

AFFIDAVIT OF INTERNATIONAL LAW SCHOLARS

The following affidavit was submitted in Ortiz v. Gramajo, Civil Action No. 91-11612 WD (D. Mass., June 15, 1992), consolidated for decision sub nom. Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass. 1995). Section I, with descriptions the qualifications of each of the scholars, is omitted.

II. UNIVERSAL AND OBLIGATORY CUSTOMARY INTERNATIONAL NORM AGAINST TORTURE

A. The norm against torture is universally recognized under international law.

The international law prohibition against torture is universal because numerous international instruments prohibit torture,¹ the constitutions of over fifty-five nations prohibit torture either explicitly or implicitly,² no nation today asserts a right to torture its own or another nation's citizens,³ and all branches of the United States Government recognize and respect the international

¹See, e.g., Universal Declaration of Human Rights, art. 5, adopted Dec. 10, 1948, G.A. Res. 217A, U.N. Doc. A/811 at 71 (1948); International Covenant on Civil and Political Rights, art. 7, adopted Dec. 16, 1966, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); American Convention on Human Rights, art. 5(2), opened for signature Nov. 22, 1969, O.A.S.T.S. No. 36 at 1, O.A.S. Doc. OEA/Ser. L/V/II.50, doc. 6 at 27 (1980), reprinted in 9 I.L.M. 673 (1970) (entered into force July 18, 1978); European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, opened for signature Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953); African Charter on Human and Peoples' Rights, art. 5, adopted June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 Rev. 5 (entered into force Oct. 21, 1986), reprinted in 21 I.L.M. 58 (1982); Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2, adopted Dec. 9, 1975, G.A. Res. 3452, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/1034 (1975); and Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2, adopted Dec. 10, 1984, G.A. Res. 46, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984) (entered into force June 26, 1987).

²Filartiga v. Pena-Irala, 630 F.2d 876, 884 (2d Cir. 1980).

³That the prohibition against torture is sometimes honored in the breach does not diminish its binding status as a norm of international law. J. Brierly, The Outlook for International Law 4-5 (1944) ("States often violate international law, just as individuals violate municipal law; but no more than individuals do States defend their violations by claiming that they are above the law.").

law norm prohibiting torture.⁴

B. The prohibition against torture is obligatory under international law.

The prohibition against torture is non-derogable and therefore obligatory under international law. See, e.g., International Covenant on Civil and Political Rights, art. 4, adopted Dec. 16, 1966, G.A. Res. 2200, 21 U.N. GAOR Supp. (No.16) at 52, U.N. Doc. A/6316 (1966) (entered into force Mar. 23, 1976) (derogation from right to be free of torture not permitted even in time of public emergency); 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 297, U.N. Doc. A/43/49 (1988) ("No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.").

C. The prohibition against torture is definable.

1. An act constitutes torture if it (1) inflicts severe pain and suffering, either physical or mental; (2) is inflicted by or at the instigation of a public official, and (3) is inflicted for a purpose such as obtaining information or a confession from the victim, punishing the victim, or intimidating the victim or a third person. See Convention Against Torture and Other Cruel, Inhuman or

⁴Recently, on October 27, 1990, the United States Senate gave its advice and consent to ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The State Department's Legal Adviser has stated that one "essential purpose" of the Convention is "to codify international law regarding the crime of torture." Convention Against Torture: Hearing Before the Committee on Foreign Relations, United States Senate, 101st Cong., 2d Sess. 4 (1990) (statement of Abraham Sofaer). Accord Restatement (Third) of Foreign Relations Law § 702 comment (a) (generally agreed that torture violates customary international law). The federal courts have consistently held that torture is one of the torts in violation of the law of nations over which federal district courts have jurisdiction. See Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980)(torture, summary execution); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1541 (N.D. Cal. 1987) (torture), on reconsideration, 694 F.Supp. 707 (N.D. Cal. 1988) (summary execution, disappearance). Cf. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984), cert. denied, 470 U.S. 1003 (1985) (Edwards J., concurring).

Degrading Treatment or Punishment, art. 1, adopted Dec. 10, 1984, G.A. Res. 46, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984) (entered into force June 26, 1987); Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, adopted Dec. 9, 1975, G.A. Res. 3452, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/1034 (1975).

2. The Torture Convention provides criteria by which to determine whether a particular act constitutes torture. A consensus has developed among international law publicists that the following acts constitute torture, though the list is by no means exhaustive:

- a) Rape,⁵ sexual abuse⁶ and other forms of gender-based violence.⁷
- b) Sustained, systematic beating. Beating will particularly constitute torture if it is

⁵See e.g. U.S. Department of State, Country Report on Human Rights Practices for 1991 (1992) (characterizing rape by government agents as a form of torture); International Human Rights Abuses Against Women: Hearings Before the Subcomm. on Human Rights and International Organizations of the House Comm. on Foreign Affairs, 101st Cong., 2d Sess. 142 (1990) (testimony of Paula Dobriansky, Deputy Assistant Secretary, Bilateral and Multilateral Affairs, Bureau of Human Rights and Humanitarian Affairs) (rape in detention is form of torture).

⁶Cable from Secretary of State to All Diplomatic and Consular Posts Re: Instructions for 1991 Country Reports on Human Rights Practices, P 211857Z (August 1991) (rape and other sexual abuse during arrest and detention or as a result of operations by government or opposition forces in the field constitutes torture and other cruel, inhuman, or degrading treatment or punishment); Statement of the United Nations Special Rapporteur on Torture to the UN Commission on Human Rights, E/CN.4/1992/SR.21 (Summary Record for the 21st meeting, February-March 1992) (rape or other forms of sexual assault in detention constitute torture).

⁷U.N. Committee on the Elimination of Discrimination Against Women, Adoption of Report, 11th Sess., General Recommendation No. 19, at 2, U.N. Doc. CEDAW/C/1992/L.1/Add.15 (1992) (gender-based violence violates the right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment). See also U.N. Economic and Social Council Commission on the Status of Women, Physical Violence Against Detained Women that is Specific to their Sex, 34th Sess., Agenda item 5, U.N. Doc. E/CN.6/1990/L.18 (1990) (calls upon Member States to take appropriate measures to eradicate these acts of violence and to report to the Secretary General on legislation and other measures they have taken to prevent such violence).

performed with truncheons or other instruments,⁸ or if it is performed while the victim is bound or otherwise forced into a position that will increase the pain of the beating.⁹ Beating will also constitute torture if it is directed at certain parts of the body, such as the genitals or the soles of the feet.¹⁰ Beating alone is sufficient to constitute torture if it is sustained and systematic.¹¹

(c) Electric shocks, infliction of burns, exposure to extreme heat or cold.¹²

(d) Binding or otherwise forcing the victim into positions that cause pain.¹³

(e) Denying food, water, or medical attention when that denial will cause the victim to suffer, or will cause the victim to continue to suffer, severe physical or mental pain and suffering.¹⁴

III. UNIVERSAL AND OBLIGATORY CUSTOMARY INTERNATIONAL NORM AGAINST CRUEL, INHUMAN, OR DEGRADING TREATMENT

A. The norm against cruel, inhuman, or degrading treatment is universally

⁸See J. H. Burgers & H. Danelius, The U.N. Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 117 (1988).

⁹Bassiouni, An Appraisal of Torture in International Law and Practice: The Need for an International Convention for the Prevention and Suppression of Torture, in Convention Against Torture: Hearing Before the Comm. on Foreign Relations, United States Senate, 101st Cong., 2d Sess. 144 (1990).

¹⁰Id. at 144.

¹¹Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, S. Exec. Rep. 30, 101st Cong., 2d Sess. 14 (1990).

¹²Bassiouni, supra note 8, at 144.

¹³Exec. Rep. 30, supra note 10, at 14.

¹⁴Bassiouni, supra note 8, at 144.

recognized under international law.

The Universal Declaration of Human Rights, article 5, adopted Dec. 10, 1948, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948) provides: "No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment" (emphasis added). The universal norm prohibiting cruel, inhuman, or degrading treatment is treated with equal dignity as the prohibition against torture by all of the major international instruments.¹⁵ Moreover, the prohibition against cruel, inhuman, or degrading treatment has been received into customary international law.¹⁶

B. The prohibition against cruel, inhuman or degrading treatment is obligatory and nonderogable.

The norm against cruel, inhuman, or degrading treatment is obligatory under all conditions and circumstances. See, e.g., International Covenant on Civil and Political Rights, art. 4, adopted Dec. 16, 1966, entered into force Mar. 23, 1976, G.A. Res. 2200, 21 U.N. GAOR Supp. (No.16), at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 717 (derogation from right to be

¹⁵See Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, art. 16, adopted Dec. 10, 1984, G.A. Res. 39/46, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984) (entered into force June 26, 1987); European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, opened for signature Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953); the American Convention on Human Rights, art. 5, opened for signature Nov. 22, 1969, O.A.S. T.S. No. 36, at 1, O.A.S. Doc. OEA/Ser. L/V/II.50, doc. 6 at 27 (1980) (entered into force July 18, 1978); the International Covenant on Civil and Political Rights, art. 7, adopted Dec. 16, 1966, G.A. Res. 2200, 21 U.N. GAOR Supp. (No.16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 717 (entered into force Mar. 23, 1976); African Charter on Human and Peoples' Rights, art. 5, adopted June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 Rev. 5, 21 I.L.M. 58 (1982) (entered into force Oct. 21, 1986). See also Declaration on the Protection of All Persons From Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2, adopted Dec. 9, 1975, G.A. Res. 3452, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/1034 (1975).

¹⁶See, e.g., Declaration of Tehran, Final Act of the International Conference on Human Rights 3, at 4, para. 2, 23 GAOR, U.N. Doc. A/CONF. 32/41 (1968) (noting status of Universal Declaration of Human Rights, including prohibition against cruel, inhuman or degrading treatment, as customary international law).

free of cruel, inhuman, or degrading treatment not permitted even in time of public emergency); 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), U.N. Doc. A/43/49, at 297 (1988) ("No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment."). No state claims the right to cause, encourage, or condone cruel, inhuman, or degrading treatment.

All branches of the United States Government recognize and respect the universal and obligatory international law norm against cruel, inhuman, or degrading treatment. In giving its advice and consent to the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, supra, the United States Senate has recently reaffirmed this position.¹⁷ In the Hostages Case (U.S. v. Iran), 1980 I.C.J. 3, the Executive Branch invoked provisions of international human rights instruments proscribing cruel, inhuman, or degrading treatment in its case against Iran seeking redress for the taking of U.S. citizens as hostages. Judge Edwards in Tel Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984), cert. denied, 470 U.S. 1003 (1985), identified cruel, inhuman, or degrading treatment as among a "handful of heinous actions--each of which violates definable, universal, and obligatory norms" of international law. Id. at 781.¹⁸

¹⁷See also 22 U.S.C. § 262d(a)(1) (stating U.S. policy to seek to channel international assistance away from those countries that violate internationally recognized human rights including cruel, inhumane, or degrading treatment); 22 U.S.C. § 2304(d)(1) (defining internationally recognized human rights to include cruel, inhuman, or degrading treatment). The U.S. Department of State's Country Reports detail state acts that violate the international norm against torture as well as the norm against cruel, inhuman, or degrading treatment. See, e.g., Country Reports on Human Rights Practices for 1981 at 329 (Argentina).

¹⁸See also Restatement (Third) of Foreign Relations Law § 702(d), which declares: "A state violates international law if, as a matter of state policy, it practices, encourages, or condones ...torture or other cruel, inhuman, or degrading treatment or punishment."

C. The prohibition against cruel, inhuman, or degrading treatment is definable.

Article 16 of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, adopted Dec. 10, 1984, G.A. Res. 39/46, 39 U.N. GAOR Supp. (No. 51), at 197, U.N. Doc. A/39/51 (1984) (entered into force June 26, 1987), defines state obligations specifically with regard to "other acts of cruel, inhuman, or degrading treatment or punishment which do not amount to torture as defined in article 1 [defining torture], when such acts are committed at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

1. Cruel, inhuman, or degrading treatment consists of acts committed against a person deprived of his or her liberty¹⁹ which cause severe mental or physical suffering that is unjustifiable. While there does exist an overlap between torture and cruel, inhuman or degrading treatment, it is possible and practicable for a court to distinguish acts constituting cruel, inhuman or degrading treatment and to identify acts that fall within its scope.

2. The distinction between cruel, inhuman, or degrading treatment on the one hand, and torture on the other, rests on the special stigma to be attached to those who commit torture. Torture is aggravated and deliberate cruel, inhuman, or degrading treatment, causing very serious and cruel suffering. Convention Against Torture and Other Cruel, Inhuman, Degrading Treatment or Punishment, S. Exec. Rep. 30, 101st Cong., 2d Sess. 13 (1990) ("[T]orture is at the extreme end of cruel, inhuman and degrading treatment.").²⁰ Cruel, inhuman, or degrading

¹⁹Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principles 1 & 6, G.A. Res. 43/173, 43 U.N. GAOR Supp. (No. 49), U.N. Doc. A/43/49, at 297 (1988); J. H. Burgers & H. Danelius, supra note 7, at 149.

²⁰See Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) 65-67, at para. 167 (1978); Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, para. 2, G.A. Res. 3452, 30 U.N. GAOR

treatment constitutes a non-deliberate--or deliberate, but less severe--infliction of suffering.²¹

3. The unjustified physical and mental suffering caused by cruel, inhuman or degrading treatment includes the creation of "a state of anguish and stress by means other than bodily assault."²²

4. Degrading treatment is that which grossly humiliates a person before others or forces the person to act against his/her will or conscience,²³ or incites fear, anguish, or inferiority capable of humiliating and debasing a person and attempting to break his/her moral resistance.²⁴

5. Whether treatment is cruel, inhuman, or degrading depends upon an assessment of all the particularities of a concrete case,²⁵ including the specific conditions at issue, duration of the measures imposed, the objectives pursued by the perpetrators, and the effects on the person(s)

Supp. (No. 34) at 91, U.N. Doc. A/10034 (1976) ("Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.").

²¹See J.H. Burgers & H. Danelius, supra note 7, at 150 ("Unlike in the definition of torture . . . the purpose of the act is irrelevant in determining whether or not the act should be considered to constitute cruel, inhuman or degrading treatment.").

²² Report of November 5, 1969, Greece v. United Kingdom, Yearbook XII 461 (1969) cited in P. van Dijk & G. van Hoof, Theory and Practice of European Convention on Human Rights (1990), at 228 n. 75.

²³ Id. at 186, cited in P. van Dijk & G. van Hoof, supra note 26, at 228 n. 73.

²⁴Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) 65-67, at para. 167 (1978).

²⁵ Similar case-by-case application has been undertaken by federal courts in cases of torture. See Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980); Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987), modified by 694 F. Supp. 707 (N.D. Cal. 1988). The duty of a federal judge in defining and applying the evolving international norm of cruel, inhuman, or degrading treatment is comparable to applying the flexible, evolving standard of cruel and unusual punishment under the Eighth Amendment of the United States Constitution. See, e.g., Wells v. Franzen, 777 F.2d 1258 (7th Cir. 1985); Medcalf v. Kansas, 626 F. Supp. 1179 (D. Kan. 1986).

involved.²⁶

6. There is a consensus among international law publicists that the following acts constitute cruel, inhuman, or degrading treatment, though the list is by no means exhaustive.

(a) Sexual abuse²⁷ and other forms of gender-based violence.²⁸

(b) Forcing detainees to stand for long periods of time, subjecting detainees to sights and sounds that have the effect or intent of breaking down their resistance and will, or inflicting severe mental or physical stress on detainees in order to obtain information or confession.²⁹

(c) Deportation or expulsion from, or refusal of admission to, one's own country without due process or under exceptional circumstances such as discriminatory application of law or the intentional infliction of physical or mental suffering.³⁰

(e) Failure or refusal to satisfy certain basic needs of the person, such as the needs for food, water, or sleep, if the pain or suffering inflicted is not severe enough to constitute

²⁶See, e.g., Tyrer Case, 26 Eur. Ct. H.R. (ser. A) 15, at para. 30 (1978) (distinctive element of degradation is degree of humiliation adjudged according to circumstances of individual case); Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) 65-67, at paras. 166-68 (1978) (minimum level of severity required to determine violation depends on circumstances of particular case including duration of treatment and physical and mental effects). J.H. Burgers & H. Danelius, supra note 7, at 70, 122; P. van Dijk & G. van Hoof, supra note 27, at 232.

²⁷See supra note 6.

²⁸See supra note 7.

²⁹See Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) 65-67, at paras. 166-68 (1978); Bouton v. Uruguay (37/1978), Report of the U.N. Hum. Rts. Comm. GAOR, 35th Sess., Suppl. No. 40 (1980), Annex XIV.

³⁰See East African Asians v. United Kingdom, 3 Eur. H.R. Rep. 76, at paras. 186-88 (Eur. Comm'n H.R. 1973); P. van Dijk & G. van Hoof, supra note 20, at 235-36.

torture.³¹

(f) Deliberate indifference to a detainee's medical needs and deprivation of the basic elements of adequate medical treatment.³²

IV. UNIVERSAL AND OBLIGATORY CUSTOMARY INTERNATIONAL NORM AGAINST ARBITRARY DETENTION

A. The prohibition against arbitrary detention is universal.

1. Numerous international agreements prohibit arbitrary detention.³³ Moreover, international judicial decisions and unequivocal statements endorsed by nearly all of the states in the international community accept the norm of customary international law condemning

³¹J.H. Burgers & H. Danelius, supra note 7, at 118.

³²With respect to detainees and prisoners, both the Eighth Amendment of the U.S. Constitution and the Standard Minimum Rules for the Treatment of Prisoners, adopted July 31, 1957, E.S.C. Res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, 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) (adding article 95), provide U.S. courts with guidelines to assist in applying the principle of cruel, inhuman, or degrading treatment in a particular case. See, e.g., Lareau v. Manson, 507 F. Supp. 1117 (D. Conn. 1980) modified on other grounds, 651 F.2d (2d Cir. 1981) (finding Standard Minimum Rules as significant expressions of obligations to prisoners under international law). See also Estelle v. Gamble, 429 U.S. 97, 103-04 (1976) (by reason of deprivation of liberty, state has obligation and duty to provide adequate and humane care to confined persons); Kyle v. Allen, 732 F. Supp. 1157, 1158 (S.D. Fla. 1990) (recognition that prison conditions can deprive inmates of minimal civilized measure of life's necessities).

³³See American Convention on Human Rights, art. 7(3), opened for signature Nov. 22, 1969, O.A.S.T.S. No. 36, at 1, O.A.S. Doc. OEA/Ser. L/V/II.50, doc. 6 at 27 (1980) (entered into force July 18, 1979); International Covenant on Civil and Political Rights, art. 9, adopted Dec. 16, 1966, G.A. Res. 2200, 21 U.N. GAOR Supp. (No.16), at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 5, opened for signature Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953); Universal Declaration of Human Rights, arts. 3 & 9, adopted Dec. 10, 1948, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948); African Charter on Human and Peoples' Rights, art. 6, adopted June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 Rev. 5, 21 I.L.M. 58 (1982) (entered into force Oct. 21, 1986).

The United Nations Commission on Human Rights has recently adopted a resolution establishing a working group on arbitrary detention. U.N. Doc. E/CN.4 1991/L.77, adopted without vote Mar. 1991.

arbitrary detention.³⁴

2. All branches of the United States Government recognize and respect the international law norm prohibiting arbitrary detention. Members of the executive branch and Congress agree that arbitrary detention violates international law.³⁵ The federal courts have declared that "[n]o principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment." Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1388 (10th Cir. 1981).³⁶

B. The prohibition against arbitrary detention is obligatory under international law.

Numerous international instruments prohibit arbitrary detention. See, e.g., International

³⁴See, e.g. Hostages Case, 1980 I.C.J. 3, at para. 91 ("Wrongfully to 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."); Winterwerp Case, 33 Eur. Ct. H.R., (ser. A), at para. 39 (1979) ("[N]o detention that is arbitrary can ever be regarded as 'lawful.'").

³⁵See, e.g., Derian, Human Rights in United States Foreign Policy--The Executive Perspective, in International Human Rights Law and Practice 183 (J. Tuttle ed. 1978) (Assistant Secretary of State for Human Rights and Humanitarian Affairs, Patricia M. Derian, describing U.S. human rights policy as seeking "greater observation of all governments of the rights of the person including freedom from torture and cruel and inhuman treatment, freedom from the fear of security forces breaking down doors and kidnapping citizens from their homes, and freedom from arbitrary detention"); Fraser, Human Rights and United States Foreign Policy--The Congressional Perspective, in International Human Rights Law and Practice 173, 176 (J. Tuttle ed. 1978).

³⁶See also Forti v. Suarez-Mason, 672 F.Supp. 1531, 1541 (N.D. Cal. 1987) ("There is case law finding sufficient consensus to evince a customary international human rights norm against arbitrary detention."); De Sanchez v. Banco Central De Nicaragua, 770 F.2d 1385, 1397 (5th Cir. 1985) ("[T]he standards of human rights that have been generally accepted--and hence incorporated into the law of nations-- . . . encompass . . . such basic rights as the right not to be murdered, tortured, or otherwise subjected to cruel, inhuman or degrading punishment; . . . and the right not to be arbitrarily detained."); Soroa-Gonzales v. Civiletti, 515 F.Supp. 1049, 1061 n.18 (N.D. Ga. 1981).

Covenant on Civil and Political Rights, art. 4, adopted Dec. 16, 1966, entered into force Mar. 23, 1976, G.A. Res. 2200, 21 U.N. GAOR Supp. (No.16), at 52, U.N. Doc. A/6316 (1966) (derogation from right to be free of arbitrary detention permitted only in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed).

C. The prohibition against arbitrary detention is definable.³⁷

1. Detention is arbitrary when it is illegal and unjust.³⁸ As the Restatement (Third) of Foreign Relations Law explains: "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.'" See id. § 702 comment h (1987) (quoting Statement of U.S. Delegation, 13 GAOR, U.N. Doc. A/C.3/SR.863, at 137 (1958)).

2. There is a consensus among international law publicists that arbitrary detention occurs when a person is detained without warrant, probable cause, articulable suspicion or notice of charges and is not brought to trial.³⁹

³⁷See, e.g. Forti v. Suarez-Mason, 672 F.Supp. 1531, 1542 (N.D. Cal. 1987) (norm against arbitrary detention "is readily definable in terms of the arbitrary character of the detention").

³⁸See Hassan, The International Covenant on Civil and Political Rights: Background and Perspective on Article 9(1), 3 Den. J. Int'l L. & Pol'y 153, 181-83 (1973); Marcoux, Protection From Arbitrary Arrest and Detention Under International Law, 5 B.C. Int'l & Comp. L.R. 345 (1982).

³⁹The International Covenant on Civil and Political Rights, art. 9, adopted Dec. 16, 1966, G.A. Res. 2200, 21 U.N. GAOR Supp. (No.16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) states:

1. Everyone has the right to liberty and security of 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.

2. Anyone who is arrested shall be informed, at the time of arrest, of

V. UNIVERSAL AND OBLIGATORY CUSTOMARY INTERNATIONAL NORM AGAINST SUMMARY EXECUTION.

A. The international law prohibition against summary execution is universal.

the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release

...

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

The European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 5, opened for signature Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953), states:

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

a. the lawful detention of a person after conviction by a competent court;

b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law;

c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.

...

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to a trial within a reasonable time or to release pending trial. . . .

...

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

1. Numerous international instruments prohibit summary execution. Summary execution is prohibited by the Universal Declaration of Human Rights of 1948, adopted Dec. 10, 1948, G.A. Res. 217A, U.N. GAOR 71, U.N. Doc. A/811 (1948), reprinted in 43 Am. J. Int'l L. Supp. 127 (1949). Article 3 guarantees the right to life, and articles 10 and 11 state the only method through which rights can be denied:

Article 10

Everyone is entitled in full equity to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11

1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Similarly, all the other major human rights instruments recognize a right to life coupled with a right to due process to protect that right. See American Declaration of the Rights and Duties of Man, arts. 1, 18 & 26, signed May 2, 1948, Res. XXX, Final Act, Ninth Int'l Conf. of American States, Bogota, Colombia, Mar. 30-May 2, 1948, at 38 (Pan-American Union 1948), O.A.S. Off. Rec. OEA/Ser.L/V/II.23/Doc.21/Rev. 6 (English 1979), reprinted in 43 Am. J. Int'l L. Supp. 133 (1949); International Covenant on Civil and Political Rights, art. 6, adopted Dec. 16, 1966, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966)999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (signed but not ratified by United States); European Convention for the Protection of Human Rights and Fundamental Freedoms, § I, art. 2,

opened for signature, Nov. 4, 1950, Europ. T.S. No. 5, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953); African [Banjul] Charter on Human and Peoples' Rights, arts. 4-7, adopted June 27, 1981, O.A.U. Doc. CAB/LEG/67/3/Rev. 5, (1981), reprinted in 21 I.L.M. 58 (1982) (entered into force Oct. 21, 1986). Further, the international community continually "condemns the practice of summary executions and arbitrary executions" G.A. Res. 22, 36 U.N. GAOR Supp. (No. 51) at 168, U.N. Doc. A/36/51 (1981).

2. United States law recognizes summary execution as a violation of international law. In Forti v. Suarez-Mason, 672 F. Supp. 1531, 1542 (N.D. Cal. 1987), the court held that "[t]he proscription of summary execution or murder by the state appears to be universal, is readily definable, and is of course obligatory."

The Fifth Circuit, distinguishing the taking of property from summary execution as a universal violation of international human rights, has similarly stated:

[T]he standards of human rights that have been generally accepted -- and hence incorporated into the law of nations -- are still limited. They encompass only such basic rights as the right not to be murdered

De Sanchez v. Banco Central De Nicaragua, 770 F.2d 1385, 1397 (5th Cir. 1985) (emphasis added).

Congress has also recognized summary execution as an international human rights violation. Provisions in 22 U.S.C. §§ 262d (aid to international financial institutions), 2151n (development aid) and 2304 (security assistance) (1988) all deny U.S. funding to countries that practice "gross violations of internationally recognized human rights," and define these violations to include a "flagrant denial of the right to life, liberty or the security of person," a concept that encompasses summary execution.

The Restatement (Third) of Foreign Relations Law of the United States § 702 (1987)

states, "[a] state violates international law if, as a matter of state policy, it practices, encourages or condones ... the murder [of individuals]"⁴⁰

B. The prohibition against summary execution is obligatory under international law.

The prohibition against summary execution is non-derogable and is thus obligatory under international law. See, e.g., International Covenant on Civil and Political Rights, arts. 4 & 6, (the right not to be arbitrarily deprived of life is never derogable, not even in times of public emergency⁴¹); European Convention for the Protection of Human Rights and Fundamental Freedoms, arts. 2 & 15, opened for signature Nov. 4, 1950, Europ. T.S. No. 5, 213 U.N.T.S. 221, (entered into force Sept. 3, 1953) (neither war nor any other public emergency is a justification for summary execution).

C. The prohibition against summary execution is definable. An act constitutes summary execution if it (1) intentionally results in the proximate death of an individual; (2) is not the result of a fairly and publicly constituted tribunal based on the existing law of the state, and (3) is caused by or at the instigation of a public official. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva I), opened for signature Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31 (entered into force Oct. 21, 1950). See also Restatement (Third) of Foreign Relations Law of the United States, § 702 comment f (1987) ("Under this section, it is a violation of international law

⁴⁰ The Restatement's list of international human rights violations was cited, inter alia, by Judge Edwards in his concurrence in Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984), cert. denied, 470 U.S. 1003 (1985), as a gauge of what constitutes a violation of international law for purposes of 28 U.S.C. § 1350 (1988).

⁴¹ See also International Covenant on Economic, Social and Cultural Rights, art. 5, adopted Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

for a state to kill an individual other than as lawful punishment pursuant to conviction in accordance with due process of law, or as necessary under exigent circumstances, for example by police officials in line of duty in defense of themselves or of other innocent persons, or to prevent serious crime.")

VI. UNIVERSAL AND OBLIGATORY CUSTOMARY INTERNATIONAL NORM AGAINST DISAPPEARANCE

A. The international law prohibition against disappearance is universal.

1. International law uniformly condemns disappearance as a violation of international human rights. See, e.g., Organization of American States, Inter-American Commission of Human Rights, GA Res. 666, (XIII-0/83) of Nov. 18, 1983. (denouncing "disappearance" as "an affront to the conscience of the hemisphere and ... a crime against humanity"); Velásquez Rodríguez case, Inter-Am. C.H.R., paras. 155-58 (1988), reprinted in 9 Hum. Rts. L.J. 212, 238-39 (1988) (finding that Honduras in "disappearing" Velásquez Rodríguez violated his rights to life, humane treatment and personal liberty as defined by Articles 4, 5 and 7 of the American Convention on Human Rights, opened for signature Nov. 22, 1969, O.A.S.T.S. No. 36, entered into force July 18, 1978)); G.A. Res. 173, 33 U.N. GAOR Supp. (No. 45) at 158, U.N. Doc. A/33/45 (1979) (disappearance violates the Universal Declaration of Human Rights, G.A. Res. 217A (III)); U.N. Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, 35th Sess., U.N. Doc. E/CN.4/1983/4, U.N. Doc. E/CN.4/Sub.2/1982/43 (29 September 1982); United Nations Economic and Social Council Resolution 1979/38 of May 10, 1971; Annual Report of the Inter-American Commission on Human Rights, Inter-Am. C.H.R. 26, OEA/ser. L/V/II.43, doc. 21 (1977) at 26; H.R. Con. Res. 285, 96th Cong., 2d. Sess. (1980);

Annual Report of the Inter-American Commission on Human Rights, Inter-Am. C.H.R. 113, OEA/ser. L/V/II.54, Doc. 9, Rev. 1 (1980), Draft Declaration on the Protection of All Persons from Enforced Disappearance, U.N. Comm'n on Hum. Rts., U.N. Doc. E/CN.4/1991/WG.10/CRP.3/REV.1/Corr. (8 November 1991).

2. International law universally condemns disappearance as violating fundamental human rights contained in numerous international instruments.⁴² The United Nations Working Group on Enforced or Involuntary Disappearances reported that:

130. The information in this and prior reports shows that a wide range of the human rights of the victim himself and his family which are recognized in various international human rights instruments are violated or infringed by enforced or involuntary disappearances

131. The right to liberty and security of person is the principal human right denied by the practice of enforced or involuntary disappearance. Related rights, such as the right to freedom from arbitrary arrest, right to a fair trial in criminal matters and the right to recognition as a person before the law, are all involved. In addition, the right to humane conditions of detention and freedom from torture, cruel or degrading treatment or punishment are involved. The very fact of being detained as a disappeared person, isolated from one's family for a long period is certainly a violation of the right to humane conditions of detention and has been represented to the Group as torture. Further, some of the information before the group deals with the conditions of detention, including ill-treatment, suffered by the missing or disappeared persons. The right to life is also involved;

133. ... a reading of the Universal Declaration of Human Rights and the International Covenants on Human Rights shows that to a greater or lesser degree practically all basic

⁴² The United Nations Economic and Social Council Working Group on Enforced or Involuntary Disappearances finds that disappearances violate the following principal international instruments: Universal Declaration of Human Rights; International Covenant on Economic, Social and Cultural Rights; International Covenant on Civil and Political Rights; African Charter on Human and People's Rights; American Declaration of the Rights and Duties of Man; American Convention on Human Rights; European Convention on Human Rights; and the Geneva Conventions of 1949. Report of the Working Group on Enforced or Involuntary Disappearances: Question of the Human Rights Of All Persons Subjected to Any Form of Detention or Imprisonment. In Particular: Question of Enforced or Involuntary Disappearances, U.N. Doc. E/CN.4/1983/14 (21 January 1983).

human rights of such a person are infringed.⁴³ [footnotes and citations omitted]

See also Draft Declaration on the Protection of All Persons from Enforced Disappearance, art. 1

(2), U.N. C.H.R., U.N. Doc. E/CN.4/1991/WG.10/CRP.3/REV.1/Corr. (8 November 1991).⁴⁴

When an individual is disappeared, that individual may be presumed to have been summarily executed, and in any event to have been arbitrarily detained without any acknowledgement of accountability for that person's whereabouts.⁴⁵ The illegality of disappearance thus follows from the well-settled illegality of summary execution, discussed supra pp. 20-24, and arbitrary detention, discussed infra pp. 43-47.

A violation of the right to be free from disappearance infringes not only the rights of the individual disappeared, but also the rights of that individual's family members. Family members who lose a spouse, parent or sibling are subjected to severe emotional and often economic harm. Disappearance is an effective tool of terror precisely because it both removes an individual opposed to the state and frightens and punishes family and friends of the disappeared. Family members of the disappeared suffer continued anguish, as they are indefinitely unaware of the status of their loved ones. See U.N. Report of the Working Group on Enforced or Involuntary Disappearances, 39th Sess., U.N. Doc. E/CN.4/1983/14 (21 January 1983) at 47 (human rights of family and particularly children are infringed by the disappearance of a family member); U.N.

⁴³ Id.

⁴⁴ Art. 1(2) states: "It [disappearance] violates the rules of international law guaranteeing, inter alia, the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment. It also violates or constitutes a grave threat to the right of life."

⁴⁵ See Velásquez Rodríguez case, Inter-Am. Ct. H.R., para. 188 (1988), reprinted in 9 Hum. Rts. L.J. 212, 244 (1988). ("The context in which the disappearance of Manfred Velásquez occurred and the lack of knowledge seven years later about his fate create a reasonable presumption that he was killed.")

Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, 35th Sess., U.N. Doc. E/CN.4/1983/4, U.N. Doc. E/CN.4/Sub.2/1982/43) (29 September 1982) at 74 (acknowledging "reports of threats against, attacks on or the arrest of relatives of missing persons actively seeking the whereabouts of their missing family members," reiterating "the right of families to know the fate of their relatives" and urging "protection of persons, including relatives, who seek the whereabouts of missing persons"). Family members of the disappeared, along with all other persons, have the right to be free from cruel, inhuman, or degrading treatment or punishment, a universally proscribed violation of fundamental human rights discussed below. Disappearance of an individual per se works cruel and inhuman treatment on his or her family members. Draft Declaration on the Protection of All Persons from Enforced Disappearance, art. 1 (2), U.N. Comm'n on Hum. Rts., U.N. Doc. E/CN.4/1991/WG.10/CRP.3/REV.1/Corr. (8 November 1991) ("Such enforced or involuntary disappearance places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families.")

3. All branches of the United States government recognize and respect the international law norm against disappearance.⁴⁶ Congress has declared disappearance to be a gross violation of human rights:

the term "gross violations of internationally recognized human rights" includes ... causing the disappearance of persons by the abduction and clandestine detention of those persons, and other flagrant denial of the right to life, liberty or the security of person

22 U.S.C. § 2304(d)(1) (1988) (grounds for denial of foreign security assistance). See also 22 U.S.C. §§ 262d (1988) (aid to international financial institutions shall be channeled away from

⁴⁶ The Restatement (Third) of Foreign Relations Law § 702 (1987) specifically states, "A state violates international law if, as a matter of state policy, it practices, encourages, or condones... causing the disappearance of individuals...."

countries whose governments commit such gross violations of human rights) and 2151(n) (grounds for a denial of development aid) (1988).

In Forti v. Suarez-Mason, the court held that there is "a universal and obligatory international proscription of the tort of `causing disappearance.'" 694 F.Supp. 707, 711 (N.D. Cal. 1988).

The Department of State has stated that disappearance is a fundamental human rights violation contravening customary international law. More than a decade ago, Assistant Secretary of State for Human Rights and Humanitarian Affairs Patricia Derian described disappearances as "one of the more tragic and insidious instances of human rights abuses occurring in today's world." Protection of Human Rights, 1979 Digest of United States Practice in International Law § 6, at 529. Pursuant to 22 U.S.C. § 262d(c)(1) and § 2304(b)(1) (1988), the State Department has submitted annual "Country Reports" to Congress, many of which have specifically enumerated "disappearances" under violations of "respect for the integrity of the person." See, e.g., Country Reports on Human Rights Practices for 1981 at 329 (1981) (Argentina).

B. The prohibition against disappearance is obligatory.

In Forti v. Suarez-Mason, 694 F.Supp. 707, 711 (N.D. Cal. 1988), the Court held that there is "a universal and obligatory international proscription of the tort of `causing disappearance'" (emphasis added). See also Organization of American States, Inter-American Commission of Human Rights, General Assembly Resolution 666, (XIII-0/83) of Nov. 18, 1983 (denouncing "disappearance" as "an affront to the conscience of the hemisphere and ... a crime against humanity"); Velásquez Rodríguez case, Inter-Am. Ct. H.R., paras. 155-58 (1988), reprinted in 9 Hum. Rts. L.J. 212, 238-39 (1988) (finding that Honduras in "disappearing" Velasquez Rodriguez violated his rights as defined by Articles 4, 5 and 7 of the American

Convention on Human Rights, opened for signature Nov. 22, 1969, O.A.S.T.S. No. 36, entered into force July 18, 1978, reprinted in 9 Int'l Legal Materials 673 (1970)); G.A. Res. 173, U.N. GAOR, 33d Sess. Supp. No. 45, at 158, U.N. Doc. A/33/45 (1979) (disappearance violates the Universal Declaration of Human Rights, G.A. Res. 217A (III)); Draft Declaration on the Protection of All Persons from Enforced Disappearance, art. 7, U.N. Comm'n Hum. Rts., U.N. Doc. E/CN.4/1991/WG.10/CRP.3/REV.1/Corr. (8 November 1991) ("No circumstance whatsoever, whether a threat of war, a state of war, internal political instability or any other public emergency may be invoked to justify enforced or involuntary disappearances."). Moreover, the nonderogability of the norm against disappearance flows from the fact that disappearance invariably violates the fundamental human rights to be free from summary execution or arbitrary detention, both of which are non-derogable and thus universal. See sections II supra, pp. 20-24 and VI infra, pp. 43-47.

C. The prohibition against disappearance is definable.

An act constitutes disappearance if it involves "(1) an abduction by state officials or their agents, followed by (2) official refusals to acknowledge the abduction or to disclose the detainee's fate." Forti v. Suarez-Mason, 694 F.Supp. 707, 711 (N.D. Cal. 1988). See also G.A. Res. 173, 33 U.N. GAOR Supp. (No. 45) at 158, U.N.Doc. A/33/45 (1979) (noting "difficulties in obtaining reliable information from competent authorities as to the circumstances of [disappeared] persons, including reports of persistent refusal of such authorities or organizations to acknowledge that they hold such persons in their custody or otherwise to account for them"); Draft Inter-American Convention on the Forced Disappearance of Persons, Inter-Am. C.H.R. 351-357, OEA/ser. L./V/II.74, doc. 10 rev. 1 (1988) (Article II defines "disappearance" as an "abduction or detention of any person by an agent of a State or by a person acting with the

consent or acquiescence of a State," coupled with official refusal to acknowledge the abduction); Annual Report of the Inter-American Commission on Human Rights, Inter-Am. C.H.R. 26, OEA/ser.L/V/II.43, doc.21 (1977), (noting frequency of government denial of allegations of disappearance). See also Berman & Clark, State Terrorism: Disappearances, 13 Rutgers L.J. 531, 533 (1982) ("The denial of accountability is the factor which makes disappearance unique among human rights violations...")

VII. CONCLUSION

Torture, cruel, inhuman or degrading treatment, arbitrary detention, summary execution and disappearance are violations of the law of nations and customary international law. The international law prohibitions against each of these human rights violations are universal, obligatory and definable.

Respectfully submitted,

s/ above-named law professors