

individual during lengthy and intense questioning by law enforcement would not violate section 2340(2). On the other hand, the development of a mental disorder such as posttraumatic stress disorder, which can last months or even years, or even chronic depression, which also can last for a considerable period of time if untreated, might satisfy the prolonged harm requirement. See American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 426, 439–45 (4th ed. 1994) (“DSM-IV”). See also Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. Rev. L. & Soc. Change 477, 509 (1997) (noting that posttraumatic stress disorder is frequently found in torture victims); cf. Sana Loue, *Immigration Law and Health* § 10:46 (2001) (recommending evaluating for post-traumatic stress disorder immigrant-client who has experienced torture).⁴⁸ By contrast to “severe pain,” the phrase “prolonged mental harm” appears nowhere else in the U.S. Code nor does it appear in relevant medical literature or international human rights reports.

Not only must the mental harm be prolonged to amount to severe mental pain and suffering, but also it must be caused by or result from one of the acts listed in the statute. In the absence of a catchall provision, the most natural reading of the predicate acts listed in section 2340(2)(A)–(D) is that Congress intended it to be exhaustive. In other words, other acts not included within section 2340(2)’s enumeration are not within the statutory prohibition. See *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (“*Expressio unius est exclusio alterius.*”); Norman Singer, 2A *Sutherland on Statutory Construction* § 47.23 (6th ed. 2000) (“[W]here a form of conduct, the manner of its performance and operation, and the persons and things to which it refers are designated, there is an inference that all omissions should be understood as exclusions.”) (footnotes omitted). We conclude that torture within the meaning of the statute requires the specific intent to cause prolonged mental harm by one of the acts listed in section 2340(2).

A defendant must specifically intend to cause prolonged mental harm for the defendant to have committed torture. It could be argued that a defendant needs to have specific intent only to commit the predicate acts that give rise to prolonged mental harm. Under that view, so long as the defendant specifically intended to, for example, threaten a victim with imminent death, he would have had sufficient *mens rea* for a conviction. According to this view, it would be necessary for a conviction to show only that the victim suffered prolonged mental harm, rather than that the defendant intended to cause it. We believe that this approach is contrary to the text of the statute. The statute requires that the defendant specifically intend to inflict severe mental pain or suffering. Because the statute requires this mental state with respect to the infliction of severe mental pain, and because it expressly defines severe mental pain in terms of prolonged

⁴⁸ The DSM-IV explains that posttraumatic disorder (“PTSD”) is brought on by exposure to traumatic events, such as serious physical injury or witnessing the deaths of others and during those events the individual felt “intense fear” or “horror.” *Id.* at 424. Those suffering from this disorder reexperience the trauma through, *inter alia*, “recurrent and intrusive distressing recollections of the event,” “recurrent distressing dreams of the event,” or “intense psychological distress at exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event.” *Id.* at 428. Additionally, a person with PTSD “[p]ersistent[ly]” avoids stimuli associated with the trauma, including avoiding conversations about the trauma, places that stimulate recollections about the trauma; and they experience a numbing of general responsiveness, such as a “restricted range of affect (e.g., unable to have loving feelings),” and “the feeling of detachment or estrangement from others.” *Id.* Finally, an individual with PTSD has “[p]ersistent symptoms of increased arousal,” as evidenced by “irritability or outbursts of anger,” “hypervigilance,” “exaggerated startle response,” and difficulty sleeping or concentrating. *Id.*

mental harm, that mental state must be present with respect to prolonged mental harm. To read the statute otherwise would read the phrase "the prolonged mental harm caused by or resulting from" out of the definition of "severe mental pain or suffering."

A defendant could negate a showing of specific intent to cause severe mental pain or suffering by showing that he had acted in good faith that his conduct would not amount to the acts prohibited by the statute. Thus, if a defendant has a good faith belief that his actions will not result in prolonged mental harm, he lacks the mental state necessary for his actions to constitute torture. A defendant could show that he acted in good faith by taking such steps as surveying professional literature, consulting with experts, or reviewing evidence gained from past experience. *See, e.g., Ratzlaf*, 510 U.S. at 142 n.10 (noting that where the statute required that the defendant act with the specific intent to violate the law, the specific intent element "might be negated by, e.g., proof that defendant relied in good faith on advice of counsel.") (citations omitted). All of these steps would show that he has drawn on the relevant body of knowledge concerning the result proscribed by the statute, namely prolonged mental harm. Because the presence of good faith would negate the specific intent element of torture, it is a complete defense to such a charge. *See, e.g., United States v. Wall*, 130 F.3d 739, 746 (6th Cir. 1997); *United States v. Casperson*, 773 F.2d 216, 222-23 (8th Cir.1985).

ii. Harm Caused By Or Resulting From Predicate Acts

Section 2340(2) sets forth four basic categories of predicate acts. First on the list is the "intentional infliction or threatened infliction of severe physical pain or suffering." This provision might at first appear superfluous because the statute already provides that the infliction of severe physical pain or suffering can amount to torture. This provision, however, actually captures the infliction of physical pain or suffering when the defendant inflicts physical pain or suffering with general intent rather than the specific intent that is required where severe physical pain or suffering alone is the basis for the charge. Hence, this subsection reaches the infliction of severe physical pain or suffering when it is but the means of causing prolonged mental harm. Or put another way, a defendant has committed torture when he intentionally inflicts severe physical pain or suffering with the specific intent of causing prolonged mental harm. As for the acts themselves, acts that cause "severe physical pain or suffering" can satisfy this provision.

Additionally, the threat of inflicting such pain is a predicate act under the statute. A threat may be implicit or explicit. *See, e.g., United States v. Sachdev*, 279 F.3d 25, 29 (1st Cir. 2002). In criminal law, courts generally determine whether an individual's words or actions constitute a threat by examining whether a reasonable person in the same circumstances would conclude that a threat had been made. *See, e.g., Watts v. United States*, 394 U.S. 705, 708 (1969) (holding that whether a statement constituted a threat against the president's life had to be determined in light of all the surrounding circumstances); *Sachdev*, 279 F.3d at 29 ("a reasonable person in defendant's position would perceive there to be a threat, explicit, or implicit, of physical injury"); *United States v. Khorrami*, 895 F.2d 1186, 1190 (7th Cir. 1990) (to establish that a threat was made, the statement must be made "in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates a statement as a serious expression of an intention to inflict bodily harm upon [another individual]") (citation and internal quotation marks omitted); *United*

States v. Peterson, 483 F.2d 1222, 1230 (D.C. Cir. 1973) (perception of threat of imminent harm necessary to establish self-defense had to be “objectively reasonable in light of the surrounding circumstances”). Based on this common approach, we believe that the existence of a threat of severe pain or suffering should be assessed from the standpoint of a reasonable person in the same circumstances.

Second, section 2340(2)(B) provides that prolonged mental harm, constituting torture, can be caused by “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.” The statute provides no further definition of what constitutes a mind-altering substance. The phrase “mind-altering substances” is found nowhere else in the U.S. Code nor is it found in dictionaries. It is, however, a commonly used synonym for drugs. See, e.g., *United States v. Kingsley*, 241 F.3d 828, 834 (6th Cir.) (referring to controlled substances as “mind-altering substance[s]”) *cert. denied*, 122 S. Ct. 137 (2001); *Hogue v. Johnson*, 131 F.3d 466, 501 (5th Cir. 1997) (referring to drugs and alcohol as “mind-altering substance[s]”), *cert. denied*, 523 U.S. 1014 (1998). In addition, the phrase appears in a number of state statutes, and the context in which it appears confirms this understanding of the phrase. See, e.g., Cal. Penal Code § 3500(c) (West Supp. 2000) (“Psychotropic drugs also include mind-altering . . . drugs . . .”); Minn. Stat. Ann. § 260B.201(b) (West Supp. 2002) (““chemical dependency treatment”” define as programs designed to “reduc[e] the risk of the use of alcohol, drugs, or other mind-altering substances”).

This subparagraph, however, does not preclude any and all use of drugs. Instead, it prohibits the use of drugs that “disrupt profoundly the senses or the personality.” To be sure, one could argue that this phrase applies only to “other procedures,” not the application of mind-altering substances. We reject this interpretation because the terms of section 2340(2) indicate that the qualifying phrase applies to both “other procedures” and the “application of mind-altering substances.” The word “other” modifies “procedures calculated to disrupt profoundly the senses.” As an adjective, “other” indicates that the term or phrase it modifies is the remainder of several things. See *Webster’s Third New International Dictionary* 1598 (1986) (defining “other” as “the one that remains of two or more”) *Webster’s Ninth New Collegiate Dictionary* 835 (1985) (defining “other” as “being the one (as of two or more) remaining or not included”). Or put another way, “other” signals that the words to which it attaches are of the same kind, type, or class as the more specific item previously listed. Moreover, where statutes couple words or phrases together, it “denotes an intention that they should be understood in the same general sense.” Norman Singer, *2A Sutherland on Statutory Construction* § 47:16 (6th ed. 2000); see also *Beecham v. United States*, 511 U.S. 368, 371 (1994) (“That several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well.”). Thus, the pairing of mind-altering substances with procedures calculated to disrupt profoundly the senses or personality and the use of “other” to modify “procedures” shows that the use of such substances must also cause a profound disruption of the senses or personality.

For drugs or procedures to rise to the level of “disrupt[ing] profoundly the senses or personality,” they must produce an extreme effect. And by requiring that they be “calculated” to produce such an effect, the statute requires that the defendant has consciously designed the acts to produce such an effect. 28 U.S.C. § 2340(2)(B). The word “disrupt” is defined as “to break

asunder; to part forcibly; rend," imbuing the verb with a connotation of violence. *Webster's New International Dictionary* 753 (2d ed. 1935); see *Webster's Third New International Dictionary* 656 (1986) (defining disrupt as "to break apart: Rupture" or "destroy the unity or wholeness of"); IV *The Oxford English Dictionary* 832 (1989) (defining disrupt as "[t]o break or burst asunder; to break in pieces; to separate forcibly"). Moreover, disruption of the senses or personality alone is insufficient to fall within the scope of this subsection; instead, that disruption must be profound. The word "profound" has a number of meanings, all of which convey a significant depth. *Webster's New International Dictionary* 1977 (2d ed. 1935) defines profound as: "Of very great depth; extending far below the surface or top; unfathomable[;] . . . [c]oming from, reaching to, or situated at a depth or more than ordinary depth; not superficial; deep-seated; chiefly with reference to the body; as a *profound* sigh, wound, or pain[;] . . . [c]haracterized by intensity, as of feeling or quality; deeply felt or realized; as, *profound* respect, fear, or melancholy; hence, encompassing; thoroughgoing; complete; as, *profound* sleep, silence, or ignorance." See *Webster's Third New International Dictionary* 1812 (1986) ("having very great depth: extending far below the surface . . . not superficial"). *Random House Webster's Unabridged Dictionary* 1545 (2d ed. 1999) also defines profound as "originating in or penetrating to the depths of one's being" or "pervasive or intense; thorough; complete" or "extending, situated, or originating far down, or far beneath the surface." By requiring that the procedures and the drugs create a *profound* disruption, the statute requires more than that the acts "forcibly separate" or "rend" the senses or personality. Those acts must penetrate to the core of an individual's ability to perceive the world around him, substantially interfering with his cognitive abilities, or fundamentally alter his personality.

The phrase "disrupt profoundly the senses or personality" is not used in mental health literature nor is it derived from elsewhere in U.S. law. Nonetheless, we think the following examples would constitute a profound disruption of the senses or personality. Such an effect might be seen in a drug-induced dementia. In such a state, the individual suffers from significant memory impairment, such as the inability to retain any new information or recall information about things previously of interest to the individual. See DSM-IV at 134.⁴⁹ This impairment is accompanied by one or more of the following: deterioration of language function, e.g., repeating sounds or words over and over again; impaired ability to execute simple motor activities, e.g., inability to dress or wave goodbye; "[in]ability to recognize [and identify] objects such as chairs or pencils" despite normal visual functioning; or "[d]isturbances in executive level functioning," i.e., serious impairment of abstract thinking. *Id.* at 134-35. Similarly, we think that the onset of "brief psychotic disorder" would satisfy this standard. See *id.* at 302-03. In this disorder, the individual suffers psychotic symptoms, including among other things, delusions, hallucinations, or even a catatonic state. This can last for one day or even one month. See *id.* We likewise think that the onset of obsessive-compulsive disorder behaviors would rise to this level. Obsessions are intrusive thoughts unrelated to reality. They are not simple worries, but are

⁴⁹ Published by the American Psychiatric Association, and written as a collaboration of over a thousand psychiatrists, the DSM-IV is commonly used in U.S. courts as a source of information regarding mental health issues and is likely to be used in trial should charges be brought that allege this predicate act. See, e.g., *Atkins v. Virginia*, 122 S. Ct. 2242, 2245 n.3 (2002); *Kansas v. Crane*, 534 U.S. 407, 413-14 (2002); *Kansas v. Hendricks*, 521 U.S. 346, 359-60 (1997); *McClellan v. Merrifield*, No. 00-CV-0120E(SC), 2002 WL 1477607, at *2 n.7 (W.D.N.Y. June 28, 2002); *Peebles v. Coastal Office Prods.*, 203 F. Supp. 2d 432, 439 (D. Md. 2002); *Lassiegné v. Taco Bell Corp.*, 202 F. Supp. 2d 512, 519 (E.D. La. 2002).

repeated doubts or even "aggressive or horrific impulses." *See id.* at 418. The DSM-IV further explains that compulsions include "repetitive behaviors (e.g., hand washing, ordering, checking)" and that "[b]y definition, [they] are either clearly excessive or are not connected in a realistic way with what they are designed to neutralize or prevent." *See id.* Such compulsions or obsessions must be "time-consuming." *See id.* at 419. Moreover, we think that pushing someone to the brink of suicide, particularly where the person comes from a culture with strong taboos against suicide, and it is evidenced by acts of self-mutilation, would be a sufficient disruption of the personality to constitute a "profound disruption." These examples, of course, are in no way intended to be exhaustive list. Instead, they are merely intended to illustrate the sort of mental health effects that we believe would accompany an action severe enough to amount to one that "disrupt[s] profoundly the senses or the personality."

The third predicate act listed in section 2340(2) is threatening a prisoner with "imminent death." 18 U.S.C. § 2340(2)(C). The plain text makes clear that a threat of death alone is insufficient; the threat must indicate that death is "imminent." The "threat of imminent death" is found in the common law as an element of the defense of duress. *See Bailey*, 444 U.S. at 409. "[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them." *Morissette v. United States*, 342 U.S. 246, 263 (1952). Common law cases and legislation generally define imminence as requiring that the threat be almost immediately forthcoming. 1 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 5.7, at 655 (1986). By contrast, threats referring vaguely to things that might happen in the future do not satisfy this immediacy requirement. *See United States v. Fiore*, 178 F.3d 917, 923 (7th Cir. 1999). Such a threat fails to satisfy this requirement not because it is too remote in time but because there is a lack of certainty that it will occur. Indeed, timing is an indicator of certainty that the harm *will* befall the defendant. Thus, a vague threat that someday the prisoner *might* be killed would not suffice. Instead, subjecting a prisoner to mock executions or playing Russian roulette with him would have sufficient immediacy to constitute a threat of imminent death. Additionally, as discussed earlier, we believe that the existence of a threat must be assessed from the perspective of a reasonable person in the same circumstances.

Fourth, if the official threatens to do anything previously described to a third party, or commits such an act against a third party, that threat or action can serve as the necessary predicate for prolonged mental harm. *See* 18 U.S.C. § 2340(2)(D). The statute does not require any relationship between the prisoner and the third party.

d. Summary

Section 2340's definition of torture must be read as a sum of these component parts. *See Argentine Rep. v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-35 (1989) (reading two provisions together to determine statute's meaning); *Bethesda Hosp. Ass'n v. Bowen*, 485 U.S. 399, 405 (1988) (looking to "the language and design of the statute as a whole" to ascertain a statute's meaning). Each component of the definition emphasizes that torture is not the mere

infliction of pain or suffering on another, but is instead a step well removed. The victim must experience intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body function will likely result. If that pain or suffering is psychological, that suffering must result from one of the acts set forth in the statute. In addition, these acts must cause long-term mental harm. Indeed, this view of the criminal act of torture is consistent with the term's common meaning. Torture is generally understood to involve "intense pain" or "excruciating pain," or put another way, "extreme anguish of body or mind." *Black's Law Dictionary* 1498 (7th Ed. 1999); *Random House Webster's Unabridged Dictionary* 1999 (1999); *Webster's New International Dictionary* 2674 (2d ed. 1935). In short, reading the definition of torture as a whole, it is plain that the term encompasses only extreme acts.

e. Legislative History

The legislative history of sections 2340–2340A is scant. Neither the definition of torture nor these sections as a whole sparked any debate. Congress criminalized this conduct to fulfill U.S. obligations under CAT, which requires signatories to "ensure that all acts of torture are offenses under its criminal law." CAT art. 4. Sections 2340–2340A appeared only in the Senate version of the Foreign Affairs Authorization Act, and the conference bill adopted them without amendment. See H. R. Conf. Rep. No. 103-482, at 229 (1994). The only light that the legislative history sheds reinforces what is obvious from the texts of section 2340 and CAT: Congress intended Section 2340's definition of torture to track the definition set forth in CAT, as elucidated by the United States' reservations, understandings, and declarations submitted as part of its ratification. See S. Rep. No. 103-107, at 58 (1993) ("The definition of torture emanates directly from article 1 of the Convention."); *id.* at 58–59 ("The definition for 'severe mental pain and suffering' incorporates the understanding made by the Senate concerning this term.").

f. U.S. Judicial Interpretation

As previously noted, there are no reported cases of prosecutions under section 2340A. See Beth Stephens, *Corporate Liability: Enforcing Human Rights Through Domestic Litigation*, 24 *Hastings Int'l & Comp. L. Rev.* 401, 408 & n.29 (2001); Beth Van Schaack, *In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention*, 42 *Harv. Int'l L.J.* 141, 148–49 (2001); Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 *U. Chi. Legal F.* 323, 327–28. Nonetheless, we are not without guidance as to how United States courts would approach the question of what conduct constitutes torture. Civil suits filed under the Torture Victims Protection Act ("TVPA"), 28 U.S.C. § 1350 note (2000), which supplies a tort remedy for victims of torture, provide insight into what acts U.S. courts would conclude constitute torture under the criminal statute.

The TVPA contains a definition similar in some key respects to the one set forth in section 2340. Moreover, as with section 2340, Congress intended for the TVPA's definition of torture to follow closely the definition found in CAT. See *Xuncax v. Gramajo*, 886 F. Supp. 162,

176 n.12 (D. Mass 1995) (noting that the definition of torture in the TVPA tracks the definitions in section 2340 and CAT).⁵⁰ The TVPA defines torture as:

(1) . . . any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and

(2) mental pain or suffering refers to prolonged mental harm caused by or resulting from—

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) 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;

(C) the threat of imminent death; or

(D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

28 U.S.C. § 1350 note § 3(b). This definition differs from section 2340's definition in two respects. First, the TVPA definition contains an illustrative list of purposes for which such pain may have been inflicted. *See id.* Second, the TVPA includes the phrase "arising only from or inherent in, or incidental to lawful sanctions"; by contrast, section 2340 refers only to pain or suffering "incidental to lawful sanctions." *Id.* Because the purpose of our analysis here is to ascertain acts that would cross the threshold of producing "severe physical or mental pain or suffering," the list of illustrative purposes for which it is inflicted generally would not affect this analysis.⁵¹ Similarly, to the extent that the absence of the phrase "arising only from or inherent in" from section 2340 might affect the question of whether pain or suffering was part of lawful sanctions and thus not torture, the circumstances with which we are concerned here are solely that of interrogations, not the imposition of punishment subsequent to judgment. These

⁵⁰ See also 137 Cong. Rec. 34,785 (1991) (statement of Rep. Mazzoli) ("Torture is defined in accordance with the definition contained in [CAT]"); see also *Torture Victims Protection Act: Hearing and Markup on H.R. 1417 Before the Subcomm. On Human Rights and International Organizations of the House Comm. on Foreign Affairs, 100th Cong. 38 (1988)* (Prepared Statement of the Association of the Bar of the City of New York, Committee on International Human Rights) ("This language essentially tracks the definition of 'torture' adopted in the Torture Convention.").

⁵¹ While this list of purposes is illustrative only, demonstrating that a defendant harbored any of these purposes "may prove valuable in assisting in the establishment of intent at trial." Matthew Lippman, *The Development and Drafting of the United Nations Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment*, 17 B.C. Int'l & Comp. L. Rev. 275, 314 (1994).

differences between the TVPA and section 2340 are therefore not sufficiently significant to undermine the usefulness of TVPA cases here.⁵²

In suits brought under the TVPA, courts have not engaged in any lengthy analysis of what acts constitute torture. In part, the absence of such analysis is due to the nature of the acts alleged. Almost all of the cases involve physical torture, some of which is of an especially cruel and even sadistic nature. Nonetheless, courts appear to look at the entire course of conduct rather than any one act, making it somewhat akin to a totality-of-the-circumstances analysis. Because of this approach, it is difficult to take a specific act out of context and conclude that the act in isolation would constitute torture. Certain acts do, however, consistently reappear in these cases or are of such a barbaric nature, that it is likely a court would find that allegations of such treatment would constitute torture: (1) severe beatings using instruments such as iron barks, truncheons, and clubs; (2) threats of imminent death, such as mock executions; (3) threats of removing extremities; (4) burning, especially burning with cigarettes; (5) electric shocks to genitalia or threats to do so; (6) rape or sexual assault, or injury to an individual's sexual organs, or threatening to do any of these sorts of acts; and (7) forcing the prisoner to watch the torture of others. While we cannot say with certainty that acts falling short of these seven would *not* constitute torture under Section 2340, we believe that interrogation techniques would have to be similar to these acts in their extreme nature and in the type of harm caused to violate the law.

III. International Law

In this Part, we examine CAT. Additionally, we examine the applicability of customary international law to the conduct of interrogations. At the outset, it is important to emphasize that the President can suspend or terminate any treaty or provision of a treaty. *See generally* Memorandum for John Bellinger, III, Senior Associate Counsel to the President and Legal Adviser to the National Security Council, from John C. Yoo, Deputy Assistant Attorney General and Robert J. Delahunty, Special Counsel, Office of Legal Counsel, *Re: Authority of the President to Suspend Certain Provisions of the ABM Treaty* (Nov. 15, 2001); Memorandum for Alberto R. Gonzales, Counsel to the President, from Jay S. Bybee, Assistant Attorney General, *Re: Authority of the President to Denounce the ABM Treaty* (Dec. 14, 2001). Any presidential decision to order interrogation methods that are inconsistent with CAT would amount to a suspension or termination of those treaty provisions. Moreover, as U.S. declarations during CAT's ratification make clear, the Convention is non-self-executing and therefore places no legal obligations under domestic law on the Executive Branch, nor can it create any cause of action in federal court. Letter for Alberto R. Gonzales, Counsel to the President from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, 1 (July 22, 2002). Similarly, customary international law lacks domestic legal effect, and in any event can be overridden by the President at his discretion.

⁵² The TVPA also requires that an individual act "intentionally." As we noted with respect to the text of CAT, this language might be construed as requiring general intent. It is not clear that this is so. We need not resolve that question, however, because we review the TVPA cases solely to address the acts that would satisfy the threshold of inflicting "severe physical or mental pain or suffering."

A. U.N. Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment ("CAT").

The most relevant international convention here is CAT.⁵³ The treaty's text and negotiating history establish that the definition of torture is limited only to the most egregious conduct. Further, because the United States' instrument of ratification defined torture in exactly the same manner as in 18 U.S.C. §§ 2340–2340A, the United States' treaty obligation is no different than the standard set by federal criminal law. With respect to CAT's provision concerning cruel, inhuman, or degrading treatment or punishment, the United States' instrument of ratification defined that term as the cruel, unusual and inhuman treatment prohibited by the Eighth, Fifth, and Fourteenth Amendments. We review the substantive standards established by those Amendments in order to fully identify the scope of the United States' CAT obligations.

1. CAT's Text

We begin our analysis with the treaty's text. *See Eastern Airlines Inc. v. Floyd*, 499 U.S. 530, 534–35 (1991) ("When interpreting a treaty, we begin with the text of the treaty and the context in which the written words are used.") (quotation marks and citations omitted). CAT 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

⁵³ You have also asked whether U.S. interrogation of al Qaeda and Taliban detainees could lead to liability and potential prosecution before the International Criminal Court ("ICC"). The ICC cannot take action against the United States for its conduct of interrogations for two reasons. First, under international law a state cannot be bound by treaties to which it has not consented. Although President Clinton signed the Rome Statute, which establishes the ICC, the United States has withdrawn its signature from that agreement and has not submitted it to the Senate for advice and consent—effectively terminating it. *See* Letter for Kofi Annan, U.N. Secretary General, from John R. Bolton, Under Secretary of State for Arms Control and International Security (May 6, 2002) (notifying the U.N. of U.S. intention not to be a party to the treaty); Rome Statute of the International Criminal Court, 37 I.L.M. 999, U.N. Doc. A/Conf.183/9 (1998). The United States cannot, therefore, be bound by the provisions of the ICC treaty nor can U.S. nationals be subject to ICC prosecution. Second, even if the ICC could in some way act upon the United States and its citizens, interrogation of an al Qaeda or Taliban operative could not constitute a crime under the Rome Statute. The Rome Statute makes torture a crime subject to the ICC's jurisdiction in only two contexts. Under article 7 of the Rome Statute, torture may fall under the ICC's jurisdiction as a crime against humanity if it is committed as "part of a widespread and systematic attack directed against any civilian population." Here, however, the interrogation of al Qaeda or Taliban operatives is part of an international armed conflict against a terrorist organization, not an attack on a civilian population. Indeed, our conflict with al Qaeda does not directly involve any distinct civilian population. Rather, al Qaeda solely constitutes a group of illegal belligerents who are dispersed around the world into cells, rather than being associated with the civilian population of a nation-state. Under article 8 of the Rome Statute, torture can fall within the ICC's jurisdiction as a war crime. To constitute a war crime, torture must be committed against "persons or property protected under the provisions of the relevant Geneva Conventions." Rome Statute, art. 8. As we have explained, neither members of the al Qaeda terrorist network nor Taliban soldiers are entitled to the legal status of prisoners of war under the GPW. *See Treaties and Laws Memorandum* at 8 (Jan. 22, 2002); *see also United States v. Lindh*, 212 F.2d 541, 556–57 (E.D. Va. 2002). Interrogation of al Qaeda or Taliban members, therefore cannot constitute a war crime because article 8 of the Rome Statute applies only to those protected by the Geneva Conventions.

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.

Article 1(1). Unlike section 2340, this definition includes a list of purposes for which pain and suffering cannot be inflicted. The prefatory phrase "such purposes as" makes clear that this list is illustrative rather than exhaustive. Severe pain or suffering need not be inflicted for those specific purposes to constitute torture. Instead, the perpetrator must simply have a purpose of the same kind. More importantly, as under section 2340, the pain and suffering must be severe to reach the threshold of torture. As with section 2340, the text of CAT makes clear that torture must be an extreme act.

CAT also distinguishes between torture and other acts of cruel, inhuman, or degrading treatment or punishment.⁵⁴ Article 16 of CAT requires state parties to "undertake to prevent . . . other acts of cruel, inhuman or degrading treatment or punishment *which do not amount to torture* as defined in article 1." (Emphasis added). CAT thus establishes a category of acts that states should endeavor to prevent but need not criminalize. CAT reserves for torture alone the criminal penalties and the stigma attached to those penalties. In so doing, CAT makes clear that torture is at the farthest end of impermissible actions, and that it is distinct and separate from the lower level of "cruel, inhuman, or degrading treatment or punishment." This approach is in keeping with the earlier, but non-binding, U.N. Declaration on the Protection from Torture, which defines torture as "an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment." Declaration on Protection from Torture, UN Res. 3452, Art. 1(2) (Dec. 9, 1975).

2. Ratification History

Executive branch interpretation of CAT further supports our conclusion that the treaty prohibits only the most extreme forms of physical or mental harm. As we have previously noted, the "division of treaty-making responsibility between the Senate and the President is essentially the reverse of the division of law-making authority, with the President being the draftsman of the treaty and the Senate holding the authority to grant or deny approval." *Relevance of Senate Ratification History to Treaty Interpretation*, 11 Op. O.L.C. 28, 31 (1987) ("*Sofaer*

⁵⁴ Common article 3 of GPW contains somewhat similar language. Article 3(1)(a) prohibits "violence to life and person, in particular murder of all kinds, mutilation, *cruel treatment and torture*." (Emphasis added). Article 3(1)(c) additionally prohibits "outrages upon personal dignity, in particular, humiliating and degrading treatment." Subsection (c) must forbid more conduct than that already covered in subsection (a) otherwise subsection (c) would be superfluous. Common article 3 does not, however, define either of the phrases "outrages upon personal dignity" or "humiliating and degrading treatment." International criminal tribunals, such as those respecting Rwanda and former Yugoslavia have used common article 3 to try individuals for committing inhuman acts lacking any military necessity whatsoever. These tribunals, however, have not yet articulated the full scope of conduct prohibited by common article 3. Memorandum for John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, from James C. Ho, Attorney-Advisor, Office of Legal Counsel, *Re: Possible Interpretations of Common Article 3 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War* (Feb. 1, 2002). We note that section 2340A and CAT protect any individual from torture. By contrast, the standards of conduct established by common article 3 do not apply to "an armed conflict between a nation-state and a transnational terrorist organization." *Treaties and Laws Memorandum* at 8.

Memorandum”). In his capacity as the “sole organ of the federal government in the field of international relations,” *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936), the President alone decides whether to initiate treaty discussions and he alone controls the course and substance of negotiations. The President conducts the day-to-day interpretation of a treaty and may terminate a treaty unilaterally. See *Goldwater v. Carter*, 617 F.2d 697, 707-08 (D.C. Cir.) (en banc), *vacated and remanded with instructions to dismiss on other grounds*, 444 U.S. 996 (1979). Courts accord the Executive Branch’s interpretation the greatest weight in ascertaining a treaty’s intent and meaning. See, e.g., *United States v. Stuart*, 489 U.S. 353, 369 (1989) (“the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight”) (quoting *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982)); *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961) (“While courts interpret treaties for themselves, the meaning given them by the department of government particularly charged with their negotiation and enforcement is given great weight.”); *Charlton v. Kelly*, 229 U.S. 447, 468 (1913) (“A construction of a treaty by the political departments of the government, while not conclusive upon a court . . . , is nevertheless of much weight.”).

A review of the Executive branch’s interpretation and understanding of CAT reveals that the United States understood that torture included only the most extreme forms of physical or mental harm. When it submitted the Convention to the Senate, the Reagan administration took the position that CAT reached only the most heinous acts. The Reagan administration included the following understanding:

The United States understands that, in order to constitute torture, an act must be a deliberate and calculated act of an extremely cruel and inhuman nature, specifically intended to inflict excruciating and agonizing physical or mental pain or suffering.

S. Treaty Doc. No. 100-20, at 4-5. Focusing on the treaty’s requirement of “severity,” the Reagan administration concluded, “[t]he extreme nature of torture is further emphasized in [this] requirement.” S. Treaty Doc. No. 100-20, at 3 (1988); S. Exec. Rep. No. 101-30, at 13 (1990). The Reagan administration determined that CAT’s definition of torture was consistent with “United States and international usage, [where it] is usually reserved for extreme deliberate and unusually cruel practices, for example, sustained systematic beatings, application of electric currents to sensitive parts of the body and tying up or hanging in positions that cause extreme pain.” S. Exec. Rep. No. 101-30, at 14 (1990).

Further, the Reagan administration clarified the distinction between torture and lesser forms of cruel, inhuman, or degrading treatment or punishment. In particular, the administration declared that article 1’s definition of torture ought to be construed in light of article 16. See S. Treaty Doc. No. 100-20, at 3. “‘Torture’ is thus to be distinguished from lesser forms of cruel, inhuman, or degrading treatment or punishment, which are to be deplored and prevented, but are not so universally and categorically condemned as to warrant the severe legal consequences that the Convention provides in case of torture.” *Id.* at 3. This distinction was “adopted in order to emphasize that torture is at the extreme end of cruel, inhuman and degrading treatment or

punishment." *Id.* at 3. Given this definition, "rough treatment as generally falls into the category of 'police brutality,' while deplorable, does not amount to 'torture.'" *Id.* at 4.

Although the Reagan administration relied on CAT's distinction between torture and "cruel, inhuman, or degrading treatment or punishment," it viewed the phrase "cruel, inhuman, or degrading treatment or punishment" as vague and lacking in a universally accepted meaning. The vagueness of this phrase could even be construed to bar acts not prohibited by the U.S. Constitution. The Administration pointed to *Case of X v. Federal Republic of Germany* as the basis for this concern. In that case, the European Court of Human Rights determined that the prison officials' refusal to recognize a prisoner's sex change might constitute degrading treatment. See S. Treaty Doc. No. 100-20, at 15 (citing European Commission on Human Rights, *Dec. on Adm.*, Dec. 15, 1977, *Case of X v. Federal Republic of Germany* (No. 6694/74), 11 Dec. & Rep. 16)). As a result of this concern, the Administration added the following understanding to its proposed instrument of ratification:

The United States understands the term, 'cruel, inhuman or degrading treatment or punishment,' as used in Article 16 of the Convention, to mean the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States."

S. Treaty Doc. No. 100-20, at 15-16. Under this understanding, treatment or punishment must rise to the level of action that U.S. courts have found to be in violation of the U.S. Constitution in order to constitute cruel, inhuman, or degrading treatment or punishment. That which fails to rise to this level must fail, *a fortiori*, to constitute torture under section 2340 or CAT.

The Senate consented to the Convention during the first Bush administration. The Bush administration agreed with the Reagan administration's cruel, inhuman, and degrading treatment or punishment understanding and upgraded it from an understanding to a reservation. The Senate consented to the reservation in consenting to CAT. Although using less vigorous rhetoric, the Bush administration joined the Reagan administration in interpreting torture as reaching only extreme acts. To ensure that the Convention's reach remained limited, the Bush administration submitted the following understanding:

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

S. Exec. Rep. No. 101-30, at 36. This understanding accomplished two things. First, it ensured that the term "intentionally" would be understood as requiring specific intent. Second, it defined the amorphous concept of *mental* pain or suffering. In so doing, this understanding ensured that mental torture would rise to a severity seen in the context of physical torture. The Senate ratified CAT with this understanding, and Congress codified it in 18 U.S.C. § 2340.

To be sure, the Bush administration's language differs from the Reagan administration understanding. The Bush administration said that it had altered the CAT understanding in response to criticism that the Reagan administration's original formulation had raised the bar for the level of pain necessary to constitute torture. See *Convention Against Torture: Hearing Before the Senate Comm. on Foreign Relations*, 101st Cong. 9-10 (1990) ("1990 Hearing") (prepared statement of Hon. Abraham D. Sofaer, Legal Adviser, Department of State). While it is true that there are rhetorical differences, both administrations consistently emphasized the extreme acts required to constitute torture. As we have seen, the Bush understanding as codified in section 2340 reaches only extreme acts. The Reagan understanding, like the Bush understanding, declared that "intentionally" would be understood to require specific intent. Though the Reagan administration required that the "act be deliberate and calculated" and that it be inflicted with specific intent, in operation there is little difference between requiring specific intent alone and requiring that the act be deliberate and calculated. The Reagan administration's understanding also made express what is obvious from the plain text of CAT: torture is an extreme form of cruel and inhuman treatment. The Reagan administration's understanding that the pain be "excruciating and agonizing" does not substantively deviate from the Bush administration's view.

The Bush understanding simply took an amorphous concept—excruciating and agonizing mental pain—and gave it a more concrete form. Executive branch representations made to the Senate support our view that there was little difference between these two understandings. See *1990 Hearing*, at 10 (prepared statement of Hon. Abraham D. Sofaer, Legal Adviser, Department of State) ("no higher standard was intended" by the Reagan administration understanding than was present in the Convention or the Bush understanding); *id.* at 13-14 (statement of Mark Richard, Deputy Assistant Attorney General, Criminal Division, Department of Justice) ("In an effort to overcome this unacceptable element of vagueness [in the term "mental pain"], we have proposed an understanding which defines severe mental pain constituting torture with sufficient specificity . . . to protect innocent persons and meet constitutional due process requirements.") Accordingly, we believe that the two definitions submitted by the Reagan and Bush administrations had the same purpose in terms of articulating a legal standard, namely, ensuring that the prohibition against torture reaches only the most extreme acts.

Executive branch representations made to the Senate confirm that the Bush administration maintained the view that torture encompassed only the most extreme acts. Although the ratification record, such as committee hearings, floor statements, and testimony, is generally not accorded great weight in interpreting treaties, authoritative statements made by representatives of the Executive Branch are accorded the most interpretive value. See *Sofaer Memorandum* at 35-36. Hence, the testimony of the executive branch witnesses defining torture, in addition to the reservations, understandings and declarations that were submitted to the Senate by the Executive branch, should carry the highest interpretive value of any of the statements in

the ratification record. At the Senate hearing on CAT, Mark Richard, Deputy Assistant Attorney General, Criminal Division, Department of Justice, offered extensive testimony as to the meaning of torture. Echoing the analysis submitted by the Reagan administration, he testified that “[t]orture is understood to be that barbaric cruelty which lies at the top of the pyramid of human rights misconduct.” *1990 Hearing* at 16 (prepared statement of Mark Richard). He further explained, “As applied to physical torture, there appears to be some degree of consensus that the concept involves conduct, the mere mention of which sends chills down one’s spine[.]” *Id.* Richard gave the following examples of conduct satisfying this standard: “the needle under the fingernail, the application of electrical shock to the genital area, the piercing of eyeballs, etc.” *Id.* In short, repeating virtually verbatim the terms used in the Reagan understanding, Richard explained that under the Bush administration’s submissions with the treaty “the essence of torture” is treatment that inflicts “excruciating and agonizing physical pain.” *Id.* (emphasis added).

As to mental torture, Richard testified that “no international consensus had emerged [as to] what degree of mental suffering is required to constitute torture[.]” but that it was nonetheless clear that severe mental pain or suffering “does not encompass the normal legal compulsions which are properly a part of the criminal justice system[:] interrogation, incarceration, prosecution, compelled testimony against a friend, etc,—notwithstanding the fact that they may have the incidental effect of producing mental strain.” *Id.* at 17. According to Richard, CAT was intended to “condemn as torture intentional acts such as those designed to damage and destroy the human personality.” *Id.* at 14. This description of mental suffering emphasizes the requirement that any mental harm be of significant duration and supports our conclusion that mind-altering substances must have a profoundly disruptive effect to serve as a predicate act.

Apart from statements from Executive branch officials, the rest of a ratification record is of little weight in interpreting a treaty. *See generally Sofaer Memorandum.* Nonetheless, the Senate understanding of the definition of torture largely echoes the administrations’ views. The Senate Foreign Relations Committee Report on CAT opined: “[f]or an act to be ‘torture’ it must be an *extreme* form of cruel and inhuman treatment, cause *severe* pain and suffering and be *intended to cause severe* pain and suffering.” S. Exec. Rep. No. 101-30, at 6 (emphasis added). Moreover, like both the Reagan and Bush administrations, the Senate drew upon the distinction between torture and cruel, inhuman or degrading treatment or punishment in reaching its view that torture was extreme.⁵⁵ Finally, concurring with the administration’s concern that “cruel, inhuman, or degrading treatment or punishment” could be construed to go beyond constitutional standards, the Senate supported the inclusion of the reservation establishing the Constitution as the baseline for determining whether conduct amounted to cruel, inhuman, degrading treatment or punishment. *See* 136 Cong. Rec. 36,192 (1990); S. Exec. Rep. No. 101-30, at 39.

⁵⁵ Hearing testimony, though the least weighty evidence of meaning of all of the ratification record, is not to the contrary. Other examples of torture mentioned in testimony similarly reflect acts resulting in intense pain: the “gouging out of childrens’ [sic] eyes, the torture death by molten rubber, the use of electric shocks,” cigarette burns, hanging by hands or feet. *1990 Hearing* at 45 (Statement of Winston Nagan, Chairman, Board of Directors, Amnesty International USA); *id.* at 79 (Statement of David Weissbrodt, Professor of Law, University of Minnesota, on behalf of the Center for Victims of Torture, the Minnesota Lawyers International Human-Rights Committee).

3. Negotiating History

CAT's negotiating history also supports interpreting torture to include only the extreme acts defined in section 2340. The state parties endeavored to craft a definition that reflected the term's gravity. During the negotiations, state parties offered various formulations to the working group, which then proposed a definition. Almost all of these suggested definitions illustrate the consensus that torture is an extreme act designed to cause agonizing pain. For example, the United States proposed that torture be defined as "includ[ing] any act by which extremely severe pain or suffering . . . is deliberately and maliciously inflicted on a person." J. Herman Burgers & Hans Danelius, *The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment* 41 (1988) ("*CAT Handbook*"). The United Kingdom suggested that torture be defined even more narrowly as the "systematic and intentional infliction of extreme pain or suffering rather than intentional infliction of severe pain or suffering." *Id.* at 45 (emphasis in original). Ultimately, in choosing the phrase "severe pain," the parties concluded that this phrase "sufficient[ly] . . . convey[ed] the idea that only acts of a certain gravity shall . . . constitute torture." *Id.* at 117.

State parties were acutely aware of the distinction they drew between torture and cruel, inhuman, or degrading treatment or punishment. The state parties considered and rejected a proposal that would have defined torture merely as cruel, inhuman or degrading treatment or punishment. *See id.* at 42. Mirroring the U.N. Declaration on Protection From Torture, some state parties proposed the inclusion of a paragraph defining torture as "an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment." *See id.* at 41; *see also* S. Treaty Doc. No. 100-20, at 2 (the U.N. Declaration on Protection from Torture (1975) served as "a point of departure for the drafting of [CAT]"). In the end, the parties concluded that the proposal was superfluous because Article 16 "impl[ies] that torture is the gravest form of such treatment or punishment." *CAT Handbook* at 80; *see* S. Exec. Rep. No. 101-30, at 13 ("The negotiating history indicates that [the phrase 'which do not amount to torture'] was adopted in order to emphasize that torture is at the extreme end of cruel, inhuman and degrading treatment or punishment and that Article 1 should be construed with this in mind.").

Additionally, the parties could not reach a consensus about the meaning of "cruel, inhuman, or degrading treatment or punishment." *See CAT Handbook* at 47. Without a consensus, the parties viewed the term as simply "too vague to be included in a convention which was to form the basis for criminal legislation in the Contracting States." *Id.* This view reaffirms the interpretation of CAT as purposely reserving criminal penalties for torture alone.⁵⁶

⁵⁶ CAT's negotiating history offers more than just support for the view that pain or suffering must be extreme to amount to torture. First, the negotiating history suggests that the harm sustained from the acts of torture need not be permanent. In fact, "the United States considered that it might be useful to develop the negotiating history which indicates that although conduct resulting in permanent impairment of physical or mental faculties is indicative of torture, it is not an essential element of the offence." *CAT Handbook* at 44. Second, the state parties to CAT rejected a proposal to include in CAT's definition of torture the use of truth drugs, where no physical harm or mental suffering was apparent. This rejection at least suggests that such drugs were not viewed as amounting to torture per se. *See id.* at 42.

4. U.S. Obligations Under CAT

a. Torture

Despite the apparent differences in language between the Convention and 18 U.S.C. § 2340, the U.S. obligations under both are identical. As discussed above, the first Bush administration proposed an understanding of torture that is identical to the definition of that term found in section 2340. S. Exec. Rep. No. 101-30, at 36. The Senate approved CAT based on this understanding, and the United States included the understanding in its instrument of ratification.⁵⁷ As we explained above, the understanding codified at section 2340 accomplished two things. First, it made crystal clear that torture requires specific intent. Second, it added form and substance to the otherwise amorphous concept of *mental* pain or suffering. Because the understanding was included in the instrument of ratification, it defines the United States' obligation under CAT.

It is one of the basic principles of international law that a nation cannot be bound to a treaty without its consent. See Advisory Opinion on Reservations to the Convention on Genocide, 1951 I.C.J. 15, 21 (May 28, 1951) ("Genocide Convention Advisory Opinion"). See also 1 *Restatement (Third) of the Foreign Relations Law of the United States* pt. I, introductory note at 18 (1987) ("*Restatement (Third)*") ("Modern international law is rooted in acceptance by states which constitute the system."); Anthony Aust, *Modern Treaty Law and Practice* 75 (2000) (a state can only be bound by a treaty to which it has consented to be bound). In other words, the United States is only bound by those obligations of the Torture Convention to which it knowingly agreed. The United States cannot be governed either by provisions of the Convention from which it withheld its consent, or by interpretations of the Convention with which it disagreed, just as it could not be governed by the Convention itself if it had refused to sign it.

This does not mean that in signing the Torture Convention, the United States bound itself to every single provision. Rather, under international law, a reservation made when ratifying a treaty validly alters or modifies the treaty obligation. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (entered into force Jan. 27, 1980); *Restatement (Third)* at § 313.⁵⁸ The right to enter reservations applies to multilateral agreements just as to the

⁵⁷ See http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/iv_boo/iv_9.html.

⁵⁸ A reservation is generally understood to be a unilateral statement that modifies a state party's obligations under a treaty. The ratifying party deposits this statement with its instrument of ratification. See, e.g., Memorandum for the Attorney General, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Genocide Convention* at 1 n.1 (Jan. 20, 1984). By contrast, an understanding is defined as a statement that merely clarifies or interprets a State party's legal obligations under the treaty. Such a statement does not alter the party's obligations as a matter of international law. How a party characterizes a statement it deposits at ratification is not, however, dispositive of whether it is reservation or understanding. See Letter for Hon. Frank Church, Chairman, Ad Hoc Subcommittee on the Genocide Convention, Committee on Foreign Relations, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel at 2-3 (May 8, 1970). Instead, whether a statement is a reservation or understanding depends on the statement's substance. See Memorandum for the Attorney General, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Genocide Convention*, at 2 n.4 (June 1, 1982). Here, although under domestic law, the Bush administration's definition of torture was categorized as an "understanding," it was deposited with the instrument of ratification as a condition of the United States' ratification, and so under international law we consider it to be a reservation if it indeed modifies CAT's standard. See *Restatement (Third)*, at § 313 cmt. g. Under either characterization, the section 2340 standard governs.

more familiar context of bilateral agreements. *Restatement (Third)* at § 313. Under international law, therefore, the United States is bound only by the text of CAT as modified by the Bush administration's understanding.⁵⁹ As is obvious from its text, and as discussed at length above, Congress codified the understanding almost verbatim when it enacted section 2340. The United States' obligation under CAT is thus identical to the standard set by section 2340. Conduct that does not violate the latter does not violate the former. So long as the interrogation methods do not violate section 2340, they also do not violate our international obligations under CAT.

To be sure, the Vienna Convention on Treaties recognizes several exceptions to the power to make reservations. None of them, however, apply here. First, a reservation is valid and effective unless it purports to defeat the "object and purpose" of the treaty. Vienna Convention, art. 19.⁶⁰ International law provides little guidance regarding the meaning of the "object and purpose" test. See Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. Penn. L. Rev. 399, 432-33 (2000) (explaining that "[n]either the Vienna Convention nor the [Genocide Convention Advisory Opinion] provides much guidance regarding the 'object and purpose' test" and that "there has been no subsequent judicial analysis of the test under either the Vienna Convention or customary international law, and no binding official determination that a reservation has ever violated the test."). Nonetheless, it is clear that here the United States did not defeat the object and purpose of the Convention. In fact, it enacted section 2340 to expand the prohibition on torture in its domestic criminal law. The United States could only have defeated the object and purpose of the Convention if it had *narrowed* the existing prohibitions on torture under its domestic law. Rather than defeat the object of CAT, the United States accepted its terms and attempted, through the Bush administration's understanding, to make clear the scope and meaning of the treaty's obligations.

Second, a treaty reservation will not be valid if the treaty itself prohibits states from taking reservations. CAT nowhere prohibits state parties from entering reservations. Two provisions of the Convention—the competence of the Committee Against Torture in Article 28, and the mandatory jurisdiction of the International Court of Justice in Article 30—specifically note that nations may take reservations from their terms. The Convention, however, contains no provision that explicitly attempts to preclude states from exercising their basic right under international law to enter reservations to other provisions. Other treaties are quite clear when they attempt to prohibit any reservations. Without such a provision, we do not believe that CAT precludes reservations.

⁵⁹ Further, if we are correct in our suggestion that CAT itself creates a heightened intent standard, then the understanding the Bush Administration attached is less a modification of the Convention's obligations and more of an explanation of how the United States would implement its somewhat ambiguous terms.

⁶⁰ The United States is not a party to the Vienna Convention on Treaties. Nonetheless, as we have previously explained, "some lower courts have said that the Convention embodies the customary international law of treaties," and the State Department has at various times taken the same view. See Letter for John Bellinger, III, Senior Associate Counsel to the President and Legal Advisor to the National Security Council, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, at 1 (Nov. 15, 2001). See also Memorandum for John H. Shenefield, Associate Attorney General, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, *Re: The Application of Sections 212(a)(27) and 212(a)(29) of the Immigration and Nationality Act of 1952 to Persons Within the Scope of the United Nations Headquarters Agreement and the Convention on the Privileges and Immunities of the United Nations* 22 (Oct. 20, 1980) (noting that the Vienna Convention is "generally accepted as the universal guide for the interpretation of treaties").

Third, in regard to multilateral agreements, a treaty reservation may not be valid if other parties object in a timely manner. Vienna Convention, art. 20. If another state does not object within a certain period of time, it is deemed to have acquiesced in the reservation. If another nation objects, then the provision of the treaty to which the reservation applies is not in force between the two nations, unless the objecting nation opposes entry into force of the treaty as whole between the two nations. *Id.* art. 21(3). *See also* Genocide Convention Advisory Opinion, 1951 I.C.J. 15, 26 (May 28, 1951) (an objection “will only affect the relationship between the State making the reservation and the objecting State”). Here, no nation objected to the United States’ further definition of torture.⁶¹ Even if any nation had properly objected, that would mean only that there would be no provision prohibiting torture in effect between the United States and the objecting nation—effectively mooting the question whether an interrogation method violates the Torture Convention.

We conclude that the Bush administration’s understanding created a valid and effective reservation to CAT. Even if it were otherwise, there is no international court that could take issue with the United States’ interpretation of the Convention. In an additional reservation, the United States refused to accept the jurisdiction of the ICJ to adjudicate cases under the Convention. Although CAT creates a committee to monitor compliance, it can only conduct studies and has no enforcement powers.

Some may argue that permitting the assertion of justification defenses under domestic law, such as necessity or self-defense, would place the United States in violation of its international obligations. Such an argument would point to article 2(2) of CAT, which 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.” We do not believe, however, that a treaty may eliminate the United States’ right, under international law, to use necessary measures for its self-defense. The right of national self-defense is well established under international law. As we have explained elsewhere, it is a right that is inherent in international law and in the international system. *See* Memorandum for Alberto R. Gonzales, Counsel to the President, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Authority of the President under Domestic and International Law to Use Force Against Iraq* at 30 (Oct. 23, 2002) (“*Iraq Memorandum*”). And, as we explained above, Article 51 of the U.N. Charter recognizes and reaffirms this inherent right:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security.

⁶¹ Three nations commented. Finland and Sweden asserted that the understanding did not alter U.S. obligations under CAT. While the Netherlands noted that the understanding “appear[ed] to narrow” article 1’s definition of torture, it too asserted that this understanding did not alter U.S. obligations under CAT. Comments such as these have no effect under international law. Moreover, even if these comments could be termed objections, they were in fact untimely and thus are invalid. An objection to a reservation must be raised within twelve months of the notification of the reservation or by the date on which the objecting party consented to be bound, whichever is later. *See Restatement (Third)*, at § 313 cmt. e. None of these countries entered their comments within that time frame.

U.N. Charter art. 51; *see also* North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246 (agreeing that if an armed attack occurs against one of the parties, the others will exercise the right of individual or collective self-defense recognized by article 51); Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, art. 3, 62 Stat. 1681, 1700, 21 U.N.T.S. 77, 93 (Rio Treaty) (same).

Although recognized by these agreements, the United States has long held the view that the right to self-defense is broader in scope, and could not be limited by these treaty provisions. Our Office has observed, for example, that Article 51 merely reaffirms a right that already existed independent of the Charter. As this Office explained forty years ago:

The concept of self-defense in international law of course justifies more than activity designed merely to resist an armed attack which is already in progress. Under international law every state has, in the words of Elihu Root, "the right . . . to protect itself by preventing a condition of affairs in which it will be too late to protect itself."

Memorandum for the Attorney General, from Norbert A. Schlei, Assistant Attorney General, Office of Legal Counsel, *Re: Legality under International Law of Remedial Action Against Use of Cuba as a Missile Base by the Soviet Union* at 2 (Aug. 30, 1962); *cf. Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 29 (1827) ("the [domestic] power to provide for repelling invasions includes the power to provide against the attempt and danger of invasion"). We have opined that "it is likely that under international law no treaty could prevent a nation from taking steps to defend itself." *High Seas Memorandum* at 10. As Secretary of State Frank Kellogg explained, "The right of self-defense . . . is inherent in every sovereign state and implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self-defense." *Id.* (internal quotation marks and citation omitted). Indeed, the United States has consistently defended the doctrine of anticipatory self-defense, even though the text of Article 51 of the United Nations Charter itself seems to permit the use of force only after an armed attack has occurred. We believe that Article 51 is only expressive of one element of the broader right to self-defense, and that it could not derogate from a nation's right to use force to prevent an imminent attack.

Thus, if interrogation methods were inconsistent with the United States' obligations under CAT, but were justified by necessity or self-defense, we would view these actions still as consistent ultimately with international law. Although these actions might violate CAT, they would still be in service of the more fundamental principle of self-defense that cannot be extinguished by CAT or any other treaty. Further, if the President ordered that conduct, such an order would amount to a suspension or termination of the Convention. In so doing, the President's order and the resulting conduct would not be a violation of international law because the United States would no longer be bound by the treaty.

The right to self-defense, of course, cannot be invoked in any and all circumstances. As this Office has recently explained, the use of force must meet two requirements to be legitimate.

See *Iraq Memorandum* at 33. First, “the use of force must be necessary because the threat is imminent and thus pursuing peaceful alternatives is not an option.” *Id.* “Second, the response must be proportionate to the threat[.]” *Id.* We further explained that to determine whether a threat is sufficiently imminent to make the use of force necessary, “[f]actors to be considered include: the probability of an attack; the likelihood that this probability will increase, and therefore the need to take advantage of a window of opportunity; whether diplomatic alternatives are practical; and the magnitude of the harm that could result from the threat.” *Id.* at 44.

b. **Cruel, Inhuman, or Degrading Treatment or Punishment**

CAT provides that “[e]ach 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.” Art. 16.⁶² CAT does not require state parties to criminalize such conduct, nor does CAT (in contrast to the prohibition against torture) preclude its justification by exigent circumstances. Thus, the United States is within its international law obligations even if it uses interrogation methods that might constitute cruel, inhuman, or degrading treatment or punishment, so long as their use is justified by self-defense or necessity.

In its instrument of ratification to the Torture Convention, the United States expressly defined the term “cruel, inhuman, or degrading treatment or punishment” for purposes of Article 16 of the Convention. The reservation limited “cruel and unusual or inhumane treatment or punishment” to the conduct prohibited under the Fifth, Fourteenth and Eighth Amendments. This reservation cannot be said to defeat CAT’s object and purpose. As with the U.S. definition of torture, it does not expand the right to engage in cruel, inhuman, or degrading treatment. Rather, the reservation merely reaffirmed the United States’ consistent interpretation of this ambiguous term.⁶³ While several countries commented on this reservation, those objections, if valid, mean simply that Article 16 is not in force between the United States and the objecting states.⁶⁴ As to the remaining countries, this reservation is a binding obligation.

The U.S. reservation is important in light of the lack of international consensus regarding the meaning of cruel, inhuman or degrading treatment. See, e.g., *Forti v. Suarez-Mason*, 694 F.

⁶² Article 16, like the other first 15 articles in the treaty, is non-self executing. The United States took a reservation to this section, as with the other first fifteen articles, that this section was non-self executing. As explained in text, therefore they not only “are not federal law cognizable in federal court, they also place no obligations on the Executive Branch.” Letter for Alberto R. Gonzales, Counsel to the President, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, at 1 (July 22, 2002). See also *Buell v. Mitchell*, 274 F.3d 337, 372 (6th Cir. 2001) (“Courts in the United States are bound to give effect to international law and to international agreements, except that a non-self-executing agreement will not be given effect as law in the absence of necessary authority.”) (internal quotation marks and citation omitted).

⁶³ The United States took the same reservation with respect to a provision in the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, that prohibited cruel, inhuman, or degrading treatment or punishment.

⁶⁴ Three countries objected to this reservation. Finland and the Netherlands objected to this reservation on the ground that it was incompatible with the object and purpose of the treaty. Additionally, these two countries, along with Sweden objected to this reservation because of its reference to national law, which these countries found to fail to clearly define U.S. treaty obligations. A fourth country, Germany, merely commented that this reservation did not touch upon the obligations of the United States of America as State Party to the Convention.” These objections and comments, as noted earlier, were untimely and thus invalid.