedies, each for periods of less than 24 hours. They were then summarily removed from Mexico. The Inter-American Commission determined that these acts constituted arbitrary detention in violation of Article 7 of the American Convention. Loren Laroye Riebe Star v. Mexico, Case 11.610, Inter-Am. C.H.R. Report No. 49/99 (1999), at para. 41.

B. The United States Recognizes the Prohibition against Arbitrary Detention

47. In statements before international tribunals, the United States has argued that arbitrary detention is a violation of international law. For example, the United States argued before the International Court of Justice that arbitrary detention is contrary to fundamental international norms. Significantly, the International Court of Justice agreed. "[T]o deprive human beings of their freedom and to subject them

to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights." Case Concerning United States Diplomatic and Consular Staff in Tehran, 1980 I.C.J. 42, at para. 91.

48. U.S. courts have repeatedly held that arbitrary detention violates international law. See Martinez v. City of Los Angeles , 141 F.3d 1373, 1384 (9th Cir. 1998) ("Detention is [also] arbitrary if it is not accompanied by notice of charges; if the person detained is not given early opportunity to communicate with family or to consult counsel; or is not brought to trial within a reasonable time."). See also Mehinovic v. Vuckovic, 198 F. Supp. 2d at 1349; Wiwa v. Royal Dutch, 2002 U.S. Dist. LEXIS at *17; Ma v. Ashcroft, 257 F.3d 1095, 1114 (9th Cir. 2001); Xuncax v. Gramajo, 886 F. Supp. at 184; Paul v. Avril, 901 F. Supp. at 330; Siderman de Blake v. Argentina, 965 F.2d at 717; Committee of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 940 (D.C. Cir. 1988); Forti v. Suarez-Mason, 672 F. Supp. at 1541; Fernandez-Roque v. Smith, 622 F. Supp. 887, 903 (D.C. Ga. 1985).

49. While most U.S. courts have addressed claims of arbitrary detention in cases of extended detention, this does not establish a temporal requirement. Indeed, at least one court has recognized claims of arbitrary detention even for periods of less than 24 hours.[22] In Paul v. Avril, 901 F. Supp. at 330, for example, the district court awarded compensatory and punitive damages to an individual who was detained for less than ten hours. While the Restatement (Third) § 702(e) indicates that prolonged arbitrary detention is a violation of international law, the subsequent commentary indicates that a single, brief arbitrary detention may give rise to a violation. Given the unambiguous nature of the relevant treaty provisions as well as the various tribunal rulings on this matter, there is simply no basis for adding a temporal component to arbitrary detention.

50. Based on the foregoing review, it is evident that the prohibition against arbitrary detention is a specific, universal, and obligatory norm under international law.

VI. CONCLUSION

51. Torture, cruel, inhuman, or degrading treatment, crimes against humanity, and arbitrary detention are each well-recognized violations of customary international law. These acts have been condemned in international agreements and state practice. They have also been condemned by the United States through executive statements, legislative pronouncements, and judicial decisions. In sum, the prohibitions against torture, cruel, inhuman, or degrading treatment, crimes against humanity, and arbitrary detention are specific, universal, and obligatory.

AFFIRMED:

S/
WILLIAM J. ACEVES
SARAH H. CLEVELAND
JOAN FITZPATRICK
RONALD SLYE

ATTESTION REGARDING SIGNATURES

I, Joshua Sondheimer, declare under penalty of perjury under the Laws of the United States that affirmations as to the contents of the foregoing Affidavit of International Law Scholars on the Status of Torture, Cruel, Inhuman or Degrading Treatment, Crimes Against Humanity, and Arbitrary Detention Under International Law, and concurrence in the filing of this document, have been obtained from each of the above-named signatories.

Dated: July 3, 2002

s/Joshua Sondheimer
JOSHUA SONDHEIMER (SBN 152000)
The Center for Justice & Accountability
870 Market Street, Suite 684
San Francisco, CA 94102
Tel: (415) 544-0444
Fax: (415) 544-0456
Email: jsond@cja.org

APPENDIX A

SUMMARY OF CREDENTIALS
AFFIDAVIT REGARDING TORTURE, CRUEL, INHUMAN OR DEGRADING TREATMENT, CRIMES AGAINST HUMANITY AND ARBITRARY DETENTION

WILLIAM J. ACEVES is Professor of Law and Director of the International Legal Studies Program at California Western School of Law. Professor Aceves teaches Human Rights Law, Comparative Law, Foreign Affairs and the Constitution, and Law and International Relations. He was previously a Ford Foundation Fellow in International Law at the UCLA School of Law. Professor Aceves is a member of the Executive Committee of the American Branch of the International Law Association and the Chair of the Extradition and Human Rights Committee. He is a member of the Litigation Advisory Council of the Center for Justice & Accountability and a Cooperating Attorney with the Center for Constitutional Rights. He is also a member of the Amnesty International USA Legal Support Network Steering Committee. Professor Aceves has published articles in several law reviews and written several essays for the prestigious American Journal of International Law. He was the principal author of the 2002 Amnesty International USA report on torture and impunity. Professor Aceves has extensive experience in human rights litigation, having submitted amicus briefs to the First Circuit, Fourth Circuit, Fifth Circuit, Ninth Circuit, Tenth Circuit, and the United States Supreme Court. He has also appeared before the Inter-American Commission on Human Rights and the United Nations Special Rapporteur on Migrants.

SARAH H. CLEVELAND has been named the Marrs McLean Professor of International Law, effective as of September 2002, at the University of Texas School of Law. A member of the faculty since 1997, she teaches and writes primarily in the areas of human rights, international law, constitutional law and foreign relations law. She has served as an investigator or legal adviser in human rights situations around the globe, including in Cuba, Kenya and Namibia, and has testified before the U.S. Congress on human rights and refugee issues. She is a graduate of Yale Law School, Brown University, and Oxford University, where she studied as a Rhodes Scholar. She served as a law clerk to Associate Justice Harry

A. Blackmun.

JOAN FITZPATRICK is the Jeffrey & Susan Brotman Professor of Law at the University of Washington, where she has taught since 1984. She is the author of six books and numerous articles on international human rights, refugee law, domestic incorporation of international law, and constitutional law. She is a member of the Board of Editors of the *American Journal of International Law,* and Vice President of the Procedural Aspects of International Law Institute. She worked for the Department of Justice in the 1970s, and contributed to the seminal memorandum submitted by the State Department in the case of Filartiga v. Pena-Irala. She is a member of the Advisory Council of the Center for Justice & Accountability.

RONALD C. SLYE is an associate professor at Seattle University School of Law, where he teaches public international law, international human rights law, poverty law, and property law. He is the author or co-author of numerous articles and books in those fields, and is currently writing a book on the legitimacy of amnesties for gross violations of human rights. He is a member of the Operating Committee of the Desmond Tutu Peace Foundation, and was a visiting professor at the Community Law Centre at the University of the Western Cape in South Africa. From 1997 to the present, he has been a consultant in public international law and human rights to the South African Truth and Reconciliation Commission. Professor Slye received a J.D. from Yale Law School in 1989, co-taught Yale's international human rights law clinic (1993-96), and served as the Associate Director of the Law School's Orville H. Schell, Jr. Center for International Human Rights.

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[1] To determine the rules of customary international law, courts may look to numerous sources, including multilateral and regional agreements, pronouncements of international organizations, decisions

of international tribunals, and other forms of state practice. See Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 714-715 (9th Cir. 1992). In addition, courts are to interpret international law as it has evolved and now exists among the nations of the world today. Kadic v. Karadzic, 70 F.3d 232, 238 (2d Cir. 1995).

[2] In General Comment No. 20, the Human Rights Committee added that Article 7 is complemented by the positive requirements of Article 10(1), which stipulates that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

[3] The Human Rights Committee has noted, however, that it is not necessary "to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied." Human Rights Committee, General Comment No. 20, U.N. Doc. HRI/GEN/1/Rev.5 (2001), at para. 4.

[4] Article 2 of the Inter-American Convention to Prevent and Punish Torture defines torture, in part, as "the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause him physical pain or mental anguish."

[5] See also Tomasi v. France, 15 E.H.R.R. 1, 56 (1993) ("The requirements of the investigation and the undeniable difficulties inherent in the fight against crime, particularly with regard to terrorism, cannot result in limits being placed on the protection to be afforded in respect of the physical integrity of individuals.").

[6] The United States has also signed the American Convention on Human Rights, which contains a similar prohibition against torture and cruel, inhuman or degrading treatment.

[7] The United States Government made a similar pronouncement to the Human Rights Committee in 1994. See Human Rights Committee, "Initial Reports of States Parties: United States of America," U.N. Doc. CCPR/C/8 I /Add.4 (1994).

[8] See generally The Greek Case, 12 Yearbook of the European Convention on Human Rights: 1969 186 (1972).

[9] In its annual Country Reports on Human Rights Practices, the State Department defines torture

> as an extremely severe form of cruel, inhuman, or degrading treatment or punishment, committed by or at the instigation of government forces or opposition groups, with specific intent to cause extremely severe pain or suffering, whether mental or physical. Discussion concentrates on actual practices, not on whether they fit any precise definition, and includes use of physical and other force that may fall short of torture but which is cruel, inhuman, or degrading.

U.S. Dep't of State, Country Reports on Human Rights Practices for 1998 – Volume II 1984 (1999).

[10] In Selmouni v. France, the European Court noted that definitions of torture and inhuman or

degrading treatment must be interpreted in light of present-day conditions.

> [T]he Court considers that certain acts which were classified in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in [the] future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.

Selmouni v. France, 29 E.H.R.R. at 442.

[11] The European Convention differs from other international and regional instruments by not using the term "cruel" in its definition of inhuman or degrading treatment. This omission has little, if any, significance. See Rodley, supra , at 75.

[12] According to the European Commission on Human Rights, degrading treatment is defined as action that interferes with the dignity of the individual. East African Asians v. United Kingdom , 3 E.H.R.R. 76 (1973). "It follows that an action, which lowers a person in rank, position, reputation or character, can only be regarded as 'degrading treatment' in the sense of Article 3, where it reaches a certain level of severity." Id. at 80.

[13] This explains the United States reservation to Article 16 of the Convention against Torture, which provides:

> [T]he United States considers itself bound by the obligation under Article 16 to prevent "cruel, inhuman or degrading treatment or punishment," only insofar as the term "cruel, inhuman or degrading treatment or punishment" means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States.

136 Cong. Rec. S10090, S10093 (July 19, 1994). See also Initial Report of the United States, supra, at 65.

[14] In Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987), aff'd Forti v. Suarez-Mason, 694 F. Supp. 707 (N.D. Cal. 1988), the District Court indicated that the prohibition against cruel, inhuman or degrading treatment had not attained the status of customary international law. However, this ruling has been superceded by subsequent developments. For example, the United States had not ratified the ICCPR or the Convention against Torture when the Forti ruling was made. Both of these treaties prohibit cruel, inhuman or degrading treatment. In addition, most of the international jurisprudence on cruel, inhuman or degrading treatment appeared after the Forti ruling was made. It is not surprising, therefore, that subsequent rulings in the federal courts have recognized the status of the prohibition against cruel, inhuman or degrading treatment under customary international law.

[15] The definition of torture is further defined as "the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; . . . ." Rome Statute, supra, at art. 7(2)(e). The Rome Statute definition differs from the Convention against Torture definition because it omits the purpose requirement. Thus, the Rome Statute definition recognizes that the random, purposeless, or sadistic infliction of severe pain or suffering may constitute torture.

[16] The definition of persecution is further defined as "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity." Rome Statute, supra, at art. 7(2)(g).

[17] The definition of enforced disappearance is further defined as "the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time." Rome Statute, supra, at art. 7(2)(i).

[18] The Rome Statute has clearly removed the purported nexus requirement between crimes against humanity and armed conflict.

[19] While the term "prolonged arbitrary detention" is often used, the proper term under international law is "arbitrary detention."

[20] This fundamental principle of human rights can be traced to the Magna Carta, which proclaimed "[n]o free man shall be taken or imprisoned . . . except by the lawful judgment of his peers or by the law of the land." See generally Philip Alston, The European Union and Human Rights 125 (1999).

[21] See also U.N. Body of Principles, supra, at Principle 2 ("Arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose.").

[22] Another U.S. court, declined to determine whether international law requires arbitrary detention to be "prolonged," noting the difficulty of applying such a standard. Eastman Kodak Co. v. Kavlin, 978 F. Supp. 1078, 1094 (S.D. Fla. 1997). According to the District Court, imprisonment of less than two weeks for purposes of extortion is sufficient to state a claim for arbitrary detention. Even assuming that "prolonged" is an element required in an arbitrary detention claim, the court noted:

> [T]he Court sees no reason why a prison stay of eight or ten days cannot be considered a 'prolonged' detention. Defendants implicitly assume that whatever 'prolonged' means, it must mean more than eight or ten days. But why? What does it mean for a detention to be prolonged? If the standard were purely comparative, then Nelson Mandella's [sic] twenty-seven year imprisonment for political reasons might set a very high threshold of duration for the actionability of 'arbitrary detention' claims. Under such a standard, even the Forti plaintiff's four years in detention might not look particularly "prolonged." But that cannot be right. The actionability of one plaintiff's claims cannot depend on the degree of evil perpetrated on another plaintiff.

Id.