

8-16-2018

Torture as a Management Practice: The Convention Against Torture and Non-Disciplinary Solitary Confinement

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Torture as a Management Practice: The Convention against Torture and Non-Disciplinary Solitary Confinement

Samuel Fuller*

Abstract

Non-disciplinary solitary confinement encompasses a wide variety of practices used to manage prison populations worldwide. These practices, like their disciplinary equivalents, cause severe and unnecessary harm to prisoners, violating the United Nations Convention against Torture. Though the Convention against Torture has limited effects on state behavior, a finding that non-disciplinary solitary confinement is torture would improve conditions and future outcomes for prisoners without significantly diminishing administrators' ability to effectively run correctional facilities.

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I. INTRODUCTION

Solitary confinement is a widely used practice in prisons around the world. It isolates prisoners from contact with other prisoners, the outside world, and prison staff in an attempt to control and manage prison populations. In practice, prisoners held in solitary confinement are usually held alone in cells for at least twenty-two hours per day. They have little access to light, short outdoor exercise periods (if they are allowed to exercise at all), and limited or no personal privileges, such as access to mail, books, or television.¹ Prisoners in solitary confinement might only encounter other people when moved through the prison by guards and during short, irregular visits through windows or openings in their cell doors with mental health professionals.² This Comment focuses on non-disciplinary solitary confinement, which includes any use of solitary confinement in prisons, jails, or other correctional facilities for any purposes other than discipline. Common types of non-disciplinary solitary confinement include protective custody, pre-trial isolation, and administrative segregation.

Although the different types of solitary confinement have some unique features, they are all subject to the same provisions of international law. The U.N. has condemned torture for almost its entire existence as an international body. Its first major undertaking on the issue was the inclusion of a prohibition on torture in the Universal Declaration of Human Rights in 1948.³ The U.N. later reaffirmed this commitment against torture in 1965 with the International Covenant on Civil and Political Rights.⁴

The U.N. Convention against Torture (CAT) was signed in 1985, becoming the first international agreement to explicitly define torture.⁵ The CAT is the culmination of decades of U.N. statements on the subject and serves as the linchpin of the international law on torture. It has 163 parties and seeks to eliminate torture internationally by outlining a set of effects, motives, and levels of severity that together determine whether various practices constitute torture.⁶

¹ Anna Conley, *Torture in US Jails and Prisons: An Analysis of Solitary Confinement under International Law*, 7 VIENNA J. ON INT'L CONST. L. 415, 418–19 (2013).

² *Id.*

³ G.A. Res. 217 (III) A, art. 5, Universal Declaration of Human Rights (Dec. 10, 1948).

⁴ International Covenant on Civil and Political Rights art. 7, Dec. 16, 1966, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171.

⁵ United Nations Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment art. 1, Dec. 10, 1984, 1465 U.N.T.S. 85, S. Treaty Doc. No. 100-20 (1988) [hereinafter CAT]; MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL32438, U.N. CONVENTION AGAINST TORTURE (CAT): OVERVIEW AND APPLICATION TO INTERROGATION TECHNIQUES 1 (2009).

⁶ CAT, *supra* note 5, at art. 2

It condemns the practice of torture during both war and peacetime, with no meaningful exceptions from the treaty's prohibitions.⁷

This Comment argues that most non-disciplinary solitary confinement is torture under the CAT and should be recognized as such by both parties to the treaty and international bodies, such as the U.N. Committee against Torture. Currently, solitary confinement is a widely-used practice for both disciplinary and non-disciplinary purposes in prisons, jails, and other correctional facilities around the world. However, solitary confinement has distinctly negative effects that are severe enough for the practice to count as torture under the CAT, and it is used for purposes that are prohibited under the CAT.

The U.N. currently holds the view that disciplinary solitary confinement is torture under the CAT, though it declines to condemn similar forms of non-disciplinary solitary confinement.⁸ While this position encourages humane treatment of prisoners, it does not address prison authorities' continued ability to harm prisoners with non-disciplinary solitary confinement that avoids the narrow interpretation currently employed. Large numbers of prisoners are currently harmed by non-disciplinary practices that would not be permissible under a determination that the CAT covers non-disciplinary solitary confinement. Because solitary confinement's harms—including severe negative effects on prisoners' mental health—exist even when it is not used for punishment, non-disciplinary solitary confinement's effects are largely indistinguishable from those of disciplinary solitary confinement. This artificial distinction in international law's treatment of solitary confinement allows the continued use of detention methods that severely harm prisoners without adequate justification.

Different prison systems use various words such as “segregation” or “restrictive housing”⁹ to describe prisoner isolation, but this Comment will use “solitary confinement” to refer to any practice that isolates prisoners for approximately twenty-two hours or more each day.¹⁰ The term “solitary confinement” avoids confusion with specific practices that form a subset of solitary confinement, such as administrative segregation, and accurately reflects

⁷ *Id.*

⁸ U.N. Secretary-General, *Torture and Other Cruel, Inhuman or Degrading Punishment: Note by the Secretary-General*, ¶ 81, U.N. Doc. A/66/268 (Aug. 5, 2011).

⁹ See Tamar R. Birckhead, *Children in Isolation: The Solitary Confinement of Youth*, 50 WAKE FOREST L. REV. 1, 3 n. 18 (2015) (providing an extensive list of terms used to describe solitary confinement in prisons).

¹⁰ Jane Casella & Sal Rodriguez, *What is Solitary Confinement?*, THE GUARDIAN (Apr. 27, 2016), <http://perma.cc/HQM8-TXXS> (“Few prison systems use the term ‘solitary confinement,’ instead referring to prison ‘segregation’ or placement in ‘restrictive housing.’”). This article, like much of the literature on solitary confinement, defines the practice as isolation for over 22 hours a day.

the experience of prisoners held in solitary confinement. Additionally, “solitary confinement” is the most accurate way to refer to the practice because it is a “term[] of art in correctional practice and scholarship.”¹¹

Despite the variety of reasons for placing prisoners into solitary confinement, the practice can be separated into two principal groups: disciplinary and non-disciplinary solitary confinement. Disciplinary solitary confinement is easily defined; it is any instance in which prisoners are placed into solitary confinement for punitive reasons or purposes.¹² This Comment uses the term “non-disciplinary solitary confinement” to encompass all solitary confinement imposed for purposes other than discipline or punishment.¹³

In Section II, this Comment explains the CAT’s existing legal regime and details solitary confinement’s continued use despite current prohibitions. In Section III, it outlines the serious harm done to prisoners by non-disciplinary solitary confinement and evaluates these effects under the CAT for each type of non-disciplinary solitary confinement. In Section IV, the Comment considers policy and enforcement issues surrounding non-disciplinary solitary confinement, including the CAT’s weak spots illuminated by past enforcement difficulties against influential countries in the international community during the War on Terror. Finally, this Comment explains effective alternatives to solitary confinement and examines ways in which actors can improve compliance with the CAT.

II. SOLITARY CONFINEMENT AND THE CAT’S LEGAL REGIME

Like many areas of international law, the CAT depends on a mix of international institutions and individual state commitments to the treaty. In particular, enforcement mechanisms rely heavily on states’ domestic prohibition, investigation, and prosecution of torture. The CAT requires parties to take effective action to prevent torture from occurring anywhere within their jurisdictions, to take action to end torture if it does occur, and to provide

¹¹ Redacted Expert Report of Craig Haney at ¶ 11, *Ashker v. Brown*, No. 4: 09 CV 05796, 2018 U.S. Dist. LEXIS 53805 (N.D. Cal. 2015) [hereinafter Haney].

¹² Shira E. Gordon, *Solitary Confinement, Public Safety, and Recidivism*, 47 U. MICH. J. L. REFORM 495, 496 (2014).

¹³ The term accurately encompasses all types of solitary confinement that are for non-punitive purposes, as opposed to terms such as “administrative segregation,” which fail to include other forms of the practice because, for example, administrative segregation excludes pre-trial solitary confinement and protective custody in some prison systems. See Kirsten Weir, *Alone, in ‘the hole’*, 43 MONITOR ON PSYCHOL. 54, 54 (2012). Non-disciplinary solitary confinement is not a term of art, but it is the most straightforward term that also captures all the varieties of solitary confinement that exist for reasons other than punishment.

remedies for victims of torture.¹⁴ It also requires parties to take proactive steps to prevent torture in the future, including revising their domestic criminal codes to include severe penalties for torture, complicity in torture, and attempts to commit torture.¹⁵

A. The Institutions of the CAT

The CAT set up the Committee against Torture to fill some of the gaps left by its reliance on states' domestic obligations to prevent and address torture. Despite this essential role in the CAT's enforcement, the Committee has limited powers and depends on good-faith cooperation from participating states (including virtually all major states in the world).¹⁶ The Committee receives regular reports from parties detailing their compliance with the CAT, which it reviews and uses to make comments and recommendations about parties' status under the treaty.¹⁷ The Committee may also undertake confidential inquiries into whether parties are undertaking systematic torture if it receives information indicating that such practices are taking place within a state's jurisdiction.¹⁸ Beyond its ongoing monitoring operations, the Committee has the ability to hear and investigate claims that states party are not successfully upholding their obligations under the treaty.¹⁹ While the Committee itself does not have an exceptional amount of enforcement power over states party, it provides reports to the U.N. on current findings and issues regarding torture, which creates another pathway to achieving compliance with the CAT's provisions.²⁰ Despite these methods for international action in service of the treaty, the CAT's structure indicates that the most important pathway for effective implementation of its provisions stems from states' own good-faith compliance efforts.

The United Nations Commission on Human Rights appoints the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Punishment to serve as an expert on torture and coordinate international responses to torture.²¹ The Special Rapporteur's principal activities are communicating with states on

¹⁴ CAT, *supra* note 5, at art. 2, 13–14.

¹⁵ *Id.* at art. 4.

¹⁶ *Id.* at art. 17.

¹⁷ *Id.* at art. 19.

¹⁸ *Id.* at art. 20.

¹⁹ *Id.* at art. 21–22. These claims may be brought by both individuals and states. *Id.*

²⁰ *Id.* at art. 24.

²¹ *Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Office of the United Nations High Commissioner for Civil Rights, <http://perma.cc/XX7W-ZZ5A> (last visited Jan. 28, 2018).

cases of past or present torture, performing on-the-ground fact-finding on issues of torture, and submitting annual reports to the Human Rights Council and the General Assembly.²² In short, the Special Rapporteur is an influential part of almost any determination regarding torture under international law.

B. Effects and Motivations Govern CAT Application

The CAT uses specific language to define torture by its effects and the torturer's intent, not by any specified practices, methods, or instruments. The CAT defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person."²³ Actions causing severe pain and suffering constitute torture when they are undertaken for a prohibited purpose listed in the CAT, including "obtaining . . . information or a confession, punishing him for an act he or another person has committed or is suspected of having committed, intimidating or coercing him or a third person, or for any reason based on discrimination of any kind."²⁴

While its broad scope seeks to include a wide variety of harmful practices, the CAT does not define torture as including negative results or effects that are incidental to a lawful action. Instances in which individuals experience severe negative effects "arising only from, inherent or incidental to lawful sanctions" are not torture under the CAT.²⁵ The "inherent or incidental" standard means that solitary confinement is not on its face torture under the treaty, but instead must be performed for a prohibited purpose.²⁶ Solitary confinement would be legally allowable if those responsible for the treatment of prisoners could show an internationally lawful reason for their use of solitary confinement and that the harm prisoners experience is an inherent consequence of that lawful action. If solitary confinement is only an incidental part of a lawful treatment regime, then it falls under this exception.²⁷ However, as explained below, solitary confinement is a practice for which prisons build specific wings and on which corrections administrators focus significant amounts of attention, indicating that it is part of a larger, lawful undertaking in corrections systems.²⁸ The existence of large,

²² *Id.*

²³ CAT, *supra* note 5, at art. 1.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ See Sharon Shalev, *Solitary Confinement: The View from Europe*, 4 CAN. J. HUM. RTS. 143, 144, 150, 159 (2015) (describing the proliferation of American "isolation prisons, where upwards of 25,000 human beings are confined in isolation from each other," as well as the widespread use of solitary confinement in purpose-built housing units in Europe).

purpose-built facilities indicates that solitary confinement is not a practice incidental to a different goal in prison systems, but instead a separate practice in and of itself. Given its present uses, solitary confinement is unlikely to fall under this exception because it is a standalone practice constituting a major, non-incidental part of prison management.

C. Disciplinary Solitary Confinement is Torture

Under Article 1 of the Convention against Torture, the U.N. considers disciplinary solitary confinement to be torture.²⁹ Long-term disciplinary solitary confinement is a practice that is of special concern to the U.N. Disciplinary solitary confinement of under fifteen days, the upper limit advised by the Special Rapporteur, is itself problematic and may constitute torture.³⁰ In the view of the Special Rapporteur, a longer period of confinement makes the action even more likely to be torture.³¹ Additionally, the Special Rapporteur found in 2011 that, even if disciplinary solitary confinement is not torture, it still violates Article 16 of the CAT, which addresses and condemns harmful practices that fall short of its definition of torture.³² This determination has been echoed in recent years by the U.N. General Assembly, which in 2015 adopted a revised version of the Standard Minimum Rules for the Treatment of Prisoners, a set of minimum standards for the treatment of prisoners also known as the “Mandela Rules.”³³ The new Mandela Rules tightened the U.N.’s restrictions on solitary confinement and recommended that solitary confinement “be used only in exceptional cases as a last resort, for as short a time as possible.”³⁴ Under the Mandela Rules, solitary confinement is viewed with extreme skepticism, and is considered a practice that often causes severe harm to prisoners.

D. Despite This Determination, Solitary Confinement Remains Common

Solitary confinement remains a widespread practice worldwide for a variety of reasons. While discipline continues to be a common purpose for solitary

²⁹ U.N. Secretary-General, *Torture and Other Cruel, Inhuman or Degrading Punishment: Note by the Secretary-General, supra* note 8, at ¶¶ 79, 81.

³⁰ *Id.* at ¶ 88.

³¹ *Id.* (“In the opinion of the Special Rapporteur, prolonged solitary confinement, in excess of 15 days, should be subject to an absolute prohibition.”).

³² *Id.* at ¶ 80.

³³ G.A. Res. 70/175, U.N. Doc. A/Res/70/175, United Nations Standard Minimum Rules for the Treatment of Prisoners (Dec. 17, 2015) [hereinafter the Mandela Rules].

³⁴ *Id.* at 14.

confinement,³⁵ prison officials use non-disciplinary solitary confinement for an array of purposes more related to prison management than to prisoner punishment.³⁶ Non-disciplinary solitary confinement is used, for example, to isolate political prisoners whom prison administrators claim may be in danger of violent attacks, prisoners with mental illness who cannot follow prison rules and instructions, and prisoners whom officials believe pose a danger to other inmates.³⁷ It is also often used to isolate and intimidate pre-trial detainees as part of efforts to induce confessions or compliance with law enforcement.³⁸ Pre-trial detention is used as a management tool to separate gang members from one another in order to suppress gang activity.³⁹ Protective custody for vulnerable prisoners is frequently used as a form of non-disciplinary solitary confinement and often involves, but is not limited to, juveniles, LGBT prisoners, famous (or infamous) prisoners, and prisoners convicted of sex crimes or other offenses that could lead to violent attacks from others.⁴⁰ Especially in the U.S. and Europe, non-disciplinary solitary confinement is regularly used for individuals detained for immigration violations and awaiting deportation.⁴¹

It is difficult to calculate the prevalence of solitary confinement, and particularly non-disciplinary solitary confinement, around the world. This is due to often-opaque prison system management and the lack of incentives for prison administrators to keep records on the reasons for solitary confinement.⁴² However, in the U.S., prisons place a significant percentage of prisoners in solitary confinement for at least some period of time during their incarceration. In late 2015, American corrections officials placed over 67,000 people—roughly five percent of the entire American prison population—in solitary confinement for at least fifteen continuous days.⁴³ The number of American prisoners in

³⁵ Alison Shames et al., *Solitary Confinement: Common Misconceptions and Emerging Safe Alternatives*, in VERA INST. OF JUST. CTR. ON SENT'G & CORRECTIONS 14 (2015).

³⁶ See Gordon, *supra* note 12, at 496.

³⁷ Manfred Nowak et al., *The Obama Administration and Obligations under the Convention Against Torture*, 20 TRANSNAT'L L. & CONTEMP. PROBS. 33, 37 (2011).

³⁸ Shalev, *supra* note 28, at 151.

³⁹ Shames et al., *supra* note 35, at 22.

⁴⁰ See Michael P. Harrington, *Methodological Challenges to the Study and Understanding of Solitary Confinement*, 79 FED. PROBATION 45, 46 (2015).

⁴¹ Shalev, *supra* note 28, at 149.

⁴² Elizabeth Koh, *How Many Prisoners Are in Isolated Confinement? It's Hard to Say*, WASHINGTON POST (July 19, 2015), <http://perma.cc/JY2Q-K6KW> (“[P]rison systems, which track inmates by disparate factors such as location or disciplinary record, weren’t built to answer those questions.”) (internal quotation marks removed).

⁴³ ASS’N OF STATE CORRECTIONAL ADMINISTRATORS & YALE LAW SCHOOL ARTHUR LIMAN PUBLIC INTEREST PROGRAM, AIMING TO REDUCE TIME-IN-CELL: REPORTS FROM CORRECTIONAL

solitary confinement grew rapidly through the first decade of the twenty-first century, then steadily fell in recent years at a slower pace than the initial rise.⁴⁴ Recent reform efforts by private groups and the federal government have resulted in what some describe as a “‘national consensus’ in the United States to end the ‘over-use of extreme isolation in prisons.’”⁴⁵

An especially common and harmful form of non-disciplinary solitary confinement in some countries is pre-trial solitary confinement. Scandinavian countries, most notably Sweden and Norway, use pre-trial non-disciplinary solitary confinement at extremely high rates.⁴⁶ This indicates that such practices remain common even in countries that are sometimes regarded as the international benchmark for humane treatment of prisoners. Records show that nearly half of all pre-trial detainees in Sweden are placed into solitary confinement at some point.⁴⁷ Such pre-trial solitary confinement is an especially harmful practice because it can cause severe health problems for individuals who have not yet been convicted of any crime, can coerce prisoners in ways that are

SYSTEMS ON THE NUMBERS OF PRISONERS IN RESTRICTED HOUSING AND ON THE POTENTIAL OF POLICY CHANGES TO BRING ABOUT REFORMS 22–23 (2016) [hereinafter AIMING TO REDUCE TIME-IN-CELL]. It is too early to collect large-scale data on changes to the number of Americans in solitary confinement after the transition between the Obama and Trump administrations. One potential indicator of changes is the Department of Justice’s rescission of an Obama-era memo directing the Bureau of Prisons to reduce and eliminate its use of private prisons. This policy change could result in an increase of the number of prisoners in solitary confinement due to private prisons’ more frequent use of the practice. See Jeff Sessions, *Memorandum for the Acting Director, Federal Bureau of Prisons: Rescission of Memorandum of Private Prisons*, Office of Attorney General (Feb. 21, 2017); Review of the Federal Bureau of Prisons’ Monitoring of Contract Prisons, U.S. Department of Justice Office of the Inspector General, 29–31 (2016) (detailing elevated use of solitary confinement in private prisons). Financial incentives likely cause a significant share of this difference. Private prisons spend less per capita than public prisons, and pressures to keep costs low in private prisons result in bed space shortages due to a lack of spending on long-term expansion and facility improvement projects. Private prisons often address these shortages by placing new inmates who have no disciplinary issues into solitary confinement (which is costly in the short term, but is not a large lump sum to pay like a facility expansion) until bed space opens elsewhere in the facility. Review of the Federal Bureau of Prisons’ Monitoring of Contract Prisons at 12, 29. For an award-winning undercover investigation of private prisons’ cost-cutting, see Shane Bauer, *My Four Months as a Prison Guard*, MOTHER JONES, Jul.-Aug. 2016, at 18, <https://perma.cc/S2Vq-6FM4>.

⁴⁴ Bauer, *supra* note 43, at 10, 12; see also Alexandra Naday et al., *The Elusive Data on Supermax Confinement*, 88 PRISON J. 69, 85–86 (2008). The U.S. may be a skewed example, given that its incarceration rate is one of the highest in the world. See *World Prison Brief Data*, WORLD PRISON BRIEF, <https://perma.cc/2SJ6-UCDB> (last visited May 3, 2018). The U.S. does, however, keep reasonably detailed records of prisoners as compared to other countries, making it a worthwhile source of accurate data.

⁴⁵ AIMING TO REDUCE TIME-IN-CELL, *supra* note 43, at 13.

⁴⁶ SHARON SHALEV, A SOURCEBOOK ON SOLITARY CONFINEMENT 29 (2008).

⁴⁷ *Id.*

harmful both to the justice system and to the prisoners' well-being, and can diminish prisoners' ability to assist their attorneys in preparing an effective defense (a harm that falls short of torture, but still negatively affects prisoners).⁴⁸

The CAT's current definition of torture already encompasses many forms of solitary confinement. Both disciplinary solitary confinement and some non-disciplinary solitary confinement are sufficiently severe and driven by motives that are sufficiently harmful to violate the standards laid out in the CAT.⁴⁹ Because the harms that result from disciplinary and non-disciplinary solitary confinement are virtually indistinguishable, it follows logically that non-disciplinary solitary confinement is also torture. It is near-impossible to subject a prisoner to solitary confinement without severely harming the individual. Of course, simply classifying non-disciplinary solitary confinement as torture would not alone resolve the problem; the current prevalence of solitary confinement shows that compliance remains a significant issue. A renewed and rigorous focus on meeting obligations under international law is a vital part of any determination that solitary confinement is torture.

III. THE CAT APPLIES TO NON-DISCIPLINARY SOLITARY CONFINEMENT

This Section argues that non-disciplinary solitary confinement as currently practiced qualifies as torture under the CAT in nearly all instances, including when imposed for relatively short periods of time. It will evaluate non-disciplinary solitary confinement under the CAT's severity, intent, purpose, and official capacity standards.

Currently, the U.N. Special Rapporteur on Torture distinguishes between long-term and short-term non-disciplinary solitary confinement. Solitary confinement that exceeds fifteen days (long-term solitary confinement) is treated in a substantially different manner than short-term solitary confinement.⁵⁰ The Special Rapporteur considers long-term solitary confinement, including non-disciplinary solitary confinement, to presumptively be torture, and short-term non-disciplinary solitary confinement to be allowed in certain (non-disciplinary) circumstances, but to still be a cause for concern.⁵¹

Under the CAT, the potential positive effects of non-disciplinary solitary confinement, including ease of prison administration, avoidance of immediate

⁴⁸ Naday et al., *supra* note 44 at 85–86.

⁴⁹ See Section III(C), *infra*, for greater detail on the severity of solitary confinement.

⁵⁰ U.N. Secretary-General, *Torture and Other Cruel, Inhuman or Degrading Punishment: Note by the Secretary-General*, *supra* note 8, at ¶ 61.

⁵¹ *Id.* at ¶ 76.

and imminent violent conflict, and protection of vulnerable prisoners, do not matter in the determination of whether the practice is torture. The CAT instead specifies that even far more extreme circumstances, including armed conflict and national upheaval, do not create exceptions for whether practices are labeled torture.⁵² The determination of severity is instead made independent of any benefit resulting from the practice; in other words, the CAT's calculus does not take the form of a cost-benefit analysis.⁵³ Thus, even if there is utilitarian cost-benefit analysis under the CAT, and even if non-disciplinary solitary confinement's aggregate positive effects were greater than its negative consequences, this determination would be irrelevant to its legal status.⁵⁴ In short, a prohibited practice remains prohibited even if it would have benefits that exceed its drawbacks.

A. Non-Disciplinary Solitary Confinement Causes Severe and Predictable Harm to Prisoners, Violating the CAT's Severity Standard

Non-disciplinary solitary confinement rises to a sufficient level of severity to count as torture under the CAT. The CAT provides comparatively little guidance on the question compared to its other sections, outlining a terse standard of "severe pain or suffering, whether physical or mental."⁵⁵ While the definition itself provides little guidance, the Special Rapporteur on Torture has addressed the issue directly, holding that solitary confinement as a whole rises to a sufficient level of severity to constitute torture under the CAT because of its negative effects on prisoners.⁵⁶ Acts that the Special Rapporteur have determined to be torture include beating, suffocation, exposure to intense loud noises and bright lights, and "prolonged denial of rest, sleep, food, sufficient hygiene, or medical assistance, and prolonged isolation and sensory deprivation."⁵⁷ While these determinations⁵⁸ carry influence internationally, the interpretations are not legally binding.

⁵² CAT, *supra* note 5, at art. 2.

⁵³ *Id.*

⁵⁴ *See id.* at arts. 2–3 (enacting an absolute ban on torture, including exceptional circumstances that could lead to torture's benefits exceeding its costs); *see also* Mario Silva, *Extraordinary Rendition: A Challenge to Canadian and United States Legal Obligations Under the Convention Against Torture*, 39 CAL. W. INT'L L. J. 313, 333–34 (2009).

⁵⁵ CAT, *supra* note 5, at art. 1.

⁵⁶ U.N. Secretary-General, *Torture and Other Cruel, Inhuman or Degrading Punishment: Note by the Secretary-General*, *supra* note 8, at ¶ 72.

⁵⁷ David Weissbrodt & Cheryl Heilman, *Defining Torture and Cruel, Inhuman, and Degrading Treatment*, 29 L. & INEQ. 343, 377–78 (2011).

Studies performed on prisoners subjected to solitary confinement show severe pain and suffering that rise to the levels required by the CAT.⁵⁹ Solitary confinement causes a predictable set of negative effects, including frightening hallucinations, panic attacks, paranoia, and uncontrollable intrusive violent thoughts, among prisoners who are placed into isolation.⁶⁰ Prison officials can predict the onset of the unique mix of damaging psychological effects due to its reliable occurrence in solitary confinement, which makes placement of prisoners into solitary confinement a knowing decision to cause harm.⁶¹ The harmful psychological effects include, but are not limited to, hyper-responsivity to external stimuli, visual and auditory hallucinations, panic attacks, reduced cognitive abilities, memory impairment, obsessive thoughts, invasive violent fantasies, paranoia, and reduced impulse control.⁶²

Solitary confinement causes severe short-term and long-term harm to prisoners who are subject to the practice, even when only for a short period of time. Prisoners frequently suffer from post-traumatic stress disorder (PTSD) following isolation due to the severe psychological harm it inflicts.⁶³ Past studies have indicated that placement in solitary confinement has severe negative effects on prisoners' mental health, including increases in unwarranted anger, hostility, and aggression.⁶⁴ These effects do not disappear when a prisoner is removed from solitary confinement. Prisoners subjected to solitary confinement often experience significant ongoing behavioral and psychological problems following their release into the general population.⁶⁵ Research indicates that these issues can extend beyond incarceration and cause prisoners who have experienced solitary confinement to be less likely to successfully reintegrate into society upon

⁵⁸ See U.N. Comm'n on Human Rights Res. 1985/33, U.N. Doc. E/CN.4/RES/1985/33, at 72 (Mar. 13, 1985) (establishing the special rapporteur's mandate to "appeal to all Governments to co-operate with and assist the special rapporteur in the performance of his tasks and to furnish all information requested").

⁵⁹ Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J. L. & POL'Y 325, 335–36 (2006).

⁶⁰ *Id.*

⁶¹ *Id.* American courts have found that constructive knowledge is sufficient to satisfy the requisite *mens rea* under the CAT. See *Zheng v. Ashcroft*, 332 F.3d 1186, 1197 (9th Cir. 2003); *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 354 (5th Cir. 2002) (stating the rule that "willful blindness suffices to prove acquiescence").

⁶² Grassian, *supra* note 59, at 335–36.

⁶³ Bruce A. Arrigo & Jennifer Leslie Bullock, *The Psychological Effects of Solitary Confinement on Prisoners in Supermax Units*, 20 INT'L J. OF OFFENDER THERAPY & COMP. CRIMINOLOGY 1, 10 (2007).

⁶⁴ Maria A. Luise, *Solitary Confinement: Legal and Psychological Considerations*, 15 NEW ENGL. J. ON CRIM. & CIV. CONFINEMENT 301, 314–15 (1989).

⁶⁵ Haney, *supra* note 11, at ¶ 46.

release.⁶⁶ Both electronic brain scans and observation by clinicians reveal strongly negative and often permanent effects on prisoners' mental health; these effects are significantly pronounced among the significant proportion of prisoners who suffer from pre-existing mental illness.⁶⁷ These negative effects are in no way a new or recently-discovered phenomena. Clinicians recognized solitary confinement's severe harm to prisoners as early as the nineteenth century.⁶⁸ Due to concerns about Soviet prisoner isolation practices, solitary confinement's negative effects garnered increasing attention among the American public and the scientific community beginning in the mid-1900s.⁶⁹

The effects of solitary confinement are generally more or less predictable, but prisoners' special circumstances can magnify and distort the harms in unique ways. For example, reduced cognitive abilities and memory could pose particular problems for prisoners who are isolated while preparing for trial, because these symptoms diminish their ability to work with an attorney and assist in the preparation of an effective defense.⁷⁰ Inmates suffering from mental health issues experience especially severe problems. Mental illness can result in increased vulnerability to harmful effects from harsh treatment, causing mentally ill prisoners to often experience greater negative effects than prisoners without mental illness.⁷¹ Juveniles, whose harsh treatment in prisons is already subject to scrutiny, could also experience negative effects. Juveniles' relatively vulnerable

⁶⁶ *Id.* (observing that “although [inmates’] adaptations may have been functional in isolation (or appeared to be so), they are typically acutely dysfunctional in the social world most prisoners are expected to re-enter.”); see also Gordon, *supra* note 12, at 501 (noting that “prisoners who are released from solitary confinement directly into communities often have difficulty adjusting to natural light, the noise of traffic and conversation, and physical, human contact”) (internal quotations omitted).

⁶⁷ Grassian, *supra* note 59, at 329.

⁶⁸ *Id.* at 328–29. In a tragic historical irony, social reformers pushed for the introduction of solitary confinement into the American prison system, believing it provided new opportunities to effectively rehabilitate prisoners. Beginning with Pennsylvania’s construction of the revolutionary isolation-only Eastern State Penitentiary, solitary confinement was widely adopted across the U.S. and Europe. The negative effects became apparent soon after its introduction. See *id.* at 328. For a close examination of the records of the Eastern State Penitentiary and the disparity between nineteenth century theory of criminal rehabilitation and reality, see Jacqueline Thibaut, “To Pave The Way To Penitence”: Prisoners and Discipline At The Eastern State Penitentiary 1829–1835, 106 PENN. MAG. OF HIST. & BIOGRAPHY 187 (1982).

⁶⁹ Grassian, *supra* note 59, at 330.

⁷⁰ *Reassessing Solitary Confinement: The Human Rights, Fiscal, and Public Safety Consequences: Hearing Before the Subcomm. on Constitution, Civil Rights and Human Rights of the Comm. on the Judiciary*, 112th Cong. 294 (2014) (statement of the Center for Constitutional Rights).

⁷¹ Grassian, *supra* note 59, at 329.

mental conditions make them more susceptible to psychological harm and trauma that alters their mental development.⁷²

Even if the mental effects of solitary confinement on prisoners are not enough to constitute torture under the CAT, physical effects can also render the practice torturous. Solitary confinement leads to increased rates of self-harm and suicide,⁷³ which qualify as severe negative physical effects and satisfy the physical aspect of the CAT's severity standard (not to mention that they are often the result of severe mental harm). There is a direct and causal link between prisoners' placement in solitary confinement and their increased rates of suicide and self-harm, and needless to say suicide or physical self-harm are severely negative physical effects. Arguments that prisoners are wholly responsible for personal decisions to commit suicide or self-harm, thereby fracturing any causal chain, do not hold water for two reasons. First, prisoners in solitary confinement experience a reduced degree of agency to begin with due to their harmful and isolating environment. Second, and more importantly, a wide majority of national penal codes recognize inciting, encouraging, or instigating suicide as a criminal offense that causes harm to the individual attempting suicide,⁷⁴ suggesting an international consensus on the issue. However, a number of these laws vary in their standards for mens rea, ranging from "direct provoking" to simple "complicity," which makes it possible that, in countries with a higher standard, officials would be required to have intent to drive prisoners to suicide, which is extremely unlikely.⁷⁵

Additionally, the presence of severe physical effects can work in the opposite direction and instead serve as evidence of ongoing mental harm, strengthening claims that solitary confinement meets the CAT's severity standard solely through its mental effects as shown through physical manifestations. In this sense, physical manifestations are outward indicators that placement in solitary confinement is causing severe mental harm to a prisoner.⁷⁶ Self-harm is more frequent in solitary confinement than in the general

⁷² Conley, *supra* note 1, at 423.

⁷³ Fatos Kaba et al., *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, 104 AM. J. PUB. HEALTH 442, 445 (2014) (concluding that "inmates punished by solitary confinement were approximately 6.9 times as likely to commit acts of self-harm.").

⁷⁴ Brian L. Mishara & David N. Weisstub, *The Legal Status of Suicide: A Global Review*, 44 INT'L J. L. & PSYCHIATRY 54, 56 (2016) (reporting that 142 of 192 national penal codes contain such a provision). The laws addressed in this article mostly apply to individuals who drive another to suicide, not assisted suicide by medical professionals. *See id.* at 60–74.

⁷⁵ *Id.* at 56.

⁷⁶ Kaba et al., *supra* note 73, at 445–46 (finding a "strong association between [serious mental illness] and self-harm" and that "a small proportion of inmates, those in solitary confinement, with [serious mental illness] and aged 18 years or younger, accounted for the majority of self-harm").

population, and when self-harm occurs, it indicates that the practice is causing severe harm to inmates.⁷⁷ While the negative mental and physical effects of solitary confinement may increase in severity over time, they also cause acute harm after only short periods of time. Observational and EEG⁷⁸ tests indicate that measurable negative effects appear in prisoners after a matter of days in solitary confinement.⁷⁹ Given the immediacy of its negative effects, even short-term solitary confinement violates the CAT's severity standard.

B. Non-Disciplinary Solitary Confinement Is within the CAT's Jurisdiction

Non-disciplinary solitary confinement falls under the jurisdiction of the CAT, no matter where it occurs around the world because actions taken by individuals acting under the color of state authority qualify under the CAT's jurisdiction. Actions taken by state actors within a state's borders fall within the CAT's jurisdiction.⁸⁰ This covers the vast majority of non-disciplinary solitary confinement in the world, because most prisons are located within the operating state's borders and operated by employees of the state.

The question of jurisdiction is more complicated for actions outside of a state's borders, but the CAT still has jurisdiction in these instances. Despite the added complexity, actions taken outside of a state's borders by a corrections officer acting under color of the state also fall within the jurisdiction of the CAT, due to the CAT's prohibition on states practicing torture in any territory under their jurisdiction.⁸¹ Among most scholars and legislators, the CAT is still interpreted to include extraterritorial detention, rendering the prohibition on solitary confinement applicable in these instances as well.⁸² A loophole that countries could engage in prohibited practices only when they are being

⁷⁷ *Id.* at 445.

⁷⁸ Electroencephalography is a technique for monitoring brains' electrical activity.

⁷⁹ *See* Grassian, *supra* note 59, at 331, 376.

⁸⁰ Mary E. McLeod, *Opening Statement: Committee Against Torture*, Permanent Mission of the United States of America to the United Nations and Other International Organizations in Geneva (November 12–13, 2014), <https://perma.cc/VM3X-NEQK> (stating the U.S. understanding of the text of Articles 2 and 16, that "where the Convention provides that obligations apply to a State Party in 'any territory under its jurisdiction,' such obligations . . . extend to . . . 'all places that the State Party controls as a governmental authority'").

⁸¹ *Id.*; *see also* CAT, *supra* note 5, at art. 2.

⁸² *Cf.* Michael P. Scharf, *International Law and the Torture Memos*, 42 CASE W. RES. J. INT'L L. 321, 350, 351 n. 173 (2009) (paraphrasing Jose E. Alvarez, *Torturing the Law*, 37 CASE W. RES. J. INT'L L. 175, 213 (2006) (arguing that the authors of Bush-era interrogation memos "turned the Convention against Torture into the convention for certain kinds of torture when it came to actions outside the U.S. and . . . dismissed customary law in a way that was cavalier and reckless").

performed on non-citizens would be illogical and likely lead to more torture due to a lack of political accountability for torturing non-citizens.

The CAT also requires that for a practice to count as torture, it must be committed by an actor in their official capacity. This standard requires, in essence, that the person committing the torture is acting as a representative of the state at the time, and not as a private citizen committing the acts for their own, private reasons.⁸³ The standard for torture is fairly easily satisfied by non-disciplinary solitary confinement. The practice is almost exclusively undertaken by corrections officers and administrators acting in their official capacity within a prison, jail, or other state-run correctional facility, with the full backing of state authority and the symbolic status as an authority figure conferred by a badge and uniform.⁸⁴ There is little to no confusion among prisoners that the individual putting them into solitary confinement is acting as an agent of the state.

If a way did exist for an individual to act without color of state action and outside of their official role when carrying out a transfer of a prisoner into non-disciplinary solitary confinement, the confinement would possibly not count as torture under the CAT. Such a scenario would likely only occur in instances similar to those resulting in criminal prosecutions for false imprisonment in the U.S., which are different from solitary confinement in correctional facilities that operate with state authority even when managed by private operators under government contracts. This sequence of events seems virtually impossible within a correctional facility given the ways that prisoners are placed in solitary confinement in jails and prisons.

C. Non-Disciplinary Solitary Confinement Meets the CAT's Intent Standard

Intent is likely the easiest factor of the CAT to apply to non-disciplinary solitary confinement. To meet the intent standard, the actor must simply intend to inflict suffering for a prohibited purpose.⁸⁵ These purposes include obtaining information or a confession, punishment, intimidation, and discrimination.⁸⁶ As such, “merely negligent conduct does not, without more, amount to torture.”⁸⁷

⁸³ See CAT, *supra* note 5, at art. 2.

⁸⁴ Ogechi Joy Anwukah, Comment, *The Effectiveness of International Law: Torture and Counterterrorism*, 21 ANN. SURV. INT'L & COMP. L. 1, 8–9 (2016).

⁸⁵ See CAT, *supra* note 5, at art. 1.

⁸⁶ *Id.*

⁸⁷ Oona Hathaway et al., *Tortured Reasoning: The Intent to Torture Under International and Domestic Law*, 52 VA. J. INT'L L. 791, 799 (2012); see also U.N. Secretary-General, *Torture and Other Cruel, Inhuman or Degrading Punishment: Note by the Secretary-General*, *supra* note 8, at ¶ 29 (clarifying that “a detainee

For the CAT to apply to solitary confinement, prison administrators must manifest the required intent when placing prisoners into solitary confinement.⁸⁸ The most difficult determination under this standard is whether the actor intends to inflict suffering. Placing prisoners into solitary confinement with the intent of inflicting its severe and extremely common effects is enough to qualify as intentionally inflicting suffering on a prisoner.⁸⁹ Additionally, courts have found that, even standing alone, knowledge that a prisoner will experience severe pain or harm is enough to meet this standard, thus making the standard one of constructive intent.⁹⁰ An individual who places a prisoner into solitary confinement expecting the inevitable resulting suffering meets the constructive intent standard. As long as the actor has some sort of affirmative intent to take the action in question, they likely meet the standard.⁹¹

D. Most Non-Disciplinary Solitary Confinement Meets the CAT's Purpose Standard

The purpose element narrows which types of non-disciplinary solitary confinement constitute torture and is likely the most difficult part of determining whether non-disciplinary solitary confinement falls under the reach of the CAT. To meet the CAT's purpose standard, the act must be committed for one of the specific purposes listed in the treaty: "obtaining . . . information or a confession . . . or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind."⁹² If prison officials are able to demonstrate that solitary confinement is used for a purpose other than one of those listed, then it would likely be allowed.

Practices such as pre-trial solitary confinement and long-term administrative segregation for dangerous prisoners likely include intimidation or coercion as a significant part of their purpose.⁹³ The European Court of Human Rights has held in a ruling under the European Convention on Human Rights that purpose is a vital part of the determination of whether an act is torture, because it differentiates torture from cruel treatment inflicted on a prisoner.⁹⁴

who is forgotten by the prison officials and suffers severe pain due to the lack of food" is not a victim of torture "given the lack of intent by the authorities").

⁸⁸ CAT, *supra* note 5, at art. 1.

⁸⁹ Hathaway et al., *supra* note 87, at 799–802.

⁹⁰ See *Zheng*, *supra* note 61, at 1188; *Ontunex-Tursios*, *supra* note 61, at 353–55.

⁹¹ See *id.*

⁹² CAT, *supra* note 5, at art. 1.

⁹³ Peter Scharff Smith, *Solitary Confinement: An Introduction to The Istanbul Statement on the Use and Effects of Solitary Confinement*, 18 TORTURE 56, 60 (2008).

⁹⁴ See generally *Keenan v. United Kingdom*, App. No. 27229/95, 33 Eur. H.R. Rep. 38 (2001).

Such treatment is also worthy of condemnation, but if it falls short of torture then it does not trigger the full weight of the CAT.

In practice, the prison administrator's purpose in assessing the punishment influences the severity of the effects of solitary confinement on prisoners. Prisoners who perceive their situation as threatening are more likely to experience negative mental health effects than other prisoners, which is especially important because the principal harms of solitary confinement are mental rather than physical.⁹⁵ However, the coercion, discrimination, and information-forcing elements of purpose under the CAT likely cover widely-used applications of non-disciplinary solitary confinement, including isolation of inmates for weeks at a time and unnecessary confinement of LGBT prisoners and people of color.⁹⁶ The information-forcing element covers instances such as pre-trial solitary confinement, and the coercion or intimidation element has broad applicability to practices such as administrative segregation that frighten prisoners and attempt to induce compliant behavior.

E. Nearly All Current Uses of Non-Disciplinary Solitary Confinement Violate the CAT

This Comment divides non-disciplinary solitary confinement into four main types: pre-trial solitary confinement, administrative segregation, protective custody, and long-term non-disciplinary solitary confinement. Each of these practices warrants its own analysis under the CAT because of their unique elements, such as pre-trial solitary confinement's use on prisoners who have not yet been convicted or protective custody's common application as a response to threats of violence.

1. Pre-trial solitary confinement is torture under the CAT.

It is very likely that pre-trial solitary confinement constitutes torture under the CAT, regardless of duration. In 2011, the U.N. Special Rapporteur on Torture explicitly found pre-trial solitary confinement to be torture under Article 1 of the CAT when used to obtain information or a confession.⁹⁷ The Special Rapporteur has determined that pre-trial solitary confinement is used for its coercive power in order to pressure prisoners to confess or to make false statements to authorities.⁹⁸ Though pre-trial solitary confinement may often be

⁹⁵ Grassian, *supra* note 59, at 347 n. 48 (citing Nancy A. Wright & David S. Abbey, *Perceptual Deprivation Tolerance and Adequacy of Defenses*, 20 PERCEPTUAL & MOTOR SKILLS 35 (1965)).

⁹⁶ CAT, *supra* note 5, at art. 1.

⁹⁷ U.N. Secretary-General, *Torture and Other Cruel, Inhuman or Degrading Punishment: Note by the Secretary-General*, *supra* note 8, at ¶ 73.

⁹⁸ *Id.* at ¶ 69.

used for a shorter length of time than other forms of non-disciplinary solitary confinement, it causes a unique set of harms due to its immediate proximity to trial, as well as its application to prisoners who have not yet been convicted and may be deemed not guilty following a trial.⁹⁹ Even if it is not explicitly used to obtain a confession or other information, it is used on vulnerable detainees who have not been convicted of a crime and have no information about when their stay in solitary confinement could end, indicating that it is unacceptably coercive and intimidating.¹⁰⁰

Pre-trial solitary confinement is frequently ordered by prison administrators with the specific intent of intimidating defendants into cooperating with law enforcement before trial and inflicts unnecessary suffering on prisoners subject to the practice.¹⁰¹ Officials often use pre-trial solitary confinement to “soften up” defendants in order to obtain confessions or plea bargains.¹⁰² This application pushes the practice into prohibited territory under the CAT, as these are goals related to the prohibited motive of obtaining information.¹⁰³ There is no legitimate prison management reason to place many pre-trial defendants into solitary confinement because it is only used for prisoner coercion instead of prison administration.¹⁰⁴ The suffering pre-trial solitary confinement causes is unnecessary for prison management or administration, making its continued use contrary to the CAT’s provisions.

The addition of the right to remain silent to the CAT could reduce pre-trial solitary confinement because it is often used to force information from prisoners.¹⁰⁵ Because of its potential effects on solitary confinement, some commentators support adding explicit language on the right to remain silent to the CAT.¹⁰⁶ Such a right is already sometimes inferred from the CAT’s

⁹⁹ Shalev, *supra* note 28, at 151.

¹⁰⁰ *Id.*

¹⁰¹ Smith, *Solitary Confinement*, *supra* note 93, at 60.

¹⁰² *Id.* See also Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME & JUST. 441, 446–48 (2006) (describing Danish authorities’ use of pre-trial solitary confinement to induce a suspect’s confession in a drug and tax case). See *id.* at 501 (describing the use of pre-trial solitary confinement to purposefully induce confessions in Scandinavian countries, American intelligence agencies, the Soviet Union, and apartheid South Africa).

¹⁰³ Smith, *Solitary Confinement*, *supra* note 93, at 56.

¹⁰⁴ Deema Nagib, Comment, *Jail Isolation after Kingsley: Abolishing Solitary Confinement at the Intersection of Pretrial Incarceration and Emerging Adulthood*, 85 FORDHAM L. REV. 2915, 2925 (2017).

¹⁰⁵ See Smith, *The Effects of Solitary Confinement on Prison Inmates*, *supra* note 102, at 501.

¹⁰⁶ Anwukah, *supra* note 84, at 28.

provisions barring the use of information obtained through torture.¹⁰⁷ Under this logic, the right to remain silent is complementary to the right to be free from information-motivated torture, and the U.N. currently encourages states to make such a right part of their domestic laws.¹⁰⁸ Instituting a uniform standard as part of the CAT could have a limited but noticeable effect on pre-trial isolation due to prison administrators' use of the practice to obtain information from prisoners before trial. If prisoners have a uniform right to remain silent, then administrators would have less incentive to use isolation because prisoners could withhold confessions or statements.

2. Administrative segregation, though widespread, rises to the level of torture.

Administrative segregation also constitutes torture, though this is a closer call than other practices. Administrative segregation is a common practice in prisons “used to separate those deemed to pose a significant threat to institutional security from the general population.”¹⁰⁹ The main problem is the purpose standard. Administrative segregation is generally not undertaken to garner information or a confession, is non-disciplinary, and is debatably not intended to intimidate or coerce the prisoner.¹¹⁰ The CAT explicitly forbids the use of necessity or emergency to justify a practice that would otherwise count as torture.¹¹¹ However, the justification for administrative segregation is often that it promotes prisoners' safety and the general order of the prison in cases of immediate danger or what an average person would commonly understand to be extenuating circumstances.¹¹² Because of this justification, it seems possible, if not likely, that an international body would find administrative segregation to be a necessary part of prison management and not deem it to be torture. This is despite the CAT's explicit exclusion of extenuating circumstances or immediate danger from the calculus, and the fact that such a holding would require the body to ignore or minimize some element of the definition of torture.¹¹³ In short, most international bodies would be unable to ignore what they would see

¹⁰⁷ U.N. Committee Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Conclusions and Recommendations of the Committee Against Torture: Austria, ¶ 4, U.N. Doc. CAT/C/AUT/CO/3 (Dec. 15, 2005).

¹⁰⁸ UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, PREVENTING TORTURE: AN OPERATIONAL GUIDE FOR NATIONAL HUMAN RIGHTS INSTITUTIONS 6 (2010).

¹⁰⁹ Natasha A. Frost & Carlos E. Monteiro, *Administrative Segregation in U.S. Prisons*, in NAT'L INST. OF JUST. 5 (2016).

¹¹⁰ CAT, *supra* note 5, at art. 1.

¹¹¹ *Id.* at art. 2.

¹¹² Frost & Monteiro, *supra* note 109, at 5.

¹¹³ *See generally id.* (outlining the wide reliance on administrative segregation in U.S. prisons).

as an inevitable and undesirable transfer of prisoners who need different treatment than the rest of the prison population from administrative segregation to the general population.¹¹⁴

Despite what international bodies may be likely to hold, a purely textual determination under the CAT indicates that administrative segregation is likely torture. It unnecessarily harms prisoners and is performed at least in part to intimidate or coerce them.¹¹⁵ While administrative segregation is claimed to allow prisoners to cool off after a violent episode, it is instead coercive due to the highly unpleasant nature of solitary confinement.¹¹⁶ Even if administrators do not explicitly employ administrative segregation as a coercive tactic, the nature of solitary confinement makes a coercive element inevitable. Prison administrators who understand these coercive factors and place prisoners into administrative segregation have met the intent standard through knowledge of its inevitable effect. In addition, administrative segregation is often overused, with prisoners who are not legitimately violent placed into solitary confinement as an imprecise management tool to address prison administration issues, such as individuals' undue influence on other prisoners or perceived disorder in prison populations.¹¹⁷ Additionally, administrative segregation could potentially be simply disciplinary solitary confinement masked as prisoner management—a clear instance of torture. In this type of masked disciplinary practice, administrative segregation subjects prisoners to severe harm without a corresponding necessity and likely constitutes torture. The presence of alternative, less-damaging ways to protect prisoners who would suffer harm in the general population makes solitary confinement for such reasons an inhumane practice.

Administrative segregation in any form is an unnecessarily cruel practice that meets the CAT's severity standard due to the severe harm it causes to prisoners.¹¹⁸ Administrative segregation in solitary confinement is not the only way to control prisoners and enforce order in dangerous prison management

¹¹⁴ U.N. Committee Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention Pursuant to the Optional Reporting Procedure: Third to Fifth Periodic Reports of States Parties Due in 2011: United States, ¶¶ 214–15, U.N. Doc. CAT/C/USA/3-5 (Dec. 4, 2013) (using similar logic of necessity to justify the ongoing use of solitary confinement).

¹¹⁵ See NATIONAL INSTITUTE OF JUSTICE, RESTRICTIVE HOUSING IN THE U.S.: ISSUES, CHALLENGES, AND FUTURE DIRECTIONS 299, 309 (2016).

¹¹⁶ Rosemary Ricciardelli & Victoria Sit, *Producing Social (Dis)Order in Prison: The Effects of Administrative Controls on Prisoner-on-Prisoner Violence*, 96 PRISON J. 210, 226 (2016).

¹¹⁷ U.S. DEPARTMENT OF JUSTICE, REPORT AND RECOMMENDATIONS CONCERNING THE USE OF RESTRICTIVE HOUSING 15 (2016).

¹¹⁸ Luise, *supra* note 64, at 321.

situations. Prison administrators have the option to use humane and efficient prison administration techniques like less-restrictive housing units that still allow significant control of prisoners, time outside of cells for closely-supervised communal activities in administrative segregation cellblocks, and step-down units to deescalate conflicts within prisons.¹¹⁹ Additionally, isolating violent prisoners in administrative segregation is not linked to increased prison safety, indicating that current techniques for administrative segregation are unproductive and do not accomplish their stated goals.¹²⁰

Beyond its limited utility in prisons, administrative segregation using solitary confinement can be counterproductive, given the effects of complete social isolation on the majority of prisoners subjected to the practice, especially those suffering from mental illness. Prisoners who are released back into the general population suffer the lingering effects of solitary confinement, including paranoia, increased anger, and violent impulses.¹²¹ Any one of these changes clearly meets the CAT's standard for severity, and as a matter of policy these effects on prisoners are undesirable for prison administrators and officials. If the purpose of administrative segregation is to address problems within prisons such as violence and angry confrontations, placing prisoners into total isolation is a self-defeating temporary solution that at best ignores and at worst reinforces systemic problems within the prison system. Given its ineffectiveness and the presence of reliable alternatives, there is no compelling reason to continue the use of total isolation for administrative segregation.

3. Protective custody as currently practiced is torture, even when requested by prisoners.

Protective custody is a difficult issue to resolve under the CAT, but it likely constitutes torture, even when voluntarily chosen by prisoners. Protective custody is the placement of vulnerable prisoners, including LGBT prisoners, famous prisoners, and sex offenders, into solitary confinement for their own protection, usually in order to separate the prisoner from other members of the prison population who might seek to harm them in some way.¹²² It differs from other forms of solitary confinement because a significant number of prisoners in protective custody choose to be placed into it voluntarily for their own protection. Even in instances of voluntary protective custody, the practice is

¹¹⁹ Vedan Anthony-North et al., *The Safe Alternatives to Segregation Initiative: Findings and Recommendations for the New York City Department of Correction*, VERA INSTITUTE OF JUSTICE 68–70 (June 2017).

¹²⁰ Shames et al., *supra* note 35, at 20.

¹²¹ Haney, *supra* note 11, at para. 46.

¹²² Angela Browne et al., *Prisons within Prisons: The Use of Segregation in the United States*, 24 FED. SENT'G REP. 46, 46–47 (2011).

likely torture under the CAT. Prisoners do not usually choose to be put into protective custody for a constructive or positive reason. Instead, prisoners choose to be put into protective custody in order to avoid threats to their well-being due to other prisoners' reactions to personal characteristics such as informant status, criminal history, or sexual orientation. Additionally, prison administrators often place prisoners into protective custody when they believe that a prisoner's personal characteristics make the individual especially susceptible to violence.¹²³ This is not to suggest that prisoners must choose to stay in general population. Instead, administrators have an obligation to create a safe environment within correctional facilities without using solitary confinement.

While protective custody may prevent attacks on prisoners who are vulnerable and feel a need to opt in, when solitary confinement is used as the primary means of protecting vulnerable individuals, these prisoners are subject to needlessly cruel and unnecessarily isolating measures.¹²⁴ Because prisoners can be effectively protected by means other than solitary confinement, its use for protective custody is more harmful than necessary. Instances in which prisoners choose to be placed into protective custody are the closest calls about whether protective custody constitutes torture under the CAT because of the element of prisoner choice, which is not present in other forms of the practice. However, the needless cruelty and isolation of the practice likely tips the scale towards it counting as torture under the CAT, especially because effective alternatives are available, such as creating specialized housing units for prisoners at risk of victimization that do not require significant time in isolation and include supervised out-of-cell time.¹²⁵

For prisoners who do not voluntarily choose to be placed into protective custody, it is an easier determination to label such treatment torture. The imposition of solitary confinement by a prison official, as opposed to a prisoner choosing to be placed into a different population, is clearly further from any gray area than voluntary protective custody. This is likely torture, especially if it occurs for an extended period of time, such as above the fifteen-day threshold described by the U.N. Special Rapporteur on Torture.¹²⁶ It is unnecessary severe suffering imposed on an inmate solely due to the decision of a prison official in

¹²³ Shames et al., *supra* note 35, at 4.

¹²⁴ U.N. Secretary-General, *Torture and Other Cruel, Inhuman or Degrading Punishment: Note by the Secretary-General*, *supra* note 8, at ¶ 69.

¹²⁵ Shames et al., *supra* note 35, at 22.

¹²⁶ U.N. Secretary-General, *Torture and Other Cruel, Inhuman or Degrading Punishment: Note by the Secretary-General*, *supra* note 8, at ¶ 88.

the face of credible alternatives such as protective housing units that would accomplish the same goals for prison administrators.

When analyzing protective custody under the intent standard, discrimination provides the best argument for a violation of the CAT, because it lists “any reason based on discrimination of any kind” as a prohibited purpose.¹²⁷ As outlined above, protective custody is far harsher than necessary, given that effective and realistic alternatives are available, for example closely-supervised separate facilities without isolation for vulnerable prisoners.¹²⁸ The unnecessary harshness of protective custody makes it unlikely that the harmful effects of the practice would fall under the CAT’s incidental to a lawful action exception, which would require the effects to be, for example, similar to the discomfort that prisoners experience when lawfully housed in general population.¹²⁹ This bolsters the argument that the practice constitutes discrimination because not only are prisoners discriminated against based on their personal characteristics, they are subjected to harsher treatment than would otherwise be necessary, due to their membership in racial or LGBT minority groups.

One potential stumbling block for this line of argument is that data remains scarce both on the reasons prisoners are placed into solitary confinement and on the practice as a whole. In countries such as France and the U.S., where a federal prison system is centralized to at least some degree, records are sparse, and in countries with prison systems that are managed in a more decentralized manner, records are virtually nonexistent. The data that does exist indicates that the American prison system as a whole has a disproportionate rate of solitary confinement among prisoners from racial minority groups, particularly among black prisoners.¹³⁰ Though information on racial discrimination in international prisons is not centralized and often completely unavailable (and it is beyond the scope of this Comment to perform a wide-scale survey of the races of prisoners in solitary confinement internationally), available information does suggest that racial discrimination when assigning prisoners to solitary confinement is a phenomenon in no way limited to the U.S.¹³¹ LGBT

¹²⁷ CAT, *supra* note 5, at art. 1.

¹²⁸ Shames et al., *supra* note 35, at 22

¹²⁹ See CAT, *supra* note 5, at art. 1 (“[P]ain or suffering arising only from, inherent in or incidental to lawful sanctions” does not result in a determination that a practice is torture).

¹³⁰ Margo Schlanger, *Prison Segregation: Symposium Introduction and Preliminary Data on Racial Disparities*, 18 U. MICH. J. RACE & L. 241, 245 (2013); see AIMING TO REDUCE TIME-IN-CELL, *supra* note 43, at 35–38; see also Juleyka Lantigua-Williams, *The Link Between Race and Solitary Confinement*, THE ATLANTIC (Dec. 5, 2016), <http://perma.cc/3QZT-N3C7>.

¹³¹ See HM INSPECTORATE OF PRISONS, EXTREME CUSTODY: A THEMATIC INSPECTION OF CLOSE SUPERVISION CENTRES AND HIGH SECURITY SEGREGATION 6 (2006) (finding that nearly three quarters of all prisoners in solitary confinement in the U.K. were members of racial minority

prisoners are also disproportionately represented in solitary confinement units in the U.S., resulting from LGBT prisoners' frequent placement in protective custody due to the possibility of violent attacks by other inmates on the basis of sexual orientation.¹³²

Because LGBT prisoners and people of color are placed into protective custody at such high rates, an argument based on discrimination—both in the determination of a prisoner's placement in solitary confinement and as a threat-creating force in the wider prison environment—undergirding prisoners' placement in protective custody would likely be successful. This argument would contend that the act of placing an individual into protective custody based on their sexual orientation or race is due to discrimination by prison officials, which is supported by the disparate rates of protective custody among prisoners of different races and sexual orientations. The discrimination argument can be broadened to cover prisoners voluntarily placed into protective custody by arguing that discriminatory conditions within prisons are covered by the discrimination element of this part of the CAT's description of torture.¹³³ While this may not mean that every case of such prisoners being placed into protective custody is due to discrimination, cases in which discrimination led to the prisoner's placement into solitary confinement would be covered.

A broader reading of Article 1 further indicates that the realities of protective custody violate the intent standard. While prison officials may be justified in placing prisoners into solitary confinement, the fact that their actions are taken in response to a discriminatory prison environment violates the intent standard. Administrators may want to help prisoners avoid dangerous situations, but must work to lessen discrimination in prisons in the first place, lest their actions be rooted in institutional discrimination.¹³⁴ This is, in essence, a sequencing argument. Prison officials should combat discrimination in prisons' general populations, instead of subjecting prisoners to the harsh effects of solitary confinement while in protective custody. Given the current dangers of violence, especially sexual violence, against LGBT inmates, this is not to suggest

groups); Brenda L. Gunn, *Aboriginal Legal Services CSO Report Submitted to Committee on the Elimination of Racial Discrimination in Consideration of Canada's 21st–23rd Periodic Reports*, 3–4 (July 12, 2017) (describing the disproportionate use of solitary confinement on indigenous inmates in Canadian prisons); see also European Parliament Committee on Civil Liberties, Justice and Home Affairs, *Conditions of Imprisonment in E.U. Member States*, POL/C/IV/2003/04/02, 25–37 (Mar. 2004) (describing generally the presence of racial discrimination in numerous prison systems across the E.U.).

¹³² ALLEN J. BECK, *USE OF RESTRICTIVE HOUSING IN U.S. PRISONS AND JAILS*, 2011–12 4 (2015).

¹³³ CAT, *supra* note 5, at art. 1.

¹³⁴ Jade Glenister, *Good Intentions: Can the "Protective Custody" of Women Amount to Torture?*, 16 *EQ. RTS. REV.* 13, 36 (2016).

that simply releasing LGBT or racial minority prisoners into general population in present-day prisons is the solution.¹³⁵ Instead, prison administrators should work to enhance the safety of LGBT and racial minority prisoners without placing them into isolation because solitary confinement, which causes clear harm to prisoners, is not an acceptable way to address problems of violence and prejudice in prisons.¹³⁶

4. Short-term non-disciplinary solitary confinement causes harm severe enough to constitute torture.

Contrary to current findings on the subject, non-disciplinary solitary confinement that lasts less than fifteen days likely also constitutes torture. The Special Rapporteur on Torture currently holds that solitary confinement lasting less than fifteen days may not be torture due to its reduced effects on prisoners, as well as what the Special Rapporteur claims are legitimate applications of the practice in prisons, such as addressing urgent prison management problems that lack other solutions.¹³⁷ But the Special Rapporteur's interpretation is not legally binding and, indeed, is too forgiving.

First, solitary confinement's harmful effects frequently manifest themselves early into isolation, significantly harming prisoners who are subjected to the practice for even a very short period of time.¹³⁸ Research indicates that human beings begin experiencing severely negative psychological effects in a matter of days when undergoing sensory deprivation similar to that experienced in solitary confinement.¹³⁹ In addition, EEG tests show clear differences, including telltale signs of delirium and depression, in the brains of prisoners who have been in solitary confinement for only a matter of days.¹⁴⁰ In the face of both behavioral changes and effects that are visible through scans of prisoners' brains, it is not a viable position to claim that prisoners are only minimally harmed by up to fifteen days in solitary confinement.

¹³⁵ See Giovanna Shay, *PREA's Elusive Promise: Can DOJ Regulations Protect LGBT Incarcerated People?*, 15 *LOY. J. PUB. INT. L.* 343, 344–46 (2014).

¹³⁶ The U.S. Prison Rape Elimination Act has shown promise through its introduction of strategies to curb sexual violence against LGBT inmates without increased use of solitary confinement. It instituted strict sexual assault prevention training and investigation requirements, stiffened requirements to place a prisoner into involuntary protective custody, and liberalized transgender inmate housing assignment processes. *Id.* at 350–54.

¹³⁷ U.N. Secretary-General, *Torture and Other Cruel, Inhuman or Degrading Punishment: Note by the Secretary-General*, *supra* note 8, at ¶ 88.

¹³⁸ See Grassian, *supra* note 59, at 376.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 331.

Even if some of the balancing that the Special Rapporteur attempts to set up between the harm inflicted on prisoners and the interests of prison administrators were to come out in favor of fifteen days as an acceptable limit, the CAT and the effects of solitary confinement do not provide a basis for a time-limit exemption. A generous time limit of fifteen days cuts against the broader intent of the CAT, which is to establish a blanket ban on practices that constitute torture, and to eliminate exceptions or loopholes that could be exploited by interested parties to achieve the effects of torture without running afoul of international law.¹⁴¹ As discussed above, the negative effects of solitary confinement manifest after only days of sensory deprivation—far shorter than the fifteen-day limit. Much like how continuous exposure to bright lights or noise is not immediately torture but becomes torture after some time,¹⁴² isolation becomes torture when a sufficient degree of time has passed for harm to occur to prisoners. Such a time period is well below the fifteen-day mark. The CAT's ban on exceptions in wartime and other situations of pressing urgency or need indicates a clear stance that difficult circumstances are not enough to warrant a practice's use, even if it may make an official's job easier or more effective.

Second, the value of various applications for administrators does not outweigh a determination of torture under the CAT. The lack of exceptions in wartime causes greater inconvenience to officials and organizations than would a prohibition on putting prisoners into short-term solitary confinement. This means that even if there were to be a weighing mechanism, or even if international bodies were to take some degree of necessity for short-term solitary confinement into account, the urgency and necessity for short-term solitary confinement would be far less than during an armed conflict. Additionally, courts have previously found instances of torture to have occurred in times that some would consider to be a period of extreme necessity, such as wartime.¹⁴³ The circumstances surrounding conduct constituting torture do not excuse the conduct.

F. Article 16 of the CAT Likely Prohibits Any Practices to which Article 1 Does Not Apply

Even if certain subsets of non-disciplinary solitary confinement do not fully qualify as torture under the CAT, Article 16 can still require their curtailment. It contains a ban on overly harsh treatment, which could result in

¹⁴¹ CAT, *supra* note 5.

¹⁴² See Weissbrodt & Heilman, *supra* note 57, at 377–78.

¹⁴³ *Nuru v. Gonzales*, 404 F.3d 1207, 1222–23 (9th Cir. 2005) (reaffirming the CAT's absolute prohibition on torture and clarifying that the prohibition has attained the status of *jus cogens*).

prohibition of the types of solitary confinement that would be difficult to find violate Article 1, potentially including non-coercive administrative segregation or very short stays in solitary confinement.¹⁴⁴ This additional prohibition exists because it can sometimes be difficult to tell whether a practice is simply overly harsh (but not amounting to torture), and an under-inclusive standard would thus risk allowing interested parties to totally evade the treaty's proscription.¹⁴⁵ Article 16 differs from Article 1 because it includes harsh treatment inflicted without a specific purpose under its general intent requirement, as opposed to Article 1's elevated intent standard.¹⁴⁶

However, finding that solitary confinement is in violation of Article 16 would be less effective than using Article 1 because Article 16 lacks some of the strict language of Article 1. States have fewer enforcement obligations for Article 16 practices, and there is no mention of the prohibition of emergency or exceptional circumstances that exists for Article 1 practices.¹⁴⁷ Despite this lack of explicit text on the issue, the Committee against Torture has found in an official comment that states' obligations to prevent practices that would violate Article 16 of the CAT do fall under a similar absolute prohibition as states' obligation to prevent Article 1 torture.¹⁴⁸

Article 16 provides more opportunities for countries in the developing world to effectively combat torture. One of the issues with effectively following Article 1 as a developing country is the significant cost involved in producing the required reporting and research.¹⁴⁹ Due to its lower bar for states' obligations, Article 16 would not impose as many costs on developing countries, making participation in the treaty regime significantly less burdensome. Using Article 16 could result in significantly more accessibility for countries with lower budgets and reporting abilities, likely resulting in less torture.

The Committee against Torture's findings relating to Article 16 suggest that solitary confinement would also be prohibited as cruel, inhumane, or degrading treatment. Practices that the Committee has found to be prohibited under Article 16 include holding prisoners in ill-equipped, heated, or cooled

¹⁴⁴ See CAT, *supra* note 5, at art. 1.

¹⁴⁵ Silva, *supra* note 54, at 334.

¹⁴⁶ Hathaway et al., *supra* note 87, at 800.

¹⁴⁷ Seth F. Kreimer, *Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror*, 6 U. PA. J. CONST. L. 278, 279–80 (2003).

¹⁴⁸ U.N. Comm. Against Torture, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Comment No. 2: Implementation of Article 2 by States Parties, 3, U.N. Doc. CAT/C/GC/2/CRP.1/Rev.4 (Nov. 23, 2007).

¹⁴⁹ Cosette D. Creamer & Beth A. Simmons, *Ratification, Reporting, and Rights: Quality of Participation in the Convention Against Torture*, 37 HUM. RTS. Q. 579, 588 (2015).

cells, solitary confinement lasting a year, sleep deprivation, threats of violence, and the use of restraint chairs.¹⁵⁰ Specifically, the Committee's previous findings that solitary confinement for long periods of time as well as poor prison facility conditions violate Article 16 suggest that extension of its holdings to most solitary confinement is sensible. Article 16 has a lower floor for a practice to be prohibited than Article 1, and long-term solitary confinement is already prohibited under it, so a prohibition on shorter-term solitary confinement is no great deviance from the Committee's current stance on Article 16. As such, it remains a viable option for addressing solitary confinement under the CAT if an Article 1 finding that solitary confinement is torture is not possible. While Article 16 is not ideal in terms of its protections for prisoners and obligations on countries, it does provide an effective way to address undesirable practices that fall short of Article 1's standards.

IV. IMPLEMENTATION AND POLICY CONSIDERATIONS

This Section will first explore the reaction to practices during the War on Terror that violated the CAT. The example of the War on Terror demonstrates some of the potential implementation and enforcement limits on the CAT's application to solitary confinement. It will then offer policy arguments in favor of applying the CAT to solitary confinement, including the expenses associated with solitary confinement, its ineffective and unnecessary role in managing correctional facilities, and the presence of effective, non-isolating alternative management techniques.

A. American Actions during the War on Terror Show the Limits of the CAT's Effectiveness

The academic and international political communities are in general agreement that long-term solitary confinement for disciplinary reasons is disallowed under the CAT, especially when it lasts for multiple months and is coupled with harsh or abusive treatment of prisoners.¹⁵¹ Despite this consensus, disciplinary solitary confinement continues to be widely used.¹⁵² The response to prisoner abuses committed during the U.S. War on Terror provides an

¹⁵⁰ Craig Forcese, *A New Geography of Abuse – The Contested Scope of U.S. Cruel, Inhuman, and Degrading Treatment Obligations*, 24 BERKELEY J. INT'L L. 908, 914–15; see also U.N. Comm. Against Torture, Report of the Committee Against Torture, ¶ 183, U.N. Doc. A/56/44 (2001); U.N. Comm. Against Torture, Report of the Committee Against Torture, ¶ 175, U.N. Doc. A/53/44 (1998).

¹⁵¹ U.N. Secretary-General, *Torture and Other Cruel, Inhuman or Degrading Punishment: Note by the Secretary-General*, *supra* note 8, at ¶ 76; Conley, *supra* note 1, at 426 n. 59.

¹⁵² AIMING TO REDUCE TIME-IN-CELL, *supra* note 43, at 22–23; Naday et al., *supra* note 44; Shalev, *supra* note 28; Conley, *supra* note 1, at 425.

illuminating example of the limits on CAT enforcement for internationally powerful states' potential violations.¹⁵³ The responses to treatment of detainees during the War on Terror show that states sometimes face little to no demand to properly investigate torture, especially when the states at issue possess a high level of influence in the global community. This may explain why practices like long-term disciplinary solitary confinement endure and why a finding that non-disciplinary solitary confinement is torture might have limited influence on states' behavior.

The War on Terror strained the CAT's ability to accomplish its goals and highlighted some of its weaknesses. The U.S., a global superpower with heavy influence on international law, used urgent national security threats to justify treatment of prisoners contrary to the mandates of the treaty.¹⁵⁴ A wide array of abuses committed by state parties during the War on Terror constituted torture under the CAT due to the severe mental and physical suffering inflicted in the pursuit of information. These practices included a suite of dehumanizing techniques referred to as "enhanced interrogation," rendition to CIA "black sites" in foreign countries, and long-term isolation of prisoners.¹⁵⁵

After the Bush administration, the Obama administration showed little interest in investigating or prosecuting abuses that occurred during the War on Terror, despite bipartisan denunciation of the practices.¹⁵⁶ The Department of Justice declined to prosecute Bush administration officials for their roles in the torture of detainees during the War on Terror, even when their actions resulted in severe physical harm or death.¹⁵⁷ In the wake of the Obama administration's decision to not prosecute Bush-era officials for their abuses, the U.N. Special

¹⁵³ Marcy Strauss, *Torture*, 48 N.Y. L. SCH. L. REV. 201, 252 (2003).

¹⁵⁴ *Statement of Attorney General Eric Holder on Closure of Investigation into the Interrogation of Certain Detainees*, U.S. DEP'T OF JUST. (Aug. 30, 2012), <https://perma.cc/D5J4-VE3H>.

¹⁵⁵ *"If the US Tortures, Why Can't We Do It?"—UN Expert Says Moral High Ground Must Be Recovered*, UNITED NATIONS HIGH COMMISSIONER FOR HUM. RTS. (Dec. 11, 2014), <https://perma.cc/9VJH-6TYS>.

¹⁵⁶ See S. REP. NO. 113-288, at 516 (2014) (Additional Views of Senator Collins) ("[S]ome detainees were subject to techniques that constituted torture. This inhumane and brutal treatment never should have occurred"); Floor Statement by Senator John McCain on Senate Intelligence Committee Report on CIA Interrogation Methods (Dec. 9, 2014), <http://perma.cc/8WKH-YWFY> ("I have long believed some of these practices amounted to torture"); Peter Baker, *Obama Catches Blame on Tactics of Torture That He Ended*, N.Y. TIMES (Dec. 10, 2014), <http://www.nytimes.com/2014/12/11/us/politics/obama-effectiveness-cia-torture.html>.

¹⁵⁷ *Statement of Attorney General Eric Holder on Closure of Investigation into the Interrogation of Certain Detainees*, *supra* note 154.

Rapporteur on Torture sharply criticized the administration's handling of the violations.¹⁵⁸

There are several plausible explanations for the Obama administration's decision to not prosecute Bush administration officials involved in torture. These include the Obama administration's desire to avoid scrutiny of its continued rendition of terrorism suspects to other countries—a practice that government officials know often leads to torture, and for which Obama administration officials themselves could possibly be prosecuted¹⁵⁹—or reluctance to go against the general public's support of torturing terrorism suspects.¹⁶⁰ Another, less self-interested explanation is a desire to promote democratic stability, because prosecution of political opponents is a hallmark of authoritarian and non-democratic governments.¹⁶¹

1. Operational noncompliance has limited effectiveness in the wake of the War on Terror.

The lack of international remedies for American actions during the War on Terror shows a way in which consequences for violations of the CAT can be limited by the ubiquity of a practice and the influence of the states responsible for the violations. This problem is especially difficult when those violating international law are states frequently seen as responsible for maintaining and enforcing systems of international law.¹⁶²

States regularly and intentionally breach international law, with varying levels of consequences, especially depending on whether the breach is in good or bad faith. Some breaches, such as the humanitarian intervention in Kosovo, are means of addressing deficiencies in international law—but such breaches are more likely to be effective if performed by powerful states.¹⁶³ The NATO response to criticism of the legality of the Kosovo humanitarian intervention

¹⁵⁸ "If the US Tortures, Why Can't We Do It?", *supra* note 155 (arguing that a lack of significant American response to abuses during the War on Terror would weaken American moral authority and make future instances of torture more likely).

¹⁵⁹ David Johnston, *U.S. Says Rendition to Continue, but With More Oversight*, N.Y. TIMES (Aug. 24, 2009), <http://www.nytimes.com/2009/08/25/us/politics/25rendition.html>.

¹⁶⁰ Richard Wike et al., *Global Publics Back U.S. on Fighting Isis, but Are Critical of Post-9/11 Torture*, PEW RESEARCH CENTER (June 23, 2015), <http://perma.cc/HC7B-LTJC> (finding that fifty-eight percent of Americans supported using torture against terrorism suspects to prevent future attacks).

¹⁶¹ Roberto Gargarella, *Political (In)justice: Authoritarianism and the Rule of Law in Brazil, Chile, and Argentina*, 63 THE AMERICAS 311, 312 (2006) (book review).

¹⁶² See Jacob Katz Cogan, *Noncompliance and the International Rule of Law*, 31 YALE J. INT'L L. 189, 191 (2006).

¹⁶³ *Id.* at 200.

illustrates that powerful states deliberately and knowingly take action in violation of international law when they see a pressing need for such action, constituting operational noncompliance.¹⁶⁴ The Kosovo intervention, however, was undertaken with an eye towards ensuring enforcement of international obligations in a good-faith approach that strengthened international human rights obligations.¹⁶⁵ Noncompliance with treaties can vary based on compliance costs and benefits, as well as the individual treaty's level of importance in the state's eyes, with a state's international reputation as a whole playing a relatively minor role compared to the state's perception of the costs, benefits, and importance of compliance.¹⁶⁶ Operational noncompliance has definite downsides, including diminishing the force of the provision in question and undermining international law more generally. It also helps refine existing rules to fit changing circumstances and address urgent problems that develop more quickly than international legal regimes.¹⁶⁷

2. Retaliatory breach is undesirable on the issue of torture.

In general, countries can respond to treaty noncompliance by asserting their interests through several options. One limited remedy for noncompliance is the ability of parties to retaliate to a breach by suspending or terminating their compliance with all or part of a treaty. This tactic is most straightforward when applied to bilateral treaties, but it can also be used by parties to suspend all or part of a treaty between themselves and a violating party, or the parties to a treaty can unanimously decide to terminate a treaty in its entirety.¹⁶⁸ States have incentives to keep their breach roughly proportional to the prior breach, and as such partial suspensions offer an effective way to respond to prior breaches by other parties to a treaty.¹⁶⁹

If states remain party to the CAT, then it is difficult to find an acceptable way to respond to breach. Parties can either breach a minor part of the treaty that garners little retaliatory firepower and avoids international condemnation, or they can engage in conduct that effectively retaliates, but may be internationally and politically unacceptable. A state breaching the CAT in response to perceived

¹⁶⁴ *Id.* at 201.

¹⁶⁵ *Id.* at 199–201.

¹⁶⁶ George W. Downs & Michael A. Jones, *Reputation, Compliance, and International Law*, 31 J. LEGAL STUD. S95, S108 (2002).

¹⁶⁷ Cogan, *supra* note 162, at 204–05.

¹⁶⁸ John Norton Moore, *Enhancing Compliance with International Law: A Neglected Remedy*, 39 VA. J. INT'L L. 881, 893–94 (1999) (describing the retaliatory termination remedy under Article 60 of the Vienna Convention of the Law of Treaties, with the caveat that, as of 1999, the obligations Article 60 imposes with respect to means of dispute resolution would not apply to the U.S.).

¹⁶⁹ *Id.* at 899, 932, 943.

breaches during the War on Terror could perhaps cease providing reports to the Committee against Torture, or could treat prisoners harshly in violation of Article 1 or 16—neither of which is a productive option. Harsh treatment of another country's citizens held in a country's prisons would likely only make matters worse, and mistreating a country's own prisoners would cause pointless suffering while only diminishing the country's international human rights reputation. This makes enforcement of the CAT especially problematic, because the options for breach are far less effective or feasible than treaties dealing with less-sensitive subjects that would not involve mistreatment of another country's citizens as part of a retaliatory breach.

In the few instances in which perpetrators of torture during the War on Terror did face consequences for their actions, those who faced consequences were often from less-influential collaborating states that housed the detainees, not the U.S.¹⁷⁰ Such a pattern helps explain why disciplinary and non-disciplinary solitary confinement remain widespread despite the U.N.'s arguments for elimination of the practices around the world. Even if current prohibitions on solitary confinement were to be expanded, the lack of consequences or formal condemnation for the torture of prisoners during the War on Terror, as well as the infeasibility of enforcing the treaty with retaliatory breach, indicates that violators often face little pressure to change their policies and behaviors.

Widespread use of practices that violate the CAT, such as some forms of enhanced interrogation or non-disciplinary solitary confinement, weakens the force of international law on the issue. Properly aligning prohibited practices with international law could help strengthen the normative and moral force of the CAT. The CAT is the linchpin of international law on torture, and because states have previously complied well with obligations to report past practices and abuses, they would likely take the expansion seriously and make a good-faith effort to comply. At present, some commentators regard the CAT's ban on torture to be an example of the enforcement problems that arise with over-criminalization, "like the ban on the sale of alcohol during Prohibition—unenforceable precisely because violations are so pervasive."¹⁷¹ However, if some actions continue to undermine international law due to their use, such as solitary confinement, then a clear prohibition of these practices would cut down on the use of solitary confinement in gray areas of international law that lack clear pronouncements.¹⁷² The CAT has wide-ranging influence on state behavior, and its obligations encourage states to take their commitments to

¹⁷⁰ See, for example, *Al-Nashiri v. Poland*, App. No. 28761/11, Eur. Ct. H. R. (2015).

¹⁷¹ Louis Michael Seidman, *Torture's Truth*, 72 U. CHI. L. REV. 881, 884 n. 13 (2005).

¹⁷² See Rosemary Foot, *Torture: The Struggle over a Peremptory Norm in a Counter-Terrorist Era*, 20 INT'L REL. 131, 141–144 (2006).

human rights seriously. As such, international treaties like the CAT are likely best understood in this context as providing a “code of conduct” for human rights that encourages states to comply with various expectations for treatment of prisoners.¹⁷³

B. Effective Prison Management Is Possible without Non-Disciplinary Solitary Confinement

As a matter of policy, non-disciplinary solitary confinement is often unnecessary in the instances it is used in jails and prisons. It can be replaced with alternatives that are, at minimum, no less effective and that have the potential to produce more humane and efficient results. It is possible to use protective custody for prisoners without subjecting them to the amount of social isolation imposed under current practices.¹⁷⁴ In American prisons, the Department of Justice has recommended alternative approaches to handling vulnerable prisoners, including transfer to different institutions or special non-solitary protective housing units within the same institution, or allowing threatened prisoners to sleep alone in a cell and perform closely-supervised activities outside of their cell during the day to minimize the potential for violence in areas without guards.¹⁷⁵ Additionally, a less-harsh prisoner treatment regime in protective custody would likely encourage prisoners to request protective custody without fear of the negative experiences of solitary confinement.¹⁷⁶ Treating those who request voluntary custody less harshly during confinement may have the indirect benefit of encouraging more frank reporting of sexual offenses and other violence, which, in turn, would increase prisoner safety overall.

1. Financial considerations favor elimination of the practice.

The financial incentives surrounding solitary confinement make its elimination especially appealing in the developing world. Solitary confinement is far more expensive than other prisoner treatment schemes, with purpose-built units “two to three times as costly to build and, because of their extensive

¹⁷³ JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 128 (2005).

¹⁷⁴ See Harrington, *supra* note 40, at 46.

¹⁷⁵ REPORT AND RECOMMENDATIONS CONCERNING THE USE OF RESTRICTIVE HOUSING, *supra* note 117, at 24, 29.

¹⁷⁶ See Kristine Schanbacher, *An Inside Job: The Role Corrections Officers Play in the Occurrence of Sexual Assault in U.S. Detention Centers*, 9 DEPAUL J. SOC. JUST. 38, 48 (2015) (noting that harsh conditions in protective custody can deter inmates who are victims of sexual assault from reporting the crimes).

staffing requirements, to operate as conventional prisons are.”¹⁷⁷ Given the availability of other less-costly alternatives, it likely makes financial sense for developing countries to eliminate solitary confinement. Prison systems might continue to use solitary confinement despite its high costs due to institutional inertia, preexisting housing units purpose-built for solitary confinement, and facilities investments that would be required to house currently-isolated prisoners in non-solitary conditions. However, it is also important to keep compliance costs low in order to induce participation. The volume of information collection and reporting required for CAT compliance can sometimes prevent developing countries from fulfilling their reporting obligations.¹⁷⁸ Despite these expenses, some developing countries transitioning from authoritarian governments to liberal democracies have incentives to bear these costs and actively fulfill human rights treaty obligations because treaties can signal that countries are serious about new commitments to liberal democracy.¹⁷⁹

2. Corrections systems do not require pre-trial isolation.

Pre-trial isolation is largely unnecessary. As is true of solitary confinement imposed in order to avert violence by prisoners who have already been convicted, much of the danger of violence and general disorder that pre-trial isolation supposedly addresses can be tackled more effectively by providing mental health resources and proactively addressing systemic problems such as overcrowding, rather than reacting to the violence fomented by substandard prison conditions.¹⁸⁰ Prison officials have struggled to justify pre-trial isolation, with the most plausible justifications stemming from the need to control inmates who pose additional risks for significant disturbances, disorder, or violence while detained and awaiting trial.¹⁸¹ Other reasons for the continued use of the practice mainly stem from its ability to coerce confessions and intimidate suspects into cooperating with law enforcement after they have been detained and charged.¹⁸²

Scientifically-developed interrogation practices, together with competent evidence-gathering and analysis of evidence by law enforcement, make pre-trial

¹⁷⁷ Erica Goode, *Prisons Rethink Isolation, Saving Money, Lives and Sanity*, N.Y. TIMES (Mar. 10, 2012), <http://www.nytimes.com/2012/03/11/us/rethinking-solitary-confinement.html>.

¹⁷⁸ Creamer & Simmons, *supra* note 149, at 588.

¹⁷⁹ GOLDSMITH & POSNER, *supra* note 173, at 131.

¹⁸⁰ Seena Fazel et al., *Mental Health of Prisoners: Prevalence, Adverse Outcomes, and Interventions*, 3 THE LANCET PSYCHIATRY 871, 876 (2016).

¹⁸¹ Nagib, *supra* note 104, at 2924.

¹⁸² CTR. FOR CONST. RTS. & LOWENSTEIN INT’L HUM. RTS. CLINIC, *THE DARKEST CORNER: SPECIAL ADMINISTRATIVE PROCEDURES AND EXTREME ISOLATION IN THE FEDERAL BUREAU OF PRISONS* 14 (2017).

solitary confinement's coercive effects on suspects largely unnecessary. In addition, pre-trial solitary confinement is a type of non-disciplinary solitary confinement especially suited for international involvement because its inherently transitory and temporary nature makes it difficult for individuals to bring complaints challenging their conditions of confinement.¹⁸³ Prisoners who are subject to pre-trial solitary confinement may not be in solitary confinement long enough to make it worth the time and money to bring a case against prison authorities, and prisoners who are found not guilty after pre-trial solitary confinement may want to avoid further entanglement with the legal system or retaliation by the state following release. This makes international law an important tool because instead of reacting to difficult-to-litigate abuses, it is able to set proactive norms ahead of mistreatment of prisoners. Given that the practice of pre-trial solitary confinement serves to largely intimidate and hurt prisoners who have not yet been convicted of a crime, prison administrators have better tools for accomplishing their goals while also causing less collateral damage to prisoners.

3. Alternative prisoner management techniques eliminate the need for solitary confinement in almost all instances.

Prison officials can take proactive steps to reduce the number of prisoners who warrant placement into non-disciplinary solitary confinement before the problems arise. For example, increased availability of mental health resources for prisoners in the general population greatly decreases the number of mental health crises experienced by prisoners and mitigates the negative effects of prisoners' mental health problems in the limited data available on effective interventions in prisons and jails.¹⁸⁴ A reduced need for acute crisis response would likely contribute to the cost savings resulting from the elimination of solitary confinement. Instituting an effective counseling, medication, and treatment regime for prisoners' mental health could reduce the number of prisoners sent to solitary confinement for mental health reasons as well as reduce the number of precipitating incidents for solitary confinement, such as fights and disobedience, for which prisoners' mental health issues are often a contributing factor.¹⁸⁵ Proactive measures reduce the expenditures necessitated

¹⁸³ Amber Baylor, *Beyond the Visiting Room: A Defense Counsel Challenge to Conditions in Pretrial Confinement*, 14 CARDOZO PUB. L. POL'Y & ETHICS J. 1, 29–30 (2015).

¹⁸⁴ Fazel et al., *supra* note 180, at 871.

¹⁸⁵ Jennifer M. Reingle Gonzalez & Nadine M. Connell, *Mental Health of Prisoners: Identifying Barriers to Mental Health Treatment and Medication Continuity*, 104 AM. J. PUB. HEALTH 2328, 2328 (2014) (noting that “the limited [mental health] treatment options in many prison settings are directly reflected in the greater number of disciplinary problems, rule violations, and physical assaults

by solitary confinement, and avoid future negative effects on inmates that necessitate further spending.¹⁸⁶

Of course, there are some instances in which solitary confinement for short periods of time is the only way to prevent a large-scale emergency, such as a riot, a prisoner uprising, or a large fight. There is presumably some length of time for which absolute emergency may make solitary confinement an unavoidable action in a prison, with minimal harm to prisoners. So long as the harm falls short of the standards for torture set out in the CAT, the instance of confinement would be allowable. However, this time is likely rather short, due to research indicating harm to prisoners resulting from even short stints of less than a week in solitary confinement.¹⁸⁷ Previous studies have indicated that mental harm and psychosis occurred in individuals after two to six days of sensory deprivation.¹⁸⁸ As such, an effective upper limit on solitary confinement in a true emergency—such as a prison riot—should be shorter than this threshold for negative mental effects, and no longer than a day or two. While solitary confinement would ideally never be used in correctional facilities, if it is the only option to prevent danger to prisoners' well-being then its use may be unavoidable for very short periods of time. This Comment does not seek to draw a hard upper limit for solitary confinement—a task better left to administrators in corrections systems—but it is safe to say that in light of the documented effects of solitary confinement, the Special Rapporteur's fifteen-day limit permits solitary confinement of inmates for a time period long enough to cause mental health problems, and any limit should be no longer than two days.¹⁸⁹

The elimination of most non-disciplinary solitary confinement is feasible in situations of large-scale prison disorder and violence, such as riots, because it is not the typical response to these problems. Riots and other kinds of large-scale disorder in prisons are usually addressed with lockdown, not solitary confinement.¹⁹⁰ While lockdown is unpleasant for prisoners due to confinement in their cells, prisoners maintain contact with other human beings and are usually not in lockdown for longer than several hours; thus, the harms caused by even

among those who have mental health disorders, often compounded by the resulting solitary confinement”).

¹⁸⁶ *Id.*; see also U.S. DEPARTMENT OF JUSTICE OFFICE OF THE INSPECTOR GENERAL, REVIEW OF THE FEDERAL BUREAU OF PRISONS' USE OF RESTRICTIVE HOUSING FOR INMATES WITH MENTAL ILLNESS (2017).

¹⁸⁷ Grassian, *supra* note 59, at 331, 376.

¹⁸⁸ *Id.* at 376.

¹⁸⁹ *Id.*

¹⁹⁰ Jody L. Sundt et al., *The Sociopolitical Context of Prison Violence and Its Control: A Case Study of Supermax and Its Effect in Illinois*, 88 PRISON J. 94, 105 (2008).

extended lockdown fall far short of the harms caused by solitary confinement.¹⁹¹ In truly severe instances, lockdowns can last for several days, though prisoners retain privileges including contact with others and access to personal items.¹⁹² Instances of long-term lockdown are rare and are often triggered by underlying problems with prisoner treatment or facility management, with lockdown largely remaining a method for responding to acute threats in well-managed prisons.¹⁹³ The ability of prison administrators to use lockdown as a tool for managing crises indicates that refraining from solitary confinement would not lead to increased violence and disorder during such crises.

For any prisoners who remain subject to solitary confinement, prison units known as step-down units provide a transition between solitary confinement and complete exposure to the general population, decreasing the negative effects experienced by prisoners who are returned to general population.¹⁹⁴ In a typical step-down unit, prisoners are assisted by psychologists and other prison staff as they move from solitary confinement to a transitional housing unit with increased freedoms and responsibilities, before finally reintegrating into general population.¹⁹⁵ Well-run step-down units give prisoners the opportunity to work with staff on addressing behavioral and mental health issues in order to prevent another stint in solitary confinement.¹⁹⁶ Step-down units may decrease violence and disruption for prisoners who have experienced isolation in solitary confinement, particularly for prisoners subject to administrative segregation and those with severe mental illness.¹⁹⁷ Due to their effectiveness at obtaining better results for prisoners and mitigating harmful lingering effects of solitary confinement, step-down units should be used whenever prisoners are held in solitary confinement.

Given the variety of effective prison management practices that can be substituted for the various forms of solitary confinement, prison administrators would not lose a vital administrative tool after a finding that solitary confinement is torture under the CAT. The presence of realistic alternatives

¹⁹¹ *Id.*

¹⁹² During a 2017 crisis in Florida state prisons, all prisoners in the state were placed on lockdown for multiple days. See Julie K. Brown, *Florida Prisons—All of Them—on Lockdown*, MIAMI HERALD (Aug. 17, 2017), <http://perma.cc/UZ3E-ZB4B>.

¹⁹³ *Id.*

¹⁹⁴ Terry A. Kupers et al., *Beyond Supermax: Administrative Segregation: Mississippi's Experience Rethinking Prison Classification and Creating Alternative Mental Health Programs*, 35 CRIM. JUST. & BEHAV. 1037, 1042–43 (2009).

¹⁹⁵ *Id.* at 1042.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 1046.

makes such a finding more feasible and could improve the day-to-day operations of correctional facilities.

C. International Bodies' Ability to Ensure Compliance

The Committee against Torture's determinations under the CAT are often taken seriously by countries. For example, Norway reduced its use of pre-trial solitary confinement and eliminated disciplinary solitary confinement in response to individualized findings by the Committee.¹⁹⁸ Additionally, the Committee's individualized recommendations have been taken seriously and led to action in the Netherlands, Sweden, and Portugal, with more limited effects in Denmark and the Czech Republic.¹⁹⁹

The CAT is less effective when the Committee is left to enforce it unilaterally, in part because under many circumstances, the Committee can only apply reputational pressure. Given the prominence of the reporting system, adequate enforcement of the reporting process in and of itself can be as powerful as the Committee's remedies. Public evaluations of states' conduct and an ongoing blacklist of non-reporting parties create an internationally accessible record of states' compliance status.²⁰⁰ One issue with this process is that countries may wish to withhold information that they regard as confidential or embarrassing from the Committee. When the Committee uncovered states withholding such information in the past, it responded with strong condemnation and findings of additional violations under the CAT.²⁰¹ Even with these consequences, it is plausible that countries with especially sensitive or embarrassing information may find it worth the risk to deliberately withhold that information. However, such a calculus may only work in favor of withholding when the practice is exceptionally severe or widespread—instances in which the misconduct may be difficult to hide for long from international observers anyway. Additionally, the Committee has detected past instances of withholding information, ultimately ending in compliance.²⁰²

Even with these problems, compliance with the CAT remains, in many ways, desirable for countries because they want to highlight their good behavior to other actors and because normative pressures encourage countries to follow

¹⁹⁸ Ronagh McQuigg, *How Effective is the United Nations Committee Against Torture?*, 22 EUR. J. INT'L L. 813, 814–15 (2011).

¹⁹⁹ See generally *id.*

²⁰⁰ Chris Ingelse, *The Committee against Torture: One Step Forward, One Step Back*, 18 NETH. Q. HUM. RTS. 307, 313–14 (2000).

²⁰¹ Sarah Joseph, *Rendering Terrorists and the Convention Against Torture*, 5 HUM. RTS. L. REV. 339, 345–46 (2005).

²⁰² *Id.*

others' lead in reporting torture.²⁰³ These motivators have led to widespread cooperation with the reporting process. A significant proportion of countries with a duty to report under the CAT have met their obligation and submitted documents that have not whitewashed reality, detailing past issues within the country and, of course, highlighting efforts to comply with the treaty and eliminate instances of torture.²⁰⁴ The U.S. has consistently reported ongoing issues and its compliance efforts under the CAT.²⁰⁵

Regional courts, such as the European Court of Human Rights, offer another way to enhance enforcement of the principles behind the CAT. The European Court of Human Rights decides cases under the legal regime of the European Convention on Human Rights, not the CAT, but the Convention addresses many of the same issues. However, some regional bodies, such as the Inter-American Court of Human Rights, have only "sustained application of the Court's moral force" as an enforcement mechanism, which limits the ways in which they may go beyond the Convention against Torture's enforcement capacity.²⁰⁶ Like any international legal regime seeking to enforce international obligations within a country's borders, regional courts have enforcement issues. Despite these issues, the Inter-American Court of Human Rights has shown some promise with enforcement successes that sometimes go beyond remedies suggested by leaders in the region.²⁰⁷

Countries can also individually decide to take their human rights obligations seriously, as seen in Canada when the Supreme Court of British Columbia found extended solitary confinement to be disallowed under the Canadian Charter of Rights and Freedom. The court held that solitary confinement for prolonged and indefinite periods (in practice, more than fifteen days) was not permitted under the Charter.²⁰⁸ In part, the decision relied on the "emerging consensus in international law that under certain circumstances solitary confinement can cross the threshold from a legitimate practice into

²⁰³ Creamer & Simmons, *supra* note 149, at 590.

²⁰⁴ *Id.* at 586–88.

²⁰⁵ For a collection of American reports to the Committee, see *U.S. Treaty Reports*, U.S. DEP'T OF ST., <https://perma.cc/27DU-N4SU> (last visited May 3, 2018).

²⁰⁶ Lea Shaver, *The Inter-American Human Rights System: An Effective Institution for Regional Rights Protection?*, 9 WASH. U. GLOBAL STUD. L. REV. 639, 664 (2010).

²⁰⁷ *Id.* at 665–71. *But see* David Forsythe, *Human Rights, the United States and the Organization of American States*, 13 HUM. RTS. Q. 66, 66, 73 (qualifying the Inter-American Court's overall track record as muted and attributing its effectiveness instead to the dynamics of state moral leadership more broadly).

²⁰⁸ *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2018 CanLII 62, ¶ 609–10 (Can. B.C. S.C.).

cruel, inhuman or degrading treatment [], even torture.”²⁰⁹ While the continued use of solitary confinement indicates that domestic courts left to their own devices do not always outlaw the practice, the Canadian decision shows that sometimes a country’s government can address human rights issues effectively without international intervention.

V. CONCLUSION

The CAT imposes a legal regime prohibiting torture based on practices’ effects, severity, and motives, instead of banning specific acts. At present, both disciplinary and long-term solitary confinement are considered torture under the CAT.²¹⁰ Despite this trend towards recognizing the ways in which the isolation imposed on prisoners in solitary confinement has severe negative effects, the U.N. has declined to find non-disciplinary solitary confinement to be torture in every instance.²¹¹ Such a determination would recognize the severe negative effects that non-disciplinary solitary confinement imposes on prisoners subjected to the practice. Non-disciplinary solitary confinement causes great harm to prisoners that is strikingly similar to the harm resulting from disciplinary solitary confinement. When the impermissible motives behind the majority of instances of non-disciplinary solitary confinement are taken into account, the practice runs afoul of the CAT. The various types of non-disciplinary solitary confinement, such as pre-trial isolation, administrative segregation, and protective custody, are used in prison facilities for reasons prohibited under the CAT, including coercion and discrimination. Because corrections systems are acting under color of the state, the harms and motives under the CAT are not just cruel, but torturous. Moreover, even if non-disciplinary solitary confinement does not constitute torture under Article 1 of the CAT, the practice can also be curtailed by finding it to be excessively harsh under Article 16.

Classifying non-disciplinary solitary confinement as torture under the CAT would have clear benefits to prisoners, as well as to administrators. Prisoners, especially those with preexisting mental illnesses, would be able to avoid the severe and long-lasting harm caused by solitary confinement, including delusions, increased propensity towards violence, and paranoia. From a policy standpoint, the elimination of non-disciplinary solitary confinement is desirable to administrators because most instances of its use, including protective custody, administrative segregation, and pretrial detention,

²⁰⁹ *Id.* at ¶ 50.

²¹⁰ U.N. Secretary-General, *Torture and Other Cruel, Inhuman or Degrading Punishment: Note by the Secretary-General*, *supra* note 8, at ¶ 79, 81.

²¹¹ *Id.* at ¶ 88.

often result in more harm than benefit to prison order and safety.

Though there are hurdles to the classification of non-disciplinary solitary confinement as torture under the CAT, they would be unlikely to prevent such a determination if the legal and policy consequences were weighed adequately. Most notably, it could be costly for countries that extensively use non-disciplinary solitary confinement to face the prospect that a frequently relied-upon correctional facility management practice is torture. Solitary confinement causes a great number of harmful, long-lasting, and costly effects on prisoners. Beyond the goal of not subjecting citizens to unnecessarily harsh treatment while in prison, it is in the interest of states that want efficient, humane corrections systems to eliminate the use of non-disciplinary solitary confinement. Under the CAT, the international community would be well-served to recognize that non-disciplinary solitary confinement, much like its disciplinary sibling, is an unacceptable practice.