

# Prosecuting Rape and Other Forms of Sexual Violence as Acts of Torture Under § 2340

Ryan M. McIlroy

## SUMMARY

Rape and other forms of sexual violence may be prosecuted under the Extraterritorial Torture Statute, 18 U.S.C. Section 2340 (“§ 2340”). The U.S. understandings of the CAT and the congressional intent of § 2340 support prosecuting rape and other forms of sexual violence as torture. Domestic and international courts have conceptualized rape and other forms sexual violence as torture when the acts meet the legal elements of torture. Congress and administrative bodies have condemned rape or indicated that rape may constitute torture, as well.

The § 2340 elements of intent and pain or suffering present the most challenging prosecutorial considerations. In proving the intent element, the defendant must have had specific intent to inflict severe pain or suffering. To be sure, the notion of specific intent does not lend itself to a precise or single objective standard. Even if a defendant claims sexual motivations, the specific intent to commit an act of torture may be proven through the facts and circumstantial evidence, such as harm to the victim or her family and community or the defendant’s attitudes toward the victim or women in general. A defendant’s mental state is almost inevitably proven through circumstantial evidence. Thus, once the act of rape or other form of sexual violence is proven, courts and juries may infer the *mens rea* requirement of specific intent from the facts and totality of the circumstances. For example, specific intent to inflict severe pain or suffering may be inferred from the defendant’s conduct or the victim’s injuries and other signs of sexual violence.

In proving the pain or suffering element, the defendant’s actions must have resulted in severe physical or mental pain or suffering. Severe physical pain or suffering does not require organ failure or death as suggested by the now-repudiated 2002 Memo. Rather, rape and other forms of sexual violence often involve legally sufficient physical pain or suffering, especially when its infliction involves physical violence or corporal injury. Further, sexual violence may result in long-term, if not lifetime, sexual issues and reproductive dysfunctions. Even without physical injury, rape and other forms of sexual violence inevitably involve mental pain or suffering caused by prolonged mental harm. Prolonged mental harm often includes, but is not limited to, PTSD and psychological problems, such as social anxiety and depression. Moreover, sexual violence specifically results in additional lasting psychological trauma, such as sexual and reproductive issues. In all, the victim’s prolonged mental harm may be demonstrated through witness testimony, expert testimony, and medical evidence, for example.

Overall, courts and juries may infer specific intent or severe pain or suffering through the totality of the circumstances. Thus, any unique challenge to to proving the elements of torture for a sexual violence charge will depend fundamentally on the facts and evidence, as with any prosecutable offense under § 2340.

|  |    |
|--|----|
| INTRODUCTION.....  | 3  |
| I. RAPE AS TORTURE.....  | 3  |
| A. Rape as Torture under § 2340.....                                       | 4  |
| 1. Legislation and Congressional Findings.....                             | 4  |
| 2. Administrative and Federal Courts on Rape as Torture.....               | 5  |
| 3. Executive Understandings.....   | 5  |
| B. Rape as Torture under International Law.....                            | 6  |
| 1. International Criminal Law.....   | 7  |
| a. Rape as Genocide.....   | 7  |
| b. Rape as a Crime Against Humanity.....                                   | 8  |
| c. Rape as a War Crime.....  | 9  |
| 2. International Human Rights Law.....                                     | 9  |
| II. ELEMENTS OF § 2340.....  | 10 |
| A. § 2340 Text and Definitions.....  | 10 |
| B. <i>Actus Reus</i> .....   | 11 |
| 1. Attempted or Threatened Act.....  | 11 |
| 2. Under Color of Law.....   | 12 |
| C. Specifically Intended to Inflict.....                                   | 12 |
| 1. The CAT and Legislative History of § 2340.....                          | 13 |
| a. Drafting of the CAT.....  | 14 |
| b. U.S. Understandings and Implementation.....                             | 15 |
| 2. The 2002 Memo “Problems” and Prosecuting Sexual Violence.....           | 16 |
| a. Inferring the <i>Mens Rea</i> Requirement.....                          | 17 |
| 3. Specific Intent and “For Such Purposes” in <i>U.S. v. Belfast</i> ..... | 18 |
| 4. Distinguishing Specific Intent as Applied in Immigration Cases.....     | 18 |
| D. Severe Physical or Mental Pain or Suffering.....                        | 20 |
| 1. “Severe” under the CAT and U.S. Understandings.....                     | 20 |
| 2. The 2002 and 2004 Memos Regarding Pain or Suffering.....                | 21 |
| 3. Military Commissions Act of 2006.....                                   | 22 |
| 4. TVPA and Other Cases.....   | 23 |
| 5. Severe Physical Pain or Suffering.....                                  | 24 |
| a. Physical Suffering as Opposed to Physical Pain.....                     | 25 |
| 6. Severe Mental Pain or Suffering.....                                    | 25 |
| a. Sexual Violence and Prolonged Mental Harm.....                          | 28 |
| E. Upon a Person under Custody or Physical Control.....                    | 30 |
| III. CONCLUSION.....   | 30 |

## INTRODUCTION

This paper contends that rape and other forms of sexual violence committed outside the territorial United States may be prosecuted successfully under the Extraterritorial Torture Statute, 18 U.S.C. Section 2340 (“§ 2340”). First, this paper surveys domestic and international jurisprudence related to rape and other forms of sexual violence as torture. Next, this paper organizes the statutory text of § 2340 into its prosecutorial elements, and discusses prosecutorial issues and contextual research. Specifically, this paper demonstrates that: 1) rape and other forms of sexual violence are acts of torture; 2) the requisite specific intent may be inferred through circumstantial evidence and the totality of the circumstances; 3) sexual violence may cause severe physical pain or suffering; and 4) sexual violence may cause severe mental pain or suffering. In discussing how each element of the offense could be proven for an extraterritorial act of rape, this paper addresses practical considerations and cites instructive civil and international criminal cases—given the limited charges and case law under § 2340.<sup>1</sup>

By way of background, the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment (CAT) obliges signatories to prevent acts of torture by taking preventive measures and criminalizing all acts of torture, regardless of where committed. In 1994, the U.S. ratified the CAT, subject to certain declarations, reservations, and understandings to include a detailed definition of torture.<sup>2</sup> While existing federal and state laws were understood to already prohibit torture occurring inside the U.S., Congress enacted § 2340 to cover acts of torture occurring outside the U.S.<sup>3</sup>

### I. RAPE AS TORTURE

This section discusses rape and other forms of sexual violence in domestic and international law. The U.S. understandings of the CAT and the congressional intent of § 2340 support the conceptualization of rape as a form of torture, generally, and pursuant to § 2340. Similarly, international law and jurisprudence hold that rape and other forms of sexual violence may constitute torture and be prosecuted as such.

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1. In 2009, Roy M. Belfast, Jr., a.k.a. Charles Emmanuel Taylor, a.k.a. Chuckie Taylor, (“Emmanuel”) was sentenced to 97 years after being convicted for torture committed in Liberia. This is the only prosecuted case under § 2340. *See* *United States v. Belfast*, 611 F.3d 783 (11th Cir. 2011). In 2012, a federal grand jury charged Sulejman Mujagic with one count of physical and mental torture under § 2340 for torturing a prisoner of war in the Bosnian conflict. He was later extradited to Bosnia and Herzegovina, where he was convicted of murder and torture and imprisoned. *See* *United States of America, One-Year Follow-up Response of the United States of America to Recommendations of the Committee Against Torture on its Combined Third to Fifth Periodic Reports on Implementation of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, ¶ 13 (2015) (describing the conviction of Emmanuel and charges against Mujagic) available at <http://www.state.gov/j/drl/rls/250342.htm>.

2. CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN, OR DEGRADING TREATMENT OF PUNISHMENT, SEN. EXEC. RPT. 101-30, at 8-11 (1990); *see also* U.S. Reservations, Declarations, and Understandings, Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, 136 CONG. REC. S17486-01 (1990).

3. Committee Against Torture, *Consideration of Reports Submitted by the States Parties*, U.N. Doc. CAT/C/28/Add.5, ¶ 47 (2000). All Committee Against Torture reports available at <http://www.state.gov/j/drl/reports/treaties/index.htm> or [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=USA&Lang=EN](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=USA&Lang=EN).

## A. Rape as Torture Under § 2340

U.S. courts, legislatures, and administrative bodies—indeed all three branches of government—have routinely condemned acts of rape and indicated that rape may constitute torture.<sup>4</sup> Legislation and treaty compliance reports consider rape as torture within the meaning of § 2340. Whether captured by federal law, state law, or § 2340, rape is considered an act of prosecutable torture within the meaning and under the obligations of the CAT. Additionally, Congress has amplified this understanding in enacting civil remedies for acts of torture, such as rape.

### 1. Legislation and Congressional Findings

Congress routinely indicates its understanding that rape can constitute torture under international and U.S. law. For example, in addition to § 2340, Congress enacted related statutes in compliance with the CAT. For example, the Torture Victim Protection Act of 1991 (TVPA) and the Torture Victim Relief Act of 1998 (TVRA) both incorporate or support CAT purposes. Overall, cases under the TVPA—which defines torture pursuant to CAT Article 1—provide instructive findings for charging rape and other forms of sexual violence as torture under § 2340.<sup>5</sup> The TVRA—which defines torture pursuant to § 2340 to include rape—also provides clear congressional intent that rape and other forms of sexual violence are acts of torture.

The TVPA provides a civil remedy for victims of international torture and extrajudicial killing, and operates largely as implementing legislation of the CAT.<sup>6</sup> Notably, the U.S. understandings to the CAT stated that CAT Article 14 did not require states parties to provide a “private right of action” for torture committed outside their territorial jurisdiction.<sup>7</sup> Nonetheless, the TVPA created a private right of action for victims of torture committed “under actual or apparent authority, or color of law, of any *foreign* nation.”<sup>8</sup> The TVPA defines torture by tracking the definition of torture within CAT Article 1—with the exception of an added custody or control element and a definition of mental pain or suffering.<sup>9</sup>

The TVRA provides funding for treatment and rehabilitation programs for torture survivors in the U.S. and abroad.<sup>10</sup> Importantly, the TVRA defines “torture” using § 2340 to

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4. For example, Justice Blackmun, concurring in judgment, stated that prison rape “is nothing less than torture.” *Farmer v. Brennan*, 511 U.S. 825, 854 (1994) (holding that prison officials may be liable for “deliberate indifference” or subjective recklessness to an inmate’s Eighth Amendment right to protection against violence, such as prison rape).

5. *See infra* Subsections II(D)(1)-(6) (citing TVPA cases).

6. Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note (2006)) (“An Act: To carry out the obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights . . .”); *see also* S. Rep. No. 102-249, at 3 (1991).

10. Sen. Understanding, II.(3).

8. Pub. L. No. 102-256, § 2(a) (emphasis added). The TVPA was codified in a note to the Alien Tort Statute (ATS). A congressional report described the TVPA as a means to “enhance the remedy already available under” the ATS by extending a civil remedy to U.S. citizen victims of actions by the color of law of a foreign state. S. Rep. No. 102-249, at 3 (1991).

9. S. Rep. No. 102-249, at 3; *see also* *Price v. Socialist People’s Libyan Arab Jamahiriya*, 294 F.3d 82, 92 (D.C. Cir. 2002) (“This definition, in turn, borrows extensively from the 1984 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment . . .”).

10. Pub. L. No. 105-230, 112 Stat. 3016 (1998).

“include[] the *use of rape and other forms of sexual violence*.”<sup>11</sup> As a bipartisan effort, the TVRA expressed congressional support for the CAT and efforts to aid torture survivors, such as victims of sexual violence. In supporting the elimination of torture worldwide, Congress recognized that torture includes rape and other forms of sexual violence.<sup>12</sup> The congressional findings state that “[t]orture is the deliberate mental and physical damage caused by governments to destroy personality and terrorize society.”<sup>13</sup> The findings recognize torture’s long term, if not lifetime, effects on survivors and future generations, to include “physical and psychological threats.”<sup>14</sup> Overall, the TVPA and TVRA provide congressional intent and support to U.S. understandings that torture includes rape and other forms of sexual violence.

## 2. Administrative and Federal Courts on Rape as Torture

Administrative and federal courts have found that acts of rape and sexual assault may constitute torture for the purposes of the TVPA or CAT Article 3. For example, in the first case brought under the TVPA, *Xuncax v. Gramajo*, the court found that the factual allegations, which included sexual abuse, constituted torture under the TVPA.<sup>15</sup> Similarly, for an Article 3 claim in *Zubeda v. Ashcroft*, the Third Circuit found that: “Rape can constitute torture. Rape is a form of aggression constituting an egregious violation of humanity.”<sup>16</sup> The Board of Immigration Appeals (BIA), in an unpublished decision, also held that rape and sexual assault are torture within the terms of the CAT.<sup>17</sup> Moreover, the courts in TVPA and CAT cases have discussed the physical or mental pain or suffering element of torture, providing illustrative examples for prosecuting § 2340 cases.

## 3. Executive Understandings

As executive pronouncements, the U.S. periodic reports and responses to the Committee Against Torture emphasize that federal and state legislation fulfills the obligations of the CAT. For example, the initial and periodic reports state that U.S. law categorically prohibits acts constituting torture “within the meaning of [the CAT]” to include “rape, sodomy, and

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11. *Id.* at § 3 (emphasis added) (“As used in this Act, the term ‘torture’ has the meaning given the term in section 2340(1) of title 18, United States Code, and includes the use of rape and other forms of sexual violence by a person acting under the color of law upon another person under his custody or physical control.”).

12. “[T]he bill contains an expression of the Sense of Congress that the United States shall use its voice and its vote in the United Nations to support the investigation and elimination of practices prohibited by the Convention Against Torture.” Torture Victims Relief Act of 1998: Hearing on H.R. 4309, 105th Cong. (1998) (statements of Rep. Christopher Smith, Prime Sponsor); *see also* H.R. Rep. No. 105-709, at 4 (1998) (“[The TVRA] is the product of bipartisan congressional efforts to address the continuing world-wide problem of torture and its lingering effects on torture survivors.”).

13. Pub. L. No. 105-230, § 2(2).

14. *Id.* at § 2(4).

15. *Xuncax v. Gramajo*, 866 F. Supp 162 (D. Mass. 1995). For example, “. . . they stripped her and sexually abused her, raping her repeatedly until she began to black out intermittently.” *See id.* at 174.

16. *Zubeda v. Ashcroft*, 333 F.3d 46 (3rd Cir. 2003).

17. *Matter of Kuna*, A76491421 (BIA July 12, 2001) (unpublished decision); *see also Zubeda* at n.9 (citing *Matter of Kuna*).

molestation.”<sup>18</sup> § 2340, thus, provides punishment for such acts of torture committed outside the U.S in conformity with the CAT meaning.<sup>19</sup>

The Executive Branch is in accord as to the purpose and reach of the TVPA and TVRA. For example, U.S. periodic reports to the Committee Against Torture describe the TVPA and TVRA as compliance efforts and highlight their torture prevention and remedial goals. Notably, the U.S. initial report references TVRA provisions that provide training for collecting evidence of torture and interviewing victims of torture, including “specific training on the subject of interacting with men and women who are *victims of rape*.”<sup>20</sup> The initial report also emphasizes that the TVPA represents the “‘sense of Congress’ . . . to use the voice and vote of the [U.S.] to support the work of the Special Rapporteur on Torture and the Committee against Torture.”<sup>21</sup>

Separately, the Office of Legal Counsel (OLC) at the Department of Justice (DOJ) has provided legal advice on § 2340 to the Executive Branch. In 2002, the OLC issued a memo regarding interrogation standards under § 2340—which has since come to be known as one of the “torture memos.” In 2004, following both public and internal criticism, the OLC issued a memo withdrawing the 2002 Memo and modifying some of the agency’s understanding of torture under § 2340. The superseding memo rejected the 2002 Memo findings that torture under § 2340 must involve pain “‘equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.’”<sup>22</sup> Still, even with its seemingly heightened pain requirement, the 2002 Memo recognized that rape may constitute torture. The 2002 memo states that courts would likely find allegations of barbaric treatment to constitute torture, such as “rape or sexual assault, or injury to an individual’s sexual organs, or threatening to do any of these sorts of acts.”<sup>23</sup>

## **B. Rape as Torture under International Law**

This section surveys international jurisprudence holding that rape and other forms of sexual violence may constitute torture under international law. Overall, developments in international law instruct that rape and other forms of sexual violence are severe violations of human rights and run counter to torture safeguards. Torture and, more broadly, genocide, war crimes and crimes against humanity are recognized as *jus cogens* crimes subject to universal

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18. “Every system of criminal law in the United States clearly and categorically prohibits acts of violence against the person, whether physical or mental, which would constitute an act of torture within the meaning of the Convention. Such acts may be prosecuted, for example, . . . as rape, sodomy, or molestation; . . . While the specific legal nomenclature and definitions vary from jurisdiction to jurisdiction, it is clear that any act of torture falling within the Convention would in fact be criminally prosecutable in every jurisdiction within the United States.” See U.N. Doc. CAT/C/28/Add.5, *supra* note 3, ¶ 101. See also Committee Against Torture, *Consideration of Reports Submitted by the States Parties*, U.N. Doc. CAT/C/48/Add.3/Rev.113, ¶ 16 (2006); United States of America, *United States Written Response to Questions Asked by the Committee Against Torture*, 51 (2006); and Committee Against Torture, *Consideration of Reports Submitted by the States Parties*, U.N. Doc. CAT/C/USA/3-5, para. 9 (2013).

19. U.N. Doc. CAT/C/28/Add.5, *supra* note 3, ¶¶ 47, 194.

20. *Id.* at ¶ 225 (emphasis added).

21. *Id.* at ¶ 226.

22. Memorandum from Daniel Levin, Acting Assistant Attorney General, to James B. Comey, Deputy Attorney General, Re: Legal Standards Applicable Under § 18 U.S.C. §§ 2340-2340A, at 2 (Dec. 30, 2004) [hereinafter 2004 Memo] (citing Memorandum from Jay S. Bybee, Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under § 18 U.S.C. §§ 2340-2340A, at 1 (Aug. 1, 2002) [hereinafter 2002 Memo]).

23. 2002 Memo, *supra* note 22, at 24.

jurisdiction.<sup>24</sup> Consequently, rape as torture may be recognized, arguably, as a *jus cogens* crime.<sup>25</sup> Moreover, the prohibition of rape may even be considered a preemptory norm in and of itself, given that, like torture, “no circumstances exist in which rape can be authorized or tolerated or escape penal sanction under customary international law or international treaty law.”<sup>26</sup> Thus, international law condemns rape, whether forming an element of a preemptory norm or constituting one itself.

## 1. International Criminal Law

International courts and tribunals have found that acts of rape and other sexual violence (e.g., sexual mutilation and sexual slavery) may constitute torture as a crime against humanity or war crime.<sup>27</sup> Moreover, evidence of sexual violence has been relevant in establishing the elements of genocide.<sup>28</sup> The *ad hoc* tribunals—specifically, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)—have similar jurisdictional mandates, covering genocide, crimes against humanity, violations of humanitarian law, and breaches of the Geneva Conventions. While this paper does not focus on the International Criminal Court (ICC), practitioners and advocates have advanced that the ICC Statute (similarly covering genocide, war crimes, and crimes against humanity) would enable the prosecution of rape as torture, as well.<sup>29</sup>

### a. Rape as Genocide

The first conviction of rape and sexual violence by the ICTR was in *Prosecutor v. Akayesu*.<sup>30</sup> The conviction connected genocide and rape when such acts of sexual violence are committed with the “intent to destroy, in whole or in part, a national, ethnical, racial, or religious group.”<sup>31</sup> The Trial Chamber stated that “rape in fact constitutes torture when 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.”<sup>32</sup> Moreover, sexual violence is “one of the worst ways [to] inflict harm on the victim as he or she suffers both bodily and mental harm.”<sup>33</sup> Such cases recognize the

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24. See generally Alex Obote-Odora, *Rape and Sexual Violence in International Law: ICTR Contribution*, 12 NEW ENG. J. INT’L & COMP L. 135 (2005).

25. See ANNE-MARIE L.M. DE BROUWER, SUPRANATIONAL CRIMINAL PROSECUTION OF SEXUAL VIOLENCE: THE ICC AND THE PRACTICE OF THE ICTY AND THE ICTR 434 (2005) (surveying arguments for the act of rape as part of, or itself a, *jus cogens* crime in international law); see generally Hillary Charlesworth & Christine Chinkin, *The Gender of Jus Cogens*, 15 HUM. RTS. Q. 63 (1993).

26. Brouwer, *supra* note 26, at 434 (quoting Patricia Viseur Sellers, *The Cultural Value of Sexual Violence* (1999)).

27. See generally Angela M. Banks, *Sexual Violence and International Criminal Law: An Analysis of the Ad Hoc Tribunal’s Jurisprudence & the International Criminal Court’s Elements of Crimes*, Women’s Initiatives for Gender Justice (2005) available at <http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1326&context=facpubs>.

28. *Id.* at 7.

29. See generally, e.g., Banks, *supra* note 28; Patricia Viseur Sellers, *The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as Means of Interpretation*, UN OHCHR working paper, undated, available at [http://www2.ohchr.org/english/issues/women/docs/Paper\\_Prosecution\\_of\\_Sexual\\_Violence.pdf](http://www2.ohchr.org/english/issues/women/docs/Paper_Prosecution_of_Sexual_Violence.pdf).

30. *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998).

31. *Id.* at ¶ 731.

32. *Id.* at ¶ 597.

33. *Id.* at ¶ 731.

egregious nature of sexual violence in international law and find that the serious physical or mental pain caused by sexual violence may constitute an element of genocide.<sup>34</sup>

### **b. Rape as a Crime Against Humanity**

The ICTY and ICTR have jurisdiction over nine crimes against humanity, including torture, rape, and other inhumane acts.<sup>35</sup> Though “rape” is specifically enumerated, the tribunals have charged rape and other forms of sexual violence explicitly as “torture” when the elements of torture are met.<sup>36</sup>

For example, in *Prosecutor v. Kunarac*, the Trial Chamber convicted two defendants of torture based on their involvement in acts of rape, noting that the “rapes resulted in severe mental and physical pain and suffering for the victims” such that they constituted torture.<sup>37</sup> The Appeals Chamber also held that the pain and suffering element of torture had been proven once the act of rape had been proven: “Severe pain or suffering, as required by the definition of the crime of torture, can thus be said to be established once rape has been proved, since the act of rape

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34. *See, e.g.*, *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR-95-1-T, Judgment & Sentence at ¶¶ 108, 116 (May 21, 1999) (“[D]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part,’ includes methods of destruction which do not immediately lead to the death of members . . . [and such] conditions of life envisaged include rape . . .”); *Prosecutor v. Musema*, Case No. ICTR-96-13, Judgment & Sentence at ¶ 156 (Jan. 27, 2000) (“[T]he Chamber understands the words ‘serious bodily or mental harm’ to include, but not limited to, acts of bodily or mental torture, inhuman or degrading treatment, rape, sexual violence, and persecution.”); *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgment at ¶¶ 509, 513 (Aug. 2, 2001) (holding that acts of inhuman treatment, torture, rape, sexual abuse, and deportation may constitute acts of “serious bodily or mental injury”); *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, Judgment & Sentence at ¶ 815 (Dec. 1, 2003) (noting that ICTR Trial Chambers have held that “‘serious bodily harm’ does not necessarily have to be permanent or irreparable” and includes non-mortal acts of sexual violence, rape, and mutilation); *Prosecutor v. Gacumbitsi*, Case No. ICTR-2001-64-T, Judgment at ¶ 291 (June 17, 2004) (“Serious bodily harm means any form of physical harm or act that causes serious bodily injury to the victim, such as torture and sexual violence. Serious bodily harm does not necessarily mean that the harm is irremediable.”).

35. S.C. Res. 827, U.N. SCOR, 48th Sess., 3217 mtg., at 28, U.N. Doc S/RES/827 at art. 5 (1993) (murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecutions on political, racial, and religious grounds; and other inhumane acts) [hereinafter ICTY Statute]; S.C. Res. 955, U.N. SCOR, 49th Sess., 3453 mtg at 15, U.N. Doc. S/RES/955 & Annex at art. 3(1994) (murder; extermination; enslavement; deportation; imprisonment; torture; rape; prosecutions; and other inhumane acts) [hereinafter ICTR Statute].

36. *Prosecutor v. Kvočka*, Case No. IT-98-30/1, Judgment at ¶ 145 (Nov. 2, 2010). In *Kvočka*, the Trial Chamber held that “[t]he jurisprudence of the Tribunals, consistent with the jurisprudence of human rights bodies, has held that rape may constitute severe pain and suffering amounting to torture, provided that the other elements of torture, such as a prohibited purpose, are met.” The elements of torture as generally applied by the tribunals include: (i) torture consists of the infliction, by act or omission, of severe pain or suffering, whether physical or mental; (ii) the act or omission must be intentional; and (iii) the act or omission must be for a prohibited purpose, such as obtaining information or a confession, punishing, intimidating, humiliating, or coercing the victim or a third person, or discriminating, on any ground, against the victim or a third person. *See id.* at ¶ 141.

37. *Prosecutor v. Kunarac*, Case No. IT-96-23&23/1-T, Judgment at ¶¶ 669, 711 (Feb. 22, 2001) (“ . . . Kunarac forced her to touch his penis and to look at him. He cursed her. The other two soldiers watched from the car, laughing. While she was raped by Dragoljub Kunarac, FWS-183 heard him tell the other soldiers to wait for their turn. Subsequently, she was raped vaginally and orally by the other soldiers. The rapes resulted in severe mental and physical pain for FWS-183.”)

necessarily implies such pain or suffering.”<sup>38</sup> As such, “some acts establish *per se* the suffering . . . [r]ape is obviously such an act.”<sup>39</sup>

Additionally, in *Akayesu*, the Prosecutor charged rape and other sexual violence as multiple crimes against humanity: namely, as rape, torture, extermination, murder, and other inhuman acts (including forced nudity).<sup>40</sup>

### c. Rape as a War Crime

The ICTY and ICTR exerted similar, but not identical, jurisdiction over war crimes. Articles 2 and 3 of the ICTY Statute grant, respectively, jurisdiction over grave breaches of the Geneva Convention and violations of the laws or customs of war (including violations of Common Article 3 of the Geneva Conventions).<sup>41</sup> Article 4 of the ICTR Statute grants jurisdiction over serious violations of Common Article 3 of the Geneva Conventions and Additional Protocol II of 8 June 1977, but does not cover grave breaches, which are exclusive to international conflicts. Overall, both tribunals have charged acts of rape and sexual violence as various war crimes, whether under grave breaches or as violations of Common Article 3.<sup>42</sup>

For example, in *Prosecutor v. Delalic*, the ICTY charged and convicted rape and other sexual violence as grave breaches.<sup>43</sup> The Trial Chamber found that: “[Rape] causes severe pain and suffering, both physical and psychological. The psychological suffering of persons upon whom rape is inflicted may be exacerbated by social and cultural conditions and can be particularly acute and long lasting.”<sup>44</sup> Thus, the Trial Chamber found that “whenever rape and other forms of sexual violence meet” the criteria of torture under the ICTY Statute, “they shall constitute torture, in the same manner as any other acts that meet this criteria.”<sup>45</sup>

## 2. International Human Rights Law

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38. *Prosecutor v. Kunarac*, Case No. IT-96-23&23/1-A, Judgment at ¶ 151 (June 12, 2002).

39. *Id.* at ¶ 150 (“Generally speaking, some acts establish *per se* the suffering of those upon whom they are inflicted. Rape is obviously such an act. The Trial Chamber could conclude that such suffering occurred even without a medical certificate. Sexual violence necessarily gives rise to severe pain or suffering, whether physical or medical, and in this way justifies its characterization as an act of torture.”).

40. *Akayesu*, Case No. ICTR-96-4-T, Indictment at ¶ 6.

41. *Prosecutor v. Tadic*, Case No. IT-95-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction at ¶ 91 (Oct. 2, 1995) (Appeals Chamber held that Article 3 “functions as a residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the International Tribunal.”)

42. Examples include torture pursuant to ICTY Articles 2(b) “Torture or inhuman treatment, including biological experiments” and 3 and ICTR Article 4(a) “Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;” cruel treatment pursuant to ICTY Article 3 and ICTR Article 4(a); outrages upon personal dignity pursuant to ICTY Article 3 and ICTR 4(e) “Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;” “willfully causing great suffering or serious injury to body or health” pursuant to ICTY Article 2(c); and inhuman treatment pursuant to ICTY Article 2(b).

43. *Prosecutor v. Delalic*, Case No. IT-96-21, at ¶¶ 440, 494 (Nov. 16, 1998) (charged and convicted for rape and other sexual violence under torture [“rape as torture”], inhuman treatment, and causing great suffering or serious injury to body or health).

44. *Id.* at ¶ 495.

45. *Id.* at ¶¶ 494-496.

International human rights law and regional human rights courts support prosecuting rape and other forms of sexual violence as torture. Regional courts, such as the Inter-American Court of Human Rights (IACHR) and the European Court of Human Rights (ECHR), have recognized rape and other forms of sexual violence as forms of torture.

In *Mejía v. Peru*, where members of the armed forces raped a suspected militant's wife, the IACHR held that rape may constitute torture as proscribed by Article 5 of the American Convention on Human Rights and, subsequently, found the State responsible for torture.<sup>46</sup> In *Miguel Castro Prison v. Peru*, where female visitors to a detention center faced forced nudity, the IACHR relied on the ICTR jurisprudence, particularly in *Akayesu*, to define sexual violence and held that forced nudity violated personal dignity and "finger vaginal inspections" constituted "sexual rape."<sup>47</sup> In *Aydin v. Turkey*, where a local police officer raped an illegally detained teenager, the ECHR found that rape may constitute a violation of Article 3 of the European Convention, which prohibits torture.<sup>48</sup>

## II. ELEMENTS OF § 2340

The above-mentioned international jurisprudence, while not binding on U.S. courts, could be cited in support of a prosecution for rape as torture under § 2340, a statute which was intended to provide "the necessary legislation to implement the [CAT]."<sup>49</sup> International jurisprudence makes clear that rape and other forms of sexual violence may constitute torture when the facts satisfy the statutory elements of torture. This section presents the statutory text of § 2340 and separates the offense into its constitutive elements. Each element is discussed generally and within the context of a sexual violence prosecution. This section significantly focuses on the elements of specific intent and the infliction of severe pain or suffering, whether physical or mental. These elements present the most challenging prosecutorial considerations. In addition to domestic and international cases, this section cites *U.S. v. Belfast* and other proceedings involving Charles Emmanuel Taylor ("Emmanuel").

### A. § 2340 Text and Definitions

The statutory text of § 2340 can be broken into discrete elements: an act committed by a person acting under color of law; specifically intended to inflict; severe physical or mental pain or suffering (mental injury meaning prolonged mental harm); upon another person within his custody or physical control. § 2340 defines the act of torture as follows:

- (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;

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46. *Mejía v. Peru*, Case 10.970, Rep. 5/96, Inter-Am. Ct. H.R., OEA/Ser.L./V/II.91 Doc.7 at ¶ 157 (1996).

47. *Miguel Castro-Castro Prison v. Peru*, Inter-Am Ct. H.R. (ser. C) No. 160 at ¶¶ 306, 309-12 (2006) (citing to *Akayesu*, Case No. ICTR-96-4-T at ¶ 688).

48. *Aydin v. Turkey*, Eur. Ct. H.R. 23178/94 (1997).

49. 2004 Memo, *supra* note 22, at 14 (citing S. Rep. No. 103-107, at 58-59 (1993)).

- (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; and
- (3) “United States” means the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States.  
18 U.S.C. § 2340(1)-(3) (2012).

## ***B. Actus Reus***

Rape and other forms of sexual violence may constitute “an act” under the color of law when satisfying the elements of torture. In brief, challenges to the act element might involve claims of failed attempt or threat. Challenges to the color of law element might involve a lack of official or formal capacity. In response, unconsummated attempts or threats may constitute torture, and the act of rape is not a private act outside the color of law.

By way of potential defenses, a defendant might also claim a lack of notice that acts of sexual violence are criminalized as torture. Such void-for-vagueness claims would likely fail. To be sure, such claims would fail whenever torture is properly charged using the particular facts and evidence. For example, the district court rejected Emmanuel’s notice and vagueness challenge.<sup>50</sup> After reciting the allegations (e.g., “burned the alleged victim’s flesh with a hot iron”), the district court held that such allegations coupled with the statutory language of § 2340 “certainly advise the ordinary person of prohibited conduct with sufficient definiteness. . . . [and put a defendant] on notice of conduct prohibited not only in this country, but in much of the civilized world.”<sup>51</sup>

### **1. Attempted or Threatened Act**

Attempted or threatened acts of sexual violence, including one-time events, may constitute torture when the elements of torture are met, namely the elements of intent and severe mental pain or suffering.<sup>52</sup> Briefly, CAT Article 4 includes “attempt to commit torture” and complicity or participation in torture.<sup>53</sup> Moreover, even a single or isolated act can constitute torture.<sup>54</sup>

In *U.S. v. Belfast*, Emmanuel claimed that § 2340 criminalizes unconsummated acts with no more than the specific intent to inflict pain or suffering.<sup>55</sup> The Eleventh Circuit held that “an attempt to commit torture is exactly the same as an act done with the specific attempt to commit

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50. *United States v. Emmanuel*, No. 06-20758-CR, 2007 LEXIS 48510, 42-45 (S.D. Fla. July 5, 2007).

51. *Id.* at 45.

52. Elements of intent and severe mental pain or suffering discussed *infra* Subsections II(C)-(D).

53. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 4, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 [hereinafter CAT].

54. J. HERMAN BURGERS AND HANS DANIELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 118 (1988) [hereinafter CAT Handbook].

55. *Belfast*, 611 F.3d at 808.

torture.”<sup>56</sup> Additionally, Emmanuel claimed that criminalizing conspiracy to commit torture exceeded the constitutional authority of § 2340. The Eleventh Circuit found that: “[T]he CAT specifically instructs its signatories to criminalize not only the act of torture itself, but also conduct that encourages and furthers the commission of torture by others. Conspiracy plainly amounts to such conduct.”<sup>57</sup>

## 2. Under Color of Law

U.S. understandings did not modify the official capacity element of the CAT. Indeed, the U.S. understandings of the CAT found no distinction between the concepts of “official capacity” and “color of law.” “[T]he Convention applies only to torture that occurs in the context of governmental authority, excluding torture that occurs as a wholly private act or, in terms more familiar in U.S. law, it applies to torture inflicted ‘under color of law.’”<sup>58</sup> Additionally, acts of sexual violence were often viewed in the past as private crimes or “a detour, a deviation, or the acts of renegade soldiers . . . [and thus] not really the subject of international humanitarian law.”<sup>59</sup> Fortunately, as demonstrated by the *ad hoc* tribunals, rape and other forms of sexual violence are now recognized as weapons of war and international crimes.<sup>60</sup>

In *U.S. v. Belfast*, Emmanuel claimed that § 2340 invalidly uses “under color of law” rather than “in an official capacity” under the CAT.<sup>61</sup> The Eleventh Circuit held that there is no materially distinction between under color of law and in an official capacity.<sup>62</sup> The Eleventh Circuit found that “the Supreme Court has explained that ‘[t]he traditional definition of acting under color of state law requires that the defendant . . . have exercised power ‘possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.’”<sup>63</sup>

### C. Specifically Intended to Inflict

The intent element poses one of the more complicated issues in applying § 2340 to rape and other forms of sexual violence. The now-repudiated 2002 Memo largely embodied the challenge in its conclusion that “specific intent” meant “precise objective”:

[T]he infliction of pain must be the defendant’s precise objective. . . . If the defendant acted knowing the severe pain or suffering was reasonably likely to result from his actions, but no more, he would have acted only with general intent . . . Thus, even if the defendant knows that severe pain will result from his actions, if causing such harm is not

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56. *Id.* (citing *United States v. Yost*, 479 F.3d 815, 819 (11th Cir. 2007) (explaining that the crime of attempt consists of some overt act, e.g., a substantial step, done with the requisite specific intent).

57. *Id.* at 811.

58. SEN. EXEC. RPT. 101-30, *supra* note 2, at 14.

59. Patricia Viseur Sellers, *Individual(s) Liability for Collective Sexual Violence*, in GENDER AND HUMAN RIGHTS 153, 190 (Karen Knop ed., 2004)

60. *See generally* Susana SaCouto & Katherine Cleary, Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the International Criminal Court, 17 Am. U. J. Gender & Soc. Pol’y & L. 339 (2009).

61. *Belfast*, 611 F.3d at 808.

62. *Id.* at 808-09.

63. *Id.* (citing *West v. Atkins*, 487 U.S. 42, 49 (1988) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)) (explaining under color of law in the context of 42 U.S.C. § 1983).

his objective, he lacks the requisite specific intent even though the defendant did not act in good faith.<sup>64</sup>

Thus, according to this interpretation of the *mens rea* requirement, the defendant would not be guilty of torture even if knowing that the infliction of pain or suffering was reasonably foreseeable or even certain but not his precise objective.<sup>65</sup> While rejecting this conclusion, the 2004 Memo did not reinterpret the intent requirement, rather finding it unhelpful to “define the precise meaning of ‘specific intent’ as the term is ambiguous and inconsistently applied by courts.”<sup>66</sup> Hence, the OLC concluded “it would not be appropriate to rely on parsing the specific intent element of the statute to approve as lawful conduct that might otherwise amount to torture.”<sup>67</sup> Unsurprisingly, given this ambiguity, practitioners and courts have invariably defined “specifically intended” as meaning both traditional “specific intent” or “general intent” under U.S. criminal law.<sup>68</sup>

This subsection finds that torture does require a showing of “specific intent” under U.S. law, given the meaning of the CAT and legislative history of § 2340. However, a specific intent requirement does not confound or discourage prosecuting rape under § 2340. Specific intent does not embody a heightened “precise objective” standard, nor does it theoretically or actually exonerate torturers who claim ulterior objectives. This subsection first discusses the specific intent requirement of § 2340 within the meaning of the CAT. Next, this subsection addresses the 2002 Memo in the context of prosecuting sexual violence and demonstrates that courts may infer *mens rea* from the facts and totality of the circumstances. Lastly, this subsection distinguishes certain immigration cases requiring “prospective” specific intent.

## 1. The CAT and Legislative History of § 2340

The CAT and § 2340 definitions of torture include an additional *mens rea* element over and above the concept of traditional general intent. Torture must be an intentional act under CAT Article 1. “It follows that where pain or suffering is the result of an accident or of mere negligence, the criteria for regarding the act as torture are not fulfilled.”<sup>69</sup> For example, pain or suffering caused by mere negligence or incidental to a justified medical treatment would be unintentionally inflicted.<sup>70</sup> Accordingly, the former U.N. Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“U.N. Special Rapporteur on

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64. 2002 Memo, *supra* note 22, 3-4.

65. *Id.* at 4 (“Instead, a defendant is guilty of torture only if he acts with the express purpose of inflicting severe pain or suffering on a person within his custody or physical control.”).

66. 2004 Memo, *supra* note 22, at 16 (citing WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW, § 5.2(e), 355 n.79 (2d ed. 2003)).

67. *Id.* at 16-17.

68. “‘Specific intent’ is most commonly understood, however, ‘to designate a special mental element which is required above and beyond any mental state required with respect to the *actus reus* of the crime.’” *See id.* at 16 (quoting LAFAVE, *supra* note 61, at 354). General intent, as opposed to specific intent, requires “‘that the defendant possessed knowledge [only] with respect to the *actus reus* of the crime.’” *See id.* (quoting *Carter v. United States*, 530 U.S. 255, 268 (2000)). The 2004 Memo also cites illustrative cases. *See id.* at 16-17 (citing *United States v. Bailey*, 444 U.S. 394 (1980) (suggesting that specific intent requires that one consciously desire the result); citing *United States v. Neiswender*, 590 F.2d 1269, 1273 (4th Cir. 1979) (suggesting “knowledge or notice” that the act “would have likely resulted in” the proscribed outcome is enough to prove specific intent)).

69. CAT Handbook, *supra* note 54, at 118.

70. *Id.* at 119.

Torture”) Manfred Nowak stated “that torture can never be inflicted by negligence” as it lacks intent to inflict for a prohibited purpose under the CAT.<sup>71</sup>

The specific intent requirement of § 2340 largely tracks but does not precisely replicate the text of the CAT. CAT Article 1 requires that pain or suffering be “intentionally inflicted on a person for such purposes” as obtaining information or a confession, punishment, intimidation or coercion, or for any reason based on discrimination.<sup>72</sup> This does “not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”<sup>73</sup> These prohibited purposes provide a heightened *mens rea* requirement and practically render the crime one of specific intent.<sup>74</sup>

The *mens rea* requirement of torture distinguishes it from cruel, inhuman, or degrading treatment or punishment (CIDT) under CAT Article 16, which “means the infliction of severe pain or suffering without purpose or intention.”<sup>75</sup> Hence, the prohibited purpose of torture can be described as the *mens rea* (a proscribed purpose) that goes beyond the *actus reus* (the infliction of pain or suffering).<sup>76</sup>

### a. Drafting of the CAT

The negotiating history of the CAT offers some additional evidence for interpreting the intent requirement. The negotiating parties focused more on distinguishing torture and CIDT by requiring prohibited purposes for torture, rather than on parsing the precise meaning of intent. When discussed, the parties rejected proposals for heightened standards of intent. For example, the United Kingdom proposed adding “systematic” to the intentional requirement.<sup>77</sup> The U.S. proposed replacing intentional with “deliberately and maliciously,” which ostensibly could have replaced the need to list any purposes.<sup>78</sup> France proposed that the motives of perpetrators were irrelevant and, thus, the act’s purpose should not characterize it as torture.<sup>79</sup> And some parties wished to include an exhaustive list of purposes and named acts of torture, such as “truth drugs.”<sup>80</sup> In the end, the parties kept the intentional requirement and agreed to extend the draft of purposes broadly to include discriminatory and coercive purposes.<sup>81</sup> To be sure, the enumeration of any purposes was not to be exhaustive but merely indicate the most characteristic examples of

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71. Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Human Rights Council, ¶ 34, U.N. Doc. A/HRC/13/39/Add.5 (2010) (prepared by Manfred Nowak) [hereinafter 2010 Special Rapporteur Report] available at [http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.39.Add.5\\_en.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.39.Add.5_en.pdf).

72. CAT, *supra* note 54, art. 1.

73. *Id.*

74. See generally Oona A. Hathaway et al., *Tortured Reasoning: The Intent to Torture Under International and Domestic Law*, VA. J. INT’L L. 52 (2012) (demonstrating that international and U.S. torture laws require the same intent standard and *mens rea* requirement).

75. *Id.* at ¶ 188.

76. See, e.g., Hathaway, *supra* note 74, at 804 (demonstrating a *mens rea* requirement for torture under the CAT).

77. CAT Handbook, *supra* note 54, at 45.

78. *Id.* at 41, 46.

79. *Id.* at 46.

80. *Id.* at 45.

81. *Id.* at 46.

torture.<sup>82</sup> An exhaustive list, as France stated, “might afford State parties a means of evading their commitment to prevent or punish all acts of torture regardless of the identity or goals of the perpetrators.”<sup>83</sup>

## **b. U.S. Understandings and Implementation**

The U.S. understandings to the CAT did not alter the intent standard of torture. Congressional and interagency discussions addressed the issue of specific intent, but did not suggest any heightening of the standard. For example, the Senate Executive Report, attached to the treaty, included the below interpretation:

Because specific intent is required, an act that results in unanticipated and unintended severity of pain and suffering is not torture for purposes of this Convention. The requirement of intent is emphasized in Article 1 by reference to illustrative motives for torture: obtaining information of a confession, intimidation and coercion, or any reason based on discrimination of any kind. The purposes given are not exhaustive, as is indicated by the phrasing ‘for such purposes as.’ Rather, they indicate the type of motivation that typically underlines torture, and emphasize the requirement for deliberate intention and malice.<sup>84</sup>

The U.S. understanding that torture must be “specifically intended to inflict severe physical or mental pain or suffering” did not heighten the intent requirement but, rather, accounted for all motivations underlying torture—an act that by definition must involve the infliction of pain or suffering. Thus, in implementing the CAT, § 2340 broadly captures all prohibited purposes by requiring the *mens rea* requirement (i.e., specifically intending to inflict severe pain or suffering) rather than requiring a showing of a precise prohibited purpose or type of torture.<sup>85</sup>

As former U.N. Special Rapporteur on Torture Manfred Nowak contended, the U.S. understanding did not “go beyond the requirement of intention” stipulated in Article 1.<sup>86</sup> In fact, criticism of the U.S. understandings revolved not around the intent standard but rather around what were perceived to be heightened pain or suffering standards.<sup>87</sup> In response, before the

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82. *Id.* at 46, 118 (“The result was a compromise: the most common purposes are indicated, but the list of purposes is not exhaustive.”); *see also* SEN. EXEC. RPT. 101-30, *supra* note 2, at 14 (“The purposes given are not exhaustive, as is indicated by the phrasing ‘for such purposes as.’”).

83. Hathaway, *supra* note 74, at 804 (quoting MANFRED NOWAK & ELIZABETH MCARTHUR, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A COMMENTARY Article 1, 40, ¶ 31 (2008)).

84. SEN. EXEC. RPT. 101-30, *supra* note 2, at 14.

85. Intending pain or suffering follows the congressional intent to cover all acts of torture by categorically prohibiting any underlying motivations of torture. Excluding examples or enumerated lists of prohibited purposes follows the U.S. proposal during drafting and negotiations that clarifying intentionally inflicted could replace the need to list or enumerate any prohibited purposes. For example, the U.S. proposed replacing a list of purposes or motives with the phrase “deliberately and maliciously” to capture the more general type of motivation underlining torture. *See* CAT Handbook, *supra* note 54, at 41, 46.

86. NOWAK, *supra* note 83, 74, ¶ 106.

87. *See, e.g.*, SEN. EXEC. RPT. 101-30, *supra* note 2, at 9 (the definition of torture represents a “revision of the Reagan administration’s proposed understanding, which was criticized for setting too high a threshold of pain for an act to constitute torture.”); *see also* MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, S. TREATY DOC. 100-20, at 4-5 (1988) (“The United States understands that, in

Senate Committee on Foreign Relations, then-State Department Legal Adviser Abraham Sofaer stated that “no higher standard was intended” broadly or in pain or suffering standards in interpreting the treaty or in understandings by the Reagan and Bush administrations.<sup>88</sup>

## 2. The 2002 Memo “Problems” and Prosecuting Sexual Violence

Although repudiated, the conclusions of the 2002 Memo offer some insight into possible defenses against charges of rape and other forms of sexual violence as torture—namely, that the pain or suffering inflicted by sexual violence was unintended or not the defendant’s precise objective but, rather, secondary to purposes of sexual pleasure.

Per the 2002 Memo, a defendant could claim that he did not specifically intend to cause severe pain or suffering despite knowing that the rape would reasonably or certainly cause such severe pain or suffering required of torture. The 2002 Memo equates specific intent to meaning the defendant possessed the “precise objective” and “express” purpose of inflicting severe pain or suffering.<sup>89</sup> If § 2340 “had required only general intent, it would be sufficient to establish guilt by showing that the defendant ‘possessed knowledge with respect to the *actus reus* of the crime.’”<sup>90</sup> Accordingly, it could be argued that he expressly intended to seek sexual pleasure, and any severe pain or suffering was a result of recklessness or ancillary intentions.

The CAT, the U.S. understandings, and § 2340, however, do not redefine specific intent to require a sole, predominant, or overriding objective. International tribunals and U.S. federal courts have found the intent requirement of torture to cover multiple and varying purposes. For example, in *Mehinovic v. Vuckovic*, involving Alien Tort Statute (ATS) and TVPA claims, the court cited the ruling of the ICTY in *Delalic* regarding torture under the CAT: “There is no requirement that the conduct must be solely perpetrated for a prohibited purpose. Thus, in order for this requirement to be met, the prohibited purpose must simply be part of the motivation behind the conduct and need not be the predominating or sole purpose.”<sup>91</sup> Likewise, in *Kunarac*, an ICTY Trial Chamber found that: “There is no requirement under international customary law that the conduct must be solely perpetrated for one of the prohibited purposes of torture, such as discrimination. The prohibited purpose need only be part of the motivation behind the conduct and need not be the predominant or sole purpose.”<sup>92</sup>

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order to constitute torture, an act must be a deliberate and calculated act of an extremely cruel and inhuman nature, specifically intended to inflict excruciating and agonizing physical or mental pain or suffering.”)

88. “[N]o higher standard was intended by the Reagan administration understanding that was present in the Convention or the Bush understanding.” 2002 Memo, *supra* note 22, at 19 (citing *Convention Against Torture: Hearing before the S. Comm. on Foreign Relations*, 101st Cong. 9-10 (1990) (prepared statement of Abraham D. Sofaer, Legal Adviser, Department of State)).

89. *Id.* at 3.

90. *Id.* (quoting *Ratzlaf v. United States*, 510 U.S. 135, 141 (1994)). Interestingly, the 2002 Memo, with its strict application of specific intent, found a general intent requirement for the predicate acts, such that a defendant is guilty if he had specific intent to inflict prolonged mental harm even if having only general intent, such as knowingly or foreseeing, to inflict the severe pain or suffering of the predicate acts. The memo noted that § 2340(2) “might at first appear superfluous . . . [but] [t]his provision, however, actually captures the infliction of physical pain or suffering when the defendant inflicts physical pain or suffering with general intent rather than” and severe mental pain or suffering is part of the charge. *See id.* at 9.

91. *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1346 n.26 (N.D. Ga. 2002) (quoting *Delacic*, Case No. IT-96-21 at ¶ 470).

92. *Kunarac*, Case No. IT-96-23&23/1-T at ¶ 816.

In fact, international tribunals have rejected defenses that rape was committed to satisfy a sexual urge, rather than a prohibited purpose, so that the *mens rea* to torture was absent. In *Kunarac*, the Appeals Chamber held that “even if the perpetrator’s motivation is entirely sexual, it does not follow that the perpetrator does not have the intent to commit an act of torture or that his conduct does not cause severe pain or suffering, whether physical or mental, since such pain or suffering is a likely and logical consequence of his conduct.”<sup>93</sup>

### a. Inferring the *Mens Rea* Requirement

Even when a defendant claims ulterior purposes, courts may infer intent from circumstantial evidence and the totality of the circumstances. Traditionally, criminal intent or mental state may be proven through circumstantial evidence in addition to direct evidence.<sup>94</sup> Indeed, a defendant’s mental state is almost inevitably proven through circumstantial evidence. Thus, once the act of rape or other form of sexual violence is proven in § 2340 cases, courts and juries may infer *mens rea* or specific intent from circumstantial evidence. Even the 2002 Memo—concluding “as a theoretical matter” that knowledge does not constitute specific intent—recognized that courts and juries “are permitted to infer from the factual circumstance that such intent is present.”<sup>95</sup> “Therefore, when a defendant knows that his actions will produce the prohibited result, a jury will in all likelihood conclude that the defendant acted with specific intent.”<sup>96</sup> Likewise, “in the federal criminal justice system it is highly unlikely that a jury would acquit in such a situation.”<sup>97</sup>

International courts and tribunal have relied on inference through circumstantial evidence and the totality of the circumstances to prove the *mens rea* requirement.<sup>98</sup> For example, in *Kunarac*, the Appeals Chamber held that the Trial Chamber “correctly inferred . . . discriminatory intent on the basis, inter alia, of” witness evidence that recounted comments made by the perpetrator during the rapes.<sup>99</sup> Even if the defendant claims sexual motivations, inference

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93. *Kunarac*, Case No. IT-96-23&23/1-A at ¶ 153.

94. *Holland v. United States*, 348 U.S. 121, 140 (1954) (“Circumstantial evidence in this respect is intrinsically no different from testimonial evidence. Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more.”)

95. 2002 Memo, *supra* note 22, at 4 (*see, e.g.*, *United States v. Godwin*, 272 F.3d 659, 666 (4th Cir. 2001); *United States v. Karro*, 257 F.3d 112, 118 (2d Cir. 2001); *United States v. Wood*, 207 F.3d 1222, 1232 (10th Cir. 2000); *Henderson v. United States*, 202 F.2d 400, 403 (6th Cir. 1953)).

96. *Id.* at 4.

97. *Id.* at 5.

98. The cases previously mentioned in this paper (TVPA, CAT Article 3, tribunal, and regional human rights courts) did not explicitly require or rely on direct evidence to infer specific intent. *See also* Hathaway, *supra* note 74, at 811-836 (surveying CAT complaints and cases under the TVPA, ATS, CAT Article 3, ICTR, ICTY, and regional human rights courts that have convicted through inference without explicitly inquiring or requiring direct evidence of mens rea).

99. *Kunarac*, Case No. IT-96-23&23/1-A at ¶ 218 (“Trial Chamber correctly inferred that the Appellant had a discriminatory intent on the basis, inter alia, of the evidence of FWS-183 regarding comments made by the Appellant during the rapes in which he was involved. Although caution must be exercised when drawing inferences, after having carefully reflected and balanced the details and arguments of the parties, the Appeals Chamber considers these inferences reasonable. The special circumstances and the ethnic selection of victims support the Trial Chamber’s conclusions.”).

and circumstantial evidence can “establish whether a perpetrator intended to act in a way which, in the normal course of events, would cause severe pain or suffering, whether physical or mental, to his victims.”<sup>100</sup>

### 3. Specific Intent and “For Such Purposes” in *U.S. v. Belfast*

In the case against Emmanuel, the district court included specific intent in its jury instructions.<sup>101</sup> On appeal, Emmanuel claimed that the CAT and § 2340 differ in that the CAT requires torture to be intentionally inflicted for a prohibited purpose, while § 2340 “does not require the government to prove the defendant’s motive.” The Eleventh Circuit held that § 2340 “tracks the provisions of the CAT in all material respects.”<sup>102</sup>

The “for such purposes” language is meant merely “to illustrate the common motivations that cause individuals to engage in torture . . . [and to] ensure[] that, whatever its specific goal, torture can occur . . . only when the production of pain is purposive, not merely haphazard.” Furthermore, the congressional definition of torture contained in [§ 2340] fully embodies the considerations that the CAT’s “for such purposes” language is intended to “reinforce.” Congress properly understood the thrust of this language to require intentionality on the part of the torturer. . . . [§ 2340] in no way eliminates or obfuscates the intent requirement contained in the offense of torture; instead, [§ 2340] makes that requirement even clearer by stating that the proscribed acts must have been ‘specifically intended’ to result in torture.<sup>103</sup>

In sum, the Eleventh Circuit found no merit to Emmanuel’s constitutional challenges to the legislative definition of torture in § 2340. “If anything, the arguably more expansive definition of torture adopted by the United States is that much more faithful to the CAT’s purpose of enhancing global efforts to combat torture.”<sup>104</sup>

### 4. Distinguishing Specific Intent as Applied in Immigration Cases

The specific intent standard itself may raise issues of consistency given the inherent and consistent ambiguity in its meaning. The 2004 Memo “recognized that the term ‘specific intent’

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100. *Id.* at ¶ 153.

101. “The district court gave the following relevant instruction: . . . The defendant can be found guilty of that offense only if all of the following acts are proved beyond a reasonable doubt: First: That the defendant committed an act with the specific intent to inflict severe physical pain or suffering; Second: That the defendant was acting under the color of law; Third: That the act of torture was against another person who was within the Defendant’s custody or physical control; and Fourth: That the act of torture occurred outside the United States.” *Belfast*, 611 F.3d 783, 821 (11th Cir. 2011).

102. *Id.* at 806.

103. *Id.* at 807-808 (quoting *Price v. Socialist People’s Libyan Arab Jamahiriya*, 294 F.3d at 93).

104. *Id.* at 809. Additionally, the Eleventh Circuit stated that the torture charges satisfied the prohibited purpose element of the CAT, independent of § 2340. “Although Emmanuel says once in his brief that he challenges the statute ‘as applied,’ he provides no substantive argument on this point, and there is no indication that the statute’s alleged deviations from the CAT apply to him. The torture he is alleged to have committed was undertaken for a particular purpose (to intimidate any possible dissenters to his father’s regime and extract information from them), caused severe physical and mental pain and suffering, and was perpetrated while he was acting in an official capacity.” *Id.* at 804 n.4.

is ambiguous and that the courts do not use it consistently.”<sup>105</sup> The 2004 Memo cites cases suggesting that only a “conscious desire” is sufficient for specific intent and cases suggesting knowledge or foreseeability alone is sufficient.<sup>106</sup> To be sure, torture cannot be inflicted through negligence under the CAT or § 2340.<sup>107</sup> As a practical matter, the defendant’s mens rea can be inferred from circumstantial evidence. TVPA cases, not unlike § 2340 cases, have found intentional infliction of pain or suffering given circumstantial evidence, such as injuries, witness testimony, and the act itself.<sup>108</sup>

Conversely, some immigration cases have taken a different approach. Immigration cases involving CAT Article 3 have denied relief to petitioners unless they can show that their “prospective torturer[s]” intend to inflict future pain or suffering upon them.<sup>109</sup> While distinguishable in legislative implementation (and motivations to contain immigration relief), such cases provide an example of a challenge posed by prospective specific intent *not* applicable to § 2340 cases.

In the immigration context, the Second, Third, and Eight Circuits have held that a showing of prospective specific intent is required and, in some instances, held that earlier circuit statements supporting a foreseeability standard were non-binding *dicta*.<sup>110</sup> Circuits generally cite the BIA’s 2000 interpretation *In re J-E-*, which involved a claim of prospective torture in a Haitian prison if the petitioner were removed from the U.S.<sup>111</sup> The BIA held that congressional intent required specific intent and “unanticipated or unintended severity of pain or suffering does not constitute torture.”<sup>112</sup> (The dissent argued that Congress did not intend a strict U.S. criminal law definition of specific intent and, short of an affidavit from the torturer, inferences are necessary in a prospective context.)<sup>113</sup> In 2003, in *Zubeda v. Ashcroft*, the Third Circuit concluded that, unlike the BIA interpretation, specific intent was not required and found that threats of an egregious or protracted nature may “elevate the foreseeable suffering to the level of ‘torture.’”<sup>114</sup> In 2005, however, the Third Circuit held that the *Zubeda* discussion of intent was *dicta* and, thus, specific intent is required.<sup>115</sup> In 2010, the Eighth Circuit also found that a earlier

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105. *See supra* note 67. While abstaining from precisely defining specific intent, “as it would not be appropriate to rely on parsing the specific element . . . to approve” otherwise torturous conduct, the 2004 Memo concludes that, at least, a conscious desire to inflict severe pain or suffering would satisfy § 2340. *Id.* at 16-17.

106. *See supra* note 69.

107. *See supra* notes 55, 72.

108. Cited *infra* in Subsection II(D)(4).

109. *Cherichel v. Holder*, 591 F.3d 1002, 1013 (8th Cir. 2010). CAT Article 3 covers non-refoulement, which prohibits signatories from expelling, returning, or extraditing “a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” *See CAT, supra* note 54, art. 3.

110. *See, e.g., Pierre v. Gonzales*, 502 F.3d 109 (2d Cir. 2007); *Marsan v. AG of the United States*, 199 Fed. Appx. 159 (3d Cir. 2006); *Cherichel*, 591 F.3d 1002.

111. *In re J-E-*, 23 I. & N. Dec. 291 (BIA 2002).

112. *Id.* at 298.

113. *Id.* at 315-16. Dissent continues, “[i]ndeed, it would be difficult, if not impossible, to prove specific intent in a prospective context.” *See id.* at 16-17.

114. *Zubeda*, 333 F.3d 474. “Moreover, requiring an alien to establish the specific intent of his/her persecutors could impose insurmountable obstacles to affording the very protections the community of nations sought to guarantee under the Convention Against Torture.” *See id.*

115. *Marsan*, 199 Fed. Appx. 165 (citing *August v. Ridge*, 395 F.3d 123, 148 (3d Cir. 2005)).

circuit discussion that foreseeability was sufficient was dicta and held that specific intent is required.<sup>116</sup>

The specific intent standard of § 2340 does not face the same prospective challenges inherent to adjudicating immigration relief. In § 2340 cases, juries would infer intent from the facts and circumstantial evidence of a past act. Indeed, the criminal context compels inferences of *mens rea* from the totality of circumstances. These inferences also differ from the application of specific intent by immigration judges and courts, which must answer probabilistic questions of future intent *and* the act itself. For example, certain claims for immigration relief have relied on future imprisonment as the act of torture.<sup>117</sup> Immigration courts, however, have found substandard prison conditions alone do not constitute torture without evidence that authorities intentionally create or maintain such conditions in order to inflict torture.<sup>118</sup> As the court cannot infer intent from any future act, such prospective determinations practically require direct evidence of a perpetrator’s mental state. A court construing § 2340 can infer intent from not only direct evidence but the nature of the act itself and its infliction within the totality of the circumstances. This would hold true with respect to acts of sexual violence.

#### **D. Severe Physical or Mental Pain or Suffering**

The severe pain or suffering element poses another challenging element of § 2340. Neither the CAT nor § 2340 specifically defines “severe” in relation to inflicted pain or suffering. Surveying the CAT and the U.S. understandings that torture is a more egregious form of CIDT demonstrates, at least, a minimal floor of pain or suffering. Notably, not all forms of inhumane treatment or elevated CIDT are torture, and the U.S. does not expressly penalize CIDT as an enumerated crime.

Ultimately, as with specific intent, juries may infer severe pain or suffering from the totality of the circumstances. Hence, any unique challenge to proving the pain or suffering element for a sexual violence charge will depend fundamentally on the facts and circumstances. Intent to commit torture may be inferred from physical injuries and signs of sexual violence. Where physical pain or suffering is not evident, this element may be satisfied by a showing of the psychological harm caused to victims and survivors of sexual violence.

##### **1. “Severe” under the CAT and the U.S. Understandings**

The CAT contains no definition of severe pain or suffering. Although the definition of Article 1 “may give the impression of being a very precise and detailed one, one of the basic concepts which it contains, namely ‘severe pain or suffering,’ is in fact a rather vague concept.”<sup>119</sup> Still, despite possibly varying views of application, the drafters did not intend that the concept of torture vary from country to country.<sup>120</sup> During the negotiations, both “extreme”

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116. Cherichel, 591 F.3d 1015 (holding earlier decision on intent is dicta) (citing *Habtemicael v. Ashcroft*, 370 F.3d 774, 782 (2004) (citing *Zubeda*, 333 F.3d 473)).

117. See, e.g., Cherichel, 591 F.3d 1015 (*see supra* notes, 111, 112). *See also* Off. of Immigr Litig, Dep’t of Justice, Immigration Litigation Bulletin, Vol. 14, no. 2 (2010) *available at* [www.justice.gov/sites/default/files/civil/legacy/2014/10/17/February\\_2010.pdf](http://www.justice.gov/sites/default/files/civil/legacy/2014/10/17/February_2010.pdf).

118. *See, e.g.*, In re J-E-, 23 I. & N. Dec. at 301 (finding that substandard prison conditions in Haiti do not constitute torture without evidence that such conditions are intentionally created and maintained to inflict torture).

119. CAT Handbook, *supra* note 54, at 122.

120. *Id.* at 123.

and “extremely severe” were proposed, but the phrase “severe pain or suffering” was eventually accepted and considered sufficient.<sup>121</sup> Further, the CAT distinguishes between torture and CIDT under Article 16.<sup>122</sup> The CAT Handbook notes “that torture is the gravest form of [cruel, inhuman, or degrading] treatment [or] punishment.”<sup>123</sup>

The Senate advice and consent to ratification recognized the CAT demarcation of torture from acts constituting CIDT, “which are not so universally or categorically condemned as to warrant the severe legal consequences.”<sup>124</sup> The “Convention seeks to define ‘torture’ in a relatively limited fashion, corresponding to the common understanding of torture as an *extreme* practice which is universally condemned.”<sup>125</sup> “The term ‘torture,’ in Unites States and international usage, is usually reserved for extreme, deliberate, and unusually cruel practices, for example, sustained systematic beating, application of electric currents to sensitive part of the body, and tying up or hanging in positions that cause extreme pain.”<sup>126</sup> The extreme nature of torture is emphasized, further, by the requirement of “*severe* pain and suffering.”<sup>127</sup> Hence, torture is an “extreme form” of Article 16 and “at the extreme end” of CIDT, and “Article 1 should be construed with this in mind.”<sup>128</sup> However, the Reagan administration proposed an understanding that “excruciating and agonizing” pain was required to constitute torture.<sup>129</sup> The final U.S. understanding used “severe” and, in a Bush administration revision, clearly stated that the Reagan administration’s proposal “was criticized for setting too high a threshold of pain for an act to constitute torture.”<sup>130</sup>

## 2. 2002 and 2004 Memos Regarding Pain or Suffering

The now-withdrawn 2002 Memo defines severe pain or suffering as limited to “excruciating and agonizing” pain or suffering.<sup>131</sup> Following criticism at the time, White House Legal Counsel Alberto Gonzales stated that “the President has not authorized, ordered or directed in any way any activity that would transgress the standards of the torture conventions or the torture statute, or other applicable laws.”<sup>132</sup> The 2002 Memo itself states that “[t]he legislative

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121. *Id.* at 117. Notably, a U.S. draft proposed “extremely severe pain or suffering” and “deliberately and maliciously inflicted.” *See id.* at 41.

122. CAT, *supra* note 54, art. 16. *See also* SEN. EXEC. RPT. 101-30, *supra* note 2, at 13 (“The requirement that torture be an extreme form of cruel and inhuman treatment is expressed in Article 16, which refers to ‘other acts . . . which do not amount to torture. The negotiating history indicates that [that phrase “which do not amount to torture”] of this description was adopted in order to emphasize that torture is at the extreme end of cruel, inhuman and degrading treatment or punishment and that Article 1 should be construed with this in mind.”).

123. *Id.* at 80.

124. SEN. EXEC. RPT. 101-30, *supra* note 2, at 13.

125. *Id.*

126. *Id.* at 14.

127. *Id.* at 13 (emphasis in original).

128. *See supra* note 123.

129. S. TREATY DOC. 100-20, *supra* note 53, at 4-5.

130. *See supra* notes 88.

131. 2002 Memo, *supra* note 22, at 13. The 2004 Memo also found no substantive difference between the Reagan administration and Bush administration revision regarding Article 1. “The Reagan administration’s understanding that the pain be ‘excruciating and agonizing’ is in substance not different from the Bush administration’s proposal that the pain must be severe.” *See id.* at 19.

132. Committee Against Torture, *Consideration of Reports Submitted by the States Parties*, U.N. Doc. CAT/C/48/Add.3, ¶ 61 (2005) (citing Press Briefing by White House Counsel Judge Alberto Gonzales (June 22, 2004)).

history simply reveals that Congress intended” for § 2430 to track the CAT and U.S. reservations, understandings, and declarations.<sup>133</sup> Still, the 2004 Memo ultimately disagreed and found that Congress did not intend to limit the statute acts to causing ““excruciating or agonizing”” pain or require pain or suffering ““equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.””<sup>134</sup>

To be sure, the 2002 Memo has been fully withdrawn. Even so, the Committee Against Torture has questioned both the 2002 and 2004 Memos use of the term “extreme.”<sup>135</sup> The U.S. response reiterated the negotiating history of the CAT and noted “that the definition of torture was reserved for those acts involving more severe pain and suffering, as distinguished from [CIDT].”<sup>136</sup> Hence, the use of the word “extreme” simply “clarifies the meaning of the word ‘severe’ contained in the [CAT] definition of torture.”<sup>137</sup> In 2010, the U.N. Special Rapporteur on Torture reiterated that “severity does not have to be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure or impairment of bodily functions or even death, as suggested in the ‘torture memos.’”<sup>138</sup>

### 3. Military Commissions Act of 2006

Courts interpreting § 2340 may also look to definitions of torture contained elsewhere in the federal code. The War Crimes Act (WCA), as amended by the Military Commissions Act of 2006 (MCA), defines torture as a war crime and distinguishes between severe and serious physical pain or suffering. This paper did not find any courts analyzing the MCA to illustrate torture within the meaning of the CAT for TVPA or Article 3 claims or § 2340 charges. Even so, it is worth noting the similar language of the MCA. The MCA defines torture as “. . . an act specifically intended to inflict *severe physical or mental pain or suffering* . . . upon another person within his custody or physical control for the purpose of obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind.”<sup>139</sup> The term “severe *mental pain or suffering*” adopts the meaning of § 2340(2).<sup>140</sup> Additionally, the offense of “cruel or inhuman treatment” is defined as “. . . an act intended to inflict *severe or serious physical or mental pain or suffering* . . . including *serious physical abuse*, upon another within his custody or control.”<sup>141</sup> The MCA, similarly, adopts the meaning of § 2340(2) with the substitution of “severe” with “serious” for mental pain or suffering.<sup>142</sup> However, the MCA specifically defines the term “serious physical pain or suffering” as meaning bodily injury that involves—(1) a substantial risk of death; (ii) extreme physical pain; (iii) a burn

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133. 2002 Memo, *supra* note 22, at 1.

134. 2004 Memo, *supra* note 22, at 2 (quoting 2002 Memo, *supra* note 22, at 1, 19).

135. Committee Against Torture, *List of Issues to be Considered during the Examination of the Second Periodic Report*, U.N. Doc. CAT/C/USA/Q/28, ¶¶ 1, 3 (2006).

136. *United States Written Response to Questions Asked by the Committee Against Torture*, *supra* note 19, at 5.

137. *Id.* at 4.

138. 2010 Special Rapporteur Report, *supra* note 71, at ¶ 32.

139. 18 U.S.C. § 2441(d)(1)(A) (emphasis added).

140. *Id.* at § 2441(d)(2)(A) (emphasis added).

141. *Id.* at § 2441(d)(1)(B) (emphasis added).

142. *Id.* at § 2441(d)(2)(E)(i). Also, replaced term “prolonged mental harm” with “serious and non-transitory mental harm (which need not be prolonged).” *Id.* at § 2441(d)(2)(E)(ii).

or physical disfigurement of a serious nature (other than cuts, abrasions, or bruises); or (iv) significant loss or impairment of the function of a bodily member, organ, or mental faculty.<sup>143</sup>

As mentioned, courts have not relied on the MCA definitions of torture and other related war crimes to define torture under the CAT. Still, a court might theoretically view “severe” pain or suffering as having to be greater than “serious” pain.<sup>144</sup> The negotiating history of the CAT and legislative history of § 2340 support otherwise. In fact, the U.S. has understood “severe” and “extreme” as being equal—which complicates any distinguishing use of the MCA as it defines “serious” pain to include “extreme” pain.<sup>145</sup> Further, torture under the MCA incorporates a specific intent and prohibited purposes element, while cruel or inhuman treatment does not require the same *mens rea* element for serious infliction. In fact, many of the other enumerated war crimes would likely constitute “torture” if meeting the required elements of specific intent and severity (e.g., murder, mutilation or maiming, or rape). Practically, courts have found that acts similar to those deemed “serious” under the MCA to constitute torture under the CAT.<sup>146</sup> Indeed, the one case convicted under § 2340 involved acts similar to the predicate acts of “serious” injury under the MCA (e.g., Emmanuel had “burned the alleged victim’s flesh with a hot iron, forced the alleged victim at gunpoint to hold scalding water in his hands, burned parts of the victim’s body with scalding water, repeatedly shocked the genitalia and other parts of the body with an electrical device, and rubbed salt into the alleged victim’s wound”).<sup>147</sup>

#### 4. TVPA and Other Cases

TVPA cases offer instructive examples of acts that would likely constitute torture. As most cases involve a series of acts, classifying individual acts as physical or mental may be difficult or unfitting given the totality of the circumstances analysis. This section lists applicable cases under the physical or mental element where fitting. Notably, both the 2002 and 2004 Memos cite TVPA cases in illustrating the meaning of severe. The 2002 Memo found that certain acts consistently reappear in such cases or are “of such a barbaric nature” that courts would likely find torture:

- (1) severe beatings using instruments such as iron barks, truncheons, and clubs;
- (2) threats of imminent death, such as mock executions;
- (3) threats of removing extremities;
- (4) burning, especially burning with cigarettes;
- (5) electric shocks to genitalia or threats to do so;
- (6) rape or sexual assault, or injury to an individual's sexual organs, or threatening to do any of these sorts of acts; and
- (7) forcing the prisoner to watch the torture of others.<sup>148</sup>

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143. *Id.* at § 2441(d)(2)(D)(i)-(iv).

144. *See, e.g.*, MICHAEL J. GARCIA, CONG. RESEARCH SERV., RL32438, U.N. CONVENTION AGAINST TORTURE (CAT): OVERVIEW AND APPLICATION TO INTERROGATION TECHNIQUES 18 (2009) (discussing interrogation under Bush-era findings and surveying domestic and international cases).

145. *See supra* notes 122, 128-29, 131.

146. *See infra* discussion of cases in Subsection II(D)(4).

147. *United States v. Emmanuel*, No. 06-20758-CR at 44-45.

148. 2002 Memo, *supra* note 22, at 24.

Similarly, the 2004 Memo cites TVPA cases in an attempt to draw distinctions among gradations of pain or suffering.<sup>149</sup> In addition to TVPA claims, some cases also involve ATS or CAT Article 3 claims.

## 5. Severe Physical Pain or Suffering

Rape and other forms of sexual violence may involve severe physical pain or suffering. An analysis of the evidence and circumstances would be necessary to find severe physical pain or suffering. For example, courts might look for visible signs of torture or injuries. “The more intense, lasting, or heinous the agony, the more likely it is to be torture.”<sup>150</sup> The following cases provide illustrative examples of evidence and allegations regarding severe pain or suffering:

### Finding Severe Physical Pain or Suffering

**Mehinovic v. Vuckovic 198 F. Supp. 2d 1322, 1345-46 (N.D. Ga. 2002) (TVPA and ATS).** Beating of a plaintiff included kicks and blows to the face, genitals, and other areas and a broken finger. Beating of a plaintiff on numerous occasions, using rifles and other instruments such as metal pipes and brass knuckles, and teeth-pulling. Beating of a plaintiff was “long and nightmarish” involving upside-down hanging and kicks to face and torso. (Included expert medical testimony.)<sup>151</sup>

**Al-Saher v. I.N.S., 268 F.3d 1143, 1147 (9th Cir. 2001) (CAT).** Sustained beatings of petitioner for a month by Iraqi prison guards. Severe beatings and cigarette burns over 8 or 10 days. Ninth Circuit cited Country Report on Human Rights Practices for 1997 to state that torture techniques in Iraq include “branding, electric shocks administered to the genitals, . . . rape, denial of food and water, and threats to rape or otherwise harm relatives.”<sup>152</sup>

**Xuncax v. Gramajo, 886 F. Supp. 162, 173-75, 201 (D. Mass. 1995) (TVPA).** Plaintiff was kidnapped, burned with cigarettes, blindfolded and hit in face, stripped, and raped repeatedly until she began to black out intermittently. Plaintiff held in pit that seemed filled with bodies and vermin. Plaintiff received death threats. (Court did not specify as physical or mental, but found if damages were rewarded under Guatemalan law, assault and battery, false imprisonment, and intentional infliction of *emotional distress* would apply.)<sup>153</sup>

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149. 2004 Memo, *supra* note 22, at 8-9 (“Drawing distinctions among gradations of pain (for example, severe, mild, moderate, substantial, extreme, intense, excruciating, or agonizing) is obviously not an easy task . . . [w]e are, however, aided in this task by judicial interpretations of the [TVPA].”).

150. Price v. Socialist People’s Libyan Arab Jamahiriya, 294 F.3d at 93 (citing SEN. EXEC. RPT. 101-30, *supra* note 2, at 15).

151. *Affidavit of Vincent James Iacopino MD, PhD In Support of Mr. Kemal Mehinovic*, Medical Evaluation, available at [http://www.cja.org/downloads/Mehinovic\\_Affidavit\\_of\\_Vincent\\_James\\_Iacopino\\_In\\_Support\\_of\\_Mehinovic\\_7\\_13\\_99\\_24.pdf](http://www.cja.org/downloads/Mehinovic_Affidavit_of_Vincent_James_Iacopino_In_Support_of_Mehinovic_7_13_99_24.pdf).

152. Al-Saher v. I.N.S., 268 F.3d 1147 (citing State Department, Country Reports on Human Rights Practice for 1997 (1998)).

153. Gramajo, 866 F. Supp at 201 (emphasis added).

## Finding No Severe Physical Pain or Suffering

**Simpson v. Socialist People’s Libyan Arab Jamahiriya, 326 F.3d 230, 234 (D.C. Cir. 2003) (28 U.S.C.S. § 1605 using TVPA torture definition).** Plaintiff’s complaint of being held *incommunicado*, receiving threats of death if she left her quarters, and not knowing about husband’s welfare “reflect a bent toward cruelty on the part of their perpetrators, [but] they are not in themselves so unusually cruel or sufficiently extreme and outrageous as to constitute torture within the meaning of the [TVPA].”

**Price v. Socialist People’s Libyan Arab Jamahiriya, 294 F.3d 82, 93-94 (D.C. Cir. 2002) (TVPA).** Plaintiff’s complaint facially alleges simple “police brutality.” It “offers no useful details about the nature of the kicking, clubbing, and beatings that plaintiff allegedly suffered.” Without details of beatings, “including their frequency, duration, the parts of the body at which they were aimed, and the weapons used to carry them out,” the complaint does not adequately allege torture.

### **a. Physical Suffering as Opposed to Physical Pain**

The 2004 Memo concludes that physical pain and physical suffering are distinct, and “under some circumstances ‘severe physical suffering’ may constitute torture even if it does not involve ‘severe physical pain.’”<sup>154</sup> Further, physical suffering “must be limited to adverse ‘physical’ rather than adverse ‘mental’ sensations,” and severe physical suffering would have to be “a condition of some extended duration or persistence as well as intensity. . . . rather than merely mild or transitory.”<sup>155</sup>

Regarding sexual violence, the distinction might apply in cases of reproductive harm, disease, mutilation, or disfigurement. For example, the U.N. Special Rapporteur has considered female genital mutilation (FGM) to involve the deliberate infliction of severe pain and suffering and to constitute torture.<sup>156</sup> Such pain and suffering may include long-term chronic infections, tumors, abscesses, cysts, infertility, excessive growth of scar tissue, increased risk of HIV/AIDS infection, hepatitis and other blood-borne diseases, damage to the urethra resulting in urinary incontinence, painful menstruation, painful sexual intercourse, and other sexual dysfunctions.<sup>157</sup> Further, force impregnation, miscarriages, and forced abortion or denial may cause physical suffering. Such conditions would likely apply to rape and other forms of sexual violence. While such conditions would likely raise issues of mental pain or suffering, some cases might raise distinct issues of physical suffering.

## **6. Severe Mental Pain or Suffering**

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154. 2004 Memo, *supra* note 22, at 10.

155. *Id.* at 11-12.

156. Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development*, Human Rights Council, ¶ 50-51, U.N. Doc. A/HRC/7/3 (2008) (prepared by Manfred Nowak) [hereinafter 2008 Special Rapporteur Report] available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/101/61/PDF/G0810161.pdf?OpenElement>.

157. *Id.*

Severe mental pain or suffering seemingly presents a more challenging, or at least a more abstract, requirement. 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;

18 U.S.C. § 2340(1) (2012). Neither the CAT nor § 2340 specifically defines prolonged mental harm. The 2004 Memo found that the phrase does not appear in the relevant medical literature or any federal code, and suggested that “mental harm must be of some lasting duration to be ‘prolonged’” (rejecting the 2002 Memo conclusion that it must be at least “months or even years”).<sup>158</sup> Indeed, the U.S. considered it useful to develop the negotiating history of the CAT that permanent impairment of physical or mental faculties is indicative but not an essential element of torture.<sup>159</sup> The Senate Executive Report also recognized that because mental pain or suffering is a “relatively more subjective phenomenon than physical suffering,” severity determinations should also look at objective criteria, such as the degree of cruelty or inhumanity involved.<sup>160</sup> Accordingly, the 2002 and 2004 Memos both suggest that prolonged mental harm could be proven by, but not limited to, cases involving post-traumatic stress disorders or chronic depression.<sup>161</sup>

Requiring a showing of prolonged mental harm is not unique to § 2340. The implementing regulations of CAT Article 3 state the same prolonged mental harm requirement and its predicate acts.<sup>162</sup> Further, TVPA cases, while not required to show predicate acts, ultimately have inferred severe mental pain or suffering from prohibited purposes within the CAT meaning. Overall, the implementing legislation of § 2340 was intended to fulfill the CAT purposes, and the definition of severe mental pain or suffering in § 2340 incorporates this understanding. (Notably, *U.S. v. Belfast* involved jury instructions and analysis of only “severe physical pain or suffering.”)<sup>163</sup>

The following cases provide illustrative examples of evidence and allegations regarding prolonged mental harm:

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158. 2004 Memo, *supra* note 22, at 14, n.24.

159. CAT Handbook, *supra* note 54, at 44.

160. SEN. EXEC. RPT. 101-30, *supra* note 2, at 13.

161. *See* 2002 Memo, *supra* note 22, at 7; 2004 Memo, *supra* note 22, at 14, n.25.

162. In order to constitute torture, mental pain or suffering must be prolonged mental harm caused by or resulting from: (i) The intentional infliction or threatened infliction of severe physical pain or suffering; (ii) 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; (iii) The threat of imminent death; or (iv) The threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the sense or personality. 8 C.F.R. § 208.18(a)(4)(i)-(iv).

163. *Belfast*, 611 F.3d at 822 (emphasis added). Jury instructions only referred to “physical pain or suffering.”

## Finding Severe Mental Pain or Suffering

***Killburn v. Islamic Republic of Iran*, 699 F. Supp. 2d 136 (D.D.C. 2009) (28 U.S.C.S. § 1605 using TVPA torture definition).** Petitioner taken hostage and later killed.

Petitioner experienced “intense suffering, including, *inter alia*, loneliness, beatings, and a lack of hygiene.” Such circumstances were “extraordinary unpleasant” and included “beatings, unsanitary conditions, inadequate food and medical care, and mock executions.”

***Doe v. Constant*, 2006 LEXIS 101961, (S.D.N.Y. Oct. 24, 2006) (TVPA and ATS).**

One plaintiff was beaten, stabbed in face and breast, and raped on multiple occasion and in front of her children. Plaintiff continues to experience shame and fear and is socially isolated. She suffers from PTSD and insomnia, nightmares, flashbacks, and the inability to concentrate. Other plaintiff was beaten, shot in the leg, and raped. She also witnessed the rape of her sister-in-law. She suffers from PSTD, anxiety, and depression. Court found that both suffered from “physical and psychological suffering.” (Included expert medical testimony.)

***Aldana v. Del Monte Produce, Inc.*, 416 F.3d 1242, 1252-53 (11th Cir. 2005) (TVPA and ATS).** Eleventh Circuit vacated district court’s dismissal of claims for prolonged mental harm and remanded. (Affirmed dismissal of claims for physical pain or suffering, finding the claims largely conclusory.) Plaintiffs’ allegations describe imminent death threats (i.e., captors were heavily armed; plaintiffs were unarmed and restrained; and captors made specific threats to kill plaintiffs that night, not sometime in the future, for their past acts). Plaintiffs were filmed and told to give their last messages. Plaintiffs were photographed and told their captors wanted photos of their faces before death.

***Sackie v. Ashcroft*, 270 F. Supp. 2d 596, 601 (E.D. Pa. 2003) (CAT).** Plaintiff, a child, had been “kidnapped at gunpoint, repeatedly threatened with death, had his arm and back cut as part of an initiation rite, and regularly fed cocaine, alcohol, and marijuana.” Court held that the Immigration Judge (IJ) and BIA erred by focusing exclusively on physical pain or suffering and disregarding prolonged mental harm. Court found that death threats on numerous occasions, mind altering substances, and bodily cuts constituted torture.

***Zubeda v. Ashcroft*, 333 F.3d 463, 467-73 (11th Cir. 2003) (CAT).** Eleventh Circuit found evidence of prolonged mental harm and remanded to IJ. “Rape can constitute torture.” “The severe pain and suffering endemic to rape is a necessary but not sufficient element of torture under the [CAT].” “The scarring effects of rape compare with ‘psychological sequelae of . . . survivors of abuse constituting torture under international law.’”<sup>164</sup> Petitioner testified that she had been gang raped by 10 soldiers, who forced her father and brother to watch. The soldiers then decapitated her father and brother, set fire to her house, and held her in a military camp, where she was further sexually abused.

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164. *Zubeda*, 333 F.3d at 472 (quoting *Lopez-Galarza v. INS*, 99 F.3d 954, 963 (9th Cir. 1996) (citing Evelyn M. Aswad, Note, *Torture by Means of Rape*, 94 Geo. L.J. 1913, 1931 (1996))).

***Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1337-59 (N.D. Ga. 2002) (TVPA and ATS).** Plaintiffs noted in testimony that they feared death during severe beatings and games of “Russian roulette.” The court found that “[e]ach plaintiff continues to suffer long-term psychological harm as a result of the ordeals they suffered at the hands of defendants and others.” “All suffer in various combinations and degrees from nightmares, difficulty sleeping, flashbacks, anxiety, difficulty relating to others, and feeling abnormal.” For example, one plaintiff still has a visible “crescent star” on his forehead that was carved with a knife. All plaintiffs have employment problems, and one has “have found it impossible to return to work.” One finds “it necessary leaves works after becoming distressed when remind of his ordeal.” Another has difficulty trusting people.

***Daliberti v. Republic of Iraq*, 146 F. Supp. 2d 19, 22-25 (D.C. Cir. 2001) (28 U.S.C.S. § 1605 using TVPA torture definition).** Plaintiff was threatened with physical torture, such as cutting off fingers, pulling out fingernails, or shocking electrically in testicles, and kept in a room with no bed, window, light, toilet, etc. Captors held loaded guns to other plaintiffs’ heads, deprived them of medical treatment, and incarcerated them without adequate toilet facilities. Plaintiffs denied adequate food and water. Each plaintiff has been diagnosed with PTSD. They exhibited “marked changes in personality, such as anger, feelings of detachment and isolation, nightmares, and insomnia. Each plaintiff has suffered significant damage to his marriage and has ongoing problems with intimacy and personal relationships.” (Included expert medical testimony and spousal testimony.)

#### **a. Sexual Violence and Prolonged Mental Harm**

Ultimately, the element of prolonged mental harm in § 2340 prosecutions of sexual violence will likely be shown through the psychological consequences of rape and other forms of sexual violence. Sexual violence may result in severe and lasting psychological trauma, such as PTSD, anxiety, depression, memory loss, sexual and reproductive issues, and fear of sexual intercourse.<sup>165</sup> Courts will likely rely on witness testimony, expert testimony, country reports, and medical studies. For example, as the Eleventh Circuit quoted in *Zubeda*, ““The effects of rape appear to endure for months or even years. One study found that twenty-six per cent [of the rape survivors studied] felt that they had not yet recovered four to six years after their rapes.”<sup>166</sup> Given the totality of the circumstances, courts will likely infer prolonged mental harm once certain acts of rape and sexual violence are proven.

Further, international tribunals and regional human rights courts support the understanding that sexual violence results fundamentally in psychological consequences and mental harm. Acts of sexual violence result in cultural stigma and social isolation worldwide, especially when inflicted by one’s government.<sup>167</sup> This rejection and isolation “greatly hinders the psychological recovery of the victim and often condemns her to destitution and extreme poverty.”<sup>168</sup> “Because of the stigma attached to sexual violence, official torturers deliberately use

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165. Some of these consequences relate to findings on FGM and suffering of women generally. *See, e.g.*, 2008 Special Rapporteur Report, *supra* note 156, ¶¶ 51-53 (listing consequences of FGM).

166. *Zubeda*, 333 F.3d at 472 (quoting *Lopez-Galarza*, 99 F.3d 963, n.10).

167. 2008 Special Rapporteur Report, *supra* note 156, ¶ 36.

168. *Id.*

rape to humiliate and punish victims but also to destroy entire families and communities.”<sup>169</sup> Briefly, the following international cases illustrate the psychological trauma caused by rape and other forms of sexual violence.

In *Akayesu*, the ICTR found that “[s]exual violence was a step in the process of destruction of the [T]utsi group - destruction of the spirit, of the will to live, and of life itself.”<sup>170</sup> “The female displaced civilians lived in constant fear and their physical and psychological health deteriorated as a result of the sexual violence and beatings and killings.”<sup>171</sup> The Trial Chamber recognized that some women were raped rather than killed in order to cause greater suffering than death.<sup>172</sup>

In *Delalic*, the ICTY noted that: “Rape causes severe pain and suffering, both physical and psychological. The psychological suffering of persons upon whom rape is inflicted may be exacerbated by social and cultural conditions and can be particularly acute and long lasting.”<sup>173</sup>

In *Prosecutor v. Kvočka*, the ICTY held that “the mental suffering caused to an individual who is forced to watch severe mistreatment inflicted on a relative would rise to the level of gravity required under the crime of torture.”<sup>174</sup> “The presence of onlookers, particularly family members, also inflicts severe mental harm amounting to torture on the person being raped.”<sup>175</sup>

In *Kunarac*, the ICTY noted that acts of rape “establish per se the suffering of those upon whom they were inflicted . . . [and] [s]exual violence necessarily gives rise to severe pain or suffering, whether physical or mental [even without a medical certificate].”<sup>176</sup> Severe pain or suffering can “thus be said to be established once rape has been proved, since the act of rape necessarily implies such pain or suffering.”<sup>177</sup> The Appeals Chamber rejected the appellant’s claim that suffering must be visible, even long after the commission of the act.<sup>178</sup>

In *Aydin v. Turkey*, the ECHR found that “[r]ape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim. Furthermore, rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence.”<sup>179</sup> Similarly, in *P. and S. v. Poland*, the ECHR stated that “the general stigma attached to abortion and to sexual violence . . . caus[ed] much distress and suffering, both physically and mentally.”<sup>180</sup>

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169. *Id.*

170. *Akayesu*, Case No. ICTR-96-4-T at ¶ 732. *See supra* note 30.

171. *Id.* at ¶ 6, 12A.

172. *Id.* at ¶ 430 (“She said her mother begged the men, who were armed with bludgeons and machetes, to kill her daughters rather than rape them in front of her, and the man replied that the ‘principle was to make them suffer’ and the girls were then raped”).

173. *Delacic*, Case No. IT-96-21 at ¶ 495. *See supra* note 43.

174. *Kvočka*, Case No. IT-98-30/1 at ¶ 149. *See supra* note 36. Trial Chamber noted that the Furundzija Trial Chamber “found that being forced to watch serious sexual attacks inflicted on a female acquaintance was torture for the forced observer.” *See Prosecutor v. Furundzija*, Case No. IT-95-17/1-T at ¶ 267 (10 Dec. 1998).

175. *Id.*

176. *Kunarac*, Case No. IT-96-23&23/1-A at ¶ 150. *See supra* note 37.

177. *Id.* at ¶ 151.

178. *Id.* at ¶ 150.

179. *Aydin*, Eur. Ct. H.R. 23178/94 at ¶ 83.

180. *P. and S. v. Poland*, Application No. 57375/08, Eur. Ct. H.R., ¶ 76. (2012). *See also* Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Human Rights Council, ¶ 49, U.N. Doc. A/HRC/22/53 (Feb. 11, 2013) (prepared by Juan E. Méndez) (citing *P. and S. v. Poland*).

## E. Upon a Person under Custody or Physical Control

Turning to the final element of § 2340, the act of torture must be against another person within the defendant’s custody or physical control. This element does not raise challenges particularly unique to sexual violence charges. The element of custody or control reflects the intent of the CAT to criminalize acts of state or official torture. Hence, the prohibited purposes of torture are related functionally to “the interests or policies of the State and its organs” and refer to situations where victims are “at least under the factual power or control of the person inflicting the pain or suffering.”<sup>181</sup> Persons held in captivity, police custody, remand facility or prison, or deprived of their liberty in any other context, “find themselves in a situation of complete dependency and are therefore particularly vulnerable to any abuse.”<sup>182</sup> Thus, the powerlessness of the victim was an essential criterion when the distinction between torture and CIDT was introduced into the CAT.<sup>183</sup>

In *U.S. v. Belfast*, the Eleventh Circuit upheld the district court’s use of 18 U.S.C.S. Section 2A4.1 (Kidnapping, Abduction, Unlawful Restraint) in sentencing guidelines regarding Emmanuel’s conviction of torture and conspiracy to commit torture. As § 2340 requires custody or physical control, the Eleventh Circuit found the kidnapping guideline—which accounts for aggravating circumstances such as sexual exploitation—“particularly appropriate in cases of torture, such as this case, where there are repeated, severe physical assaults, and the victims are imprisoned in inhumane conditions that exacerbate the physical pain caused by the abuse.”<sup>184</sup> Further, the Eleventh Circuit found that “an essential part of Emmanuel’s and his co-conspirators’ scheme to maintain *physical control and custody* over their victims was to intimidate them with random killings.”<sup>185</sup> For example, one victim was publicly decapitated after his recapture. Such public and violent murders “served to terrorize and further subjugate Emmanuel’s other victims who were imprisoned.”<sup>186</sup>

Some defendants might claim a lack of custody or physical control in certain acts of sexual violence, such as in cases of threatened rape or onetime rape. However, as discussed, threats may cause severe mental pain or suffering, and where threats satisfy the element of prolonged mental harm, the element of custody or physical control will undoubtedly be met (e.g., facts justifying a legitimate threat of imminent death will likely contain corresponding facts of sufficient custody or control). Overall, juries may infer the victim’s powerlessness from the totality of the circumstances, such as the defendant’s use or availability of weapons. Thus, custody or physical control may be found in cases where victims are forced to observe acts of rape, as well.

## III. CONCLUSION

Rape and other forms of sexual violence may be prosecuted under § 2340. The U.S. understandings to the CAT and the congressional intent of § 2340 support prosecuting rape and other forms of sexual violence as torture. Domestic and international courts have routinely held

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181. CAT Handbook, *supra* note 54, 199-20. *See also* 2010 Special Rapporteur Report, *supra* note 71, at ¶ 35 (citing and quoting CAT Handbook).

182. *Supra* note 71, at ¶ 37.

183. 2010 Special Rapporteur Report, *supra* note 71, at ¶ 38.

184. *Belfast*, 611 F.3d at 825.

185. *Id.* at 826 (emphasis added).

186. *Id.*

that rape and other forms of sexual violence may constitute torture when the acts meet the legal elements of torture. Congress and administrative bodies have condemned rape or indicated that rape may constitute torture, as well.

In proving the intent element of § 2340, the defendant must have had specific intent to inflict severe pain or suffering. Even if a defendant claims sexual motivations, the specific intent to commit an act of torture may be proven through the facts and evidence of harm to the victim or her family and community and other circumstantial evidence. In particular, once the act of rape or other form of sexual violence is proven, courts and juries may practically infer the *mens rea* requirement of specific intent from the facts and totality of the circumstances.

In proving the pain or suffering element of § 2340, the defendant's actions must have resulted in severe physical or mental pain or suffering. Rape and other forms of sexual violence often involve legally sufficient physical pain or suffering, especially when its infliction involves physical violence or corporal injury. Even without physical injury, rape and other forms of sexual violence almost by default involve mental pain or suffering caused by prolonged mental harm, which often includes, but is not limited to, PTSD and psychological problems.

Overall, courts and juries may infer specific intent and severe pain or suffering through the totality of the circumstances. Thus, any unique challenge to proving torture for a sexual violence charge will depend fundamentally and practically on the facts and circumstantial evidence, as with any prosecutable offense under § 2340.