

CRIMINALIZING EXTRAJUDICIAL KILLINGS

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I. INTRODUCTION

If those who committed torture abroad come to the United States, they can be prosecuted as torturers,¹ or deported under human rights provisions of U.S. immigration law.² But our ability to criminally punish extrajudicial killings—often very closely linked to the crime of torture—is less. For example, if a state official commits an extrajudicial killing by torturing and ultimately killing an individual, and later comes into the jurisdiction of the United States, punishment options are limited to those described above.³ Why is this?

There are a few reasons for the difficulty in bringing individuals that have committed extrajudicial killings to justice. The biggest obstacle is that an extrajudicial killing is not criminalized under international law in as broad a manner as torture. Even though torture seems less severe than death, torture is an action that is never excusable under international law. Yet states are permitted to intentionally kill individuals in a number of circumstances. They may execute them after due judicial process, they may incapacitate them in a valid exercise of law enforcement, or they may target them pursuant to the laws of armed conflict. Even the term “extrajudicial killing” does not perfectly reflect the situations in which a state may kill—war and law enforcement operations are both extrajudicial, yet killing is and should be permitted in both cases.

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1. 18 U.S.C. § 2340(a)-(b)(2) (2001).

2. *See* 8 U.S.C. § 1182(a)(3)(iii) (2010) (“Inadmissible aliens”):

Any alien who, outside the United States, has committed, ordered, incited, assisted, or otherwise participated in the commission of -

(I) Any act of torture, as defined in section 2340 of title 18; or

(II) Under color of law of any foreign nation, any extrajudicial killing, as defined in section 3(a) of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note), is inadmissible.

See also 8 U.S.C. § 1227(a)(4)(D) (2010) (“Deportable aliens”) (invoking the same descriptions from § 1182 to remove already admitted aliens).

3. For another example of an immigration prosecution, *see, e.g.*, 18 U.S.C. § 1015(a) (2001) (“Whoever knowingly makes any false statement under oath, in any case, proceeding, or matter relating to . . . any law of the United States relating to naturalization, citizenship, or registry of aliens . . . shall be fined under this title or imprisoned not more than five years . . .”).

Nonetheless, even though intentional killing, unlike torture, can sometimes be lawfully done, there exists a vast class of killings committed by public officials of states that are done pursuant to or motivated by the same illiberal motives as torture: to suppress dissent, to eliminate political rivals, and to frighten civilian populations. These killings should be outlawed and prosecutors given the tools to fight them.

The primary goal of this paper is to suggest the adoption of a statute that criminalizes extrajudicial killing, one that may be based on an international convention. To do so, this paper defines the crime of these killings carefully, separating them from lawful exercises of force and distinguishing their illiberal and vindictive nature. First, this paper begins by providing a brief background on extrajudicial killings and torture, as well as the current failure of international criminal law to criminalize extrajudicial killings sufficiently. Next, this article analyzes a crime closely related to extrajudicial killing—the crime of torture—nearly three decades after the entry into force of the seminal human rights crime treaty, the Convention Against Torture (“CAT”). This convention may provide the model for a new international ban on killings. Finally, the article concludes with a proposed U.S. law criminalizing extrajudicial killings, whether underpinned by an international convention, or not.

Considering the differences between torture and extrajudicial killings, but taking account of their many similarities, this article analyzes whether the structure of the CAT can be adopted to suit the new, heretofore neglected, purpose of criminalizing extrajudicial killings through the creation of a new convention. This article determines whether the structure and provisions of CAT, successfully widely adopted by the international community, can be adapted into a convention for extrajudicial killing that has a strong likelihood both of being adopted by states, and effectively suppressing these illiberal killings. In conclusion, this article considers how to draft a domestic criminal law for the U.S., a statute that grants both jurisdiction and the ability to allow prosecutors to charge these types of criminals, whether or not a convention against extrajudicial is created.

II. THE STATUS QUO: THE CRIME OF TORTURE AND THE FACT OF KILLINGS

Both extrajudicial killing and torture had a place in the ancient world. Towards the end of the 20th century, however, there emerged a consensus that torture was not a legitimate tool of the state, and corresponding legal regimes followed. However, such legal regimes have not emerged in regards to extrajudicial killings. A brief history of these crimes is useful in determining whether extrajudicial killing can be criminalized similarly in the future.

A. *Criminalizing Torture*

In the ancient world, torture was common. Practices ranged from stoning to crucifixion to disgusting devices such as the “brazen bull” from Ancient Greece by

which victims were burned and boiled to death while their screams were converted into music by a specially designed instrument.⁴ Torture lasted into the middle ages of Europe. For example, one of the first times torture was used to suppress political opinion took place during the Inquisition.⁵ Medieval trials were by “ordeal”—rather than testing a conviction with evidence, defendants suffered certain pain to prove their innocence, and torture was considered an effective, and legitimate, means to elicit truth and confessions from defendants.⁶ Like so many others of the ancient time, these barbarous practices had difficulty withstanding the emergence of the modern era: the dawn of the Enlightenment,⁷ of democracy, and of greater social justice and technological progress.⁸ Torture, as a common practice, seemed to be going by the wayside.

Yet, strangely, some governments began to utilize torture as a tactic of modern warfare. Twentieth century democracies, which by definition agree to be bound to the rule of law and the importance of writing un-crossable lines for governmental power, discovered a utility for torture. While democracies have generally chosen not to go to war with each other,⁹ post-colonial wars and wars of national liberation in the modern era created an uncertain role for the law of armed conflict in intrastate conflicts.¹⁰ This uncertainty has allowed some democracies to use torture, relying on facilities for detention and harm that their unconventional enemies could not replicate.¹¹

France admitted to the use of torture in the Algerian War for the independence of the French colony.¹² Some of the commonly reported practices included: sleep, food and water deprivation; exposure to extreme heat or cold; electric shock; loud noise; forced maintenance of “stress” positions for long periods of time; water torture; beatings; sexual abuse; humiliation and degradation;

4. JEAN KELLAWAY, *THE HISTORY OF TORTURE AND EXECUTION* 10-18 (Warren Lapworth ed., 1st pbk. ed. 2000).

5. ASSOCIATION INTERNATIONALE DE DROIT PÉNAL, *REVUE INTERNATIONALE DE DROIT PÉNAL: LA PRÉVENTION ET LA SUPPRESSION DE LA TORTURE* 29 (1977) [hereinafter *REVUE INTERNATIONALE*].

6. *Id.* at 26-27.

7. *See generally* MARCHESI BECCARIA, *OF CRIME AND PUNISHMENT* (Edward D. Ingraham trans., 1764) (consisting of the first modern work of criminology and criminal justice, and one that strongly advocated torture as both barbarous and completely ineffective).

8. J. JEREMY WISNEWSKI, *UNDERSTANDING TORTURE* 24-25 (2010) (giving political, humanistic, juridical, and socio-anthropological views on why torture went into disfavor at this time); *see also* AMNESTY INT’L, *REPORT ON TORTURE* 29 (2nd ed. 1975) [hereinafter *AMNESTY*].

9. *See* Michael W. Doyle, *Kant, Liberal Legacies, and Foreign Affairs*, 12 *PHILOSOPHY & PUB. AFFAIRS* 205, 213 (1983).

10. *Id.* at 216.

11. WISNEWSKI, *supra* note 8, at 38.

12. GENERAL PAUL AUSSARESSES, *SERVICES SPÉCIAUX, ALGÉRIE 1955–1957* 11-13 (2001); *see also* *THE BATTLE OF ALGIERS* (Rialto Pictures 1966) (a seminal film publicizing the use of torture in Algeria).

use of drugs; and, threats against relatives.¹³ Likewise, the republican constitutional monarchy of the United Kingdom used torture—or at the very least, “cruel and unusual treatment,”¹⁴—in dealing with Irish separatists of the Irish Republican Army. Tactics included: “hooding”; wall standing and stress positions; sleep, food and water deprivation; and, constant loud and unpleasant noise.¹⁵

The United Kingdom, like many colonial liberal societies, was especially cruel abroad. The scale of violence used against colonized peoples may seem more like crimes against humanity than isolated acts of torture that a statute intends to prevent. However, tactics used by the United Kingdom against Kenyans during the 1950s included: beatings; electric shock; use of cigarettes on the body; skin searing; use of pliers on sensitive body parts; rape, including penetration with foreign objects; and dragging people behind cars.¹⁶ Likewise, Spain did little to reform its law enforcement and military apparatuses for dealing with terrorists even as it emerged from the Franco dictatorship.¹⁷ As a result, members of the Basque separatist terrorist group, Euskadi Ta Askatasuna (“ETA”), continued to be tortured in the new democratic regime. For example, allegations against the ETA during the 1980s and 1990s state that 84 percent of Basque activists in prison were tortured, and large numbers of men in the Basque country were arrested and tortured, but never charged with crimes.¹⁸ In one case, members of a Basque newspaper accused police forces of asphyxiating them with plastic bags, and of forcing them to participate in a simulated execution.¹⁹

With even democracies finding a utility for torture, it can scarcely be surprising that illiberal societies, dictatorships, fascist regimes, and communist states have engaged in even more extreme measures in order to ensure control of the people, or to force a great societal change based on ideology.²⁰ Whereas democracies seem driven to use torture under the stress of separatists, terrorists, or

13. See DARIUS REJALI, *TORTURE AND DEMOCRACY* (2009) (explaining different torture techniques); see also JOHN T. PARRY, *UNDERSTANDING TORTURE: LAW, VIOLENCE, AND POLITICAL IDENTITY* 99 (2010); *REVUE INTERNATIONALE*, *supra* note 5, at 59-60.

14. *Ireland v. United Kingdom*, App. No. 5310/71, Eur. Ct. H.R. 59 (1978) (comparing acts rising to torture and lesser intrusions on personal dignity that might constitute other cruel, inhuman, or degrading treatment).

15. *Id.* at 35 (explaining that these tactics were so prolific and controversial they came to be known as the “five techniques”).

16. PARRY, *supra* note 13, at 108.

17. *Id.* at 117.

18. *Id.*

19. *Id.* at 118.

20. Nazi Germany, an emblematic example of an illiberal dictatorship with cruel methods of repression, used torture against its own citizens. Joseph Stalin, Soviet dictator in the years after the Second World War, proved little better. Secret police with the power to torment ordinary citizens were key elements of repression, emulated in many illiberal societies since, such as Iran. Pol Pot, a Cambodian dictator who massacred thousands in “killing fields,” and forced the entire country to migrate from cities to rural areas, was famous for the use of pulling fingernails off, or driving shoots of bamboo under fingernails, to compel persons to give information in an interrogation.

crumbling empires, dictatorships must ply violence constantly in order to maintain control. Every day is a part of an ongoing, dire national security emergency.

In the later part of the 20th century, a clearer consensus emerged that torture was not legitimate and that derogation from democratic principles in emergencies—such as the famous “ticking time bomb” scenario—undermined the rule of law.²¹ It was also accepted that torture was not especially effective as it produced false intelligence and false confessions.²² Yet defining and criminalizing torture internationally did not take place until decades after World War II, a period of time when torture-like abuses were part of a decolonization strategy. An inability to qualify and define the phenomena as a discrete legal concept was certainly part of the problem.²³ Many documents declared the broad belief that “torture” should not be permitted, whatever the concept might mean.²⁴

After a number of torture cases became public in the 1960s and 1970s in Algeria, Latin America, and elsewhere, human rights groups launched campaigns and begin to scrutinize the problem.²⁵ At this time, there was a wave of new U.N. General Assembly resolutions reaffirming these principles.²⁶ Most significantly, in 1977 the General Assembly requested that the Commission on Human Rights draft a binding convention against torture based on the General Assembly’s 1975 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.²⁷ In 1978, an ongoing working group continued the drafting process.²⁸ Between 1978 and 1984, numerous drafts circulated and there was fierce debate that led to volumes of

21. International Covenant on Civil and Political Rights art. 4, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; European Convention on Human Rights art. 15, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR]; American Convention on Human Rights art. 27, July 18, 1978, 1144 U.N.T.S. 123 [hereinafter ACHR].

22. AMNESTY, *supra* note 8, at 24; GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INT’L HUMANITARIAN LAW IN WAR* 449-53 (2010).

23. AMNESTY, *supra* note 8, at 33-38.

24. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/3/217A, art. 5 (Dec. 10, 1948) [hereinafter UDHR]; American Declaration on the Rights and Duties of Man art. 26, O.A.S. Res. XXX, *reprinted in* BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN INTER-AMERICAN SYSTEM OAS/Ser.L/V/I.4 Rev. 9 (2003) [hereinafter Rights of Man]; ICCPR, *supra* note 21, art. 7; ECHR, *supra* note 21, art. 3; ACHR, *supra* note 21, art. 5. Some treaties are also non-derogable. *See e.g.*, ICCPR, *supra* note 21, art. 4; ECHR, *supra* note 21, art.15; ACHR, *supra* note 21, art. 27.

25. MANFRED NOWAK & ELIZABETH MCARTHUR, *THE UNITED NATIONS CONVENTION AGAINST TORTURE: A COMMENTARY* 3 (2008).

26. G.A. Res. 3059 (XXVIII), ¶ 4, U.N. Doc. A/RES/3059 (Nov. 2, 1973); G.A. Res. 3218 (XXIX), ¶ 6, U.N. Doc. A/RES/3218 (Nov. 6, 1974); G.A. Res. 3452 (XXX), pmb., U.N. Doc. A/RES/3452 (Dec. 9, 1975); G.A. Res. 3453(XXX), ¶ 5, U.N. Doc. A/RES/ (Dec 9, 1975); G.A. Res. 31/8, ¶ 6, U.N. Doc. A/RES/31/8 (Dec 13, 1976).

27. Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc. A/39/51 (Dec. 10, 1984) [hereinafter Convention against Torture].

28. NOWAK & MCARTHUR, *supra* note 25, at 3-4.

drafting history. In 1984, the final version of the working group was approved by the Commission on Human Rights and transmitted to the General Assembly, where it received relatively speedy signature and ratification by a number of states.²⁹ This treaty, the Convention against Torture (“CAT”), has become one of the most important human rights treaties because it criminalizes illiberal assaults on the human body and human dignity.

B. The Fact of Extrajudicial Killings

Extrajudicial killings have been relatively common since the end of World War II. However, they are not criminalized as broadly as torture despite their similar history and prevalence. They are intertwined with the fate of people who have been “disappeared” by their governments. For example, in Argentina, liberals and communists who opposed the ruling military junta were executed or simply “disappeared.”³⁰ From the 1970s to the 1990s, during Operation Condor, Chile and other countries with military rule also participated in systematized extrajudicial killings.³¹

Extrajudicial killings are scarcely in the past, and are ongoing in a number of countries. One of the most widely reported modern cases of extrajudicial killing is taking place in the Philippines currently. Human Rights Watch reports that, despite the current president’s campaign to end violence, there have been seven recent extrajudicial killings and three recent forced disappearances.³² Hundreds of people, mostly political activists and journalists, have disappeared or been killed.³³ At least one human rights lawyer has suggested that the killings are widespread enough to constitute a crime against humanity.³⁴ In a Congressional hearing on the subject, Senator Barbara Boxer commented: “[f]or too long the Government of the Philippines has not taken sufficient action . . . to address extrajudicial killings and bring those responsible to justice.”³⁵

29. *Id.* at 5.

30. *Argentina Dirty War 1976-1983*, GLOBALSECURITY.ORG, <http://www.globalsecurity.org/military/world/war/argentina.htm> (last visited Nov. 11, 2012) (explaining, among other details, that the disappeared were known as the “desaparecidos”).

31. Robert Plummer, *Condor Legacy Haunts South America*, BBC NEWS, <http://news.bbc.co.uk/2/hi/3720724.stm> (last updated June 8, 2005).

32. *Philippines: Extrajudicial Killings, Enforced Disappearances, and Impunity*, HUMAN RIGHTS WATCH (July 14, 2011), <http://www.hrw.org/features/philippines-extrajudicial-killings-enforced-disappearances-and-impunity>.

33. Kate McGeown, *Philippines Extrajudicial Killings Continue, Says HRW*, BBC NEWS (July 19, 2011), <http://www.bbc.co.uk/news/world-asia-pacific-14196401>.

34. *PHL Police, Military May Face Extrajudicial Killing Raps Before ICC – Lawyer*, GMA NEWS (Sept. 29, 2011, 8:42 PM), <http://www.gmanetwork.com/news/story/233810/news/nation/phl-police-military-may-face-extrajudicial-killing-raps-before-icc-lawyer>.

35. *Extrajudicial Killings in the Philippines: Strategies to End the Violence, Hearing Before the Subcomm. on East Asian and Pacific Affairs of the Comm. on Foreign Relations of the S. Comm. on Foreign Relations*, 110th Cong. 2 (2007), available at <http://www.gpo.gov/fdsys/pkg/CHRG-110shrg40811/pdf/CHRG-110shrg40811.pdf>.

In Ethiopia, the threat of separatists from the Ogaden National Liberation Front (“ONLF”) has increased reports of torture and extrajudicial killings.³⁶ Estimates put between 1,000 and 2,000 civilians killed by members of the Ethiopian police force or military.³⁷ In the Ivory Coast, the United Nations discovered mass graves in a center of opposition thinking in the country’s business capital.³⁸ The U.N. documented at least twenty-six cases of extrajudicial killings, as well as eighty-five known arbitrary arrests and eleven cases of rape by government actors.³⁹

In Bangladesh, Amnesty International has reported that the Rapid Action Battalion (“RAB”), a special police force, has committed at least 700 extrajudicial killings since the group’s creation in 2004.⁴⁰ Amnesty International reports that the RAB falsely claims a number of these killings were in gun battles or accidents, rather than intentional killings of civilians.⁴¹ There are powerful organized criminal groups in the country; however, many of the killings do not appear to be pursuant to law enforcement needs, but rather the actions of a force that has impunity, and kills after aggressive questioning post-arrest. Torture victims of the RAB have reported that they were told if they did not falsely confess, they would be “cross-fired,” or, in other words, killed by the police who would claim they had done so pursuant to a gun battle.⁴²

Showing even further that torture and extrajudicial killings are inextricably related, death is often a part of torture. A state actor could kill, or threaten to kill, third parties in order to coerce a person into talking. In fact, in many reports of torture from victims across the world, the torture victim observed a killing, or a killing was a part of the torture. Additionally, torture is often so intense that it results in death, or death is contemplated as the inevitable yet perhaps not fully sought out, consequence of severe physical torture. In fact, Amnesty International found that from 1997 to 2000, there were at least eighty known deaths from torture in addition to the fact that instances of torture were present in 150 countries and widespread in seventy countries.⁴³

A U.S. case shows that there are instances of killings that simply are not addressed, leaving the torture statute as one of the only tools for suppressing

36. See Jason McLure, *Ethiopia’s Dirty War*, THE DAILY BEAST (Jan. 21, 2008, 7:00 PM), <http://www.thedailybeast.com/newsweek/2008/01/21/ethiopia-s-dirty-war.html>.

37. *Id.*

38. Daniel Howden, *Troops Blamed for Mass Graves in Ivory Coast*, THE INDEPENDENT (Aug. 13, 2011), <http://www.independent.co.uk/news/world/africa/troops-blamed-for-mass-graves-in-ivory-coast-2336887.html>.

39. *Id.*

40. AMNESTY INT’L, CRIMES UNSEEN: EXTRAJUDICIAL EXECUTIONS IN BANGLADESH 2 (Aug. 2011), available at <http://www.amnesty.org/en/library/asset/ASA13/005/2011/en/c18ad74b-75fe-4b15-b043-5982eebdb27d/asa130052011en.pdf>.

41. *Id.*

42. *Id.*

43. PARRY, *supra* note 13, at 16.

illiberal behavior. In *United States v. Belfast*, the first CAT prosecution in the U.S., refugees from Sierra Leone that sought refuge Liberia were interrogated by Liberian soldiers and killed if they did not answer questions satisfactorily.⁴⁴ As one defendant shot some of the refugees, he told the others that they would be next.⁴⁵ One soldier killed one of the refugees by slowly sawing off his head as he begged for his life.⁴⁶ Yet only the torturing of two refugees who survived the encounter could be prosecuted in a U.S. court—the killings they witnessed were not and could not be prosecuted.⁴⁷

These figures demonstrated the pervasiveness of extrajudicial killings in the modern world. While murders by government officials are prosecuted zealously in countries with a high adherence to the rule of law, such as the United States, other countries often commit extrajudicial killings with impunity. The need to eliminate safe havens and make a definitive statement that illiberal killings are just as wrong as illiberal assaults on the body shows why a convention on the prohibition on extrajudicial killing is needed at this time. It also shows why the United States should adopt a statute—perhaps based on such a treaty, but even without one—that can punish those killers who come within the jurisdiction of the United States.

C. *The Incomplete Law of Killing*

There can be no doubt that in various parts of the world, governments have killed and “disappeared” their own people to maintain power and squelch dissent. In some instances, they are prosecuted under currently defined international law paradigms of war crimes, crimes against humanity, and enforced disappearances. However, an examination of each crime’s framework demonstrates that they are defined too narrowly to provide a sufficient liability framework for extrajudicial killings, and as a result, a convention specific to extrajudicial killings should be adopted.

1. War Crimes and Crimes Against Humanity

While international criminal liability is not comprehensive in terms of covering all forms of large-scale illiberal killings, there are two well-defined international criminal law paradigms that *could* provide liability for extrajudicial killing—war crimes and crimes against humanity. War crimes proscribe certain kinds of conduct, including summary execution of civilians or combatants, as illegal when they occur pursuant to the law of armed conflict.⁴⁸ Crimes against

44. *U.S. v. Belfast*, 611 F.3d 783, 794 (11th Cir. 2010).

45. *Id.*

46. *Id.* at 795.

47. *See id.* at 799-800.

48. Dating back to the 15th century, war crimes have been tried and punished longer than any other international crime. *See SOLIS, supra* note 22, at 28. Currently the four Geneva Conventions of 1949 give the most definitive account of the commonly accepted war crimes. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 50, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Geneva

humanity proscribe certain kinds of conduct, including murder, as illegal when done as part of a widespread attack on a civilian population.⁴⁹ However, these paradigms are too narrow to encompass all contexts in which extrajudicial killings may take place.

The idea of international criminal liability, including war crimes and crimes against humanity, stems from the notion that the state may be unable or unwilling to dispense justice. This idea dates back to the Second World War and, specifically, to the crimes of the Nazis who perpetrated genocide on behalf of the state, as well as other crimes against humanity, war crimes, and crimes of aggression.⁵⁰ Thus, when the state is the perpetrator of crimes—such as is the case with extrajudicial killings—criminal liability can no longer be prosecuted by the state.

While states cannot be held directly liable for criminal activity, the germination of international criminal law begins with the idea that the state can do wrong.⁵¹ There are some actions, taken by a state or its agents, which should be—and can be—sanctioned regardless of the laws and policies of that state. Long before Nuremberg, war crimes were punishable international crimes.⁵² Wars have been a long-recorded feature of human existence and generally, war results in the

Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea art. 51, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 87 [hereinafter Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War art. 130, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 147, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]. War crimes along a similar formulation are also proscribed in Article 8 of the Statute of the International Criminal Court. *See* Rome Statute of the International Criminal Court art. 8, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Statute of the ICC].

49. The proposition that crimes against humanity fall within the scope of international law dates back to the famous “Martens Clause” of the 1899 Hague Conventions with the statement:

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.

Hague Convention with Respect to the Laws and Customs of War on Land pmbL., July 29, 1899, 32 Stat. 1803, *available at* <http://www.icrc.org/ihl.nsf/FULL/150?OpenDocument>. Crimes against humanity were then criminally proscribed for the Nuremberg trials by Control Council Law No. 10. Allied Control Council, *Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, Law No. 10 (Dec. 20, 1945), *available at* <http://avalon.law.yale.edu/imt/imt10.asp> [hereinafter Control Council Law No. 10]. They now are also proscribed in Article 7 of the Statute of the International Criminal Court. Statute of the ICC, *supra* note 48, art. 7.

50. *See* Control Council Law No. 10, *supra* note 49.

51. States themselves cannot have direct criminal liability. *See* Rep. of the Int’l Law Comm’n, 53d Sess., April 23-June 1, July 2-Aug. 10, 2001, U.N. Doc. A/56/10, GAOR, 56th Sess., Supp. No. 10, at 43-51 (2001).

52. *See* SOLIS, *supra* note 22, at 28.

incapacitation of one state's government while the victor occupies it. Thus, those who have broken the international customs of fair play in wartime were subject to tribunals run by the victor.

Historically, there has also been international criminal liability for "peremptory norms," or actions deemed so wrong by all the international community that they are universally punishable as crimes.⁵³ Usually these crimes have some nexus to international concerns, such as the fact that they commonly occur across international borders or on the high seas. Paradigmatic examples include piracy and slave trading, which both occurred on the high seas and relied on international cooperation to ensure the existence of no safe havens for such criminals.⁵⁴

The current international criminal law paradigms of war crimes and crimes against humanity are not sufficient to criminalize extrajudicial killings. Both paradigms prevent state actors from killing their people, but do not do so broadly enough. Under the war crimes doctrine, civilians are protected as improper objects of attack.⁵⁵ This holds true in cases of a civil war or a war of national liberation.⁵⁶ Thus, when a state is engaged in an internal armed conflict, its power to kill its citizens might be circumscribed.⁵⁷ This means that extrajudicial killings can be

53. See M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligations Erga Omnes*, 59 LAW & CONTEMP. PROBS. 63, 67-68 (1996).

54. See *id.*

55. This is called either "noncombatant immunity," or the "principle of distinction." See SOLIS, *supra* note 22, at 251.

56. See Protocol Relating to the Protection of Victims of International Armed Conflicts art. 1, June 8, 1977, 1125 U.N.T.S. 3 (stating that wars of national liberation are considered international for the purposes of the applicability of the Geneva Conventions regime).

57. There are two conflicting veins in international law on this point. On the one hand, internal armed conflicts were not historically treated like international armed conflicts. See Rogier Bartels, *Timelines, Borderlines and Conflicts: The Historical Evolution of the Legal Divide Between International and Non-international Armed Conflicts*, 91 INT'L REV. OF THE RED CROSS 35, 45 (2009). In the past, states were seen as having plenary power within their borders. See *id.* at 46. Thus internal killings of traitors or freedom fighters or those with political differences of opinion might be not be illegal, if purely interstate. See *id.* Under this model the prohibition on war crimes is not so much a human rights idea, but an idea about interstate relations. This certainly fits with the relatively early historical emergence of criminalization of war crimes, far predating other crimes that do have a nexus to human rights ideas. Nonetheless, even in earlier periods before the emergence of the human rights movement, and during this era of high sovereignty, there was the idea of belligerency—the notion that once a rebellion reached a certain level of strength, the conflict had become "international" in the idea of reciprocal rights between the two entities. *Id.* at 50-51. The laws of warfare would apply. *Id.* In modern times, there is increasing strength to the notion that internal wars be governed by the same law of armed conflict as international conflicts. Factually, internal conflicts are now much more common, and humanitarian concerns are the same in internal conflicts as in international ones. *Id.* at 40. Legally, the Geneva Conventions established a very minimum baseline for internal armed conflicts in the form of common article 3, expanded by Additional Protocol II. Protocol Relating to the Protection of Victims of Non-international Armed Conflicts art. 1, June 8, 1977, 1125 U.N.T.S. 610; First Geneva Convention, *supra* note 48, art. 3; Second Geneva Convention, *supra* note 48, art. 3; Third Geneva Convention, *supra* note 48, art. 3; Fourth Geneva Convention, *supra* note 48, art. 3. Many also contend

prosecuted as a war crime, but only if committed in an armed conflict setting. Murder is both prohibited in Common Article III of the Geneva Conventions—the minimum baseline of prohibitions for armed conflict—as well as in the Third Geneva Convention, with regard to prisoners of war, and in the Fourth Geneva Convention, with regard to civilians.⁵⁸ It is a crime under the Geneva Conventions, as “grave breaches” that all parties must agree to prosecute or extradite to another country that will prosecute. The same protections yet again appear in Additional Protocol I to the Geneva Conventions, which expands the 1949 Geneva Conventions regime with new humanitarian protections.⁵⁹

More narrowly, crimes against humanity may occur only in the context of widespread attacks on the civilian population. This is a proscribed criminal definition that has appeared in the charters of international criminal tribunals from Nuremberg to the present International Criminal Court, but which, unlike other international crimes, does not have a general treaty that states can sign onto and agree to criminalize in their domestic law.⁶⁰ As a result, many countries, including the United States, lack crimes against humanity criminal statutes, while many have war crimes statutes based on the Geneva Conventions, a genocide statute based on the Genocide Convention, and so on.⁶¹

The crimes against humanity offense is a reasonable way to proscribe states from killing their own citizens. However, crimes against humanity are useful as a legal tool only in a narrow setting: when a “widespread” attack on the civilian population is in progress.⁶² This requirement is one that only gets the international

that customary international law places increasingly strong demands on states (and non-state actors) in conforming their internal war behavior to the requirements of the international law of armed conflict. *See, e.g.*, SOLIS, *supra* note 22, at 169.

58. Fourth Geneva Convention, *supra* note 48, art. 3; Third Geneva Convention, *supra* note 48, art. 3.

59. Michael J. Matheson, Deputy Legal Advisor, U.S. Dep’t of State, Session Two: The U.S. Position on the Relation of Customary International Law to the 1977 Additional Protocols to the 1949 Geneva Conventions, Remarks at The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Additional Protocols to the 1949 Geneva Conventions (1987), in 2 AM. U. J. INT’L L. & POL’Y 419, 423-29 (1987).

60. Both war crimes and genocide are crimes for which there are treaties defining the crime and requiring implementation in the states parties’ domestic criminal law. *Compare* First Geneva Convention, *supra* note 48, art. 50, Second Geneva Convention, *supra* note 48, art. 51, Third Geneva Convention, *supra* note 48, art. 130, Fourth Geneva Convention, *supra* note 48, art. 147, and Convention on the Prevention and Punishment of the Crime of Genocide art. 5, Dec. 9, 1948, 78 U.N.T.S. 277 (identifying their respective grave breaches), with Genocide Implementation Act of 1987, 18 U.S.C. § 1091 (2006), and War Crimes Act of 1996 § 2401, 18 U.S.C. § 2441(1996) (implementing them in U.S. law).

61. *See id.*

62. *Compare* Statute of the ICC, *supra* note 48, art. 7 (“For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack . . .”), with Statute of the International Criminal Tribunal for the former Yugoslavia, S.C. Res. 827, art. 5, U.N.

community involved when governments killing their people, and when the scale is so grave that the massacre has risen to the level of international concern. This seems to be a compromise intended to keep the international community out of a state's affairs when the scale of violence is sufficiently small such that the state may be capable of suppressing it, even if the state does not. On the other hand, a widespread attack on the civilian population in a state suggests a massive breakdown in the state's administration of justice, one of its central functions, and thus, suggests why a mechanism for prosecution of such crimes by the international community would be needed.

Consequently, while both the proscription on war crimes and the proscription on crimes against humanity provide individual criminal liability for singular persons who participate in wide-scale violence, neither catches the kind of behavior that is criminalized in the Convention Against Torture: single, illiberal wrongs by actors in a position of state authority. Neither crime penalizes torture committed by a single member of a secret police force who interrogates a suspected terrorist or separatist by administering a severe beating. Nor does either crime punish extrajudicial killing by a soldier who takes a number of political activists from their home in the night, kills them, and buries them as a means of silencing them. The international community may want to limit the "small scale" crimes that it takes an interest in, but extrajudicial killings should be one of the acts for which direct international criminal liability is imposed, even in a single instance. For example, torture, as criminalized by the CAT, demonstrates how such a crime may be prosecuted outside of the realm of crimes against humanity or war crimes. Torture can be a crime against humanity when a number of tortures are committed on a wide scale, but unlike war crimes or crimes against humanity,⁶³ it can also exist in a single instance under the CAT. Without such a treaty for extrajudicial killings, the breakdown in the state's ability to dispense justice is great. The state's very own representative has stolen away a person's right to live with impunity, and perhaps, at the very encouragement of an illiberal government.

2. Enforced Disappearances

Torture and enforced disappearances are both acts that can, along with murder, be visited widespread on a civilian population and thus, can be crimes against humanity. However, unlike extrajudicial killings, both crimes are criminalized through adoption of conventions. A discussion of the International Convention for the Protection of All Persons from Enforced Disappearance

Doc. S/RES/827 (May 25, 1993) (demonstrating that as it was the first international court since Nuremberg, this Statute does not require the widespread quality—it instead requires that the list of acts be done to civilians in an armed conflict setting), *and* Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, art. 3, U.N. Doc. S/RES/955 (Nov. 8, 1994) (demonstrating that similar to the Statute for the Special Court of Sierra Leone, there is reference to the widespread requirement instead of the armed conflict requirement—which seems to be the preferred prerequisite—and showing that this issue is now more settled in favor of the definition that was adopted in the Rome Statute).

63. Statute of the ICC, *supra* note 48, art. 7(f).

(“CAED”),⁶⁴ in many ways similar to the CAT, will also inform the proposed creation of a convention prohibiting extrajudicial killings.

To begin, an “enforced disappearance” is different from murder—while both murder and enforced disappearances are listed in the statute of the International Criminal Court, they are listed as distinct attacks on the civilian population that can rise to the level of crimes against humanity. Furthermore, enforced disappearances may be described as a crime of the same ilk as torture and extrajudicial killings, particularly as outlined in the recent Convention against Enforced Disappearances.

The International Convention for the Protection of All Persons from Enforced Disappearance (“CAED”) is a U.N.-sponsored international human rights treaty whose object is to prohibit enforced disappearances.⁶⁵ An “enforced disappearance” is a term of art in international law; specifically, it is one of the prohibited acts that, as part of a wide-scale attack against a civilian population, constitutes a crime against humanity.⁶⁶ The convention began with a 1978 resolution by the U.N. General Assembly condemning secret abductions and disappearances by government and seeking further review of the problem.⁶⁷ In 1992, years after the passage of the Convention against Torture, the General Assembly returned with a resolution, the Declaration on the Protection of All Persons from Enforced Disappearance.⁶⁸ Following this, in 2001, the Commission on Human Rights established an open-ended working group to draft a treaty against enforced disappearances.⁶⁹ The text drew very heavily from the model of the CAT. The final text was adopted by the General Assembly in December 2006, opened for signature in February 2007, and entered into force December of 2010.⁷⁰ Although about ninety states have signed the treaty, only about thirty have ratified it so far.⁷¹ Notably, the United States, the United Kingdom, Spain, Italy, Germany, and the Netherlands did not sign.⁷²

An “enforced disappearance” is defined in Article 2 of the convention as:

the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by

64. See International Convention for the Protection of All Persons from Enforced Disappearance, G.A. Res. 61/177, U.N. Doc. A/RES/2006/1 (Dec. 20, 2006) [hereinafter Convention on Enforced Disappearance].

65. *Id.* pmb1.

66. Statute of the ICC, *supra* note 48, art. 7(i).

67. G.A. Res. 33/173, ¶ 4, U.N. Doc. A/RES/33/173 (Dec. 20, 1978).

68. G.A. Res. 47/133, pmb1., U.N. Doc. A/RES/47/133 (Dec. 18, 1992).

69. Human Rights Commission Res. 2001/46, Rep. to the Economic and Social Council on the Fifty-Seventh Session of the Commission, 57th Sess., April 25, 2001, E/CN.4/2001/L.11/Add.5, at 36 (April 25, 2001).

70. International Convention for the Protection of All Persons from Enforced Disappearance, UNITED NATIONS TREATY SERIES, http://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-16&chapter=4&lang=en (last visited Mar. 24, 2013).

71. *Id.*

72. *Id.*

a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.⁷³

States who accede to the convention have the obligation to: investigate acts of enforced disappearance and bring those responsible to justice; ensure that enforced disappearance constitutes an offense under its criminal law; establish jurisdiction over the offense of enforced disappearance when the alleged offender is within its territory, even if they are not a citizen or resident; cooperate with other states in ensuring that offenders are prosecuted or extradited, and assist the victims of enforced disappearance, or locate and return their remains; respect minimum legal standards around the deprivation of liberty, including the right for imprisonment to be challenged before the courts; establish a register of those currently imprisoned, and allow it to be inspected by relatives and counsel; and, ensure that victims of enforced disappearance, or those directly affected by it, have a right to obtain reparation and compensation. Like the CAT, the Convention intends to be governed by a "Committee against Enforced Disappearances" of persons elected by the member states-parties.

The Convention Against Enforced Disappearances obviously provides a model for the path, which is proposed here: to use familiar structures from the CAT regime to fight a related illiberal harm. But the existence of the new Convention Against Enforced Disappearances does not preempt the need for a Convention Against Extrajudicial Killings. Importantly, the enforced disappearances treaty does not target murders specifically. In fact, it is not even so expansive as to cover all sorts of illiberal deprivations of liberty by governmental actors. The Convention addresses a singular tactic wherein thousands of persons were "disappeared" by the government that was first made very famous by the Nazi "Night and Fog" decree, or the Argentine "Dirty War." While government actors continue to use this illiberal tactic, it seems the convention could have been strengthened if it had been made to include a larger class of governmental abductions and detentions, as the torture regime attempts to cover a large class of illiberal government assaults.

Both the enforced disappearances treaty, and the treaty on extrajudicial killings that this article proposes, seek to expand protection from illiberal governmental assaults on the body (torture) to other illiberal acts (kidnapping, and killing, respectively). But both the enforced disappearances treaty and the proposed one suffer in that deprivations of liberty and life by the government can be part of the regular and proper functioning of the state, while the imposition of pain on the body is generally not. The way the enforced disappearances treaty adapted to this problem was to circumscribe the kind of illiberal kidnapping the drafters were concerned with down to the single tactic of "enforced disappearances." But, what about openly jailing dissidents for political crimes?

73. Convention on Enforced Disappearance, *supra* note 64, art. 2.

What happens when a government tells the family of a disappeared person that that person has been imprisoned or killed? Do these actions somehow obviate the crime of the illiberal abduction? This scarcely seems to make sense simply because “disappearance” is the more common recent and historical mode of illiberal governmental abduction and detention.

Related to the questions the narrow scope of the enforced disappearances treaty is its usefulness. As it includes only one tactic for illiberal deprivation of liberty, states may simply innovate others. The Dirty War in Argentina, Operation Condor, and other historically known incidents of widespread disappearances have already come and gone. However, despite the historical condemnation the tactic has already received, similar crimes continue as governments become innovative with their tactics to make such types of disappearances less obvious. Perhaps these examples weighed heavily on the minds of the crime’s innovators, who first turned attention to the problem in 1978, but not again for fourteen years, and then not again for nine years. From the first call for some proscription in this area until the actual time the treaty went into force was a period of more than thirty years. Perhaps the concept of illiberal abductions needs further normative work; this must be addressed elsewhere.

Despite the future need for development of the concept of illiberal abductions, the Convention Against Enforced Disappearances does inform any potential Convention Against Extrajudicial Killings: the objective in proscribing illiberal killings must be as comprehensive as possible. Unlike in the CAED, the crime enumerated in the extrajudicial killing convention must not be limited merely to the most known, common tactics. It must be defined carefully not to impinge on the rightful prerogatives and powers of the state, as the CAT and the CAED are, but it must also be written expansively, and not in a tactic-specific way.

Thus, as we have seen from studying the history above, the CAT was a normatively powerful tool that crystallized a certain method as to how to prevent governmental abuses of the person. Using the torture regime as a starting point, a similar convention prohibiting extrajudicial killings could be successful if the crime is more clearly defined. Patterning the treaty after the CAT worked for the ratification of the CAED. However, in order to have a more widely ratified and more useful treaty than the CAED, we cannot copy the CAT wholesale or narrow the definition of an extrajudicial killing so much that it is not flexible, adaptable, and useful. In order to have hope of adoption, the new crime of extrajudicial killing outlined in the treaty must also not threaten the proper powers of government, not only because of problems in the application, but also to prevent perceived threats to governmental power. The next section will describe the type of provisions that could be included in a draft Convention Against Extrajudicial Killings modeled after the CAT.

III. THE LEGAL REGIME OF THE CONVENTION AGAINST TORTURE AND HOW IT CAN BE ADAPTED TO EXTRAJUDICIAL KILLING

The Convention Against Torture (“CAT”) provides a strong legal framework to inform the creation of a Convention Against Extrajudicial Killings as many aspects of the crime of torture are similar to extrajudicial killing. CAT’s articles and objectives are used below as a baseline for suggesting the types of legal provisions needed to prosecute extrajudicial killings.

A. *The Definition of Torture*

To begin, the definition of torture as outlined in Article 1 of the CAT is:

For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

The main elements of the definition of torture are the involvement of a public official, the infliction of severe pain and suffering, intent, and a specific purpose.⁷⁴ While the *actus reus* for a new crime of extrajudicial murder will of course be different, the intent element is analogous and thus, the proposed convention can include a similar type of definition. For example, extrajudicial killing would include intentionally causing the death of the victim rather than intentionally inflicting severe pain or suffering.

The requirement of a public official should remain the same. This is the defining characteristic of the crime of extrajudicial killing, and what separates it from ordinary, privately committed murder for which international concern should arguably not exist. However, the growth from before 1984 to present of non-state actors in the international system may give some cause to expand the definition, at least to cover non-state organizations that have *de facto* control over a territory or a population. It perhaps should also be expanded to terrorist groups and any other group with a political motive, although defining the law thusly may present some conceptual challenges.

For example, when the CAT was negotiated, some parties advocated a definition that would include public and private actors.⁷⁵ It does not seem that

74. NOWAK & MCARTHUR, *supra* note 25, at 28.

75. AHCENE BOULESBAA, THE U.N. CONVENTION ON TORTURE AND THE PROSPECTS FOR ENFORCEMENT 23-28 (1999).

much thought was given to a middle way between including all actors: public and private, and public officials only.⁷⁶ What of those acting “under color of law”? What of contractors and private security forces? Or, organizations that exercise *de facto* control over territory, but have yet to be recognized as a government? The new convention on extrajudicial killings should address such concerns. This article’s particular recommendation is to include officials acting under “color of law,” and those with actual authority in a territory, regardless of whether they are “public officials.” This is based on the fact that non-state actors with the power to act for the state acting illiberally also demonstrate the breakdown of the state. Therefore, international criminal liability is reasonable.

Despite the similar role of the state in the crime of extrajudicial killing as in torture, the specific purpose is likely to be different. The CAT notes that torture is utilized often to gain information, to punish, and to intimidate, and lists these motives as non-exclusive signs that a treatment is torture. Killing might be done for the second and third purpose, but not the first. A rewriting of Article 1 for extrajudicial killing purposes would note how extrajudicial killing is done to punish dissidents, to quell political rivals, and for other illiberal purposes, as part of a similar, non-exhaustive list. The non-exhaustive nature of the list should be maintained to maximize the utility of the statute when extrajudicial killings are utilized differently in the future, but with the same purpose to further illiberal political motives.

One issue that was not fully defined in the torture regime, which becomes even more important in a convention against extrajudicial killings, is the concept of what constitutes a “lawful sanction.”⁷⁷ Thus, the convention may benefit from an article that clearly defines the constitution of judicial authority. For example, this could include the famous provisions of Additional Protocol I to the Geneva Conventions, Article 75, which lays out judicial authority plainly, and has been accepted by many states already. This is similar to the approach of the definition in the Torture Victim Protection Act in U.S. law, which defined an extrajudicial killing not incident to lawful sanction for civil suit purposes.⁷⁸

B. Obligation to Prevent Torture

The obligation to prevent torture found in Article 2 of the CAT is as follows:

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

76. *Id.* (offering some suggestion to that effect from Germany regarding persons with powers of public officials even if not official).

77. *Id.* at 28-35.

78. Alien Tort Claims Act, 28 U.S.C. § 1350 (1948) [hereinafter ATCA]. Congress subsequently defined “extrajudicial killing” in the notes of this Act by approving section 3(a) of the Torture Victim Protection Act. *See* Torture Victim Protection Act of 1991, Pub. L. 102-256, 106 Stat. 73 (1992).

2. No exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture.
3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

Immediately, there is a clear need to distinguish torture and extrajudicial killings. While there is no legitimate role for intentionally committed torture in warfare, there is a role for public officials to kill others intentionally. This article must clarify that it does not intend to impinge upon the scope of the law of armed conflict, a vast and ever-changing body of law that determines when an individual may be targeted, and what scope of harm may come to her on the battlefield. However, war and exceptional circumstances should not be invoked as excuses to allow murders and the persecution of enemies outside of the conflict. As a result, this article must be phrased carefully to prohibit murders pre-texted on war while also protecting evolutions in the law of armed conflict. Therefore, the article should state that it does not apply to killings where the law of armed conflict is in operation, but that the mere existence of a war or other exceptional conflict cannot be invoked to justify extrajudicial killings that are not pursuant to the state's war rights and power. It is important to avoid mention of prohibiting killings "beyond the battlefield" because our technology, and the organization of enemies, are often changing. Further, the notion of a bounded geographic zone of conflict could become obsolete—it may already be obsolete enough in the U.S.'s vision of the war on terror, whether the position of the U.S. is founded or not—to discourage the U.S. and others from signing the law.

As stated above, this draft Convention should attempt to include actors who operate under "color of law" or the authority of a non-state organization that has *de facto* control over a territory. As in Additional Protocol I to the Geneva Conventions, non-state actors cannot invoke superior orders as a defense, treating them just as we would any other fighting force. Nor should they be able to invoke any defense of exceptional circumstances or public authority, just as state actors are bound. But moreover, for these actors there is also the concern that a duress defense could be used. For a public official to claim that they were forced to do the action by their organization should not be a complete excuse, particularly if the dangerousness or the conduct of the organization is known at the time the person joins, they voluntarily join, or they have opportunities to safely leave the group before or after committing the killing.

Generally, duress is not a defense in an intentional killing under current U.S. law, but this point may be worth clarifying. For example, in a case from the International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Erdemovic*, a soldier argued he was forced under threat of death himself to kill others.⁷⁹ While a majority of the Appeals Chamber rejected this as a possible

79. *Prosecutor v. Erdemovic*, Case No. IT-96-22-A, Judgment on Appeal, ¶ 11 (Oct. 7, 1997).

defense, a minority was sympathetic to it. Additionally, the U.S. Supreme Court has recently held that persecutors cannot be denied asylum under the “persecutor bar”⁸⁰ because they participated in acts of persecution under duress.⁸¹ A similar type of clarification regarding these defenses should be included in the draft convention.

C. *Non-Refoulement*

Article 3(1) of the CAT provides, as to *non-refoulement*: “No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” It might seem at first glance that the need for a *non-refoulement* provision in a Convention Against Extrajudicial Killings would not be as important as such an article found in the CAT. One of the goals of torture in illiberal systems is to gather information. If an infamous criminal has been extradited to an illiberal state, there may be much the government wants to know about that criminal’s other crimes, associates, or anything else that might endanger or embarrass the state. If the crime is a political one, like terrorism, the state may particularly want to gather information, intimidate enemies, and prevent appearances of strong internal dissension by torturing prisoners.

However, how should killing a prisoner that has just been received from an extradition be treated? If it is incident to lawful sanction—for example, a procedurally fair death penalty—then the convention’s prohibitions should not be implicated. But what if the state simply executes the person once they have them in custody? It might seem as though this would not happen since a hasty illiberal execution of an extradited person would draw a strong diplomatic response from the sending state (whereas with torture, the fact of the torture might be unknown or disputed). Therefore, it seems an extrajudicial killing would not likely occur or need as much protection. However, it is certainly the case that states have been concerned about the mistreatment of extraditees and expellees, or their disappearance after being handed over from one state to another.⁸²

80. 8 U.S.C. § 1101(a)(42) (2012).

81. *Negusie v. Holder*, 555 U.S. 511, 514 (2009).

82. *See, e.g., Soering v. United Kingdom*, App. No. 14038/88, Eur. Ct. H.R. (1989), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57619> (finding that a person could not be extradited if they risk mistreatment in the receiving state); *Chahal v. United Kingdom*, App. No. 22414/93, Eur. Ct. H.R. (1996), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58004> (finding that a Sikh separatist could not be deported because Indian guarantees of proper treatment were insufficient); *Shamayev and Others v. Georgia and Russia*, App. No. 36378/02, Eur. Ct. H.R. (2005), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-68790> (finding that a Chechen rebel and terrorist could not be deported to Russia); *Baysakov and Others v. Ukraine*, App. No. 54131/08, Eur. Ct. H.R. (2010), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-97437> (finding that Kazakh opposition activists could not be deported to their home country since the assurances of proper treatment given by Kazakh authorities were unreliable and Kazakhstan lacks an effective torture prevention regime); *see generally* EUROPEAN COURT OF HUMAN RIGHTS, FACTSHEET-EXPULSIONS AND EXTRADITIONS (2013), http://www.echr.coe.int/NR/rdonlyres/211A6F9C-A4EC-4CF7-AB2E-42E9D49FB2EF/0/FICHES_Ex

The rule of *non-refoulement* is not directly related to the criminal enforcement of an international legal norm against torture. Rather, it is a proactive provision that prevents countries from being complicit in the torture that other states might potentially do. It is speculative, and covers a narrow range of the possible circumstances that might bring a victim into the hands of his or her torturer. Furthermore, while a *non-refoulement* provision seems necessary, it is not without problems. For example, despite U.S. President Obama's work to close down the detention facility at Guantanamo Bay, Cuba, a number of still-dangerous prisoners cannot be repatriated to their country of origin due to a history of torture in those regimes.⁸³ Perversely, torturers who claim asylum in the U.S. could potentially use the fact that they tortured in the past to show that they should not be repatriated to a country where they used to be a government actor.

Given the difficulties in squaring the *non-refoulement* provision with the needs of a torture or extrajudicial killing convention, could it be excluded perhaps in favor of a more voluntary provision? Could this requirement explicitly be waived in cases where the receiving state vows to the sending state that it will not execute the person? Would this requirement genuinely protect extraditees or expellees from the most likely kind of killing, one that is pursuant to a hasty trial under corrupt judges, rather than a clearer extrajudicial killing? Recall that unlike torture, states may sometimes kill individuals as a part of their function, and that this makes clear legal provisions more difficult. Further, states already have agreements not to seek the death penalty as a predicate of some extraditions, and thus, this is not a likely solution to the problem.⁸⁴

Therefore, this paper suggests a more lax wording of the *non-refoulement* provision, such as:

All States shall endeavor not to expel, return, or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to an extrajudicial killing, or a lawfully sanctioned killing, by government that is not done pursuant to a fair and impartial judicial process.

This wording can assist by expanding the sphere of concern beyond what is criminalized, but giving states some flexibility to fashion new solutions. Unlike torture, a killing is an easier breach to observe and thus, enforcement of the provision would be easier than with torture, which could allow a less absolute standard.

pulsions_et_extraditions_EN.pdf (providing examples and summaries of cases involving expulsions and extraditions).

83. KATE JASTRAM & MARILYN ACHIRON, UNITED NATIONS HIGH COMM'R FOR REFUGEES, REFUGEE PROTECTION: A GUIDE TO INTERNATIONAL REFUGEE LAW 18 (2001), http://www.ipu.org/pdf/publications/refugee_en.pdf.

84. *See, e.g.*, United States v. Burns, [2001] 1 S.C.R. 283 (Can.) (explaining that Canada could not extradite persons to places where they might be subject to the death penalty).

History demonstrates that *non-refoulement* provisions are important and necessary, and have as much of a role with killings as with torture. The suggested changes to the provision in the draft convention in no way seek to expose extraditees or expellees to an unnecessary risk of extrajudicial execution. If it was found to do so, it may be that an absolute provision on *non-refoulement*—as in the CAT—is the most suitable provision for the Convention Against Extrajudicial Killings.

D. Obligation to Criminalize Torture

The obligation to criminalize torture, as laid out in Article 4 of the CAT, is as follows:

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.
2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

This relatively noncontroversial provision is helpful—having criminal provisions in each state is what will forge the identity of the crime of extrajudicial killing, which is now only a vague concept. This type of provision should be included in a draft extrajudicial killing convention.

E. Jurisdiction

Article 5 of the CAT outlines jurisdiction.

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:
 1. When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
 2. When the alleged offender is a national of that State;
 3. When the victim was a national of that State if that State considers it appropriate.
2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in Paragraph 1 of this article.
3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

This article works in conjunction with Article 7 of the Convention.

1. The State Party in territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found, shall in

the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1.

3. Any person regarding whom proceedings are brought in connection with any of the offences referred to in article 4 shall be guaranteed fair treatment at all stages of the proceedings.

This language illustrates that the CAT is an *aut dedere aut judicare* treaty—or, an “extradite or prosecute” treaty. There are an increasing number of treaties in the international system that utilizes this sort of language. In international law generally, there are traditional bases under which states can exercise criminal jurisdiction—acts which occur in some part in their territory (objective territorial); acts which produce effects in their territory (subjective territorial); acts which are done by their nationals (nationality); acts which affect their nationals (passive personality); acts which impinge vital national interests (protective); and, acts which are of such a concern to the entire international community that it is in the interests of all states to try and suppress them no matter where they occur (universal). *Aut dedere aut judicare* treaties create a kind of agreed universal jurisdiction, giving any state that has custody of an offender the right to try him or her. Oddly, these agreements are widely construed to give jurisdiction over offenders of nationalities of nonparties, and for crimes that occurred in nonparties’ territories.

The new convention against extrajudicial killings should continue to utilize *aut dedere aut judicare* language like that of the CAT and numerous other successful criminal “suppression” conventions. Yet, this may be problematic for the United States. Although the language of the CAT mandates extending jurisdiction over every state parties’ territory, the United States explicitly declined territorial jurisdiction in fashioning its domestic law. The U.S. criminal torture statute explicitly only applies to cases of torture that occur outside the U.S. The U.S. likely will want any new extrajudicial killings statute to be only applicable outside of U.S. territory as well. The view may be that the United States already has excellent rule of law and effectively suppresses illiberal assaults by U.S. public officials. At the federal level, there is a “Public Integrity Section” at the Department of Justice whose sole function is to root out cases of corruption; some states have similar laws. Furthermore, torture cases inside the U.S. are uncommon. Yet abroad and outside of normal law enforcement role and oversight, the U.S. has opened its nationals up to criminal liability. Although other states may complain, the U.S. may want to ratify a convention that includes this same language from the CAT about territorial, nationality, and custodial universal jurisdiction, but not

implement territorial jurisdiction. As a result, the provision on jurisdiction included in the draft convention must be clearly thought-out and accepted.

F. Monitoring Committee

Significantly, Article 17(1) of the CAT provides a provision on monitoring.

There shall be established a Committee against Torture (hereinafter referred to as the Committee) which shall carry out the functions hereinafter provided. The Committee shall consist of 10 experts of high moral standing and recognized competence in the field of human rights, who shall serve in their personal capacity. The experts shall be elected by the States Parties, consideration being given to equitable geographical distribution and to the usefulness of the participation of some persons having legal experience.

It is expanded at Article 19(1):

The States Parties shall submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have taken to give effect to their undertakings under this Convention, within one year after the entry into force of this Convention for the State Party concerned. Thereafter the States Parties shall submit supplementary reports every four years on any new measures taken, and such other reports as the Committee may request.

And further expanded at Article 20(1):

If the Committee receives reliable information which appears to it to contain well-founded indications that torture is being systematically practiced in the territory of a State Party, the Committee shall invite that State Party to co-operate in the examination of the information and to this end to submit observations with regard to the information concerned.

When the CAT was negotiated, it was decided to have its enforcement monitored by a new Committee Against Torture as opposed to the existing Commission on Human Rights. Very few suppressing Conventions have such a monitoring mechanism. Usually, these kinds of committees exist for human rights treaties, the predominant enforcement mechanisms of which are not criminal.⁸⁵ Because any Convention Against Extrajudicial Killings would, like the CAT, be similar to a human rights convention—made to bind and monitor states as well as catch criminal—it may be appropriate for it to be subject to some kind of monitoring mechanism.

Unfortunately, reception for the Committee Against Torture has not been exceptionally positive. A prevailing criticism has been that it is simply too weak

85. Office of the High Commissioner for Human Rights, *Human Rights Bodies*, UNITED NATIONS HUMAN RIGHTS, <http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx> (last visited Nov. 8, 2012).

to achieve its goals,⁸⁶ and merely repeats the failed monitoring structures of other regimes, such as the International Covenant on Civil and Political Rights.⁸⁷ This has not been an incurable criticism; some have noted that stronger monitoring regimes appear to be more successful, such as the one proposed in the optional protocol to the CAT,⁸⁸ or the European monitoring regime. Thus, it does not seem that the version in the CAT should be adopted as written. There are also those that argue that the Committee Against Torture does not go far enough, and that the European model and its follower Optional Protocol ("OPCAT"), including its much greater monitoring requirements, is more effective.⁸⁹ While not wishing to foreclose discussion on this issue and a finding by the international community that such a system would be beneficial, this paper proposes to use an established legal body to provide additional, related protections where they seem to be missing, in the relative absence of any whisperings of support for the idea. It seems that in order to propose such a measure, the least onerous proposition should be suggested.

A monitoring regime like the Optional Protocol or the European system could be adopted, but that might drastically narrow the appeal of the treaty, and thus, its widespread ratification. The creation of a new committee for extrajudicial killings seems a bit ambitious for a crime for which there is not a movement with the impetus of the anti-torture movement. This author, though hoping not to shortchange her idea's success were ever it to be adopted, thus would certainly not advocate for the creation of a Committee Against Extrajudicial Killings.

As a result, if a new monitoring committee was not created for extrajudicial killings, and this convention does not directly mirror the Committee Against Torture, should it perhaps be monitored by the Human Rights Council, formerly the Commission on Human Rights, which monitored most such treaties until the Committee Against Torture decided to forge its own path? The Council already monitors extrajudicial killings. There is currently a Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, organized under the Human Rights Council and created through its bureaucracy rather than by treaty.⁹⁰ The Rapporteur studies informally, and currently receives a very low response rate to its surveys according to its 2010 report. A new convention could give the Rapporteur a more official relationship with monitoring that is non-mandatory and informal, but prescribes certain best practices.

86. See, e.g., AMRITA MUKHERJEE, TORTURE AND THE UNITED NATIONS: CHARTER AND TREATY-BASED MONITORING 83 (2008).

87. BOULESBAA, *supra* note 75, at 294.

88. MUKHERJEE, *supra* note 87, at 107-16.

89. Frank Ledwidge, *The Optional Protocol to the Convention against Torture (OPCAT): A Major Step Forward in the Global Prevention of Terror*, 17 HELSINKI MONITOR 69, 69-70 (2006).

90. Office of the High Commissioner for Human Rights, *Special Rapporteur on extrajudicial, summary or arbitrary executions*, UNITED NATIONS HUMAN RIGHTS, www.ohchr.org/EN/Issues/Executions/Pages/SRExecutionsIndex.aspx (last visited Nov. 11, 2012).

The determination of which model to utilize—the existing rapporteur and voluntary compliance, or a more rigorous regime—may depend on whether the value of monitoring compliance outweighs the benefit of widespread ratification. The Optional Protocol was not widely ratified, and if provisions like it were included in the main body of a convention against extrajudicial killings, ratifications would likely be low. One suggestion is to revamp the role of the Rapporteur with voluntary monitoring, and have a more extensive Optional Protocol to the extrajudicial killings convention for those states that wish to promote mandatory compliance. Such a compromise may eliminate the use of the less effective middle option of the Committee Against Torture, ensure more widespread compliance, and boost the norm against extrajudicial killings, while promoting a path to growth and greater monitoring in the future.

G. Other Lessons from the CAT

The CAT contains many standard provisions that did not merit substantial discussion above: the method of choosing and manner of meeting of the members of the treaty's committee, and the accession and ratification provisions. Also, the standard language regarding is significant: the investigation of the treaty's crime, the convention as a basis for extradition to supplement existing treaties, the training of government personnel about the requirements of the treaty, mutual legal assistance, and victim complaint and compensation. Some of these ideas can be adopted into a new convention against extrajudicial killings, while others may not be necessary. For example, Article 15 of the CAT states: "Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made." As described in this article, one prominent feature of torture is that it is often used to gather information, and thus, this article has obvious relevance in the anti-torture regime. Since the object of an extrajudicial killing appears to be to silence, such a provision can most likely not be adapted from the CAT to the new convention.

Likewise, CAT at Article 10 states:

1. Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.
2. Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such persons.

This provision again applies more aptly in the anti-torture regime. It seems likely that proper interrogation techniques have to be strictly trained and enforced to ensure prevention of torture in many situations; however, law enforcement officers more readily understand that they are not at liberty to execute civilians, and thus,

such training is not needed in a similar manner. Nonetheless, the extrajudicial killings convention should include the recommended training on the parameters of self-defense and defense of others, and certainly should admonish law enforcement professionals in their written materials about the severe penalties attaching to committing such a killing. Thus, Article 10 should be modified to meet the needs of the new convention.

H. The Unique Legal Requirements of the Crime of Extrajudicial Killing

An important role for the new convention, as was important for the CAT, is the elimination of safe harbors for human rights violators. This convention targets a relatively specific, illiberal, state-sponsored or state-complicit behavior. Its jurisdiction will stem from the fact that states are not often effective at suppressing their own wrongdoing, and that some crimes with a humanitarian or political dimension are of international concern. However, while the right to life is one of the most important human rights, the convention is not intended to supply a number of special rules for how states should exercise capital punishment, if they choose to have it. It is not meant to provide exhaustive rules about how to fairly run a judicial system so that the state may take a person's life. Such measures are important and should be considered elsewhere, such as by the International Covenant on Civil and Political Rights.

Thus, there should be a limiting article in the convention that clarifies that it is meant to address killings outside of the judicial process and those committed outside of the law of war. However, it is perhaps also worth considering adding language that killings which shield themselves in the judicial process in some way, but are clearly not conducted through the judicial process, should not be protected or at the very least are discouraged. Regulation of sham trials and hasty executions should clearly define the limited scope of intrusion into what constitutes a fairly-reached sentence of death.

Likewise, incidences of public safety killings should be carved out. For example, a police officer who shoots at a person as they are committing a violent crime or trying to escape police custody, has a duty to act in protection of public safety. This killing should receive legal protection. Although both self-defense and defense of others are forms of public safety killings, this should be clarified in the text of the convention. Additionally, as with the law of armed conflict and judicial process, there should be a provision that states that a pre-textual use of a legitimate police power—such as the right to act in the public safety—will not shield a potential perpetrator from liability. It must be clear that the mere fact that a public official claims that a killing was in self-defense, or to protect others, will not be sufficient to shield a potential perpetrator from inquiry.

Aspirational provisions can be included as to proscribe proper death penalty sentences. For example, it could admonish states not to tolerate bribery, to provide for fair trial and at least one appeal, and to provide counsel, among other recommendations included in detail in Additional Protocol I article 75. It could set the parameters of self-defense and defense of others, as well as the law of armed

conflict. Finally, it could recommend required training for members of the military, judiciary, or law enforcement. However, given the enormity and diversity of thought on these issues, it is not recommended that these requirements be imposed as mandatory.

IV. A U.S. CRIMINAL STATUTE ON EXTRAJUDICIAL KILLINGS

To enact criminal prohibitions in the United States, a U.S. statute is required whether the proposed convention succeeds or fails.⁹¹ For the reasons mentioned above, a law allowing U.S. prosecutors to target and punish those who use the power of the state or another form of political power to kill others is desirable. Thus, even without a convention, a statute must be drafted. If a convention is successfully drafted, it will likely not be self-executing under U.S. law and it will require domestic legislation in order to criminalize the activity for those who come within U.S. jurisdiction.

The advantage to a convention is obviously its greater scope of application, as it will hopefully span many states. Its advantage in the United States is to bolster a statute that is written with “found-in” or “custodial universal” or “treaty-based” jurisdiction. This is the form of jurisdiction with the greatest ability to prevent impunity: it allows the U.S. to punish offenders coming from other regimes to the United States. Currently, the United States prosecutes former torturers who seek refuge in the United States once their regime is out of power, but it has limited ability to prosecute politically motivated murders.⁹² A law that allows jurisdiction over these murders when they occur abroad will have the greatest utility—indeed, that is the central utility. Thankfully, there are not many politically motivated murders committed by the state or guerilla groups in the United States. The ability to end impunity in states where the rule of law is weak relies on there being no country to which criminals can go for a safe haven. This form of “custodial” universal jurisdiction is the most expansive besides the disfavored “true” universal jurisdiction, which allows crimes committed abroad to be tried in absentia with no territorial nexus.⁹³ “Found in” language is time-tested and reliable, frequently used, relatively easy to litigate, and very desirable.

While it has long been established that Congress may criminalize extraterritorial conduct even in the absence of an underlying treaty or support in international law, this does not change the fact that Congress has been extremely hesitant to do so. For example, there are about twenty-one crimes for which Congress has imposed the desirable “the alleged offender is later found in/present

91. However, this does not apply in the highly unlikely circumstance that the treaty is self-executing.

92. See 18 U.S.C.A. § 2441(a)-(b) (2006); 18 U.S.C. § 1091(e) (2009); 18 U.S.C.A. § 2340A(a)-(b) (2004).

93. STEPHEN MACEDO, ET AL., *THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION* 29, 31 (2001), available at http://lapa.princeton.edu/hosteddocs/unive_jur.pdf

in the United States” language.⁹⁴ Nearly each of these crimes is connected to a suppression treaty signed by the United States, with the exception of some of the terrorist crimes, which are predicated under the passive personality bases of jurisdiction under international law.⁹⁵

Yet, Congress has the authority to write a law with extraterritorial application, as long as that law complies with due process requirements. It is well-established that Congress can regulate conduct outside the territorial boundaries of the United States,⁹⁶ and “the courts of the United States have repeatedly upheld the power of Congress to attach extraterritorial effect to its penal statutes, particularly where they are being applied to citizens of the United States”⁹⁷ Generally, statutes are not construed to have extraterritorial effect absent a clear statement from Congress. Where Congressional intent for extraterritorial jurisdiction of a statute is clear, that jurisdiction is not precluded by norms of customary international law.⁹⁸ Congress is not bound by international law, nor is U.S. law “subordinate to customary international law.”⁹⁹ In fact, “[i]f it chooses to do so, [Congress] may legislate with respect to conduct outside the United States, in excess of the limits posed by international law.”¹⁰⁰ The role and duty of U.S. courts’ therefore is “to enforce the

94. 18 U.S.C.A. § 32(b)(4) (2006) (destruction of aircraft or aircraft facilities); 18 U.S.C.A. § 37(b)(2) (1996) (violence at international airports); 18 U.S.C.A. § 112(e) (1996) (protection of foreign officials, official guests, and internationally protected persons); 18 U.S.C.A. § 831(c)(3) (1996) (prohibited transactions involving nuclear materials); 18 U.S.C.A. § 878(d) (1996) (threats and extortion against foreign officials, official guests, or internationally protected persons); 18 U.S.C.A. § 1091(e)(2)(D) (2009) (genocide); 18 U.S.C.A. § 1116(c) (1996) (murder or manslaughter of foreign officials, official guests, or internationally protected persons); 18 U.S.C.A. § 1201(e) (2006) (kidnapping only in the case of the kidnap of a foreign official); 18 U.S.C.A. § 1203(b)(1)(B) (1996) (hostage taking); 18 U.S.C.A. § 1596(a)(2) (2008) (additional jurisdiction in certain trafficking offenses for §§ 1581, 1583, 1584, 1589, 1590, 1591—involving human trafficking and slavery); 18 U.S.C.A. § 1651 (1948) (piracy); 18 U.S.C.A. § 2280(b)(1)(C) (1996) (violence against maritime navigation); 18 U.S.C.A. § 2281(b)(3) (1996) (violence against maritime fixed platforms); 18 U.S.C.A. § 2332f(b)(2)(C) (2002) (bombings of places of public use, government facilities, public transportation systems and infrastructure facilities); 18 U.S.C.A. § 2339B(d)(1)(C) (2009) (providing material support or resources to designated foreign terrorist organizations); 18 U.S.C.A. § 2339C(b)(2)(B) (2006) (prohibitions against the financing of terrorism); 18 U.S.C.A. § 2339D(b)(3) (2004) (receiving military-type training from a foreign terrorist organization); 18 U.S.C.A. § 2340A(b)(2) (2001) (torture); 18 U.S.C.A. § 2442(c)(3) (2008) (recruitment or use of child soldiers); 21 U.S.C.A. § 960a(b)(5) (2006) (foreign terrorist organizations, terrorist persons and groups); 49 U.S.C.A. § 46502(b)(2)(C) (1996) (aircraft piracy).

95. However, it certainly appears that Congress prefers to use custodial jurisdiction when bolstered by a treaty as opposed to standing on that bases alone for terrorism crimes.

96. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991).

97. *United States v. Layton*, 509 F. Supp. 212, 214 (N.D. Cal. 1981).

98. *United States v. Yunis*, 924 F.2d 1086, 1091 (D.C. Cir. 1991).

99. *United States v. Yousef*, 327 F.3d 56, 91 (2d Cir. 2003).

100. *United States v. Pinto-Mejia*, 720 F.2d 248, 259 (2d Cir. 1983).

Constitution, laws, and treaties of the United States, not to conform the law of the land to norms of customary international law.”¹⁰¹

From a due process perspective, Congress can provide for jurisdiction based on its constitutional authorities “[t]o define and punish . . . [o]ffenses against the Law of Nations,” “[t]o regulate Commerce with foreign Nations,” and pursuant to the Necessary and Proper Clause in conjunction with the Treaty Power.¹⁰² Some statutes thus have a firm constitutional basis on the “Law of Nations” clause where there is also universal or general jurisdiction for those crimes. When the United States enters a treaty to establish international legal basis for extraterritorial jurisdiction over a crime, Congress may enact legislation as necessary and proper to effectuate U.S. obligations under the treaty.¹⁰³

Generally, Congress is only comfortable providing a custodial universal basis of jurisdiction if the crime is pursuant to an *aut dedere aut judicare* treaty, or, a crime for which universal jurisdiction exists very clearly. If the Convention Against Extrajudicial Killings comes to be, then no more argument need be had about implementing a custodial jurisdictional trigger—neither under international law, nor U.S. due process law. But if not, then it is drastically less likely Congress will proscribe extrajudicial killings which occur outside its territorial, nationality, and passive personality jurisdiction. This would not be fatal to a statute against extrajudicial killings, as such a statute could still be written. However, a statute that only applies to killings done in the U.S., or by or against U.S. citizens, would have little value and would be redundant with the federal murder statutes the United States already has enacted. As a result, this provision is of vital importance if the United States wants to punish offenders over whom it has jurisdiction. If no convention is drafted, Congress would either need to: abrogate its previous position that it prefers not to legislate custodial universal jurisdiction crimes without universality; implement an *aut dedere aut judicare* treaty, which could raise due process concerns; or, rely on the fact that extrajudicial killings are currently illegal under customary international law, and covered by universal jurisdiction.

Universal jurisdiction exists for all states to proscribe certain kinds of crimes that are so heinous and thus, of the concern of all states that they violate “peremptory norms”—they are not acceptable for any reason in any culture.¹⁰⁴ Such crimes have been discussed, such as piracy, slavery, and perhaps terrorism.¹⁰⁵ Also, it is commonly maintained that torture was already a universal jurisdiction crime and violation of a peremptory norm before the CAT was written. CAT

101. *Yunis*, 924 F.2d at 1091; *see also Sosa v. Alvarez-Machain*, 542 U.S. 692, 738 (2004) (declining to apply alleged customary international law absent U.S. statute to effect that law).

102. U.S. CONST. art. I, § 8.

103. *See id.*

104. *See Bassiouni, supra* note 53, at 67.

105. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1987).

simply strengthened and outlined it.¹⁰⁶ The question therefore remains, is a prohibition on extrajudicial killings already a peremptory norm?

In practice, extrajudicial killings certainly seem to be roundly condemned by the international community. Numerous international agreements and guiding documents condemn arbitrary deprivations of life, including the International Covenant on Civil and Political Rights (article 6),¹⁰⁷ the Universal Declaration of Human Rights (article 3),¹⁰⁸ the American Declaration on the Rights and Duties of Man (article 1),¹⁰⁹ the American Convention on Human Rights (article 4),¹¹⁰ the European Convention on Human Rights (article 2),¹¹¹ and the African Charter on Human Rights and Peoples' Rights (article 4).¹¹² Thus, it appears that arbitrary deprivations of life, at least, have been roundly condemned by human rights law internationally, regionally, and for some time.

That an extrajudicial killing is a violation of norms of international law appears to have also received some traction in U.S. law. The Alien Tort Statute ("ATS") may criminalize such acts, and its history is informative of this proposition.¹¹³ As part of the original Judiciary Act of 1789, the ATS reads: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."¹¹⁴ The object appears to have been to provide remedies for breaches of customary international law, particularly for foreign merchants who otherwise had no standing to sue Americans in U.S. courts.¹¹⁵ It was a largely unused statute for nearly two hundred years,¹¹⁶ until 1980 in the case *Filártiga v. Peña-Irala*.¹¹⁷ In that case, two Paraguayans sued a former police officer who tortured and killed a relative of theirs.¹¹⁸ The Second Circuit held that Congress could give jurisdiction for customary international law, a matter of federal concern, and that customary international law now included a ban on torture by a government actor.¹¹⁹ Notably,

106. J. HERMAN BURGERS & HANS DANIELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT I (1988).

107. ICCPR, *supra* note 21, art. 6.

108. UDHR, *supra* note 24, art. 3.

109. Rights of Man, *supra* note 24, art. 1.

110. ACHR, *supra* note 21, art. 4.

111. ECHR, *supra* note 21, art. 2.

112. African Charter on Human and Peoples' Rights (Banjul Charter), June 27, 1981, 21 I.L.M. 58 (1982).

113. *See* ATCA, *supra* note 79.

114. *Id.*

115. John Haberstroh, *The Alien Tort Claims Act & Doe v. Unocal: A Paquete Habana Approach to the Rescue*, 32 DENV. J. INT'L L. & POL'Y 231, 236 (2004).

116. Gary Clyde Hufbauer & Nicholas K. Mitrokostas, *International Implications of the Alien Tort Statute*, 16 ST. THOMAS L. REV. 607, 609 (2004).

117. *Filártiga v. Peña-Irala*, 630 F.2d 876, 878 (2d Cir. 1980).

118. *Id.* at 876.

119. *Id.* at 880.

the court held this before the CAT was in force, looking to sources such as the Universal Declaration on Human Rights, while cautioning that not every provision in the declaration had ripened into a robust norm of customary international law. Yet summary executions are among the limited class of violations of customary international law that have been found actionable under the Alien Tort Statute.¹²⁰ This is an extremely important finding to import from the civil arena to the criminal one. If U.S. courts have already found that extrajudicial killings violate customary international law for the purposes of being vulnerable to civil suit, this strongly suggests a basis for universal criminalization of extrajudicial killings.

About a decade after the ATS was reinvigorated with this human rights purpose, Congress elected to expand the reach of the statute by passing the Torture Victim Protection Act (“TVPA”).¹²¹ The TVPA is appended as a statutory note to the ATS. It was enacted in 1992 to provide a cause of action in cases of officially sanctioned torture and extrajudicial killing.¹²² It states:

An individual who, under actual or apparent authority, or color of law, of any foreign nation—

(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual’s legal representative, or to any person who may be a claimant in an action for wrongful death.¹²³

The Torture Victim Protection Act, unlike the ATS, is not a jurisdictional statute.¹²⁴ The purpose of the Act is to “work in conjunction with the [ATS], expanding the [ATS’s] reach to torts committed against United States citizens (not just ‘aliens’) who, while in a foreign country, are victims of torture or ‘extrajudicial killing.’”¹²⁵ Thus, this act demonstrates something very interesting. First, Congress wished to extend protections for human rights suits from aliens to U.S. citizens. But, only in limited cases—those of torture and extrajudicial killings. These areas of governmental misconduct are of particular concern. As the seminal case *Kadic v. Karadžić* noted, certain violations of the law of nations are illegal whether they are conducted by state actors or by private actors, including: piracy, genocide, war crimes, or participation in the slave trade.¹²⁶ However, this is not true of torture and summary execution. Those two crimes can only be violations of

120. Pamela J. Stephens, *Spinning Sosa: Federal Common Law, the Alien Tort Statute, and Judicial Restraint*, 25 B.U. INT’L L. J. 1, 5 (2007).

121. Torture Victim Protection Act of 1991, Pub. L. No. 102-256 Stat. 73 (1992) (codified as note to 28 U.S.C. § 1350).

122. *Id.*

123. *Id.* at § 2(a), (b).

124. *Kadic v. Karadžić*, 70 F.3d 232, 246 (2d Cir. 1995).

125. *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386 (KMW), 2002 WL 319887, at 3 (S.D.N.Y. Feb. 28, 2002).

126. *Kadic*, 70 F.3d at 239.

international legal norms if public actors conduct them.¹²⁷ Thus, we see that in U.S. law there is already recognition of the shared nature of torture and extrajudicial killings and that extrajudicial killings appear to grow naturally from, and bear a strong relationship to, prohibitions on torture.

Nor has the United States only acknowledged ATS tort suits against singular actors. In the case *Murphy v. Islamic Republic of Iran*, plaintiffs brought suit against Iran for sponsoring a terrorist attack against American service members under the Foreign Sovereign Immunities Act ("FSIA").¹²⁸ The FSIA¹²⁹ is the only legal basis under which a lawsuit can be brought against a foreign sovereign in the United States, and provides strict limitations.¹³⁰ Under the FSIA terrorism exception, sovereign immunity is waived when (1) a foreign state (2) committed

an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or [provided] material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency,

(3) which "caused" (4) "personal injury or death" (5) for which "money damages are sought."¹³¹ Again, an extrajudicial killing is appended to a U.S. statutory list of impermissible international crimes. This time, still lumped with torture, it is invoked with a "terrorism" exception.¹³² In *Murphy*, the plaintiffs alleged torture and extrajudicial killing (as well as provision of material support to terrorists), but the attack on a Marine Corps barracks to kill its inhabitants was not found to be custodial torture, but rather an extrajudicial killing, using the definitions of the TVPA.¹³³ Even in the tort realm, the need for a distinct extrajudicial killing cause of action, rather than overreliance on showing torture occurred, is demonstrated.

Thus, it seems there is some cause to believe that the view that persons should not be arbitrarily deprived of life by their governments has emerged as a customary law concept. There also seems to be a great deal of recognition in U.S. statutory and case law that extrajudicial killings violate customary international law. In civil suits, extrajudicial killings are prohibited alongside crimes based on peremptory norms, for which universal jurisdiction exists.¹³⁴ These U.S. statutes and cases

127. *Id.* at 243.

128. *Murphy v. Islamic Republic of Iran*, 740 F. Supp. 2d 51, 56 (D.D.C. 2010).

129. 28 U.S.C.A. §§ 1330, 1332(a)(4), 1391(f), 1441(d), and 1602-1611 (2006).

130. *In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d 31, 38-39 (D.D.C. 2009).

131. 28 U.S.C. § 1605(a)(5) (2006).

132. Indeed, until 2008, under 28 U.S.C. § 1605, states lacked immunity for any one of these crimes even when not occurring in the context of state sponsored terrorism. *See* National Defense Authorization Act for Fiscal Year 2008, PL 110-81, § 1083, 122 Stat. 3 (2008) (providing for a lack of jurisdictional immunity in certain cases in which money damages were sought against a foreign state for personal injury or death caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act).

133. *Murphy*, 740 F. Supp. at 70-71.

134. Torture Victim Protection Act of 1991, *supra* note 121, § 2(a), (b).

strongly suggest that the U.S. has acknowledged the growth of international law to define this specific crime. The existence of the Special Rapporteur in the area also shows its recognized coalescence in the international arena. While it seems it could successfully be argued that the crime exists and is sufficiently defined in international law, it may still be in an early stage of recognition. A convention against extrajudicial killings might serve to flesh out the concept, and make it a peremptory norm for once and for all, as the CAT appears to have helped to do for the crime of torture. Without that service, it may be difficult to definitively say extrajudicial killings are covered by universal jurisdiction and proscribe the crime in the United States. Nonetheless, this paper strongly argues that the norm has emerged specifically enough for Congress to proscribe extrajudicial killings without a treaty on a universality basis.

If no consensus or impetus for a convention can be reached, and Congress decides to nonetheless move forward and enact a statute proscribing extrajudicial killings, the United States will be writing a statute with a clean slate. Writing such a statute without the basis of an *aut dedere aut judicare treaty* may lessen some support for found-in jurisdiction, though as previously observed, the courts have held that Congress nevertheless has the capacity to write such a law. Universality should nonetheless be proficient for due process and prudentially concerns.

Title 18 U.S.C. § 2340A is the U.S. statute that effectuates our obligation under the CAT to criminalize acts of torture:

- (a) Offense—Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.
- (b) Jurisdiction—There is jurisdiction over the activity prohibited in subsection (a) if—
 - (1) the alleged offender is a national of the United States; or
 - (2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.
- (c) Conspiracy—A person who conspires to commit an offense under this section shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense, the commission of which was the object of the conspiracy.

Following the logic given above that the CAT pattern is being used to limit controversy and run a well-worn path to punish a very related crime, it makes sense to model the statute criminalizing extrajudicial killings by using similar language and penalties. Even if the convention were not to be written, signed, or ratified, the following statute could still be used as a pattern. The author proposes the following statute criminalizing extrajudicial killing:

Chapter 113C of the U.S. Code should be renamed from “Torture” to “Torture and Extrajudicial Killings.” 18 U.S.C. § 2340D should be

added after 18 U.S.C. §§ 2340A-C (the statute above, criminalizing torture, and its supplementary provisions), and titled “Extrajudicial killing”:

(a) Offense—Whoever outside the United States commits or attempts to commit an extrajudicial killing shall be fined under this title or imprisoned for any term of years or for life, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.

(b) Jurisdiction—There is jurisdiction over the activity prohibited in subsection (a) if—

(1) the alleged offender is a national of the United States; or

(2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.

(c) Conspiracy—A person who conspires to commit an offense under this section shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense, the commission of which was the object of the conspiracy.

Similarly, this provision identifies that the United States will likely decline to use territorial jurisdiction for the statute. While the U.S. position is certainly not that torture is acceptable when it occurs inside the United States, there appears to be great fear by American lawmakers that torture allegations will be used incorrectly against law enforcement. That concern is not great enough in the eyes of this author to have merited extraterritorial-only jurisdiction. It should be removed from the crime of torture, and certainly should not be added to the crime of extrajudicial killings.

This provision varies from language matching the U.S. statute criminalizing torture by increasing the penalty to life for attempts of murder to death where the killing occurs. For example, 18 U.S.C. § 111, the general federal murder statute, provides that any person who commits first degree murder is subject to the death penalty, and any person who commits second degree murder, being of a less premeditated style, faces a maximum punishment of life imprisonment. The federal attempted murder statute provides that attempted murder cannot be punished by more than twenty years.¹³⁵ These prohibitions also echo the torture statute that carries a maximum punishment of twenty years, or the death penalty if death results from the act. It seems the extrajudicial killing statute could easily mimic both. However, the humble suggestion of this paper is that an extrajudicial killing is a more severe crime than murder in the ordinary course because of the betrayal by a public official, and more severe than torture because it is intended to end the life of the person permanently. Thus, the formulation of the crime recommended by this paper proposes a maximum of lifetime imprisonment for attempt. Since extrajudicial killings are intended to cause a more significant

135. 18 U.S.C. § 1113 (2006).

harm—the death of the victim—a life punishment, as with other intentional homicide crimes in the U.S. code where death does not result—particularly 18 U.S.C. § 956, conspiracy to murder U.S. nationals abroad—is appropriate.¹³⁶

Many may debate the appropriateness of a death sentence as the death sentence is increasingly unpopular worldwide, is increasingly scrutinized as a whole by the highest court in the United States, and the federal death penalty has been rarely recently used. Nonetheless, this punishment is in keeping with the severity of punishment for similar crimes in the U.S. Code, and particularly, the Supreme Court of the United States has always preserved the use of death penalty for a successful, intentional homicide under U.S. law.¹³⁷

The actual act of an extrajudicial killing must be carefully written, as was the torture statute. In keeping with the plan to model the extrajudicial killings statute on the torture statute, and house them together in the same portion of the United States Code, the two definitions could appear together:

In 18 U.S.C. § 2340, “Definitions” paragraph (3) defining the term “United States” should be renumbered to paragraph (4), and inserting a new paragraph (3) defining extrajudicial killing:

As used in this chapter—

(1) “torture” means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;

(2) “severe mental pain or suffering” means the 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 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;

(3) “extrajudicial killing” means an act committed by a person acting under color of law, or under the direction or control of a non-state

136. 18 U.S.C. §§ 956(a)(1), (a)(2)(A) (2006).

137. *See, e.g.*, *Kennedy v. Louisiana*, 554 U.S. 407, 410 (2008) (striking down the death penalty for rape of a child while explicitly stating that the court was not striking it down for a number of other offenses).

political group which exercises *de facto* control over the territory or population in a territory in which the crime occurred, specifically intended to end the life of another person, when that act is not incident to lawful sanction, public necessity, self-defense or the defense of others, or the law of armed conflict;

(4) "United States" means the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States.

The definition of extrajudicial killing, unlike the current statutory definition of torture, includes our earlier observation that protections against extrajudicial killing should be expanded when the victims are also harmed by political groups with *de facto* political control over a territory or a population to which the victim belongs.¹³⁸ The definition also includes our observations that the proscription of extrajudicial killing includes some elusive considerations, such as the fact that law enforcement, military, and other government officials are sometimes rightfully permitted to intentionally take the life of a person on behalf of the state. Importantly, the form of the proposed statute does not change depending on whether there is a source convention or not. These features are legal and prudent under domestic law either way, per the earlier conclusion about universality for the emergent crime of extrajudicial killings.

This proposed statute is only the criminal statute for the crime of extrajudicial killing. Many issues taken up in the larger Convention Against Torture include considerations of civil liability and evidentiary constraints. Immigration law issues, civil law issues, procedural and evidentiary legal issues are all significant issues that are not discussed here, but should be carefully considered whether a treaty is negotiated or it is undertaken to suppress extrajudicial killings as a nation.

One prosecutorial and practical issue related to this formulation is that it tries to be expansive, and carve out those governmental killings that are permissible, leaving the rest that are not criminalized. This approach is intended to avoid the fate of the Convention Against Enforced Disappearances, which proscribes only one technique and does not cover all kinds, or even many kinds, of illiberal governmental abductions, kidnappings, and detentions. It would seem in reading the text that each of these proper purposes must be proved not to have occurred, which is difficult for a prosecutor. Yet in reality, other kinds of crimes deal with this same problem by having the carve outs be considered affirmative defenses, provable by the defendant if they apply.¹³⁹ For example, the federal murder statute proscribes "unlawful killing" leaving the defenses of public authority or self-

138. In fact, in reforming the statute, drafters should consider expanding the potential violator in torture as well, to cover these non-state actors. Although this paper is not so presumptuous as to do it here, there seems no reason not to have symmetry between them in the code.

139. *United States v. Santos-Rivera*, 183 F.3d 367, 370-71 (5th Cir. 1999) (noting the well-established rule of criminal statutory construction that an exception set forth in a distinct clause or provision should be construed as an affirmative defense and not as essential element of crime).

defense to be alleged by the defendant.¹⁴⁰ Likewise, considering the carve outs to extrajudicial killings as affirmative defenses is an acceptable compromise to give defendants fair notice of what is illegal while defining a crime in such a way as is practical and useful to prosecutors.

Similarly, it may be questioned why the definition of extrajudicial killing advocated by this paper is not directly lifted from the definition that already exists in the TVPA. The TVPA, in defining extrajudicial killings and torture alongside each other, provides:

(a) **EXTRAJUDICIAL KILLING**—For the purposes of this Act, the term “extrajudicial killing” means a deliberate killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

(b) **TORTURE**—For the purposes of this Act—

(1) the term “torture” means 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

140. See 18 U.S.C. § 1111(a) (2006).

substances or other procedures calculated to disrupt profoundly the senses or personality.¹⁴¹

The first consideration to remember is that the TVPA is civil and therefore its purpose is different. A criminal statute needs to be careful on elements, careful to give notice, and must properly consider the prosecutorial burden of evidence. Defining a similar phenomenon differently for different purposes is not new in the U.S. Code. For example, there are more than one dozen definitions of terrorism in the U.S. code for various criminal, tortious, immigration, and other purposes.¹⁴²

Looking to a comparison between the criminal torture statute, § 2340A, and the definition of torture in the TVPA, they appear to be similar. But there are some differences. The criminal statute makes clear that only “severe” mental pain and suffering is enough to trigger prosecution. The criminal statute also omits references to the exact purpose of the torture, hoping to broadly capture torture crimes. Importantly, the civil definition of torture omits the element of an official actor, although the requirement that the offender be acting under “color of law” in order for the claim to be actionable is elsewhere in the TVPA.¹⁴³

The civil extrajudicial killing definition captures a broader range of behavior than the criminal statute may want to do. Based on the definition, the statute places great emphasis on the requirement that the killing be authorized by standards that are sufficiently civilized. It may not be desirable to try to litigate cases criminally in which poorly functioning legal regimes gave death sentences that did not meet international standards. The real specter is killings not that fall short on due process, but that are clearly committed with an illiberal purpose. While tackling both may be desirable, it is questionable whether raising judicial standards in other countries is a suitable goal to pursue through the criminal law as opposed to civil suit. This paper discussed whether sham processes and pre-textual hearings should be prosecuted with this new crime of extrajudicial killings; that question reappears in this context. However, if the criminal law is kept out of that trickier area, then much of this statute falls away. The TVPA definition of extrajudicial killing includes the catchall of what a state has authority to do under international law. This is a fine caveat and not one that this article is opposed to *per se*; it observes the same concern about wanting to define the crime broadly and list the caveats instead.

Yet this caveat, sufficient for a civil statute, may simply not give criminal defendants sufficient notice of what conduct is permissible. As a result, the criminal statute could face void for vagueness challenges. It also might be difficult to show prosecutors what to prove. By creating a list of more specific caveats, the criminal statute is less broad and flexible to changes in international law and new, unconsidered things, but more useful to prosecutors and fair to defendants.

141. Torture Victim Protection Act of 1991, *supra* note 121, § 3(b)(2)(A)-(D).

142. See Nicholas J. Perry, *The Numerous Federal Legal Definitions of Terrorism: The Problem of Too Many Grails*, 30 J. LEGIS. 249, 249-50 (2004).

143. Torture Victim Protection Act of 1991, *supra* note 121, § 2(a)(1).

V. CONCLUSION

This article does not oppose taking more time to consider the complex issues raised by the criminalization of extrajudicial killings. It does not oppose the international community or lawmakers in the United States from taking time to flush out the concept of what an extrajudicial killing is, and criminalizing it in a way that does not rely on the philosophies and mechanisms that underlie the Convention Against Torture. But it seems that the CAT, prized as it is for its strong stance against illiberal states that violate human rights, omits a rather serious practice that is relatively common the world over, and quite intimately related to torture. Oppressive states, regimes, and *de facto* powers do not always torture their victims and release them, leaving them as witnesses. Often, they kill them outright, or torture and kill them—leaving very little evidence of the one crime that could potentially be prosecuted. It seems strange that greater cruelty could remove a human rights violator from international concern and therefore from our jurisdiction. Even though torture is conceptually simpler and more cohesive, more must be done to end impunity for human rights violators.

There is nothing wrong with taking more time to consider the nature of what it is for the state, a state official, or a political organization to kill an individual—and to determine which actions are legitimate and which are not. This article has specifically sought to the limit the concept of what an extrajudicial killing is to exclude killings that are governed by the law of armed conflict, executions that pass through the judicial organs of the state, and killings that occur for public safety reasons. Although the first and last should be dealt with by the discreet bodies of law that govern them, the second concept, procedural fairness, is not so easily dismissed. Many of the illiberal executions that occur in the transitional or corrupted societies of the world do pass through some amount of judicial process that clearly does not meet an even minimum standard of procedural fairness and due process. Many of these murders are politically motivated. But, political motivation should not be a factor. If there is a place in the world where officers of the state have impunity to execute people for nonpolitical reasons, that impunity should not continue.

This essay tries to address politically motivated murders that are essentially the common completion of the act or torture, and fill what might be perceived to be a rather large gap in our enforcement of criminal sanctions on torture. Yet, more discussion is warranted. A treaty of the kind suggested here could successfully co-opt the well-worn path of the Convention Against Torture, both its international treaty and its statute as written in U.S. domestic law, to move non-controversially to legislating against this emergent international crime. Hopefully by doing so, the international community, or even the United States alone, can begin ending impunity for illegitimate, state-sanctioned, and political murders.