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THE OBLIGATION TO ESTABLISH SENTENCES FOR TORTURE THAT ARE COMMENSURATE WITH THE GRAVITY OF THE OFFENSE

Daniel O'Donnell, J.D.†

With the first blow of a policeman's fist... a part of our life ends and it can never be revived.

Jean Améry, writer*

[T]he most essential purpose of torture is the most evil in the world: to break down a personality, to destroy an identity, you could call it to kill a soul. And to use it is worse than murder.

Inge Genefke, MD**

INTRODUCTION

This Article addresses the question of what sentences meet the requirement of article 4.2 of the Convention Against Torture (CAT), viz., that torture be criminalized and made “punishable by appropriate penalties which take into account [the] grave nature” of this crime. Two additional questions are addressed: Is this obligation binding only on Parties to CAT, or is it part of the inherent obligations of all States regarding torture? Does it apply to cruel, inhuman and degrading treatment as well as torture? The second and third parts of this Article review sentences for torture in the legislation of Western Europe, and of Eastern Europe and Central Asia, in the light of this obligation.¹ The fourth part makes recommendations on how the Committee Against Torture should approach the question of over-


¹ The aim of this Article is to analyze trends in two regions in the light of international obligations; although every effort has been made to ensure that the legislative
broad statutory definitions of torture and suggests criteria for determining the appropriateness of sentences for torture and ill-treatment.

I. THE INTERNATIONAL LEGAL FRAMEWORK

A. The Compatibility of Sentences for Torture with Article 4.2 of CAT

The prohibition of torture is *jus cogens* — a peremptory norm that applies to all members of the international community, independently of their treaty obligations. One of the many obligations concerning torture recognized by international law is that of criminalizing torture and making it “punishable by appropriate penalties which take into account [the] grave nature” of this crime. This obligation is recognized by the second paragraph of article 4 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”).

Pursuant to that article, it applies to “all acts of torture,” attempted torture, and “complicity or participation” in torture.

The mandate of the Committee Against Torture (“the Committee”) includes reviewing reports by State Parties on implementation of CAT, and examining communications alleging violations of CAT by Parties that have recognized its competence to do so. Both of these functions in effect re-

provisions cited are up to date, it is possible that citations to some laws will be out of date or based on inadequate translations.


4. Id. at arts. 19 and 22. The Committee also may conduct inquiries into credible allegations of the systematic practice of torture under article 20. Three reports of inquiries and six summaries of the results of inquiries have been published (http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Inquiries.aspx, last visited March 1, 2016) but none of them address the issue of what sentences are appropriate for torture. The Com-
quire the Committee to interpret the provisions of CAT. Like other “treaty-
monitoring bodies,” it also adopts “General Comments” when it considers it 
would be appropriate to do so in order to give State Parties guidance on 
how to fulfill their obligations under the treaty.5

The Concluding Observations of the Committee regularly refer to the 
compatibility of national legislation with article 4. Most of these comments 
and recommendations concern the definition of torture, that is, the compati-

bility of criminal legislation with articles 4.1 and 1.1 of CAT.6

In recent years the Committee has begun to adopt comments and rec-

ommendations on the appropriateness of sentences for torture.7 Most of the 
Committee’s observations on this subject concern legislation that it consid-
ers incompatible with article 4.2. In 2011, the Committee commented that a 
new article of the Slovenian Criminal Code “contains all the elements spec-

ified in article 1 of the Convention,” but added that “The State party should 
also ensure that such offense is punishable by appropriate penalty which 
takes into account its grave nature, as set out in article 4, paragraph 2, of the 
Convention.”8 The first paragraph of the article in question makes torture by 
any person punishable by sentences of one to ten years, but the second 
provides for sentences of three to twelve years for torture committed by an

mittee also has competence to examine inter-State complaints under article 21, but no such complaints have been submitted.

5. Comm. Against Torture, Gen. Comment No.1 Implementation of article 3 of 
the Convention in the context of article 22, U.N. Doc. CAT/C/GC/1 (Nov. 21, 1997); 
Gen. Comment No. 2, supra note 2, ¶ 1; and General Comment No. 3, Implementation 

6. See e.g., Concluding Observations on Switzerland, U.N. Doc. CAT/C/CHE/CO/ 
7 (Sep. 7, 2015). In referring to article 4.1, the Committee often refers to the obligation 
to criminalize torture as a specific offense. CAT, art. 4, ¶ 1. Dec. 10, 1984, 1465 
U.N.T.S. 85. We take this to mean a norm that makes torture a distinct criminal offense, 
as opposed to provisions that recognize torture as an aggravating factor for another 
offense or a possible material element of another offense, such as a war crime or crime 
against humanity.

7. An analysis of the work of the Committee published in 2001 concluded that sentences for torture “should be . . . between six and twenty years,” but this conclusion 
is based on statements by individual members rather than Concluding Observations of 
the Committee as a whole. CHRIS INGELESE, THE UN COMMITTEE AGAINST TORTURE, 
342 (2001). Recent observations of the Committee on the legislation of Turkey and 
Finland, cited below, confirm that the inference that the Committee would require a 
minimum prison sentence of 6 years was unfounded.

8. Concluding Observations on Slovenia, ¶ 7, U.N. Doc. CAT/C/SVN/CO/3 (June 
20, 2011).
official, another person having official status, or persons acting with the express or tacit consent of either.\(^9\)

The Concluding Observations of the Committee on the third report of Armenia, adopted the following year, express concern "that current sanctions (a minimum of three years' imprisonment, and up to seven years imprisonment with aggravating circumstances) do not reflect the gravity of the crime" of torture.\(^10\) Under the Armenian Criminal Code, crimes punishable by a prison sentence greater than five years and less than ten years are classified as "grave."\(^11\) This indicates that the classification of the crime as serious by national legislation is not necessarily dispositive. The Committee evidently, and quite appropriately, applies other criteria to determine whether sentences are "appropriate," but it has not indicated clearly what those criteria are. The Committee also has adopted Concluding Observations that express approval of the sentences for torture recognized by the criminal codes of three European countries. In 2011 it cited with approval article 94 of the Turkish Penal Code, noting that it provides for sentences of three to twelve years for torture.\(^12\) In fact, article 94 provides for sentences of three to twelve years in the absence of aggravating circumstances; with aggravating circumstances the minimum sentence is eight or ten years, and the maximum is fifteen years.\(^13\)

The same year, it adopted a Concluding Observation on a report by Finland that

welcomes the State party’s ongoing efforts to revise its legislation in order to give effect to the Committee's recommendations and to enhance the implementation of the Convention, including [an] Amendment of the Criminal Code. . . that criminalizes torture and establishes the absolute prohibition of torture in all circumstances, in

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10. Concluding Observations on Armenia, ¶ 10, U.N. Doc. CAT/C/ARM/CO/3 (July 6, 2012). (The Committee may have been misinformed about the law, since under the first paragraph of article 119 of the Code there is no minimum sentence for torture without aggravating circumstances; under the second paragraph of article 119 there is a minimum sentence of three years imprisonment for torture with aggravating circumstances.)
the recommendations of the Committee to bring the code into accordance with articles 1 and 4 of the Convention;\footnote{14} The amendment provides sentences of a minimum of two years and maximum of twelve years for torture.\footnote{15}

In 2012 the Committee welcomed article 86 of the Criminal Code of Albania, which provides for a prison sentence of five to ten years for torture and degrading or inhumane treatment, calling it “in line” with the Convention.\footnote{16} Approval of article 86 is particularly significant because it covers “other degrading or inhuman treatment” as well as torture, and appears to be the first time that the Committee has expressed approval of a specific sentence for ill-treatment.\footnote{17} These observations gave legislators three examples of legislation providing sentences for the crime of torture that the Committee considers appropriate: one mandating sentences of two to twelve years; another, sentences of three to twelve years, and the third, sentences of five to ten years.

The Committee’s statements on the compatibility of sentences with article 4.2 are not completely consistent with one another. For example, the sentence it expressed approval of in its observations on Turkey in 2011, three to twelve years, is identical to the sentence it appeared to express disapproval of the same year in its observations on Slovenia. Possible explanations for such discrepancies can be identified in some instances, especially when one observation focuses expressly on the length of a specific sentence. It is possible, for example, that the Concluding Observation on the sentences provided for by the Slovenian Code were meant to apply to the first paragraph of article 265, which provides for a sentence of one to ten years for torture committed by any person, and not the second paragraph, which provides for longer sentences for torture with State responsibility. The Concluding Observation on the Turkish law focuses specifically on the increase in the sentence for torture, which makes the comment on article 94 of the Turkish Code a more reliable indicator of what the Committee considers an appropriate minimum sentence for torture. Neverthe-
less, such inconsistencies underline the need for the Committee to reinforce its efforts to clarify its interpretation of the obligation recognized by article 4.2 of CAT.

More recently, the Committee expressed disapproval of new Austrian legislation that makes torture punishable by a sentence of 1 to 10 years, as well as an article of the Ukrainian Criminal Code that makes torture punishable by a prison sentence of two to five years. With regard to the Austrian law, the Committee commented that “The minimum sentence of one year’s imprisonment appears to be too low,” thus confirming earlier comments approving of laws that impose a minimum sentence of two or three years.\(^{18}\) With regard to the Ukrainian Code, it did not specify whether it considered the minimum sentence or the maximum sentence incompatible with the Convention.\(^{19}\) Its earlier approval of a minimum sentence of two years suggests that this comment probably should be seen as disapproval of the maximum sentence of five years.

In 2014 the Committee welcomed the adoption by several countries of new legislation on torture providing for even longer sentences. They include Law No. VIII of 11 July 2013 of the Holy See (Vatican), making torture punishable by a prison sentence of five to ten years; the new Penal Code of Burundi, making torture and cruel, inhuman or degrading treatment punishable by a prison sentence of ten to fifteen years; an Australian law making torture punishable by a prison sentence of twenty years; and the Law Against Torture adopted by Venezuela in 2013, which provides for prison sentences of fifteen to twenty-five years for torture.\(^{20}\) The legislation of Burundi and the Holy See also provide for heavier sentences when aggravating circumstances exist.\(^{21}\) Unfortunately, none of the Committee’s statements welcoming these laws specifically mentions the sentences they

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\(^{21}\) See Penal Code arts. 205-207 (Law No. 1/05 2009) (Burundi), and Law No. VIII: Supplementary Norms on Criminal Law Matters arts. 3.2-3.3 (Vatican).
provide, or even article 4 of the Convention. This weakens the inference that the Committee’s favorable comment on the law implies approval of these sentences.

The Committee’s tendency to focus on areas where the law or practice of the reporting State is considered inadequate may explain the difficulty in knowing how to interpret the observations it made in 2014 on legislation adopted by the Australia, Burundi, the Holy See and Venezuela. The observations addressed to Australia, for example, consist of 26 paragraphs. Only two concern positive developments – including the adoption of the law providing for sentences of twenty years for torture - which are simply listed without any comment on their significance. Fifteen paragraphs – including several that are only indirectly linked to torture - are devoted to “Principle issues of concern and recommendations.” While it is logical for the Committee’s observations on the reports of State Parties to focus mainly on issues where it considers national law or practice should be changed, the Committee also should take advantage of statements welcoming new legislation to indicate why it considers the legislation compliant with the State’s obligations under the Convention. This would be a useful way of providing guidance to legislators in other States, particularly since this Committee has been slow to adopt General Comments on the obligations of State Parties to CAT.

Although the Committee Against Torture has primary responsibility for monitoring compliance with CAT, the Special Rapporteur on Torture interprets the substantive part of his mandate in the light of CAT and expresses views on the compatibility of national law and practice with CAT. The views of the Special Rapporteur on matters concerning obligations recognized by CAT do not have the same authority as those of the Committee, but they are pertinent. In his final report as Special Rapporteur on Torture,

22. See Concluding Observations on Australia, supra note 22, ¶ 8-21. (Examples of such issues concern include the powers of the national human rights commission, violence against women, trafficking in persons and sexual abuse of children. See supra text accompanying note 22, at ¶ 8-10, 19.

23. It has adopted three in nearly three decades of work, while the Human Rights Committee has adopted thirty-five since 1981, nearly one per year. See U.N., Office of the High Comm’r for Human Rights, Human Rights Comm., http://tbinternet.ohchr.org/

Manfred Nowak expressed this view on the interpretation of article 4.2 of CAT:

While the Convention does not indicate a specific penalty for torture, it is generally accepted that the punishment should be similar to the penalties established for the most serious offenses in each national legal framework. This would ensure that sentences are commensurate with the gravity of the offense. . . .

The proposition that, since torture is one of the most serious crimes, the sentences attached to it should be within the range of the heaviest sentences recognized by national law, seems logical. In fact, however, there is little evidence that this proposition is "generally accepted" at this point in time. Under many criminal codes, the sentences for torture vary greatly in function of the circumstances of the offense, the consequences for the victim, and other factors. To date, the Committee Against Torture has only found sentences on the light end of the scale to be incompatible with article 4.2. Only rarely has it compared sentences for torture to sentences for other crimes, and it has never suggested that the sentence for torture should be similar to that for murder, the crime punishable by the maximum sentence under most criminal codes.

1. Sentences for torture causing permanent injury or death

The Committee has, on occasion, criticized statutory language that implies that some acts of torture are not grave crimes. In 2009, it criticized an article of the Spanish Penal Code that establishes prison terms of two to six years for "serious torture" and one to three years for other torture. "The


State Party,” it stated, “should ensure that in all cases all acts of torture are considered to be of a grave nature, since that is intrinsic and inherent in the very concept of torture.”

The same year the Committee criticized the Criminal Code of Macao because it contained two separate articles, one on torture and the other on “serious torture.” This law provided for heavier sentences: two to eight years for torture, three to fifteen years for serious torture, and ten to twenty years for serious torture causing death. The Committee nevertheless expressed concern that the terminology used “may lead to the perception that there are more and less serious crimes of torture,” and recommended that “the crime of torture constitute a single offense subject to the relevant aggravating circumstances applicable to the crime of torture.”

Although the Committee disapproves of statutory language that implies that some torture is not grave or serious, it has indicated that legislation should provide heavier sentences for torture with certain aggravating circumstances. In 2010 the Committee expressed concern about the Criminal Code of Mauritius, which provides for a maximum sentence of ten years for torture, because it made no provision for aggravating circumstances, such as permanent disability. It seems appropriate to interpret this position more broadly to include torture that causes any permanent injury, or death.

To date, however, the Committee has avoided expressing approval or disapproval of specific statutory provisions that provide heavier sentences for aggravated torture. Its comments on the Turkish Criminal Code, for example, do not refer to article 95, which provides that the sentences set forth


30. Concluding Observations on Mauritius, supra note 28, ¶ 8. (“While noting that penalties foreseen in Section 78 . . . provide for . . . for an imprisonment for a term not exceeding 10 years for the offense of torture, the Committee is remains concerned that some aggravating circumstances, such as the permanent disability of the victim, are not taken specifically into account.”) This observation has not been reiterated by the Committee, although an observation adopted in 2013 mistakenly refers to “aggravating circumstances” as an element set forth in article 1 of CAT. Concluding Observations on Bolivia, ¶ 8, U.N. Doc. CAT/C/BOL/CO/2 (Nov. 22, 2013).

31. The legislation of many countries, as indicated below, recognises death and serious injury as aggravating factors. Since murder usually is punishable by a heavier sentence than torture, recognition of death as an aggravating factor for torture is particularly appropriate when death was not intended.
in article 94 are to be increased by half, or doubled, when certain injuries are caused, and provides for life imprisonment when the victim dies as a result of torture.\textsuperscript{32} Indeed, the Committee made no comment on the second and third paragraphs of article 94 which, as indicated above, provide for much higher minimum sentences and a maximum sentence of fifteen years for other kinds of aggravating factors, such as the age or profession of the victim. Nor did the Committee comment on article 87 of the Albanian Criminal Code, which establishes sentences of ten to twenty years of imprisonment when torture results in death, handicap, mutilation or any "permanent harm to the well-being" of the victim. It is regrettable that the Committee did not take the opportunity to signal approval of these sentences for torture with aggravating circumstances.\textsuperscript{33}

B. \textit{Do All States Have an Obligation to Make Torture Punishable by Sentences Commensurate with the Grave Nature of the Offense?}

One hundred and fifty-eight States—81% of the Member States of the United Nations—are Parties to CAT.\textsuperscript{34} Only thirty-six Member States are not, and ten of them are signatories. The prohibition of torture, as indicated above, is a norm that applies to all States, even those that are not Parties to CAT or one of the other treaties that prohibits torture. The question is whether the obligation to impose sentences on torture that are commensurate with the gravity of this crime is intrinsic part of the prohibition, or a separate obligation.

Whether or not a norm of international law is binding on all members of the international community ultimately is determined by States themselves.\textsuperscript{35} There is no specific procedure for the recognition of norms as binding on all States as part of customary international law. International courts and other bodies that are called upon to apply a norm look at various kinds of evidence of the practice of States with regard to the norm in question.\textsuperscript{36}

\textsuperscript{32}. \textsuperscript{CRIM} C., art. 95(1), (2) and (3) (Turk.).

\textsuperscript{33}. This may reflect the preference for a single article criminalizing torture, expressed inter alia in the Committee's Concluding Observations on Macao, supra note 31.


\textsuperscript{36}. \textit{IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW} 6, (6th ed. 2003). For an example, see Prosecutor v. Furundija, supra note 2, \textsuperscript{¶} 138-139 and n. 170.
The UN General Assembly offers all members of the international community the opportunity to express their views on international human rights norms. For more than a decade, it has adopted annual resolutions on torture that recognize the obligation of States to impose appropriate sentences on persons guilty of this crime. From the year 2000 to 2007, they stated that the General Assembly:

*Stresses* that all allegations of torture or other cruel, inhuman or degrading treatment or punishment should be promptly and impartially examined by the competent national authority, that those who encourage, order, tolerate or perpetrate acts of torture must be held responsible and severely punished. . . .

In 2008, the text of this provision changed to the following:

*Stresses* that an independent, competent domestic authority must promptly, effectively and impartially examine all allegations of torture or other cruel, inhuman or degrading treatment or punishment and wherever there is reasonable ground to believe that such an act has been committed, and that those who encourage, order, tolerate or perpetrate such acts must be held responsible, brought to justice and punished in a manner commensurate with the severity of the offense. . . .

Nearly identical language is found in the General Assembly resolutions on torture adopted from 2009 to 2015.

The jurisprudence of international courts and other competent international bodies also is relevant, not only on the issue of whether a customary norm exists, but also when an issue concerns the scope or content of a recognized customary obligation. A strong argument can be made that this is the case here, that is, that the duty to enact and impose sentences commensurate with the gravity of torture is part and parcel of the broad obligation of all States to prevent torture, rather than a separate obligation that States have discretion whether to accept. Impunity, as the Special Rapporteur on Torture pointed out in 2001, is “the single most important factor

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38. G.A. Res. 64/153, ¶ 6 (Dec.18, 2009).

in the proliferation and continuation of torture."\textsuperscript{40} Light sentences are one of several factors that contribute to impunity. A decade later the Special Rapporteur on Torture observed that "torture occurs because national legal frameworks are deficient and do not properly codify torture as a crime with appropriate sanctions."\textsuperscript{41} In 2015 the Special Rapporteur concluded that "All States have a customary international law obligation to investigate, prosecute and punish all acts of torture and other ill-treatment as codified, inter alia, in the Convention."\textsuperscript{42}

In the Furund-ija case, the International Tribunal for Former Yugoslavia stated that the special status of the prohibition of torture in international law gives rise to an obligation to "preclude any national legislative act authorizing or condoning torture or at any rate capable of bringing about this effect."\textsuperscript{43} Legislation that authorizes the imposition of sentences having little deterrent effect on the practice of torture would violate this obligation.

The Human Rights Committee's General Comment on torture, adopted more than two decades ago, does not address this issue.\textsuperscript{44} Recently, however, it has begun to adopt Concluding Observations concerning torture that include recommendations that State Parties to the International Covenant on Civil and Political Rights ("Covenant") amend their legislation to make sentences for torture commensurate with the gravity of this crime, or impose sentences commensurate with the gravity of this crime.\textsuperscript{45} A recent example refers to both legislation and practice:

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\textsuperscript{40} Sir Nigel Rodley, (Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment), Interim Report, ¶ 26, U.N. Doc. A/56/156 (July 3, 2001).

\textsuperscript{41} Novak, supra note 27, at ¶ 27.

\textsuperscript{42} Juan E. Méndez (Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment), Interim Report, ¶44, U.N. Doc. A/70/150 (July 16, 2015). See also ¶¶ 27 and 70.

\textsuperscript{43} Prosecutor v. Furund-ija, supra note 2, ¶ 150; see also Furund-ija, ¶¶ 148 and 155.

\textsuperscript{44} Human Rights Committee, Gen. Comment No. 20: art. 7 (Prohibition of torture or other cruel, inhuman or degrading treatment or punishment), U.N. Doc. CCPR/C/GC/20 (Mar. 10, 1992).

[T]he State party should: (a) Adopt criminal legislation that defines and criminalizes torture in accordance with international standards and provides for penalties commensurate with the gravity of the act; (b) Ensure that all allegations of torture and ill-treatment are promptly, independently and thoroughly investigated, that perpetrators are brought to justice and, if convicted, adequately sanctioned...46

Since the relevant provision of the Covenant merely provides "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment," the Committee’s recent, repeated observations on the need to ensure that sentences are commensurate with the gravity of the offense suggest that it has come to the conclusion that doing so is an integral part of the obligation to prevent torture.

The Special Rapporteur on Torture reached this conclusion earlier than the Human Rights Committee. More than a decade ago, he stated that “States have an obligation to ensure that all acts of torture are offenses under its criminal law and that these offenses shall be punishable by appropriate penalties.”48 This observation was not limited to Parties to CAT.

The European Convention on Human Rights contains an article on torture whose text is identical to the first sentence of the prohibition contained in the International Covenant on Civil and Political Rights: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”49 The European Court of Human Rights considers that, in addition to the negative obligation to refrain from torture and ill-treatment, a positive obligation to protect physical and psychological integrity through law is intrinsic to article 3, in particular by effective investigations “capable of establishing the facts and identifying and punishing those responsible.”50

Civil damages or compensation alone are not sufficient to remedy torture or ill-treatment.\textsuperscript{51} Although States have discretion to determine what sanctions are sufficient to dissuade torture and ill-treatment, the Convention requires that the sentences or other measures imposed constitute “adequate redress.”\textsuperscript{52} Sentences that are “manifestly disproportionate to a breach of one of the core rights of the Convention [do] not have the necessary deterrent effect in order to prevent further violations of the prohibition of ill-treatment in future . . . situations.”\textsuperscript{53}

The recent judgment of the European Court of Human Rights in \textit{Cestaro v. Italy} concluded that imposition of sentences incompatible with the gravity of torture due to the lack of an appropriate legislative framework violated the obligations of Italy under article 3 of the European Convention.\textsuperscript{54} The Court cited the views of the Committee Against Torture urging Italy to amend the Penal Code to make torture a specific offense, although the judgment left Italy discretion as to how the law should be amended to ensure that future sentences for torture would have sufficient deterrent effect.\textsuperscript{55}

The consistent statements of the UN General Assembly stressing the need for all States to adopt “severe” sentences for torture and “appropriate” sentences for torture and other ill-treatment, reinforced by recent observations by the Human Rights Committee implying that a duty to adopt and impose such sentences is implicit in the prohibition of torture, the jurisprudence of the European Court of Human Rights on article 3 of the European Convention, and the statements of the Special Rapporteur on Torture cited above, suffice to conclude that this specific duty is an intrinsic part of the prohibition of torture, binding on all States.\textsuperscript{56}

\textsuperscript{53} Gafgen v Germany, App. No. 22978/05 Eur. Ct. H.R., at §124 (2010) (the perpetrators in this case were convicted and sentenced to a fine, which sentence was suspended. The Court has not yet developed jurisprudence on the length of prison sentences that are commensurate with the gravity of torture or ill-treatment) (2010).
\textsuperscript{54} Cestaro v. Italy, ¶ 213, App. No. 6884/11, Eur. Ct. H.R. (2015). This was in contrast to previous judgments, wherein the imposition of mild sentences was attributed to abuse of discretion by prosecutors or courts. \textit{Ibid}, ¶¶ 223-224.
\textsuperscript{55} \textit{Ibid}, ¶ 115; ¶¶ 245-246
\textsuperscript{56} Cf. Questions Concerning the Obligation to Prosecute or Extradite (Belg v. Sen.), (2012) I.C.T. 422, 54, 122(2), (International Court of Justice did not reach the issue of whether the Senegal’s conduct was compliant with obligations regarding torture, such as the obligation to prosecute and punish, under customary international law, because it was not raised in a timely fashion).
Other legal facts support this conclusion. None of the one hundred and fifty-eight State Parties to CAT has made a reservation or declaration concerning the second paragraph of article 4.57 The Inter-American Convention to Prevent and Punish Torture, the only regional treaty whose scope and purposes are comparable to those of CAT, contains an article providing that torture shall be “punishable by severe penalties that take into account their serious nature.”58

In addition, the Geneva Conventions on international humanitarian law contain a common article that obliges State Parties “to enact any legislation necessary to provide effective penal sanctions for persons committing” grave breaches of humanitarian law, including torture.59 The Geneva Conventions have been ratified or acceded to by one hundred and ninety-six States, more than any human rights treaty.60 Recognition by these treaties of an obligation similar to that found in article 4.2 of CAT does not evidence the existence of a customary norm concerning sanctions for torture committed in contexts not covered by international humanitarian law, but it does speak to the logic of such a norm. If torture is absolutely prohibited by customary international law in all contexts whatsoever, and nearly all members of the international community have expressly accepted a treaty obligation to enact legislation containing “effective” penal sanctions when it is committed in certain contexts, it is logical to infer that the same obligation should apply to all torture, regardless of the context in which it is committed.

58. Inter-American Convention to Prevent and Punish Torture art. 6, Dec. 9,1985, O.A.S.T.S. No. 67.
C. Do States Have an Obligation to Make Ill-Treatment Punishable by Sentences Commensurate with the Grave Nature of the Offense?

Article 4.2 of CAT expressly mentions torture, but not other cruel, inhuman and degrading treatment or punishment; article 16.1 of CAT recognizes the obligation to prevent ill-treatment as well as torture, and refers specifically to four CAT articles as being applicable to ill-treatment as well as to torture. Article 4.2 is not among them, but the Committee Against Torture has indicated that the obligations of States with respect to ill-treatment are not limited to those referred to expressly by article 16. General Comment No.2, adopted in 2008, summarizes its position on this issue:

The obligations to prevent torture and other cruel, inhuman or degrading treatment or punishment (hereinafter 'ill-treatment') under article 16, paragraph 1, are indivisible, interdependent and interrelated. The obligation to prevent ill-treatment in practice overlaps with and is largely congruent with the obligation to prevent torture. Article 16, identifying the means of prevention of ill-treatment, emphasizes 'in particular' the measures outlined in articles 10 to 13, but does not limit effective prevention to these articles. . . In practice, the definitional threshold between ill-treatment and torture is often not clear. Experience demonstrates that the conditions that give rise to ill-treatment frequently facilitate torture and therefore the measures required to prevent torture must be applied to prevent ill-treatment.

States parties are obligated to eliminate any legal or other obstacles that impede the eradication of torture and ill-treatment; and to take positive effective measures to ensure that such conduct and any recurrences thereof are effectively prevented.61

The Committee confirmed that ill-treatment should be punishable by sentences that are proportionate to the gravity of the crime in Concluding Observations adopted the same year:

The Committee, underlining that the conditions that give rise to cruel, inhuman or degrading treatment or punishment frequently facilitate torture and that, therefore, the measures required to prevent torture must be applied to prevent cruel, inhuman or degrading treatment or punishment, believes that appropriate penalties should likewise be applied to acts of cruel, inhuman or degrading treatment.62

From 2000 to 2007, the resolutions of the General Assembly on torture provided that torturers and their accomplices must be “severely punished.”\textsuperscript{63} Since 2008, they provide that those who encourage, order, tolerate or perpetrate torture or other cruel, inhuman or degrading treatment or punishment must be held brought to justice and “punished in a manner commensurate with the severity of the offense.”\textsuperscript{64} This confirms that, as a matter of customary law, the obligation to impose appropriate penalties is not limited to torture but also applies to ill-treatment.

A series of Concluding Observations adopted by the Human Rights Committee in 2010 confirm that it considers the obligation to provide and impose appropriate penalties for ill-treatment to be an integral part of the prohibition of torture. On one occasion, the Committee urged a State to ensure that those found guilty of “torture, cruel, inhuman or degrading treatment and disproportionate use of force” be “punished with sentences that are commensurate with the gravity of the offense.”\textsuperscript{65} In another, it urged a State to impose criminal sanctions commensurate with the seriousness of the offense in all cases of police officers guilty of human rights violations “especially those involving torture and ill-treatment.”\textsuperscript{66} In yet another, it urged a State to ensure that police officers be given punishment commensurate with the gravity of the use of excessive force in questioning suspects, which it referred to as “mistreatment.”\textsuperscript{67}

The European Convention for the Prevention of Torture and Inhuman and Degrading Treatment and Punishment establishes a regional system for monitoring facilities where torture is likely to occur.\textsuperscript{68} Unlike CAT and the Inter-American Convention to Prevent and Punish Torture, it does not define the substantive obligations of Parties with respect to torture and ill-treatment. Nevertheless, the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment and Punishment, established under this treaty, also has indicated that it considers the adoption and imposition of sentences having a strong dissuasive effect to be an intrinsic part of the obligation to prevent torture. A general report adopted in 2004 states:

\begin{itemize}
  \item \textsuperscript{63} See supra note 35.
  \item \textsuperscript{64} See supra note 36.
  \item \textsuperscript{65} Concluding Observations on Israel, ¶ 12, U.N. Doc. CCPR/C/ISR/CO/3 (July 30, 2010).
  \item \textsuperscript{66} Concluding Observations on El Salvador, ¶ 8, U.N. Doc. CCPR/C/SLV/CO/6 (Nov.18, 2010).
  \item \textsuperscript{67} Concluding Observations on Belgium, ¶ 14, U.N. Doc. CCPR/C/BEL/CO/5 (Nov.18 2010).
  \item \textsuperscript{68} European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Nov. 26, 1987, E.T.S. 126.
\end{itemize}
It is axiomatic that no matter how effective an investigation may be, it will be of little avail if the sanctions imposed for ill-treatment are inadequate. When ill-treatment has been proven, the imposition of a suitable penalty should follow. This will have a very strong dissuasive effect. Conversely, the imposition of light sentences can only engender a climate of impunity.

Of course, judicial authorities are independent, and hence free to fix, within the parameters set by law, the sentence in any given case. However, via those parameters, the intent of the legislator must be clear: that the criminal justice system should adopt a firm attitude with regard to torture and other forms of ill-treatment. . . .

The Gafgen case, in which the European Court of Human Rights declared that sentences lacking "the necessary deterrent effect to prevent further violations of the prohibition of ill-treatment" are incompatible with article 3 of European Convention, was a case in which the Court found that the victim had suffered ill-treatment, but not torture.

II. SENTENCES FOR TORTURE IN WESTERN EUROPE

This Part reviews the criminal legislation concerning torture of eighteen countries in Western Europe.

The countries of this region include one—Sweden—that does not recognize torture as a specific criminal offense. The Danish Criminal Code also does not recognize torture as a specific offense, although it does recognize torture as an aggravating factor for other criminal offenses. Germany and Switzerland recognize torture as a war crime and crime against humanity,

70. Gafgen, App. No. 22978/05, at §§ 108 and 124
71. Countries with a population of less than 1 million are not included. The terms Western and Eastern Europe are based on a historical-political criterion, with the latter referring to countries that were part of the Soviet Union or Yugoslavia and other independent communist countries, such as Albania. Part III, below, reviews the criminal legislation of twenty-two Eastern Europe countries and the five countries of Central Asia.
73. SRTFL § 157A (Denmark); see also § 10A and § 27A of the Military Criminal Code.
but do not recognize it as a specific offense in other contexts. The Italian Military Penal Code also recognizes torture as a war crime, although the Penal Code does not recognize torture as a specific offense. In total, five Western European countries—nearly one-third of those whose legislation is considered here—do not recognize torture as a specific crime regardless of the context in which it occurs. All of these countries, except Italy, have rejected recommendations of the Committee Against Torture that they amend their codes by the addition of an article that criminalizes torture as defined by article 1 of CAT.

The criminal codes of nine countries contain articles that criminalize torture in broad terms similar to those of article 1 of CAT. The Committee has called the statutory definitions of the Finnish and Turkish Codes compliant with articles 1 and 4.1, but considers that most statutory definitions do not comply fully with the CAT definition. The discrepancies most often mentioned are absence of the element of State responsibility and failure to recognize all the forms of specific intent mentioned by article 1. In 2010 the Committee commented that the definition in the French Penal Code is not “strictly in line with article 1 of the Convention,” in particular because it covers acts of violence committed by non-State actors. A similar comment was made concerning the Greek Code in 2012.

In 2009, the Committee recommended that the definition contained in the Spanish Code be amended to make express reference to acts committed by persons “acting in an official capacity,” and the specific intent to “intimidate or coerce” the direct victim or a third person. In 2014 it recom-

74. Concluding Observations on Germany, ¶ 9, U.N. Doc. CAT/C/DEU/CO/5 (Dec. 12, 2011); CCAIL, ¶ 7(1)5 and ¶8(1)3; Concluding Observations on Switzerland, ¶ 7, U.N. Doc. CAT/C/CHE/CO/7 (Sep. 7, 2015); and Federal Criminal Code, articles 264a.1.f and 264c.1.c.


77. The text of the Cypriot law criminalizing torture is not available, but it is summarized in the fourth report of Cyprus to the Committee. CAT/C/CYP/4, ¶¶ 6-9, (2012). Surprisingly, the Committee made no commented on the definition.


mended that the definition in the Belgian Code be amended because it did not include the elements of “torture committed by a third person at the instigation of or with the consent or acquiescence of a public official or acts of torture motivated by discrimination of any kind.” 81 In 2013 the Committee indicated that the statutory definition of the Norwegian Code was not fully compliant with CAT because it mentioned only some kinds of discrimination. 82 It also recommended that the element of discriminatory intent be added to the definition of the Portuguese Code. 83

Ireland and the United Kingdom do not have Criminal Codes. In Ireland, torture is criminalized by the Criminal Justice (United Nations Convention against Torture) Act of 2000, and in the United Kingdom, by the Criminal Justice Act of 1988. 84 In the Netherlands, torture is not criminalized by the Criminal Code but by the 2003 Act Containing Rules Concerning Serious Violations of International Humanitarian Law. Although most sections of the Act apply to war crimes, section 8 criminalizes “Torture committed by a public servant or other person working in the service of the authorities in the course of his duties,” as well as torture committed by a private actor at the request or with the permission of a public employee. The Committee did not comment on the statutory definitions contained in the Irish and Dutch legislation. 85 It did indicate that the United Kingdom should adopt “a definition of torture in full conformity with article 1 of the Convention,” but its concern related to the defense of “lawful authority, justification or excuse” rather than the elements of the offense. 86

A. Sentences for Torture

A prison sentence is, in principle, mandatory for any conviction for torture in most of the countries in this region. 87 The Netherlands, where

84. Criminal Justice Act 1988, c. 33 §134 (Eng.).
87. This statement, and the analysis of sentences in general, is based on the provisions of respective codes concerning the offense of torture; it does not take into account
torture may be punished by a fine without a prison sentence, is an exception.\textsuperscript{88}

In most countries of the region statutory sentences for torture as a specific offense — excluding torture as a war crime or crime against humanity - can be divided into three groups: low minimum sentence of one to three years; sentences with a minimum of ten years or more; and life sentences. In Spain, the sentence is one to three years; in Portugal, one to five years; in Austria, one to ten years; in Finland, two to twelve years; in Cyprus, three years, or five years if committed by a public official or person acting in an official capacity; and in Turkey, three to twelve years.\textsuperscript{89} In Belgium the sentence for torture without aggravating circumstances is ten to fifteen years, and in France it is fifteen years.\textsuperscript{90}

The Committee’s evolving standards on article 4.2 indicate that a minimum sentence of at least two years in prison, and a maximum sentence of ten years, are commensurate with the gravity of the crime of torture. The sentences of Finland and Turkey are fully compliant with this interpretation of article 4.2 and the Committee has expressed approval of the relevant articles of these Codes. The minimum sentences in Austria, Portugal and Spain, and the maximum sentences of Cyprus, Greece, Portugal and Spain do not meet this standard.

The sentences recognized by the Dutch International Crimes Act are unusual in that the maximum sentence for torture is life imprisonment, but the minimum sentence is a fine, which clearly is not commensurate with the gravity of torture.\textsuperscript{91} In Norway the sentence for torture without aggravating factors is “up to 15 years.”\textsuperscript{92} The minimum duration of sentences to imprisonment apparently is less than one year, which would be inappropriate for the offense of torture.\textsuperscript{93} In Ireland and the United Kingdom the maximum

\footnotesize{the provisions of the general parts of codes on mitigation, the suspension of sentences, early release and similar rules.}

\begin{footnotes}
\item 88. International Crimes Act § 2.8.1 (Neth.).
\item 89. \textit{Stafgesetzbuch} [STGB] [\textit{Penal Code}] \textit{Bundesgesetzblatti} [\textit{Bagli}] No. 60/1974, as amended § 312a (Austria); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Ratification) Law, No.235, §3(1)a and 3(2) (1990) (Cyprus); \textit{Rikoslaki} [\textit{Criminal and Penal Law}] 11:9a (Finland); \textit{Poinikos Kodicas} [\textit{P.K.}] 1:137A (Greece); C.P. art. 243.1 (Portugal); C.P. art. 174.1 (Spain); \textit{Crim. C. art.} 94-(1) (Turkey).
\item 90. \textit{Weboek van Strafrecht} [\textit{SR}], [Penal Code] art. 417ter (Belgium); Code \textit{Penal} [C. Pén.] art. 222-1 (Fr.).
\item 91. \textit{SR} §2.8.1.
\item 92. General Civil Penal Code §117a (Nor.).
\item 93. \textit{Id.}, §17 provides “Imprisonment may be imposed: (a) for a term of from 14 days to 15 years . . . .”
\end{footnotes}
sentence for torture as a specific offense is life imprisonment, but the legislation that criminalizes torture does not specify a minimum sentence. It seems likely that the life sentences provided for by British and Irish legislation would meet the Committee's standards although, in the absence of information about the minimum sentences, there is some uncertainty.

In conclusion, of the thirteen countries in the region that recognize torture as a specific criminal offense regardless of the circumstances, the legislation of two (Finland and Turkey) is clearly in accordance with article 4.2 of CAT, and the legislation of four other countries (Belgium, France, Ireland and the United Kingdom) probably satisfies their obligations under said article; the legislation of roughly half of these countries appears not to comply with their obligations under article 4.2 in so far as torture without aggravating circumstances is concerned.

B. Sentences for Torture with Aggravating Factors

The Committee, as indicated above, has stated that torture causing permanent injury should be punishable by sentences of more than ten years in prison. The codes of most countries in the region do provide for higher sentences for torture with aggravating circumstances, and various kinds of aggravating factors are recognized. The most common include the nature and gravity of any injury caused, and the vulnerability of the victim (e.g. children, pregnant women and the handicapped). The French Penal Code has a particularly long list of aggravating circumstances, including the age, illness or other vulnerability of the victim, family ties between the victim and perpetrator, the profession of the victim, torture of a witness or victim of a crime, torture motivated by racial or religious discrimination or sexual

94. Criminal Justice Act of 2000, United Nations Convention against Torture No. 11, §§1-2 (2000) (Ire.); Criminal Justice Act of 1988, §134(1), (2) and (6). In the UK, a life sentence must be imposed for torture if the judge considers "that the seriousness of the offense . . . is such as to justify the imposition of a sentence of imprisonment for life." Criminal Justice Act of 2003, § 225(2) (U.K.). In general, when the imposition of a life sentence is discretionary, judges specify a minimum period of imprisonment that must be served before the prisoner will become eligible for parole. The Sentencing Council apparently has not adopted any guideline applicable to the minimum sentence for torture. (See http://sentencingcouncil.judiciary.gov.uk/guidelines/guidelines-to-download.htm) (last visited Feb. 26, 2015) The sentence for the first conviction for torture (conspiracy to torture) in recent history was to imprisonment for 20 years. See www.cps.gov.uk/publications/prosecution/war_crimes.html (last visited Feb. 26, 2015) In Ireland there are no official guidelines on sentencing, and no known convictions under the Criminal Justice Act of 2000.

95. RIKOSLAKI [CRIMINAL AND PENAL LAW] 11:9a (Finland) (criminalises torture but contains no provisions on aggravating factors is an exception).
orientation, the participation of two or more persons in the crime, premeditation, and the use of a weapon or sexual abuse.96

In Spain, the sentence for “serious torture” is two to six years. The law does not specify the factors that determine whether an act of torture is to be considered serious.97 The Committee has indicated that this provision does not comply with article 4.2.98 In Norway, aggravated and severe torture resulting in death is punishable by a sentence of twenty-one years, the maximum prison sentence for common crimes under Norwegian law.99

The codes of several countries contain more complex provisions on sentences for torture, depending on the number and nature of aggravating factors. In Austria, the sentence is five to fifteen years for torture causing serious long-term injury, and ten to twenty years, or life, for torture resulting in death.100 In Belgium, it is fifteen to twenty years when certain aggravating factors, including permanent harm, are caused, and twenty to thirty years for other factors, including death.101 In Cyprus torture that is inflicted systematically or causes serious bodily harm is punishable by ten to fifteen years, depending on the identity of the perpetrator, and by life in prison if the victim dies.102 In France, where the basic sentence for torture is fifteen years, the Code also provides for sentences of twenty years, thirty years and life imprisonment.103 Thirty years is the sentence for torture that results in permanent injury or mutilation.104 In Greece, the sentences for “systematic” torture using certain methods is a minimum of ten years, and the sentence for torture resulting in death is life imprisonment.105 In Portugal, the sentence is three to twelve years for torture using “particularly grave” methods or involving grave violations of physical integrity, and eight to sixteen if death or suicide is caused.106 In Turkey, the sentence is eight to fifteen years.

96. CODE PENAL [C. PEN.] art. 222-3 (Fr.).
97. C.P. art. 174.1 (Spain). (Article 22 of the Code contains a list of aggravating factors, but it seems unlikely that these factors would be applied to determine whether an act of torture should be qualified as “serious”).
98. Concluding Observation on Spain, supra note 29, ¶ 8; see also Concluding Observation on Spain, ¶ 8, UN Doc. CAT/C/ESP/CO/6 (May 29, 2015).
99. General Civil Penal Code §§ 117a and 17(b) (Nor.).
100. STAFGESETZBUCH [STGB] [PENAL CODE] BUNDESGESETZBLATTI [BAGLI] No. 60/1974, as amended § 312a(2) (Austria).
101. WEBOEK VAN STRAFRECHT [SR], [Penal Code] art. 417ter (Belgium).
102. CAT (Ratification) Law No.2 35, §§3(1)(b), 3(2) and 3(3) (1990) (as per CAT/C/CYP/4, ¶7).
103. CODE PENAL [C. PEN.] art. 222-2, 222-3, 222-4 (Fr.).
104. Id., at art. 222-5.
105. Art.137B(1) and art. 137B(3).
106. C.P. art. 244.1(a)-(b) and 244.2 (Portugal). (The sentence of three to twelve years also applies to ‘habitual’ torture. art. 244.1(c).)
for the torture of children or public officials, and ten to fifteen years for torture involving sexual abuse; in addition, sentences are increased by one-half, or doubled, if certain injuries are caused. The codes of Austria, Belgium, Cyprus, France, Greece and Turkey provide for sentence of life imprisonment for torture resulting in death or, in the case of France, for torture accompanied by rape as well as torture resulting in death.

The Committee has never expressed approval of the sentences of any European country for torture with aggravating factors, but the codes of Belgium, Cyprus, France, and Norway appear to be in harmony with the Committee’s position on sentences that are appropriate for torture causing permanent injury (or death). The life sentences for torture provided by the Irish and British legislation makes the issue of aggravating factors moot. In contrast, the codes of Austria and Spain appear to be inconsistent with the emerging standards of the Committee because of the relatively low sentences applicable to torture causing serious injury, even though the sentences for torture causing death under the Austrian Code appear to satisfy the Committee’s evolving interpretation of article 4.2. The sentences provided by the Portuguese Code also appear to be somewhat lower than those the Committee considers appropriate, for torture causing death as well as torture causing permanent injury. The complex provisions of the Turkish Code regarding torture causing permanent injury are partly consistent with the views of the Committee on this issue.

In conclusion, the codes of most of Western European countries appear to be non-compliant with their obligations under CAT, either because they do not contain an article criminalizing torture as such or because, although torture is criminalized, the sentences are not fully commensurate with the gravity of the crime.

107. TURK. CEZA KANUNU [T.C.K.] 94(2)-(3), 95(1)-(2) (Turkey).


109. The baseline punishment of three to twelve years is “increased by one-half” if certain injuries are caused, and doubled if other specific injuries are caused. TCK. m. 94 (1), 95(1)-(2). Some of the injuries mentioned are permanent, while others may or may not be. The causation of abortion or premature birth also is mentioned. TCK. m. 95(2)(e) and 95(1)(e). Sentences of eight to fifteen years for torture of a child or 10 to 15 years for torture involving “sexual harassment” also are increased by one-half or doubled, if such injuries are caused. TCK. m. 94(2)-(3), 95(1)-(2).
C. Sentences for Torture as War Crime or Crime Against Humanity

As indicated above, Germany, Italy and Switzerland recognize torture as a war crime, and Germany and Switzerland recognize torture as a crime against humanity, although they do not recognize torture as an offense in other contexts. In Germany, torture as a war crime is punishable by a sentence of not less than three years, and torture as a crime against humanity is punishable by a sentence of not less than five years.\textsuperscript{110} If death results, the sentence for torture as a war crime is increased to not less than five years, and the sentence for torture as a crime against humanity to ten years to life.\textsuperscript{111} These sentences may be reduced “in less serious cases.”\textsuperscript{112}

In Switzerland, torture as a war crime is, in principle, punishable by a prison sentence of “not less than five years,” and torture as a crime against humanity is punishable by a sentence of one year to life.\textsuperscript{113} The sentence for torture as a war crime can be increased to life “in especially serious cases,” or reduced to one year “in less serious cases.”\textsuperscript{114} In Italy, torture as a war crime is punishable by a prison sentence of one to five years.\textsuperscript{115}

Danish and Swedish legislation do not criminalize torture either as a war crime or crime against humanity. Most other countries in Western Europe recognize torture as a war crime and crime against humanity, and provide for heavier sentences when it is committed as either. In Spain, where torture as a specific offense is punishable by a prison sentence of one to three years or two to six years, the sentences for torture as a war crime and crime against humanity are heavier, but still relatively low. Torture as a war crime carries a sentence of four to eight years, and torture as a crime against humanity is punishable by a prison sentence of four to eight years if the torture is “grave” or two to six years if “less grave.”\textsuperscript{116}

The legislation of other countries provides for more severe sentences for torture as a war crime or crime against humanity. In Turkey, where the sentence for torture without aggravating circumstances is three to twelve years, the minimum sentence for torture as a crime against humanity is

\begin{footnotes}
\item[110] Völkerstrafgesetzbuch [VStGB] [Code of Crimes against International Law], June 30, 2002, Federal Law Gazette, §§ 8(1)(3), 8(1)(c)(9), 7(1)5, 7(2) (Ger.).
\item[111] Id., §§ 8(4) and § 7(3).
\item[112] Id., §§ 8(5) and § 7(4).
\item[113] Code Pénal Suisse [CP] [Criminal Code] Mar. 24, 2000 as amended by Gesetz June 18, 2010, AS 4963 (2010) art. 264c, para. 1(c) and art. 262b paras. 1(f), 2 and 3 (Switz.).
\item[114] Id., art. 264c, para. 3 - 4.
\item[115] C.p. art.185bis, added by Legge 31 jan. 2002, n. 6, art. 2.1(g) (It.).
\item[116] Art. 609, art. 607bis, para. 2(8), C. Com. (Spain).
\end{footnotes}
eight years.\footnote{117} In Austria, where the sentence for torture without aggravating circumstances is one to ten years, the sentence for the infliction of physical or mental pain or suffering as a war crime or crime against humanity is five to fifteen years.\footnote{118} In Portugal, where the sentence for torture without aggravating circumstances is one to five years, the Law on International Humanitarian Law adopted in 2004 provides that the sentence for torture as a war crime is ten to twenty-five years, and the sentence for torture as a crime against humanity is twelve to twenty-five years.\footnote{119}

In Norway, the maximum sentence for torture is twenty-one years, unless it is a war crime or crime against humanity, in which case a sentence of thirty years may be imposed.\footnote{120} In Belgium, the maximum crime for torture with aggravating circumstances is twenty years, unless it is a war crime or crime against humanity, in which case a life sentence may be imposed.\footnote{121} In Finland, the maximum sentence for torture is twelve years, unless it is a war crime or crime against humanity, in which case a sentence of life imprisonment may be imposed.\footnote{122}

The Netherlands is an exception to this pattern; sentences for torture as a war crime and crime against humanity have the same extraordinarily wide range as sentences for torture as a specific offense, from a fine to life imprisonment.\footnote{123} Greece, where the sentences for torture as a war crime and crime against humanity are similar to the sentences for torture in other contexts with aggravating factors, is another exception.\footnote{124} Ireland and the

\footnote{117} TCK. m. 94(1), 77(1)(c), 77(2).

\footnote{118} Federal Law of 14 December 2014 amending the Austrian Criminal Code and Code of Criminal Procedure, art. 1, adding new articles 321a and 321b of the Criminal Code. The term ‘torture’ is not used, nor is there a requirement that the pain or suffering be severe, which implies that these provisions cover both torture and ill-treatment.

\footnote{119} Código Penal [C.P.] [Penal Code], July 22, 2004, art. 10.1(1), 9(1).

\footnote{120} STRAFFELOVEN [GENERAL CIVIL PENAL CODE], §§ 117a, 102, as amended by Roemisches Statut 17. juli 1998, art. 77.

\footnote{121} CODE PENAL [C. PÉN.] art. 136ter 6° (war crimes), 417ter, and art. 136quater, § 1° 2° 136 Quinquies (Belg.).

\footnote{122} RIKOSLAKI [PENAL CODE] Ch.11, §§ 3(1) (crime against humanity), 5(1)(1), 5(2) (war crimes) (Fin.). There is, however, no mandatory prison sentence for a war crime which “considering the consequences or the other relevant circumstances, is petty.” \textit{Id.}, § 7(1).

\footnote{123} International Crimes Act, 19 June 2003, Stb. § 2(4)(1)(f) and § 2.5.1(b) (Neth.). \textit{See also, supra} note 125, § 7(1) (allowing “petty war crimes” to be punished by a fine instead of a prison sentence).

\footnote{124} Ten to twenty years, or life imprisonment if the victim dies. Ponikos Kodikas [P.K.] [Criminal Code] 1:137B(1) and art. 52(3), and Law No.3948 on the adaptation of the national law to provisions of the ICC Statute, art. 8.1(e), 8(2(aa) and art. 9(1)(c).
United Kingdom, where torture as a specific offense carries a maximum sentence of life imprisonment, also are exceptions. In Ireland, war crimes and crimes against humanity (including torture) are punishable by a life sentence only if the offense involves murder, or if life imprisonment is justified by "the extreme gravity of the offense and the individual circumstances of the convicted person." Otherwise, the maximum sentence is thirty years. In the United Kingdom the maximum sentence for any grave breach of the Geneva Conventions or Protocol I, unless the offense involves murder, is imprisonment for fourteen years.

In principle the criminalization of torture as a specific offense regardless of the context in which it is committed, without specifically criminalizing torture as a war crime or crime against humanity, raises no issue under CAT. Legislation criminalizing torture regardless of the context in which it occurs presumably can be applied to torture committed during an armed conflict or as part of systematic persecution of a minority. Legislation imposing low sentences for torture as a war crime or crime against humanity does raise issues under CAT, however. The sentence of one to five years provided by the Italian Military Code is clearly incompatible with the Committee’s interpretation of article 4.2. Most provisions of the Swiss and German legislation are consistent with the principle set forth in article 4.2, but the exception allowing for a prison sentence of one year “in less serious cases” of torture is contrary to the position that all torture is intrinsically serious. The same conclusion applies to the provision of the Spanish Code that provides for sentences of two to six years imprisonment for “less grave” cases of torture as a crime against humanity, and the Dutch legislation, which does not have any minimum prison sentence for torture as a war crime or crime against humanity.

The two countries in which the maximum sentence for torture as a war crime or crime against humanity is less than the maximum sentence for torture in other circumstances – provided that death has not been caused – are an aberration. An argument can be made that making torture punishable by a lower sentence when it is committed as war crime or crime against humanity makes an invidious distinction that serves no legitimate purpose. However, the severity of the sentences provided by these particular
laws for torture as a war crime or crime against humanity (fourteen years and thirty years) weaken this argument somewhat.

In most countries, the sentences for torture as a war crime or crime against humanity are more severe than sentences for torture in other contexts. Legislators no doubt have a degree of discretion as to the factors that should be recognized as justifying the imposition of more serious sentences for any crime, including torture. Nevertheless, the imposition of much heavier sentences for the crime of torture when committed in contexts that make the offense a war crime or crime against humanity raises an issue that will be discussed below, in the section on Conclusions.

III. SENTENCES FOR TORTURE IN EASTERN EUROPE AND CENTRAL ASIA

A. The Criminalization of Torture as a Specific Offense

Four codes in this region do not contain an article that criminalizes torture in terms similar to article 1 of CAT. The Hungarian Criminal Code contains no article on torture, and the Bulgarian Criminal Code criminalizes the torture of children, but not adults. The Lithuanian Criminal Code criminalizes only torture that causes physical pain, minor injury or illness. The Polish Code criminalizes only the "torment" of persons deprived of liberty, or during questioning. The Latvian Code does not contain an article specifically concerning torture, although an article on intentional causation of minor injury criminalizes "regular beating having the nature of torture, or any other kind of torture."

The criminal codes of most of the countries in this region contain several articles concerning torture. The Committee Against Torture considers, however, that most of the articles in these codes that criminalize torture as a specific offense do not fully comply with the definition of torture contained in article 1 of CAT. There are exceptions. In 2010, the Committee wel-
comed an amendment to the Criminal Code of Moldova that incorporated “a definition of torture that contains all the elements of article 1 of the Convention and makes it a specific criminal offense.”133 In 2011, it welcomed the addition to the Criminal Code of Slovenia of an article that “contains all the elements specified in article 1 of the Convention.”134 In 2012, the Committee welcomed a law amending the definition of torture contained the Criminal Code of Albania.135 Unfortunately, the Committee has not commented on the definitions of torture contained in some of the new or newly amended criminal codes in force in the region, such as the Romanian Criminal Code of 2004 or the 2006 amendments to the Georgian Criminal Code.136

B. The Adequacy of Statutory Definitions of Torture

The question of the adequacy of statutory definitions of torture is closely linked to the question of the appropriateness of sentences. The appropriateness of a sentence depends, in principle, on whether the offense is torture, ill-treatment, or torture with aggravating factors. The names given to offenses are sometimes misleading, however, and the compatibility of provisions on sentencing with article 4.2 of CAT cannot be assessed properly without taking into account the elements of the offense as defined by the national law.

In the codes of Azerbaijan, Belarus, Czech Republic, and the Slovak Republic, the core definition contained in the article that criminalizes torture—or purports to do so—does not require any specific intent. However, some forms of specific intent corresponding to the CAT definition of torture—usually discrimination—are mentioned as aggravating factors in the pertinent articles of the codes of Azerbaijan,137 the Czech Republic,138 Rus-

133. Concluding Observations on Moldova, ¶ 14, U.N. Doc. CAT/C/MDA/CO/2 (March 29, 2010). (In the same sentence, the Committee expressed concern about the “adequacy of the penalties applicable to torture.”) The provisions on the Moldovan Code on torture were amended in 2012 and the sentences have been increased.
134. Concluding Observations on Slovenia, supra note 8, ¶ 7.
137. Art. 133.3 (obtaining information, punishment).
138. TRESTNÍ ZÁKÁN [TZ] [CRIMINAL CODE], art. 149(c)(2) (Czech) (race, nationality, ethnicity, religious or political beliefs).
Another common discrepancy between article 1 of CAT and statutory definitions is the absence of a requirement that the pain and suffering inflicted be severe. The statutory definitions of torture contained in the criminal codes of the Czech Republic, Kazakhstan, Kyrgyzstan, Russia, Tajikistan, and Uzbekistan do not expressly require that the pain and suffering caused be severe. Article 305-1 of the Criminal Code of Kyrgyzstan, entitled Torture, criminalizes the infliction of physical or psychological suffering without requiring that it be severe, and does not recognize any aggravating factors. Article 141 of the Criminal Code of Kazakhstan and 143 of the Criminal Code of Tajikistan, which also are entitled Torture, likewise criminalize the infliction of physical or psychological suffering without requiring that it be severe. A number of aggravating factors are recognized by these articles, including harm to health and death, but the infliction of severe pain or suffering is not among them. The same applies to article 235 of the Criminal Code of Uzbekistan, which is entitled ‘Use of torture or cruel, inhuman or degrading treatment or punishment.’ In these articles, the key element of severe pain or suffering is plainly absent from the statutory definition.

In total, of the twenty-three countries in the region whose codes contain an article concerning torture as a specific offense, the statutory definitions in half of these articles lack one or more of the key elements of torture as defined by CAT. In some cases, it may be fair to conclude that an article that purports to criminalize torture in effect criminalizes the infliction of pain and suffering, rather than torture as defined by international law. In most, however, it would be more accurate to say that the statutory definition of torture is fragmented, has gaps, or is overbroad. Overbroad definitions

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139. UGOLOVNYI KODEKS ROSHISKOI FEDERATSII [UK RF] [Criminal Code] art. 117(2)(b) (Russ.) (national, racial or religious hatred).
140. Art. 420(2)(d) and (3)(b) (“by reason of specific motivation” and “with the intent to prevent or obstruct the exercise of fundamental rights and freedoms by another”).
141. Art. 133.1 (Azer.); art. 154.1 (Bela.); art. 144 (Geor.); art. 117.1 (U.K. RF); art. 137 (Serb.); and art. 127.1 (Ukr.).
142. Art. 133.3 (Azer.), art. 144 (Geor.), and art. 137(3) (Serb.).
143. Art. 149(1) (Czech); art. 141-1 (Kaz.); art. 305-1 (Kyrg.); art. 143-1 (Taj.); art. 117 (UK RF); and art. 235 (Uzb.).
144. Art. 141-1 and art. 143-1.
include those that criminalize both torture and ill-treatment, or that criminalize torture by private actors in addition to torture by officials and other persons whose actions can be attributed to the State.

C. The Criminalization of Ill-Treatment

The Criminal Code of Georgia is the only one in the region to have an article devoted specifically and exclusively to inhuman and degrading treatment.\(^\text{145}\) The main difference between article 144/1, which criminalizes torture, and article 144/3, which criminalizes “degrading or inhumane treatment,” is that the definition of torture in article 144/1 includes the elements of specific intent recognized by CAT, namely, the intent to obtain information, evidence or a confession, or to intimidate, coerce or punish. The definitions in both articles are overbroad in that they cover acts committed by private persons, but the participation of a public official is an aggravating factor in both.\(^\text{146}\) Both offenses carry a mandatory prison sentence although, despite the similarity of their material elements, the sentences for degrading or inhumane treatment (two to five years) are significantly lower than those for torture (seven to ten years).\(^\text{147}\) With aggravating factors, the sentence for degrading or inhuman treatment is increased four to six years.\(^\text{148}\) Although the sentence for ill-treatment mandated by this article seems appropriate, the requirement that the pain or suffering inflicted be severe makes this definition of ill-treatment too narrow to satisfy the Committee’s recommendation that ill-treatment be criminalized.

Article 190 of the Criminal Code of Bosnia and Herzegovina, on “Torture and Other Cruel, Inhuman or Degrading Treatment” takes a different approach. The core definition defines the material element as “physical or mental pain or severe physical or mental suffering.” The sentence is from six to twenty years; no aggravating factors are recognized, and there is no express requirement that a longer sentence be imposed when the pain or suffering inflicted is severe.\(^\text{149}\)

145. Article 126 of the Ukrainian Code, which punishes the infliction of physical but not mental pain, might be considered a flawed criminalization of ill-treatment. It does not carry a mandatory prison sentence. Article 143 of the Macedonian Code, which criminalizes ‘mistreatment’ by public officials, in particular humiliating, insulting or frightening a victim, also covers some forms of ill-treatment.

146. Art. 144' (Geor.) (Neither covers acts committed “by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”)

147. Art. 144/1.1, art.144/3.1.

148. Art. 144/1.2(a), (b) or (f), art.144/3.2 (a), (b) or (f).

149. Conviction under this article, as amended in 2015, carries a sentence of 6 to 20 years.
The Serbian Criminal Code has an article on "Ill-treatment and Torture" that contains one paragraph criminalizing ill-treatment and another that criminalizes "causing anguish," which presumably means severe pain or suffering.\textsuperscript{150} Ill-treatment is not defined, although the paragraph on ill-treatment also expressly applies to treating someone "in humiliating and degrading manner." A prison sentence is not mandatory for ill-treatment by a private actor, but ill-treatment by an official carries a prison sentence of three months to three years.\textsuperscript{151}

Several other codes contain articles that seem designed to criminalize both ill-treatment and torture. This often takes the form of a first paragraph that criminalizes the infliction of pain and suffering, and a separate provision that provides a heavier sentence for the infliction of pain or suffering by more serious methods. The Slovak Code, for example, contains a section whose first paragraph criminalizes the infliction of "physical or mental suffering by ill-treatment, torture or other inhuman and cruel treatment," which is punishable by a sentence of two to six years.\textsuperscript{152} The sentence is increased to three to ten years if the conduct is "more serious."\textsuperscript{153} Section 149 of the Czech Code, which criminalizes causing "bodily or mental suffering by torture or other inhuman or cruel treatment," is another example. This offense carries a prison sentence of six months to five years, which is increased to five to twelve years if the suffering is inflicted "in an especially brutal or tormenting manner."\textsuperscript{154} The infliction of physical or mental suffering by violence does not carry a mandatory prison sentence under article 117.1 of the Russian Criminal Code, but "the use of torment" as an aggravating factor makes the applicable sentence three to seven years.\textsuperscript{155} Although these provisions seem designed to criminalize ill-treatment as well as torture, they suffer from obvious defects, including the failure to define ill-treatment, the focus on methods used rather than impact on the victim as the distinction between the lesser offense and the more serious offense, and the use of "torture" as an aggravating factor rather than a distinct offense.

\textsuperscript{150} Art. 137(1) and (2), respectively.
\textsuperscript{151} Art. 137(1), (2) and (3).
\textsuperscript{152} § 420(1).
\textsuperscript{153} § 420(2)(a).
\textsuperscript{154} This sentence also is applicable if the victim is under 15 years of age or pregnant, or grave bodily harm is caused. § 149(3)(c) (Czech). The sentence increases for inhumane or cruel treatment to 2 to 8 years when the perpetrator is a public official. § 149(3)(a), (b) and (d), para. 2(a) (Czech).
\textsuperscript{155} This paragraph imposes sentences of 3 to 5 years, while a prison sentence is not mandatory for torture as defined in the first paragraph of this article. UK RF art. 117.2(e).
Article 166, added to the Moldovan Code in 2012, avoids these problems. The first paragraph criminalizes the intentional infliction of physical or mental pain or suffering by public officials or anyone acting with their consent or acquiescence, and refers to this as inhuman or degrading treatment, with no mention of the reasons for such treatment; the third paragraph criminalizes torture, defined as the intentional infliction of strong physical or mental pain, suffering or distress, for the purposes mentioned by article 1 of CAT, with State responsibility. The prison sentence for ill-treatment without aggravating factors is two to six years in prison or a fine, or three to eight years in prison with aggravating factors; the prison sentence for torture is six to ten years, or eight to fifteen years with aggravating factors.

D. Sentences for Ill-Treatment

The Committee has not begun to comment specifically on what sentences can be considered appropriate for ill-treatment not amounting to torture. Given its general position that ill-treatment should be treated as a serious offense, it seems unlikely that provisions that do not require the imposition of any prison sentence, or carry a minimum sentence of less than one year, could be considered appropriate. It would be useful for the Committee to begin to express opinions about legislation that criminalizes ill-treatment, in addition to legislation criminalizing torture.

It also would be desirable for the Committee, in Concluding Observations, to distinguish clearly between sentences that apply to torture and those that apply to ill-treatment. The sentences mandated by articles that criminalize ill-treatment as well as torture, in provisions that criminalize the infliction of pain and suffering regardless of its severity and regardless of intent, should be assessed in terms of the obligation to criminalize and provide appropriate sentences for ill-treatment. Compliance with the obligation to punish torture appropriately should be assessed with respect to the sentences provided for acts having all the key elements of torture: severe pain or suffering, official responsibility, and specific intent.

E. Sentences for Torture as a Specific Offense

The Committee’s evolving interpretation of article 4.2, as indicated above, suggests that the minimum sentence for torture must be a prison sentence. It did comment favourably, as indicated above, on article 86 of the Albanian Code, which provides for a sentence of five to ten years for both torture and ill-treatment. Art. 86 (Alb.).

156. It did comment favourably, as indicated above, on article 86 of the Albanian Code, which provides for a sentence of five to ten years for both torture and ill-treatment. Art. 86 (Alb.).

sentence of two or three years. The criminal codes of Belarus, Kazakhstan, Russia, and Uzbekistan do not require the imposition of any prison sentence for torture, allowing persons convicted of this offense to be sentenced to a fine, supervision or similar penalties. The minimum prison sentence is three months in Azerbaijan, six months in the Czech Republic and Serbia, and one year in Croatia, and Kosovo. Thus, in almost half of the countries in this region that recognize torture as a specific offense, the minimum sentence is below the threshold recognized by the Committee as appropriate.

The lowest maximum sentence for torture without aggravating circumstances that the Committee has called compatible with CAT is ten years. The maximum prison sentence for torture without aggravating circumstances is three years in Azerbaijan, Belarus, Russia and Uzbekistan; five years in the Czech Republic, Kazakhstan, Kyrgyzstan, Tajikistan and Ukraine; seven years in Estonia and Romania; and eight years in Armenia, Serbia and Turkmenistan. In Slovenia, the maximum sentence for torture is ten years, but twelve years with State responsi-

158. Art. 154.1 (supervision).
159. Art. 141 (fine, deprivation of right to hold position).
160. UK RF art. 117.1 (compulsory attachment of earnings, house arrest).
162. Art. 133.1 (provides that torture “is punished with imprisonment for the term up to 3 years”), and art. 55.2 (provides that the minimum term of any prison sentence is 3 months).
163. Art. 149(1).
164. Art. 137(3) (when committed by a public official).
165. Art. 104.
166. Art. 199(1).
168. Art. 133.1.
170. Art. 117.1.
172. Art. 149(1) (8 years if inflicted by a public official. Art.149(2)(a))
175. Art. 143-1.
176. Art. 127(1).
177. § 290¹.
178. Art. 282(1).
179. Art. 309.1, as amended in 2015; art.137(3) (when committed by a public official; under art.137(2) it is five years of committed by any other person); art.182.1 (as amended in 2012).
In Moldova, the maximum sentence for torture without aggravating factors has been increased to ten years, in Kosovo the maximum sentence for torture without aggravating factors is fifteen years, and in Bosnia, the maximum sentence for torture was recently increased from ten to twenty years. Thus, the codes of more than half of the countries in this region establish a maximum sentence below ten years, lower than the benchmark set by the Committee.

In conclusion, the criminal codes of more than half of the countries in this region that criminalize torture as a specific offense are partially or wholly non-compliant with the obligation to make torture punishable by sentences commensurate with the gravity of the offense. Both the minimum and maximum sentences for torture without aggravating factors appear to be non-compliant with this obligation in Azerbaijan, Belarus, the Czech Republic, Kazakhstan, Russia, and Uzbekistan.

F. Sentences for Torture Causing Permanent Injury or Death

The Committee has indicated that sentences of more than ten years imprisonment must be provided for torture resulting in permanent disability, a position that, as suggested above, probably should be interpreted more broadly to include other permanent injuries and death. In most of the criminal codes of this region, the articles criminalizing torture as a specific offense contain one or more paragraphs providing for more severe sentences when aggravating circumstances are present. Articles that recognize severe injury or death as aggravating factors include article 87 of the Criminal Code of Albania, section 149(3)(d) and 149.4 of the Czech Criminal Code, article 141-1(3) of the Criminal Code of Kazakhstan, article 142.2 of the Criminal Code of Macedonia, article 166(4) of the Moldovan Code, article 343(3) of the Romanian Code, article 420(3) of the Slovak Criminal Code, article 143-1(3) of the Criminal Code of Tajikistan, and article 235(3) of the Criminal Code of Uzbekistan.

Article 87 of the Albanian Code provides for prison sentences of ten to twenty years for torture or ill-treatment that results in permanent harm or death, article 343(3) of the Romanian Code provides for sentences of fifteen to twenty-five years for torture that causes death, and the third paragraph of article 143-1 of the Tajikistani Code provides for sentences of ten to fifteen years.

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180. Art. 265(1) and (2).
181. Art. 166(3), added to the Criminal Code in 2012; art. 199.1; Law on Amendments to the Criminal Code of Bosnia and Herzegovina, art. 15, and Criminal Code, art. 42(1).
182. Art. 309.1 (Arm.) (torture with aggravating factors carries a sentence of 7 to 12 years in prison).
years for torture that causes grave injury to health or death. These sentences meet the standard implicit in the Committee’s observation that sentences of ten years are not appropriate for torture that has caused permanent injury. The standard is not met by the sentences of four to eight years for severe bodily harm under the Code of Macedonia, five to eight years for serious bodily harm under the Code of Uzbekistan, or of five to ten years for grave bodily harm or death under the Code of Kazakhstan. It is unclear, at this point, whether the sentences of seven to twelve years for serious injury under article 343(2) of the Romanian Code, or seven to twelve years for serious injury or death under the Slovak Code, or eight to fifteen years for medium or serious injury or death under the Moldovan Code, would meet the Committee’s evolving views on this issue. The Committee has passed up opportunities to clarify its views in its Concluding Observations on similar provisions of other criminal codes.

G. Other Aggravating Factors

Articles that criminalize torture but contain no provisions on aggravating circumstances are unusual. In some articles, as we have seen, provisions that are formulated as aggravating factors—particularly those concerning the status of the perpetrator or the severity of pain and suffering—are elements of the offense of torture as defined by article 1 of CAT. Most aggravating factors are based on other circumstances, however. Those recognized by article 117(2) of the Russian Code are an example:

a) against two or more persons; b) against a person or his relatives in connection with the official activity of this person or the discharge of his public duty; c) against an woman who is in a state of pregnancy, which is evident to the convicted person; d) against obvious juvenile or a person who is in a helpless state, . . . or in material or any other dependence on the convicted person, and also in respect of a person, kidnapped or seized as a hostage; . . . f) by a group of persons, a group of persons under a preliminary conspiracy, or an organized group; g) by hire; h) by reason of national, racial, or religious hatred or enmity. . . .

There is no reason to conclude that the recognition of factors other than permanent injury and death should not be recognized as aggravating factors,

183. Art. 142, art. 235(3) and art. 143-1.3, respectively.
184. See, analysis of its Concluding Observations on Turkey and Macao, supra notes 12 and 31. The Committee also welcomed the definition of torture in article 86 of the Albanian Code, but made no comment on the sentences provided for by article 87. Concluding Observations on Albania, supra note 16, ¶ 16.
185. See e.g., art. 168 (Bos.), and art. 305-1(Kyrg.).
provided that the sentence for torture without such factors is commensurate with the intrinsic gravity of all torture.

H. *Torture as a Crime against Justice*

Many of the criminal codes in Eastern Europe and Central Asia have an article concerning the use of coercion as a crime against justice, and many of the articles on this offense recognize the use of torture as an aggravating factor.\(^{186}\) Sentences for the use of torture as an aggravating factor for this offense are usually greater than the sentence for torture as a specific offense. In Azerbaijan for example, the offense of torture carries a prison sentence of “up to three years,” while the sentences for offenses involving coercion of false testimony and similar purposes through the use of torture are five to ten years.\(^{187}\) In Belarus, where the specific offense of torture does not carry a mandatory prison sentence, the use torture to force an individual to give false testimony or similar purposes is punishable by a prison sentence of three to ten years. In Kyrgyzstan, the specific offense of torture is punishable by a prison term of three to five years, but forcing someone to give evidence by use of torture is punishable by a prison term of two to eight years. In Tajikistan, the offense of torture is punishable by a prison sentence of two to five years, while the use of torture to force the victim to give evidence or similar purposes carries a prison sentence of three to ten years.

The Committee Against Torture, as we have seen, considers that the principle that sentences for torture should be appropriate to the gravity of the crime includes an obligation to impose greater sentences when the consequences of torture for the victim are particularly severe. However, the very definition of torture in international law includes the infliction of suffering for a number of specific purposes, including punishment, intimidation, coercion, obtaining information or a confession, and any other reason based on discrimination. Imposing heavier or lighter sentences depending

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\(^{186}\) Art. 341.2 (Arm.), art. 293.2 (Azer.), art. 394.3 (Bel.), art. 325 (Kyrg.), art. 302.2 (Russ.), and art. 354(2) (Tajik.). The Croatian Code recognises the use of “severe violence” as an aggravating factor. Art. 126(2). Articles that criminalise this offense but do not recognize torture as an aggravating factor include art. 287 of the Bulgarian Criminal Code, art. 227 of the Hungarian Criminal Code, and art. 197.2 of the Criminal Code of Turkmenistan.

\(^{187}\) Article 341.2 (“Forcing testimony. . .”); art. 293.2 (“Compulsion to evidence”) In Concluding Observations adopted in 2015, the Committee Against Torture welcomed amendments to this article adopted in 2012, but made no mention of article 133, on torture as a specific crime. ¶ 5, U.N. Doc. CAT/AZE/C/CO/4, (Jan.27, 2016). The text of art. 293 as amended is unavailable in English, but the Committee’s observations make no mention of any change in the applicable sentences.
on which of these motives is present seems contrary to the principle that all torture must be treated as a grave offense. The use of torture in the context of law enforcement or the administration of justice is a grave problem, and must treated as such. The laws cited here, however, illustrate the danger of legislative distinctions that can only be understood as treating some torture, such as extrajudicial punishment, as less than serious. The language of some of them also makes further distinctions that are offensive to human rights principles. Article 341 of the Armenian code, for example, applies to the use of illegal means, including torture, to obtain testimony that is false.

I. Torture as an Aggravating Factor for Other Crimes of Violence

Some of the statutory definitions of torture that do not require serious pain or suffering also contain a clause excluding violence that results in moderate or serious injury to health. The sentence applicable for torture without aggravating factors is light in such codes. Indeed, the imposition of a prison sentence is optional in all of them. In all of the codes whose articles on torture as a specific offense expressly exclude treatment resulting in injury to health, articles that criminalize injury to health recognize the use of torture as an aggravating factor.

Recognition of torture as an aggravating factor for other offenses is not a priori contrary to international human rights law. Most of the legislation that takes this approach, however, appears to be based on a presumption that torture is not a serious offense if no injury is caused. Under the Russian Code, for example, the infliction of physical and mental suffering with the use of "torment" – the closest provision this Code has to an article criminalizing of torture in general - carries a prison sentence of three to seven years. Infliction of grave injury carries a prison sentence of two to eight years, which is increased to three to ten years if the injury was caused through the use of torture. Moreover, the infliction of an injury of "average gravity" through the use of torture carries a prison sentence of five years, less than the sentence for a conviction under the article that criminalizes torture in general. Legislation that implies that the commission of torture for certain purposes diminishes the gravity of the offense, cannot be considered compatible with CAT.

188. Art. 117.1 (Russ.), and art. 113.1 (Turkmen.).
189. Article 113.1 of the Azerbaijani Code also excludes treatment causing injury to health, although it does require "strong" pain or suffering. The sentence for torture without aggravating factors is imprisonment for up to 3 years.
190. Arts. 125(2)(2), 126(2)(2), and 130(3) (Bela.); art. 111.2b and 112.2c, (Russ.), and art. 107.2d and art. 108.2e (Turkmen.).
191. Arts. 117.2 and 111.2.
The criminal codes of some countries recognize torture or cruel and inhuman treatment as aggravating factors for other crimes of violence against the person, such as murder and rape. The codes of Tajikistan, Serbia and Kosovo recognize torture and/or ill-treatment as an aggravating factor in sexual offenses. In Tajikistan, the sentence for rape committed with "extreme brutality" is seven to ten years, compared to three to seven years for rape, and two to five years for torture without aggravating circumstances. In Serbia, where torture is punishable by a sentence of six months to five years, or one to eight years when committed by a public official, rape committed in a "particularly cruel or humiliating" manner is punishable by a sentence of three to fifteen years, and other sexual offenses committed in a "particularly cruel or degrading" manner by sentences of two to ten years. In Kosovo, the maximum sentence for rape with torture is fifteen years, the same as the maximum sentence for torture, but the sentences for torture as an aggravating factor for most other sexual offenses are less than the sentence for torture.

Several codes also recognize extreme cruelty or brutality as an aggravating factor for murder. Under the Lithuanian Code, which does not recognize torture as a specific offense, the sentence for murder – seven to fifteen years – is increased to eight to twenty years, or imprisonment for life, if death was caused by torture. In Tajikistan, where death is an aggravating factor for the offense of torture, the use of "extreme brutality" also is an aggravating factor for murder. The former is punishable by a sentence of ten to fifteen years, and the latter, fifteen to twenty years, or the death penalty. In Ukraine, where torture is punishable by three to five years in prison, "special brutality" is an aggravating factor for murder, raising the applicable prison sentence from seven to fifteen years, to ten to fifteen years.

Some codes also recognize torture, or some similar term, as an aggravating factor for offenses in general. The presence or absence of this aggravating factor is to be taken into account in choosing a sentence from within the range of sentences applicable for the specific crime.

192. Art. 138(1) and (2); art. 143-1(1) and (3) (Tajik.).
193. Art. 137(2)-(3), art. 178(3), art. 182(2).
194. The minimum prison sentence for torture is 1 year while the minimum sentence for rape with torture is 5 years. Art. 199.1 and art. 230.4 (Kos.). The sentence for sexual assault with rape is 3 to 10 years, and the sentence for degradation of sexual integrity with torture is I to 10 years. Id., art. 232.3 and art. 233.3.1
195. Art. 129.1 and 129.2(6).
196. Art. 141/1(2) and art. 113(2)(f).
197. Art. 127(1), art. 115(1) and 115(2)(4).
198. See e.g., art. 63.1(11) (Arm.), art. 61.1.9 (Azer.), and art. 54.1(i) (Kaza.).
States have discretion to determine, in the light of their social and cultural values, how grave an offense is and what the appropriate sentence should be. Nevertheless, some of the consequences of recognizing torture or cruel treatment as aggravating factors for other crimes are simply illogical. It does not make sense, for example, for the sentence for causing injury through the use of torture to be less than the sentence for torture as such. This, once again, reflects the false and dangerous notion that torture is not serious unless injury results.

The situation is different where torture is recognized as an aggravating factor for rape or murder. There is no consensus, as indicated above, that sentences for torture must equal those for the most serious crimes recognized by the criminal law. Murder is the most serious offense in most criminal codes, or at least the most serious common crime. Murder and torture each require a different specific intent. Consequently, it is not illogical to recognize the use of torture as an aggravating factor for the crime of murder, nor is it illogical to provide sentences heavier than the sentence for torture for murder by the use of torture, or for torture aggravated by the unintentional death of the victim. Logic neither requires, nor precludes, sentences of either kind.

In so far as rape is concerned, there are codes that recognize torture and/or ill-treatment as an aggravating factor for rape, and sometimes other forms of sexual violence, as well as codes that recognize sexual abuse as an aggravating factor for the offense of torture. Without a study of the case law, it is not possible to say whether the use of the term torture in articles criminalizing sexual offenses is interpreted strictly to mean acts where there is State responsibility and specific intent. Rape and torture are offenses of similar gravity: both are severe violations of personal integrity that have profound and long-term, if not permanent, consequences for the victim, regardless of whether physical injury is caused. It would be logical for lawmakers to recognize either as an aggravating factor for the other, provided that the sentences for both are commensurate with the gravity of these crimes.

199. The term 'common crime' is used here to exclude political crimes, such as treason, and international crimes, such as war crimes, crimes against humanity, genocide, piracy, international terrorism, torture, slavery and forced disappearance.

200. Many statutory provisions regarding cruelty as an aggravating factor for the crime of murder avoid this issue by language that implies torture, while avoiding the term itself, and hence the complications that would occur if it was necessary to determine whether the brutal treatment used to inflict death was motivated by one of the aims mentioned by Article 1 of CAT and whether there is evidence of State responsibility.
J. Torture as a War Crime and Crime Against Humanity

Most of the criminal codes in this region criminalize torture as a war crime and crime against humanity.201 Even most of those that do not criminalize torture as a specific offense, criminalize it as a war crime. The Bulgarian Code, which criminalizes torture in other circumstances only when the victim is a child, recognizes torture as a war crime punishable by a prison sentence of five to twenty years, or life imprisonment.202 The Hungarian Code, which does not criminalize torture as a specific offense, makes the ill-treatment of civilians and POWs punishable by a prison sentence of five to twenty years.203 The Latvian Code, which criminalizes torture in other circumstances only if it causes bodily injury, provides a sentence of three to twenty years for torture as a war crime.204 Similarly, the Lithuanian Code, which otherwise criminalizes torture only if it causes physical pain or minor injury, provides a sentence of three to twelve years for torture and other inhuman treatment as a war crime, and five to twenty years or life for torture as a crime against humanity.205 The Polish Code provides sentences of five to twenty years or life imprisonment for torture as a war crime, compared to three months to five years for the torment of a person deprived of liberty, or one to ten years for an official convicted of using torment to obtaining information.206

Sentences for torture as a war crime or crime against humanity are significantly more severe than sentences for torture in other circumstances in the criminal codes of this region, as the following table shows:207

201. The codes of Kazakhstan, Kyrgyzstan, and Turkmenistan are the main exceptions.
202. Arts. 187, 410(a), 411(a), and 412(a).
203. § 158(1) (Hun.).
204. Compare §130(3) (maximum sentence of 3 years) with § 74.
205. Compare art. 140.1-2 with art. 103 and 100.
206. Compare art. 123 § 2 with art. 247 § 1 and art. 246 § 1.
207. The table does not include countries that do not criminalize torture as a war crime or crime against humanity.
<table>
<thead>
<tr>
<th></th>
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<td>15 years-life³</td>
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<td>Bosnia</td>
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<td>10-45 years⁹</td>
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<td>Georgia</td>
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<td>2-6 years</td>
<td>15-25 years or life³⁴</td>
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<td>Ukraine</td>
<td>3-5 years</td>
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<tr>
<td>Uzbekistan</td>
<td>up to 3 years</td>
<td>10-20 years⁴⁰</td>
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¹This column does not include a similar offense included in many codes, that criminalizes torture, murder and other serious offenses committed as part of racial or other forms of discrimination, when the definition of the offense does not expressly require a widespread or systematic attack against a civilian population. The sentences for this offense are more serious than those for torture as such. See e.g., art. 392 (Arm.) (7-15 years) and art. 111.0.1. (Azer.) (10 to 15 years).
²Art. 75 (ill-treatment of civilians or POWs).
³Art. 74.
⁴Art. 390.1.
⁵Art. 115.2.
⁶Art. 135.2.
⁷Art. 128.
⁸Art. 173-175.
⁹Art. 172, and art. 14(1)(a) (on the meaning of "long-term imprisonment").
¹⁰Art. 104.
¹¹Art. 90(1)(6); Art. 46(1).
¹²Art. 90(1)(5).
¹³§ 259(a) (ill-treatment of civilians, POWs, etc.).
¹⁴§ 401(1)(h).
¹⁵§ 97 (torture of civilians only).
¹⁶§ 92.
¹⁷Art. 144/1 § 2a (i.e. when committed by an official . . .).
¹⁸Art. 411.2(b) (also applies to inhumane treatment).
²⁰Art. 199 (official capacity).
²¹Art. 150 and art. 151 (international conflict). (Art. 153, which criminalises war crimes committed in non-international conflicts, fails to expressly mention torture, although crimes of sexual violence (art. 153.2.6) and mutilation (art. 153.2.11) are mentioned).
²²Art. 149.1.6.
²³Art. 103.
²⁴Art. 356.1 (cruel treatment of civilians of prisoners of war).
The imposition of much heavier sentences for torture as a war crime or crime against humanity raises an issue that is discussed below.

CONCLUDING OBSERVATIONS

A. Overbroad Statutory Definitions

One common discrepancy between article 1 of CAT and statutory definitions is the absence of a requirement that the pain and suffering inflicted be severe. The lack of such a requirement appears to be a significant departure from the definition of torture recognized by CAT. Nevertheless, in 2013 the Committee welcomed the incorporation into the Criminal Code of Tajikistan of a new article on torture that brought "the definition of torture fully in line with article 1 the Convention." The article criminalizes the "intentional infliction of physical and/or mental suffering," without specifying that it be severe. The reason that the Committee took this position is not explained, and it does not appear to have made similar statements on other opportunities. One possible explanation may lie in the second paragraph of article 1 of CAT, which provides "This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application." In a General Comment on article 2 of CAT adopted in 2008, the Committee stated:

States parties must make the offense of torture punishable as an offense under its criminal law, in accordance, at a minimum, with the

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elements of torture as defined in article 1 of the Convention, and the requirements of article 4.

At the same time, the Committee recognizes that broader domestic definitions also advance the object and purpose of this Convention so long as they contain and are applied in accordance with the standards of the Convention, at a minimum.\(^{210}\)

There are two reasons for the Committee’s position that statutory definitions of torture should contain all the elements specified in article 1 of CAT.\(^{211}\) One is given in its General Comment on article 2:

Serious discrepancies between the Convention’s definition and that incorporated into domestic law create actual or potential loopholes for impunity.\(^{212}\)

The other is:

By naming and defining the offense of torture in accordance with the Convention and distinct from other crimes, the Committee considers that States parties will directly advance the Convention’s overarching aim of preventing torture, inter alia, by alerting everyone, including perpetrators, victims, and the public, to the special gravity of the crime of torture and by improving the deterrent effect of the prohibition itself.\(^{213}\)

There is a difference between discrepancies between statutory definitions and the article I definition that exclude some forms of torture from the statutory definition, and discrepancies that do not. The absence of express mention of mental pain and suffering, for example, would prevent the prosecution of psychological torture, if physical or bodily pain and suffering is an element of the statutory definition. The failure to expressly mention discrimination as a motive for the infliction of pain and suffering likewise would prevent application of statutory sanctions for torture to some conduct that constitutes torture under article I of CAT, if other motives are recognized as elements of the definition. In contrast, discrepancies that make a statutory definition overbroad and criminalize acts that articles 1 and 4 of

\(^{210}\) Gen. Comment No. 2, supra note 2, ¶ 8-9

\(^{211}\) The Committee also has indicated, on occasion, that the absence of an article criminalising torture as a specific offense is the reason that the sentences applicable to acts of torture are non-compliant with article 4.2 of CAT. See e.g., Concluding Observations on Latvia, ¶ 7, U.N. Doc. CAT/C/LVA/CO/3-5 (Dec. 23, 2013).

\(^{212}\) Gen. Comment No. 2, ¶ 9.

CAT do not oblige States to criminalize, are not \textit{a priori} inconsistent with CAT.

1. Statutory definitions that criminalize torture by private actors

It is difficult to see why a statutory definition that does not contain the element of State responsibility should be considered incompatible with CAT, provided that it criminalizes the infliction of severe pain and suffering by both public officials and private actors.\textsuperscript{214} While many consider that State involvement in torture makes the crime more heinous, and the very existence of CAT is proof of an international consensus that torture involving State responsibility requires special, concerted efforts to bring perpetrators to justice and prevent impunity, there is no unanimity on the point that torture involving State responsibility is an inherently more serious offense than the same acts committed by private actors for private purposes.\textsuperscript{215} The criminal law of some European countries allows private actors to be prosecuted for torture.\textsuperscript{216}

Indeed, the Committee itself has indicated that the State has an obligation to “investigate, prosecute and punish” torture by private actors.\textsuperscript{217} This seems to imply the need for a statutory definition of torture that is not limited to acts committed by or with the complicity of public officials. The Committee’s comments on statutory definitions of torture sometimes seem not to take into account its statements on the duty of the state to punish torture in the private sphere.

\textsuperscript{214} The Committee’s 2012 Concluding Observations on the Third Report of Armenia states “torture, as presently defined by [art.119 of the Criminal Code], does not include crimes committed by public officials, only by individuals acting in a private capacity, with the result that no public official has ever been convicted of torture by the State party.” (Arm. Crim. Code, art. 119, § 10). It has not made this observation regarding similar statutory definitions in other countries. It seems possible that the failure to apply this article to officials who torture may be due an administrative norm or policy, rather than the lack of an express mention of officials as possible perpetrators. Article 341.2, which applies specifically to torture for certain purposes by police and prosecutors and carries a heavier sentence than torture as criminalized by article 119, also has not been applied.

\textsuperscript{215} A separate matter is the obligation under international humanitarian law to criminalise and prosecute torture when it is a war crime, regardless of whether the perpetrators are associated with armed forces of a State or non-State parties to an armed conflict.

\textsuperscript{216} For example, Article 417 bis and 417 ter of the Belgian Penal Code, and Article 222-1 and 222-3.7° of the French Penal Code.

\textsuperscript{217} Gen. Comment No. 2 § 18, and Gen. Comment No. 3, § 7.
Although the Committee sometimes recommends that legislation be amended when the basic statutory definition of torture makes no mention of the involvement of public officials,\textsuperscript{218} it does not do so systematically. In 2011 the Committee welcomed the introduction into the Criminal Code of Slovenia of a new Article on torture "which contains all the elements specified in article 1 of the Convention," even though the element of State responsibility is not part of the core definition of torture contained in the first paragraph of the article, but is mentioned only in the second paragraph, as a factor that increases the sentence for torture as defined in the first.\textsuperscript{219}

It is not clear how Committee's position on this issue will evolve. It does seem likely that the Committee's concern with statutory definitions that are overbroad in this respect should be attributed to its preference for definitions that "alert everyone, including perpetrators, victims, and the public, to the special gravity of the crime of torture," rather than with "loopholes" that foster impunity and are incompatible with the obligation to criminalize all forms of torture. The support for statutory definitions that mirror article 1 of CAT is understandable, but it should be seen as a recommendation as to the best way to implement the treaty, rather than an interpretation of a legally binding obligation.\textsuperscript{220}

\textsuperscript{218} In Concluding Observations on the Fifth Report of the Russian Federation, adopted in 2012, the Committee reiterated its concern "that the definition intended to cover the term 'torture' . . . does not fully reflect all elements of the definition in article 1 of the Convention, which includes the involvement of a public official or other person acting in an official capacity in inflicting, instigating, consenting to or acquiescing to torture," and recommended that the definition be amended to bring it "into full conformity with article 1 of the Convention." ¶ 7. See also Concluding Observations on Belgium, ¶ 14, U.N. Doc. CAT/C/BEL/CO/2 (Jan. 19, 2009); Concluding Observations on Belgium, ¶ 8, U.N. Doc. CAT/C/BEL/CO/3, (Jan. 3, 2014); and Concluding Observations on France ¶ 13.

\textsuperscript{219} Concluding Observations on Slovenia, ¶ 7. The Committee also failed to comment on this aspect of article 137 of the Criminal Code of Serbia, which also treats State involvement as an aggravating factor rather than an element of torture. Concluding Observations on Serbia, ¶¶ 1(c) and 5, supra. article 144/1 of the Georgian Code is similar, but the Committee has not yet commented on it.

\textsuperscript{220} Novak and McArthur observe "The requirement that torture should be a criminal offense under domestic law does not mean that there must be a specific, separate offense corresponding to torture under article 1 of the Convention. What is important is that all acts of torture should be criminal offenses under the domestic law, and that they are punishable by sufficiently severe penalties." Novak & McArthur, supra note 27, at 129.
2. Statutory definitions that criminalize both torture and ill-treatment

Where the element of the severity of pain and suffering is concerned, another consideration must be taken into account. Definitions that are overbroad because they criminalize the infliction of pain and suffering regardless of its severity may be intended to criminalize both torture and ill-treatment. CAT requires States to prevent cruel, inhuman and degrading treatment and punishment as well as torture. Although it does not expressly require States to criminalize ill-treatment, the Committee has indicated that State Parties must criminalizing ill-treatment as well as torture.\(^{221}\) The severity of the pain and suffering inflicted is the primary distinction between torture and ill-treatment.\(^{222}\)

The Committee has expressed concern about many statutory definitions that do not require severe pain and suffering. In 2012, for example, the Committee expressed concern about §149 of the Czech Code because it “only establishes the crime of torture and other inhuman and cruel treatment but does not define torture in terms of the Convention,” and recommended “that the State party amend its Criminal Code in order to adopt a definition of torture that covers all the elements contained in article 1 of the Convention.”\(^{223}\) In 2011 it adopted a comment on article 113 of the Code of Turkmenistan recommending that “The State party should also ensure that acts of torture are not defined in terms of a less serious offense, such as the causing of physical and moral suffering, and that these offenses are punishable by appropriate penalties which take into account their grave nature, as set out in article 4, paragraph 2, of the Convention.”\(^{224}\)

These examples illustrate the need for an integrated assessment of statutory provisions concerning torture. If the sentences for torture under a given criminal code are not commensurate with the gravity of torture, is this

\(^{221}\) Gen. Comment No. 2 ¶ 6, 18, and Gen. Comment No. 3, ¶ 19.

\(^{222}\) CAT, art. 16, and Gen. Comment No. 2 ¶ 10. The other distinction is that the element of specific intent is not applicable to cruel, inhuman or degrading treatment or punishment. For an extensive discussion of this issue, with emphasis on the jurisprudence of the European Court of Human Rights, see Sir Nigel Rodley with Matt Pollard, The Treatment of Prisoners Under International Law, 82-144, (3d. ed. 2009).


\(^{224}\) Concluding Observation on Turkmenistan, ¶ 8, U.N. Doc. CAT/C/TKM/CO/1 (June 15, 2011) (article 113 was replaced by new article on torture the following year. See Concluding Observation on Turkmenistan, ¶¶ 18-20, U.N. Doc. CAT/C/TKM/2, (Oct. 6, 2015)).
due to differences between the statutory definition and the CAT definition? If a statutory definition is broader than the article 1 definition but the sentences are commensurate with the gravity of torture and there is no statute of limitations for torture, is there any reason to suggest that the statutory definition should be narrowed? Can these questions be answered in the abstract, or should the answers be informed by the practice and legal culture of the country concerned?

It seems unwise to consider articles non-compliant with article 4.1 merely because they criminalize both torture and ill-treatment. Rejecting articles because they are structured differently than article 1 of CAT and some of the elements of the definition of torture are, in effect, identified as aggravating factors for the offense of ill-treatment, places form over substance.

Indeed, it is possible that insistence on statutory definitions that mirror the language of article 1 of CAT could result in the decriminalization of ill-treatment. Article 104 of the new Criminal Code of Croatia, which came into force in 2013, replaces an article on “Torture and other cruel, inhuman or degrading treatment or punishment” that defined the key material element as “physical or mental pain or severe physical or mental suffering.” Article 104 re-defines this element as “serious bodily or mental pain or suffering.” Although there is no reason to believe that this amendment was made in response to a recommendation of the Committee, it illustrates the risk that bringing the language of a statutory definition into closer conformity with the language of article 1 of CAT may reduce the scope of the article so as to decriminalize ill-treatment. This can be avoided by recognition of ill-treatment as a separate offense, of course, but only one country in Eastern Europe has chosen to do so. The reasons for discouraging law-makers from criminalizing torture and ill-treatment in a single article are not particularly strong, especially since CAT itself lacks a clear definition of ill-treatment and defines it by reference to torture.

B. Criteria for Determining the Appropriateness of Sentences

Article 4 of CAT obliges Parties to make torture punishable by sentences that are “appropriate” given the gravity of torture, and the Human Rights Committee has stated that sentences must be “commensurate with the gravity of the offense.” These terms require that torture be punisha-

225. Concluding Observation on Russia ¶ 7.
226. Criminal Code of Georgia, art. 144/3. (Inexplicably, the statutory definition of this offense includes the element of causing “strong physical, mental pain or moral suffering”.) See also Art. 143 (Mac.) (on mistreatment).
227. See CAT, art.16(1).
ble by sentences that are serious, but do not indicate where sentences for torture must lie on the scale of seriousness. Light sentences clearly are inappropriate, but would sentences of moderate gravity — somewhere in the middle of the range of possible sentences — be appropriate in some circumstances?

The resolutions on torture adopted by the General Assembly from 2000 to 2007 state that “those who encourage, order, tolerate or perpetrate acts of torture must be held responsible and severely punished.” The use of the word “must” rather than “should” by these General Assembly resolutions is significant for two reasons. Firstly, it means that this phrase is not a mere recommendation, but an obligation. Secondly, it can be interpreted to mean that the legislation should not permit anyone convicted of torture to be given a lighter sentence. This is significant because most criminal legislation allows for sentences to be reduced or suspended in certain circumstances, and the application of such rules to the benefit of convicted torturers is a tool used to perpetuate impunity.

Only when the resolutions of the General Assembly extend this obligation to ill-treatment as well as torture, beginning in 2008, do they use the term “commensurate with the severity of the offense.” The most plausible reason for this change is that, while sentences for torture must be severe, sentences for ill-treatment must be serious, although not necessarily as serious as sentences for torture — perhaps somewhere towards the middle of the scale of sentences recognized by domestic law. The European Committee for the Prevention of Torture has taken the position that the sentences for torture and ill-treatment alike must be “suitable” and designed to have a “strong dissuasive effect.” This, too, suggests that sentences for ill-treatment should be within the range of sentences for relatively grave offenses.

The Committee against Torture has begun to set benchmarks for sentences that comply with article 4.2. Concluding Observations adopted in 2011 and 2012, as indicated above, suggest that the minimum sentence for torture should be at least two or three years, and a maximum sentence of ten years complies with article 4.2, in the absence of aggravating factors. It also has indicated that sentences for torture should be more severe when permanent injuries are caused, and has implied that sentences of ten years

228. See supra note 39.
229. See e.g., ECtHR, Okkali v Turkey, §§ 36, 39, supra note 52, and Duran v Turkey, Application No. 42942/02, Judgment of 8 April 2008, §§ 41, 69.
231. 14th General Report, supra note 56, ¶ 25.
232. See the Committee’s Concluding Observations on the Third Report of Armenia, on art. 94 of the Turkish Penal Code and art. 86 of the Albanian Criminal Code, and on § 9(a) of Ch.11 the Finnish Code.
are insufficient when this is the case. The Committee’s views on sentences for ill-treatment are less developed, consisting basically in a single observation that sentences of five to ten years for both torture and ill-treatment are compatible with CAT.

These parameters are based a small number of Concluding Observations and, in some instances, a partial appreciation of the relevant legislation. It is difficult to predict to what extent these emerging standards will be confirmed, qualified or modified by future observations on other legislation. It is important that the Committee continue to address this issue in Concluding Observations, not only because the legislation of so many countries fails to meet the emerging standards it has announced, but also because further guidance is needed on how article 4.2 should be interpreted. The Committee’s views on this issue seem likely to develop incrementally through comments on specific legislation, and it may be some years before its views have evolved and become consolidated to the point that it feels prepared to adopt a General Comment on this issue.

The development of standards on sentences for torture is complicated by differences in the length of sentences in comparative criminal law. Most European countries have sentences of life imprisonment, although in one the maximum sentence is 20 years. Would it be appropriate for an inter-


235. Life sentences are recognized by the criminal legislation of Albania, KODI PENAL, art. 31, Fletorjazytare (1995); Armenia, Criminal Code of the Republic of Armenia, art. 60 (Apr. 18, 2013); Azerbaijan, Criminal Code of the Azerbaijan Republic, Art. 57.1, Digest of Legislation of the Azerbaijan Republic, Sept. 1, 2000; Belgium, CODE PENAL [C.PEN] art. 8, 10; Bulgaria, CODE PENAL [C. PENAL] art. 38; Croatia, Criminal Code of the Republic of Croatia, Narodne novine art. 5; the Czech Republic, Trestní zákon [Criminal Code], Zákon c. 140/1961 Sb. Provision 27(3); Denmark, Strfrl § 33(1); Estonia, Penal Code § 45; Finland, Rk.Oslaki [RL] [Criminal code] 2:3; France, CODE PENAL [C.PEN.] [Penal Code] art 131-1; Georgia, Sakart’velos Siskhils Samort’lis Kodek’si [Criminal Code] art. 51; Germany, STRAFGESETZBUCH [StGB] [Penal Code], § 38(1); Hungary, Bünteto Törvénynöv [Btk.] (Criminal Code) § 41; Ireland, Criminal Justice Act of 1990 (Act No. 116/1990) § 2; Italy, Art. 22 c.p.; Kosovo, Criminal Code of the Republic Kosovo, Code No. 04/L-082, art. 44 (2012); Latvia, Criminal Law § 38(3) (2000); Lithuania, Criminal Code, art. 51; Moldova, Criminal Code [Republic of Moldova], No. 985-XV, art. 71, Feb. 18, 2002; Netherlands, Art. 10 lid 1, Sv; Poland, Art. 32.5 k.k; Romania, Art. 56, C. Pen.; Russia,
national body to adopt a fixed standard for how long prison sentences for torture must be, regardless of the length of sentences for other serious crimes? On the other hand, would it be appropriate to conclude that a sentence that meets the obligation of one State under CAT article 4.2 would not satisfy the obligation of another State under the article 4.2?

It may not be appropriate, at the present time, to adopt a single criterion on whether sentences for torture and ill-treatment are commensurate with the gravity for the crime. The adoption of a set of criteria may be the best approach. In the first instance, the Committee should confirm and clarify the standards it has already suggested regarding minimum and maximum sentences for torture, with and without aggravating factors, viz:

- the minimum sentence for torture must be at least three years of prison;
- the maximum sentence for torture without aggravating circumstances must be no less than ten years of prison; and
- the maximum sentence for torture resulting in serious injury or death must be more than ten years of prison.

On a few occasions the Committee has compared sentences for torture to sentences for other crimes, and it may be useful to develop this approach further. A recent observation that sentences for torture should be greater than those for assault is appropriate, because the crime of torture includes elements that make it more serious than other non-fatal offenses against the person, namely, the involvement of public authorities and the specific intent to violate personal integrity as a means of violating other basic rights (to obtain a confession, to punish illegally, to discriminate, etc.).

236 Rape is an offense against the person that, as a rule, has more profound and far-reaching consequences for the victim than other non-fatal crimes of violence. Indeed, rape and sexual abuse constitute torture, when the requirements of State responsibility and specific intent are met. Consequently, a strong

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UgoLvnji Kodeks RossiKoi Federatsii [UK RF] [Criminal Code] art. 57; Slovakia, Trestnē Kodexy, No. 300/[2005] § 47; Slovenia, Uradni list Republica Slovenije, No. 63/1994 art. 46(2); Sweden, Brottsbalken [BRB] [Penal Code] 26:1; Switzerland, Code Penal Swisse [CP] [Criminal Code] Dec. 21, 1937, SR 757 (1938), art. 40; Turkey, TCK m. 47-48; Ukraine, Kriminalny kodeks Ukrainy, art. 64 (2001); and United Kingdom, Criminal Justice Act 2003, § 225. The maximum sentence recognised by the Spanish Criminal Code is 20 years. CP. (2011) art. 36(1).


argument can be made that it would be inappropriate for torture to be punishable by sentences less serious than the sentences for rape.238

Another guideline might be that sentences for torture should be heavier than sentences for crimes against property. A human rights approach to criminal law requires that, in principle, crimes against the person should be punished by heavier sentences than crimes against property - although there may be exceptions for crimes against property having serious implications for the public good. Given the tendency of law enforcement bodies in some countries to rely on torture and ill-treatment to solve crimes such as theft, legislation that implies that torture is a less serious offense would convey the wrong message. Several judgments of the European Court of Human Rights illustrate this point.239

C. Sentences for Torture as a War Crime and Crime Against Humanity

International human rights law does not contain any norms specifically concerning the punishment of torture as a war crime or crime against humanity. The Geneva Conventions recognize torture and inhuman treatment as grave breaches of international humanitarian law, and require State Parties to “enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches.”240 There is no reason to consider that the obligation to provide

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1995/34 (Jan.15, 1995); and Manfred Novak, (Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment, ¶ 34, U.N. Doc. A/HCR/7/3 (Jan.15, 2008).

238. Jean Améry, writer and torture victim, compared torture to rape: “The boundaries of my body are also the boundaries of my self. My skin surface shields me from the external world. If I am to have trust, I must feel on it only what I want to feel. At the first blow, however, this trust in the world breaks down. The other person . . . forces his own corporeality on me . . . . He is on me and thereby destroys me. It is like a rape . . . .” Améry, supra note 1, at 81.


“effective penal sanctions” for torture might require heavier sentences than
the “appropriate sentences which take into account [the] grave nature” of
torture, required by CAT. Indeed, if torture is criminalized in full compli-
ance with articles 1 and 4 of Convention Against Torture as a serious of-
fense regardless of the context in which the material act occurs, this would
go far towards satisfying the obligations of a State under the Geneva Con-
ventions as well as under CAT. Historically, the adoption of CAT in 1984
can be seen as an expansion of the recognition of torture as an international
crime from the context of war and foreign occupation to, three and a half
decades later, a broader context.

No international treaty recognizes any specific obligation concerning
the prosecution and punishment of crimes against humanity as such, by na-
tional courts. Ratification of the Rome Statute of the International Criminal
Court has led a number of State Parties to adopt legislation that, inter alia,
makes the crimes defined by articles 7 and 8 of the Statute crimes under
their national law.241 This may be necessary, under national law, in order to
meet certain procedural obligations recognized by the Rome Statute, such
as the obligation to arrest suspects under investigation by the International
Criminal Court.242 However, the Rome Statute does not contain an express
obligation to criminalize the offenses defined in articles 7 and 8, and many
Parties have adopted laws designed to bring their legislation into compli-
sons who have committed or ordered grave breaches.) All the States whose legislation
is considered here are Parties to the Geneva Conventions, with the exception of Kosovo,
which is not recognised as a State by the United Nations.

241. Law relating to the repression of the serious violations of humanitarian inter-
national law, MONITEUR BELGE, March 23 1999 (Belg.); Loi 2010-930 du 9 août 2010,
portant adaption du droit pénal a l’institution de la cour pénale internationale [Law No
2010-930 of 9 August 2010 adapting the criminal law to the establishment of the Inter-
national Criminal Court], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANCAISE [OFFICIAL
GAZETTE OF FRANCE], Aug. 10, p. 14678; Law. 3948/2011 on the adaptation of internal
law to the provisions of the ICC Statute, Offical Gazette, Vol. A 71/5.4.2011 (Greece);
Kingdom Act of 20 June 2002 to implement the Statute of the International Criminal
Court in relation to cooperation with and the provision of assistance to the International
Criminal Court and the enforcement of its decision (Neth.); Decreto-Lei 31/2004 [De-
cree Law 31/2004], Diario de Republica de 22.7.2004 [Port.] (adopting Portugal Penal
Legislation to the Statute of the International Criminal Court); Loi fédérale portant
modification de lois fédérales en vue de la mise en œuvre du Statut de Rome de la Cour
pénale internationale du 18 juin 2010 (modifying the Federal Laws of Switzerland with
a view to implementation of the Rome Statute of the International Criminal Court).

242. The Rome Statute for the International Criminal Court, arts.58-59, July 17,
ance with their procedural obligations under the Statute, without criminalizing crimes against humanity.\textsuperscript{243}

In comparative criminal law, there is a pronounced tendency to provide heavy sentences for international crimes. There is a contradiction, however, in so far as torture is concerned: in many countries, the sentence for torture as a war crime or crime against humanity is much heavier than the sentence for torture committed in other contexts, such as law enforcement. The Committee Against Torture does not comment on provisions of criminal codes criminalizing torture as a war crime or crime against humanity.\textsuperscript{244} Its main concern is with norms that criminalize torture "as a specific offense," regardless of the circumstances in which it occurs. It would be reasonable, however, to expect the Committee to address the issue of whether there is any valid reason for sentences for torture committed in other contexts to be significantly lower than the sentences for torture committed in the context of armed conflict or crimes against humanity.

There are two possible justifications for the imposition of serious sentences: proportionality to the gravity of the offense, and the need for deterrence.\textsuperscript{245} The gravity of torture may vary with many circumstances, such as the duration of torture, the vulnerability of the victim, and the nature of any physical or mental injury caused. However, the fact that it occurs in the context of an armed conflict and the victim is a "protected person" does not necessarily make the crime more serious than if it was

\textsuperscript{243} See e.g., Denmark, Act No. 342/2001 on the International Criminal Court, and Finland, Act No. 1284/2000 on the implementation of the provisions of a legislative nature of the Rome Statute of the International Criminal Court; Germany also adopted such a law in 2002, the Law on Cooperation with the International Criminal Court, and simultaneously adopted a Code of Crimes against International Law criminalizing genocide, war crimes and crimes against humanity. See The International Criminal Court, FEDERAL FOREIGN OFFICE (Apr. 12, 2014), http://www.auswaertiges-amt.de/EN/Aussenpolitik/InternatRecht/ISGH/Hintergrund_node.html.

\textsuperscript{244} One exception is the criticism of a statutory definition of rape as a war crime. Concluding Observations on Bosnia and Herzegovina \textparagraph 9, U.N. Doc. CAT/C/BIH/CO/2-5 (Jan.20, 2011). On occasion the Committee welcomes the recognition of torture as a war crime or crime against humanity in order to contrast this with the failure to criminalise torture in other contexts. See e.g., Concluding Observations on Germany, supra note 76, \textparagraph 9.

\textsuperscript{245} Incapacitation and rehabilitation of the offender have little relevance to sentencing for crimes against humanity. As the ICTY observed in the Furund_jja Judgment "The Trial Chamber accepts that two important functions of the punishment are retribution and deterrence." Prosecutor v. Furund_jja, No. IT-95017/I-T, Decision, International Tribunal for the Prosecution of Persons Responsible for Serious Violations in International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, § 288 (Dec. 10, 1998).
committed in another context.\textsuperscript{246} Similarly, the fact that an act of torture occurs "as part of a widespread or systematic attack directed against any civilian population," with the support by a State or some other organization, does not necessarily make the act itself intrinsically more grave.\textsuperscript{247} The occurrence of torture in these contexts may justify the creation of international mechanisms to enforce the prohibition of such offenses, but the reasons that justify action against these offenses by the international community do not necessarily imply that the sentences applied by a national court should be more or less serious depending on the context in which the crime occurs. A person accused of torture as a war crime or crime against humanity may have committed the crime as part of a pattern of inhuman conduct involving large numbers of victims, but will be judged only for the crime or crimes for which he or she bears personal responsibility.

From the perspective of the victim, torture is always one of the most serious crimes that can be experienced, perhaps even worse than being killed. It is inflicted with the participation or tacit approval of the State, in order to strip the victims of their dignity and paralyze their free will, the very qualities that make us human. Article 4.2 of CAT is based on the principle that all torture is inherently grave. The Committee recognizes that some acts of torture are more grave than others, but thus far it recognizes this distinction only on the basis of the consequences of torture for the individual victim. Indeed, the principle that all persons are equal supports the proposition that the torture of a criminal suspect deserves to be punished as strictly as the torture of a civilian during a campaign of discrimination or repression, or an enemy combatant during armed conflict.

The idea that the need for deterrence is greater when an offense is widespread, which may be the case when torture is part of a "widespread or systematic" pattern of offenses against civilians, is valid, up to a point. This argument supposes that the imposition of heavier sentences on crimes against humanity deters them more effectively. Whether there is evidence to support this hypothesis is beyond the scope of this Article. In any event, assuming that there is a greater deterrent effect, unless the increased effectiveness is directly linked to the nature or causation of crimes against humanity, it would be a reason to increase the sentences for all torture.

The complicity of public authorities is one of the reasons particularly strong deterrents are needed for torture, as defined by CAT. However, while torture in the context of law enforcement, corrections or national security necessarily involves the participation of officials, State responsibility is not

\textsuperscript{246} See generally, Rome Statute, supra note 301, art. 8.

\textsuperscript{247} See, Rome Statute, supra note 301, art. 7.
required for torture as a crime against humanity.\textsuperscript{248} It would be unacceptable to impose lower sentences on public officials who torture, than on private actors who commit torture as a crime against humanity.

In so far as torture as a war crime is concerned, the fact that potential perpetrators are within an organizational context in which disobedience to orders is punished strictly and dehumanization of the enemy is common, may be valid reasons to seek ways to increase the deterrent effect of criminal sanctions. To some degree these factors also exist, however, in usual context of torture that is not a war crime, namely, the torture of criminal suspects and prisoners by law enforcement and correctional personnel.\textsuperscript{249} Other ways to enhance the deterrence of torture, such as making torture exempt from statutes of limitations, banning the defense of superior orders, and requiring international cooperation in the investigation and prosecution of torture regardless of where it takes place, exist, and may be more effective. Most of these measures are, indeed, required by CAT.\textsuperscript{250}

In conclusion, while lawmakers should be entitled to a degree of discretion in deciding what sentences are appropriate for torture as a war crime or crime against humanity, large differences between the sentences for such crimes and torture in other contexts are incompatible with the principle that all torture is a grave offense. States should be encouraged to reduce such discrepancies by increasing the sentences for torture as a specific offense, regardless of the context in which it occurs.

\textsuperscript{248} Article 7 of the Rome Statute, on crimes against humanity, defines torture as “the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused.” Rome Statute, supra note 301, art. 7(2)(e). The Elements of Crimes also do not include State responsibility. The basic element of all crimes against humanity, as defined by the Rome Statute, includes a “State or organizational policy” of attacking a civilian population. INTERNATIONAL CRIMINAL COURT, ELEMENTS OF CRIMES, 5 (2011).

\textsuperscript{249} Dehumanization is particularly common when criminality is associated with a racial, national or ethnic minority.

\textsuperscript{250} CAT, supra note 3, art. 2.3, 5-9; see also Gen. Comment No. 3, supra note 5, ¶ 40 (addressing on statutes of limitations).