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**THE UNITED STATES' CONVENTION AGAINST TORTURE
RUDS: ALLOWING THE USE OF SOLITARY CONFINEMENT
IN LIEU OF MENTAL HEALTH TREATMENT IN U.S.
IMMIGRATION DETENTION CENTERS**

ABSTRACT

Currently in civil immigration detention centers around the United States, the practice of placing detained immigrants who are mentally ill is allowed by U.S. Immigration and Customs Enforcement (ICE). In some detention centers, placement into solitary confinement is now the main form of psychological "treatment" for mental health concerns. Some facilities even place detainees under suicide watch into solitary confinement. In one tragic case, this "treatment" resulted in a detainee's suicide. The practice also creates a general atmosphere of fear and resistance to disclose mental health concerns.

Solitary confinement can have negative psychological effects especially for individuals with mental illness. Other international bodies, including the European Court of Human Rights, have acknowledged the harmful effects of solitary confinement. This Comment focuses on decisions by the European Court of Human Rights as to what constitutes torture. This Comment argues that placing detained immigrants who are mentally ill into solitary confinement constitutes torture, however, because the U.S.'s interpretation of torture is much narrower than other international bodies there is still a long journey to achieve the prohibition of this shameful practice in the United States.

INTRODUCTION

On May 15, 2017 at Stewart Detention Center, Jean Jimenez-Joseph, a 27-year-old Panamanian national, committed suicide after nineteen days in solitary confinement.¹ Jimenez-Joseph was under suicide watch when he was placed in solitary confinement; he also had a history of mental illness including schizophrenia and multiple suicide attempts.² U.S. Immigration and Customs Enforcement (ICE) allows for this type of treatment; under ICE guidelines, it is permissible to place a suicidal detainee or a detainee with a history of mental illness in solitary confinement.³

Jimenez-Joseph's tragic situation demands the question: Should detained immigrants who are mentally ill be placed into solitary confinement? This practice currently takes place in civil immigration detention centers around the United States. Instead of receiving appropriate and adequate mental health care, detained immigrants who are mentally ill are being placed in solitary confinement as "treatment."⁴ The practice is so commonly recognized by the detained immigrant population that many hesitate and even refuse to disclose details about their mental health problems for fear of being placed into solitary confinement.⁵ Even more startling is the increase of the civilly-detained immigrant population in the United States. The average number of daily detained immigrants has steadily increased for decades: from approximately 5,000 a day in 1994 to over 34,000 in 2014.⁶ With the number of immigrant detainees rising, it increases the risk of these individuals who are suffering from mental illness or suicidal thoughts to be subject to this "treatment."

The United States' practice of placing mentally ill detained immigrants into solitary confinement violates both domestic and international law. Section I provides a brief overview of immigration detention in the United States and the negative effects of solitary confinement. Section II discusses international law regarding the prohibition on torture and international law interpretation of what

¹ Jeremy Redmon, *ICE Detainee Wasn't Observed as Required Before He Hanged Himself*, ATLANTA J.-CONST.: POLITICALLY GA. (Oct. 4, 2017, 4:54 PM), <http://www.myajc.com/news/state—regional-govt—politics/ice-detainee-wasn-observed-required-before-hanged-himself/6QWVp7xFVnEKSIc9MNJsKK/politicallygeorgia.html>.

² *Id.*

³ *Id.*

⁴ PROJECT SOUTH, *IMPRISONED JUSTICE: INSIDE TWO GEORGIA IMMIGRANT DETENTION CENTERS*, 1, 34, 36, 49 (2017), http://projectsouth.org/wp-content/uploads/2017/06/Imprisoned_Justice_Report-1.pdf.

⁵ *Id.*

⁶ *Immigration Detention 101*, DET. WATCH NETWORK, <https://www.detentionwatchnetwork.org/issues/detention-101> (last visited Jan. 7, 2018).

constitutes torture. This Comment focuses on decisions held by the European Court of Human Rights (ECtHR) to determine what treatment constitutes torture. Section II concludes by determining that the practice of placing detained immigrants who are mentally ill into solitary confinement constitutes torture. Section III examines the how the U.S. interpretation of torture and cruel, inhuman, or degrading treatment is much narrower than how international bodies have interpreted such forms of mistreatment.

I. IMMIGRATION LAW AND SOLITARY CONFINEMENT IN THE UNITED STATES

Immigration detention is defined as “the practice of incarcerating immigrants while they await a determination of their immigration status or potential deportation.”⁷ Immigration detention includes documented and undocumented immigrants.⁸ Detained immigrants in the U.S. are civilly detained as opposed to being criminally incarcerated.⁹ The purpose of civil detention is to guarantee that an individual attends at his/her immigrations hearings and complies with immigration orders.¹⁰ Civil detention is not meant to punish or incapacitate such individual for a criminal offense.¹¹

The United States operates the world’s largest immigration detention system.¹² The U.S. immigration detention system includes operating over 200 detention facilities¹³ and detains between 380,000 to 442,000 immigrants annually.¹⁴ ICE is the U.S. agency in charge of immigration detention.¹⁵ However, ICE subcontracts a majority of its detention responsibilities to private prison companies and county jails.¹⁶ Private prison companies operate the majority—sixty-two percent—of immigration detention facilities.¹⁷ Private prison companies GEO Group and CoreCivic (formerly known as Corrections

⁷ *Id.*

⁸ *Id.*

⁹ Luz C. González Fernández, *Immigration Detention in America: Civil Offense, Criminal Detention*, JOURNAL OF HISPANIC POLICY (Dec. 3, 2013), <http://www.harvardhispanic.org/immigration-detention-in-america/>.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Immigration Detention 101*, *supra* note 6.

¹³ *Id.*

¹⁴ *Immigration Detention Map & Statistics*, CMTY. INITIATIVES FOR VISITING IMMIGRANTS IN CONFINEMENT, <http://www.endisolation.org/resources/immigration-detention/> (last visited Jan. 7, 2018).

¹⁵ *Immigration Detention 101*, *supra* note 6.

¹⁶ *Id.*

¹⁷ *Id.*

Corporation of America),¹⁸ jointly detain approximately 15,000 immigrants daily.¹⁹ Besides subcontracting to private companies, ICE also depends on other types of facilities, such as local jails, juvenile detention centers, field offices, and “family residential centers” for for detention purposes.²⁰

Among these different detention facilities, there are three main ICE contract types: (1) contract detention facilities (CDFs), (2) service processing centers (SPCs), and (3) intergovernmental service agreements (IGSAs).²¹ CDFs are defined as facilities “owned and operated by private corporations that contract directly with ICE.”²² SPCs are owned and operated by ICE, however many of the services within SPCs are fulfilled by various contractors.²³ IGSAs are owned and operated by local governmental bodies, such as county and city governments.²⁴ ICE also follows a policy known as the detention bed quota.²⁵ This is a congressionally mandated policy that requires ICE to maintain 34,000 beds in detention facilities on a daily basis.²⁶ No other law enforcement agency maintains a similar quota system.²⁷ Another alarming trend concerning ICE detention facilities is that an estimated 155 people have died in ICE custody since 2003.²⁸ One potential reason for such a troubling statistic is that there is no independent oversight of the immigration detention system.²⁹ ICE states that detention facilities follow Performance-Based National Detention Standards (PBNDS).³⁰ These standards, however, are not legally enforceable.³¹

A. *Historical Background of Immigration Detention*

The historical background of the immigration policy helps explain the

¹⁸ See Joe Davidson, *Federal Private Prisons – less safe, less secure*, WASH. POST: POWER POST (Aug. 12, 2016), https://www.washingtonpost.com/news/powerpost/wp/2016/08/12/private-federal-prisons-less-safe-less-secure/?utm_term=.b43c2f8046ee.

¹⁹ *Immigration Detention Map & Statistics*, *supra* note 14.

²⁰ *United States Immigration Detention*, GLOBAL DETENTION PROJECT, <https://www.globaldetentionproject.org/countries/americas/united-states> (last visited Jan. 7, 2018).

²¹ *Fatal Neglect: How ICE Ignores Deaths in Detention*, ACLU, DET. WATCH NETWORK AND NAT'L IMMIGRANT JUSTICE CTR. (Feb. 2016), <https://www.aclu.org/report/fatal-neglect-how-ice-ignores-death-detention>.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Immigration Detention 101*, *supra* note 6.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Immigration Detention Map & Statistics*, *supra* note 14.

³⁰ *Detention Management*, ICE, <https://www.ice.gov/detention-management> (last visited Jan. 8, 2018).

³¹ *Immigration Detention Map & Statistics*, *supra* note 14.

increased rate of immigration detention. Prior to the 1980s, the United States detained approximately thirty immigrants daily.³² In the late 1980s, Congress amended the Immigration and Naturalization Act to require the mandatory detention of immigrants with qualifying criminal convictions.³³ This created a category of immigrants whose detention had now become automatic and compulsory; no discretion could be used to provide these immigrants alternative forums, such as bond, while they awaited their immigration proceedings.³⁴ In the 1980s, the former Immigration and Naturalization Service (INS) began outsourcing immigration detention services to private companies like CoreCivic.³⁵ In the 1990s, detention then became the primary form of immigration enforcement.³⁶ Other congressional acts in the 1990s, such as the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigrant Reform and Immigrant Responsibility Act (IIRIRA), expanded mandatory detention.³⁷ After the passage of AEDPA and IIRIRA, the daily detained immigrant population in 1996 of 8,500 increased to 16,000 by 1998.³⁸ The government agency formerly in charge of immigration detention, INS, was split into multiple agencies after the September 11, 2001 terror attacks. These newly formed agencies, including ICE,³⁹ were also moved from the Department of Justice and into the Department of Homeland Security.⁴⁰ This departmental move frames immigration issues as national security concerns.⁴¹ Finally, under the Obama administration's second term, there was a resurgence of utilizing family immigration detention centers.⁴²

B. *Effects of Solitary Confinement*

Solitary confinement is defined as “the physical isolation of individuals who are confined to their cells for twenty-two to twenty-four hours a day.”⁴³ The term “segregation” can be used interchangeably.⁴⁴ The typical layout of a solitary

³² *Id.*

³³ *Immigration Detention 101*, *supra* note 6.

³⁴ *Id.*

³⁵ Gretchen Gavett, *Map: The U.S. Immigration Detention Boom*, FRONTLINE (Oct. 18, 2011), <https://www.pbs.org/wgbh/frontline/article/map-the-u-s-immigration-detention-boom/>.

³⁶ *Immigration Detention 101*, *supra* note 6.

³⁷ *Id.*

³⁸ *Immigration Detention Map & Statistics*, *supra* note 14.

³⁹ *Immigration Detention 101*, *supra* note 6.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ Juan Mendez (Special Rapporteur on Torture), *Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, U.N. Doc. A/63/175 (July 28, 2008).

⁴⁴ Elizabeth Vasiliades, *Solitary Confinement and International Human Rights: Why the U.S. Prison*

confinement cell is a six-by-eight-foot area that contains only a bed, sink, and toilet.⁴⁵

Solitary confinement can have negative psychological effects even on those without a history of mental illness.⁴⁶ Possible negative psychological effects include anxiety, depression, anger, cognitive disturbances, perceptual distortions, obsessive thoughts, paranoia, and psychosis.⁴⁷ These negative psychological effects can be worse for individuals suffering from mental illness. Symptoms of mental illness can be exacerbated by factors inherent to solitary confinement such as a lack of social interaction, stress, and inability to keep time of day.⁴⁸

There are multiple problematic outcomes for individuals with a mental illness in solitary confinement. These include: suicide, deterioration of sanity (which can result in emergency medical or psychiatric hospitalization), and persistence of the mental illness without improvement.⁴⁹ In prisons, suicide happens more often in solitary confinement than anywhere else in prison.⁵⁰ Some estimate that half of successful prison suicides take place in solitary confinement.⁵¹ Similarly, but also more than half of acts of self-harm take place in solitary confinement.⁵² Solitary confinement can have negative overall health effects beyond the psychological, including appetite and sleep disturbances, chronic tiredness, and withdrawal.⁵³ “The primary adverse factor of solitary confinement is the reduction of socially and psychologically meaningful contact is to the absolute minimum. Contact is reduced to a point that is insufficient for most detainees to remain mentally well-functioning.”⁵⁴

It does not take advanced psychological training to acknowledge the detrimental effects that solitary confinement can have upon people suffering

System Fails Global Standards, 21 AM. UNIV. INT'L L. REV. 71, 73 (2005).

⁴⁵ *Locked Up and Locked Down: Segregation of Inmates with Mental Illness*, AMPLIFYING VOICES OF INMATES WITH DISABILITIES PRISON PROJECT (2016), <http://avidprisonproject.org/assets/locked-up-and-locked-down---avid-prison-project.pdf>.

⁴⁶ Jeffrey L. Metzner & Jamie Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, 38 J. AM. ACAD. PSYCHIATRY L. 104 (2010).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Shruti Ravindran, *Twilight in the Box*, AEON (Feb. 27, 2014), <https://aeon.co/essays/this-is-what-solitary-confinement-does-to-the-brain>.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Mendez, *supra* note 43.

from mental illness.⁵⁵ Speaking on such detrimental effects, a federal judge, in one decision, equated placing a prisoner who was mentally ill in solitary confinement to “the mental equivalent of putting an asthmatic in a place with little air.”⁵⁶ Moreover, some recent neurological research suggests solitary confinement can detrimentally alter brain chemistry and structure.⁵⁷ The alterations can be irreversible.⁵⁸ Other research has suggests that solitary confinement can lead to a psychological state of Reduced Environmental Stimulation (RES).⁵⁹ This condition is caused by extensive periods of solitary confinement.⁶⁰ The main consequences of RES include “perpetual distortions, hallucinations, hyperresponsivity to external stimuli, aggressive fantasies, overt paranoia, inability to concentrate, and problems with impulse control.”⁶¹ Recognition of the detrimental psychological effects of solitary confinement is not a new discovery—these effects have been recorded by American medical journals for at least twenty years.⁶²

C. *Solitary Confinement in Immigration Detention Centers*

There is evidence of both private- and government-run immigration detention centers placing detainees who are mentally ill into solitary confinement, instead of providing adequate mental healthcare.⁶³ Stewart

⁵⁵ See, e.g. Sadhbh Walshe, *Why Do We Let 80,000 Americans Suffer a ‘Slow-Motion Torture of Burying Alive’?*, GUARDIAN (Mar. 20, 2014), <https://www.theguardian.com/commentisfree/2014/mar/20/solitary-confinement-psychological-effects-sarah-shourd> (“Solitary confinement’s psychological effects are obvious enough. But you have to hear it from the prisoners to be truly horrified.”); see also *Ruiz v. Johnson*, 154 F.Supp.2d 975, 984 (S.D. Tex. 2001) (“[Solitary confinement] units are virtual incubators of psychoses—seeding illness in those already healthy inmates and exacerbating illness in those already suffering from mental infirmities.”).

⁵⁶ Metzner & Fellner, *supra* note 46; *Madrid v. Gomez*, 889 F.Supp. 1146 (N.D. Cal. 1995).

⁵⁷ Maclyn Willigan, *What Solitary Confinement Does to the Human Brain*, SOLITARY WATCH, (Aug. 4, 2014) <http://solitarywatch.com/2014/08/04/what-solitary-confinement-does-to-the-human-brain/>.

⁵⁸ Ravindran, *supra* note 51.

⁵⁹ Vasiliades, *supra* note 44.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ Regarding government-run detention centers, see Ian Urbina & Catherine Rentz, *Immigrants Held in Solitary Cells, Often for Weeks*, N.Y. TIMES (March 23, 2013), <https://www.nytimes.com/2013/03/24/us/immigrants-held-in-solitary-cells-often-for-weeks.html> (“On any given day about 300 immigrants are held in solitary confinement at the 50 largest detention facilities that make up the sprawling patchwork of holding centers nationwide overseen by Immigration and Customs Enforcement officials, according to new federal data.”). Regarding private-run centers, specifically in Georgia, see Azadeh Shahshahani & Ayah Natasha El-Sergany, *Challenging the Practice of Solitary Confinement in Immigration Detention in Georgia and Beyond*, 16 CUNY L. REV. 243, 247 (2013) (“Notably, private corporations operate three out of the four immigration detention centers in Georgia.”). See also NAT’L IMMIGR. JUSTICE CTR. & PHYSICIANS FOR HUMAN RIGHTS, INVISIBLE IN ISOLATION: THE USE OF SEGREGATION AND SOLITARY CONFINEMENT IN IMMIGRATION DETENTION

Detention Center is a privately-run center in Lumpkin, Georgia.⁶⁴ Detainees at Stewart report that there is no access to mental health professionals.⁶⁵ Detainees also report that if an individual reports to a staff member of suffering from symptoms of a mental illness, like feeling depressed or suicidal ideation, the detainee is subsequently forced into solitary confinement.⁶⁶ This is the form of “treatment” detainees who are mentally ill are offered at Stewart.⁶⁷ Detainees also report being hesitant and fearful of even inquiring about mental health services in Stewart for fear that it will result in solitary confinement.⁶⁸

One detainee at Stewart stated: “[T]here is no mental health service. There is no therapy. They only put people in segregation when someone is ‘mentally ill.’”⁶⁹ The practice of placing detainees into solitary confinement not only directly harms individuals with a mental illness who are subjected to this treatment, but also creates a fearful, secretive environment regarding the disclosure of mental health needs.⁷⁰

Detainees report similar practices at Irwin Detention Center in Ocilla, Georgia. Unlike Stewart Detention Center, detainees at Irwin report that a mental health staff member is present within the facility.⁷¹ However, similar to detainees at Stewart, detainees at Irwin also express apprehension toward reporting mental health concerns to the staff for fear of being placed into solitary

(2012), [https://www.immigrantjustice.org/sites/immigrantjustice.org/files/Invisible in Isolation-The Use of Segregation and Solitary Confinement in Immigration Detention.pdf](https://www.immigrantjustice.org/sites/immigrantjustice.org/files/Invisible%20in%20Isolation-The%20Use%20of%20Segregation%20and%20Solitary%20Confinement%20in%20Immigration%20Detention.pdf).September 2012_7.pdf.

⁶⁴ Stewart Detention Center, CORECIVIC, <http://www.corecivic.com/facilities/stewart-detention-center> (last visited June 19, 2018).

⁶⁵ PROJECT SOUTH, *supra* note 4, at 34. *See also* Elly Yu, *Exclusive: An ICE Detention Center’s Struggle with ‘Chronic’ Staff Shortages*, NPR (May 31, 2018), <https://www.wabe.org/exclusive-an-ice-detention-centers-struggle-with-chronic-staff-shortages/> (“According to the [Department of Homeland Security Office of Inspector General], Stewart’s health services administrator noted ‘chronic shortages of almost all medical staff positions.’ As of February 2017, the facility had no psychiatrists and about one in four registered nurse positions were vacant. Stewart’s health administrator . . . also noted the lack of mental health treatment centers in the local area.”). This claim is disputed by ICE authorities. *But see* Christie Thompson, *Medical Care for Immigrant Detainees Appear to be ‘Broken’*, BUS. INSIDER (May 8, 2017), <http://www.businessinsider.com/immigrant-detention-centers-condition-2017-5?international=true&r=US&IR=T> (“‘ICE is committed to ensuring the welfare of all those in the agency’s custody, including providing access to necessary and appropriate medical care,’ said spokeswoman Jennifer Elzea, who added that all detainees had access to licensed mental health providers.”).

⁶⁶ PROJECT SOUTH, *supra* note 4, at 34

⁶⁷ PROJECT SOUTH, *supra* note 4, at 49 (“Additionally, detained immigrants stated that if an individual says that they are suicidal, the individual is strapped into a straitjacket and placed into solitary confinement.”).

⁶⁸ *Id.* at 36.

⁶⁹ *Id.* at 34.

⁷⁰ *Id.* at 36 (“[T]he vast majority of immigrants were unaware of mental health services or too afraid of being placed in segregation to approach the mental health care staff with concerns.”).

⁷¹ *Id.* at 49 (“While there is a mental health staff member employed at Irwin, detained immigrants report being afraid to voice mental health concerns for fear of being forced into the segregation unit.”).

confinement.⁷² Detainees at Irwin also report that if a detainee reports to the staff of suicidal thoughts, that detainee will be not only placed into solitary confinement but also “strapped into a straitjacket.”⁷³

II. INTERNATIONAL LAW PROHIBITING TORTURE AND CRUEL, INHUMAN, OR DEGRADING TREATMENT

Multiple sources of international law provide prohibitions against torture and cruel, inhuman, or degrading treatment, including: the Universal Declaration of Human Rights,⁷⁴ the American Convention on Human Rights,⁷⁵ the Convention Against Torture,⁷⁶ and the International Covenant on Civil and Political Rights.⁷⁷ The prohibition against torture and other acts of cruel, inhuman, or degrading treatment is now such a cornerstone of understanding between nations that it is considered customary international law. Customary international law is law arising from the general practice of states and consistent practice arising from a sense of legal obligation.⁷⁸

Customary international law is generally binding on all states, unless a state has consistently objected to the custom.⁷⁹ U.S. Federal Courts have even recognized prohibitions against torture as customary international law.⁸⁰ Similar to customary international law, prohibitions against torture and cruel, inhuman, or degrading punishment is also recognized as *jus cogens*: morals and values from which states may not derogate.⁸¹

Published in 1948, the Universal Declaration of Human Rights Article 5 states: “No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment.”⁸² This same provision is echoed in the International Covenant on Civil and Political Rights.⁸³ In 1969, the American Convention on

⁷² *Id.*

⁷³ *Id.*

⁷⁴ G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

⁷⁵ Inter-American Commission on Human Rights, art. 5.

⁷⁶ G.A. Res. 39/46, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Dec. 10, 1984) [hereinafter CAT].

⁷⁷ International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966) U.N.T.S. 171, entered into force Mar. 23, 1976.

⁷⁸ David Weissbrodt, *Defining Torture and Cruel, Inhuman, and Degrading Treatment*, 29 L. & INEQ. 343, 361.

⁷⁹ *Id.*

⁸⁰ *Id.* at 362.

⁸¹ *Id.*

⁸² UDHR, *supra* note 74.

⁸³ International Covenant on Civil and Political Rights, *supra* note 77.

Human Rights, in Article 5, provides that: “No one shall be subjected to torture or to cruel, inhuman, or degrading treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.”⁸⁴ An interesting addition to this prohibition resides in the second part of Article 5: “All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.”⁸⁵ This addition connects the prohibition against torture and cruel, inhuman, or degrading treatment to protect an individual’s inherent dignity. An individual’s dignity cannot be respected if they are subjected to torture or cruel, inhuman, or degrading treatment.

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment (CAT) also adds interesting conditions to the existing and evolving body of work regarding prohibitions against these types of actions, including Articles 1, 2, and 10.⁸⁶ Article 1 defines torture for the purposes of the treaty.⁸⁷ Article 2 states that the prohibitions and the obligations of states under the CAT may not be derogated for purposes of exceptional circumstances such as political instability, threat of war, or public emergency.⁸⁸ Article 10 stipulates that:

Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.⁸⁹

Juan Mendez, the U.N. Special Rapporteur on Torture, has stated that the practice of placing individuals with mental illnesses in solitary confinement constitutes torture.⁹⁰ However, many provisions within international treaties and conventions are general prohibitions that do not define what constitutes torture or cruel, inhuman, or degrading treatment. Therefore, it is pertinent to look at how international courts have defined what constitutes these forms of mistreatment.

For the purposes of this Comment, it is necessary to distinguish between what the international community considers torture and what the international

⁸⁴ Inter-American Commission on Human Rights, art. 5.

⁸⁵ *Id.*

⁸⁶ CAT, *supra* note 76.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Mendez, *supra* note 43.

community considers opposed to cruel, inhuman, or degrading treatment. First, the definition and interpretation of torture will be discussed, followed by a similar discussion of what constitutes cruel, inhuman, or degrading treatment.

What constitutes as torture is different from other forms of mistreatment, specifically cruel, inhuman, or degrading treatment. This is because torture requires a factual inquiry into the perpetrator's specific intent, while the other forms of mistreatment do not.⁹¹ Article 1(1) of the CAT defines torture:

[T]he term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.⁹²

One exceedingly difficult obstacle in articulating a clear definition of the treatment that constitutes torture is that many international bodies, including the ECtHR, have hesitated to designate rigid standards for what treatment would meet this specific definition.⁹³ International bodies instead prefer to keep the definition of torture adaptable so it may include the different forms that torture takes around the world and throughout history.⁹⁴ This flexibility is at times advantageous because it allows some treatments to constitute torture that may not otherwise be analyzed under a strict definition.⁹⁵ In addition, this flexibility is needed as the European Convention on Human Rights (ECHR) mandates that treatment be considered under present-day conditions,⁹⁶ thus creating the expectation that the definition of torture is a "living instrument."⁹⁷ Keeping the

⁹¹ *Torture*, INT'L JUSTICE RES. CTR., <http://www.ijrcenter.org/thematic-research-guides/torture/> (last visited November 28, 2018).

⁹² CAT, *supra* note 76.

⁹³ Amy Strand, *Case Watch: Defining "Degrading Treatment" at the European Court of Human Rights*, OPEN SOC'Y FOUNDS.: VOICES (May 5, 2015), <https://www.opensocietyfoundations.org/voices/case-watch-defining-degrading-treatment-european-court-human-rights>.

⁹⁴ *Id.*

⁹⁵ *Interpretation of Torture in the Light of the Practice and Jurisprudence of International Bodies*, OFFICE OF THE U.N. HIGH COMM'R FOR HUM. RTS., http://www.ohchr.org/Documents/Issues/Torture/UNVFVT/Interpretation_torture_2011_EN.pdf (last visited Jan. 9, 2017) [hereinafter OHCHR].

⁹⁶ *Id.*

⁹⁷ *Id.* at 8.

definition a “living instrument” has allowed international bodies to define certain present-day actions as constituting torture that historically were not considered as such.⁹⁸

As a result, there is no single definition of what treatment constitutes torture,⁹⁹ instead, the CAT outlines a definition that relies on five criteria. The ECHR recognizes that certain thresholds exist to designate what treatment meets the definition.¹⁰⁰ It is also more helpful to think of torture not as a specific act or type of acts, but rather as “the legal qualification of an event or behavior, based on the *comprehensive assessment* of this event or behavior.”¹⁰¹

Article 1(1)’s definition includes five major criteria: (1) either physical or mental severe pain or suffering, (2) intentionally inflicted, (3) for prohibited purposes, (4) by a public official or person acting in official capacity, and (5) that the pain and suffering does not arise from lawful sanctions.¹⁰² Nonetheless, even the number of elements making up the definition are disputed. Different sources argue between three, four, and five different requirements of the definition.¹⁰³ For comprehensiveness, this Comment discusses the five-requirement view of the definition.

Article 1(1) of the CAT states the pain or suffering must be “severe”.¹⁰⁴ The ECHR has also specified that the severe pain and suffering must be “serious” and identifiable by “the special stigma attached to the crime.”¹⁰⁵ The severity of pain is a large factor in determining whether treatment constitutes torture, but the ECHR has also given weight to the arbitrariness of the violence.¹⁰⁶ Another factor to be weighed in meeting the severity requirement is whether the individual was held in control by the state.¹⁰⁷ Treatment while an individual is under control by the state—for example, during detention—is evaluated under a

⁹⁸ *Id.* (“The Court has previously examined cases in which it concluded that there had been treatment which could only be described as torture. However, having regard to the fact that the Convention is a ‘living instrument which must be interpreted in the light of present-day conditions,’ the Court considers that certain acts which were classified in the past as ‘inhuman and degrading treatment’ as opposed to ‘torture’ could be classified differently in future.”).

⁹⁹ *Id.*

¹⁰⁰ Strand, *supra* note 93.

¹⁰¹ OHCHR, *supra* note 95, at 2 (emphasis added).

¹⁰² CAT, *supra* note 75; Christina Kosin, *The Difference between Torture and Other Ill-Treatment: Cestaro v. Italy and the “Prohibited Purpose” Requirement*, EU L. ANALYSIS BLOG (Apr. 14, 2015) <http://eulawanalysis.blogspot.com/2015/04/the-difference-between-torture-and.html>.

¹⁰³ *Id.*

¹⁰⁴ CAT, *supra* note 76.

¹⁰⁵ Kosin, *supra* note 102.

¹⁰⁶ Romanov v. Russia, Eur. Ct. H.R. 115 (2009); Kosin, *supra* note 102.

¹⁰⁷ Strand, *supra* note 93.

strict threshold due to the factor's ability to compound with other factors when analyzing if an act's severity constitutes torture.¹⁰⁸ Evaluating the severity requirement is a fact-specific inquiry, which must reach a minimum level of severity.¹⁰⁹ The victim's vulnerability should be considered, including the victim's age, gender, status, and other relevant factors.¹¹⁰ Other relevant factors to be considered include the duration, mental effects, and physical effects of the treatment.¹¹¹ An individual's environment during the treatment and cumulative effect of all relevant factors should also be considered.¹¹² Physical or mental pain or suffering may be considered when assessing the severity of the treatment.¹¹³ Threat of torture and mock executions have both met the mental pain severity threshold.¹¹⁴ Also, the definition includes both acts and omissions that inflict the necessary threshold of pain or suffering.¹¹⁵ The ECtHR first decided in the *Greek Case* that an omission of a certain action could qualify as torture—in that case, the withholding of food.¹¹⁶ To determine if solitary confinement is severe enough to constitute torture, the factual situation should be examined.¹¹⁷ More specifically, regarding solitary confinement, the former European Commission of Human Rights stated that the confinement's conditions, stringency, duration, reasons, and effect on the individual should be evaluated to determine if it reached the severity level required to constitute torture.¹¹⁸

The second requirement accepted both by Article 1(1) of the CAT and the jurisprudence of the ECtHR is that the treatment must be intentional or deliberate.¹¹⁹ Negligence has been insufficient to meet this requirement, whereas recklessness can potentially pass.¹²⁰

The third requirement defined in Article 1(1) of the CAT is the “prohibited

¹⁰⁸ *Id.*

¹⁰⁹ OHCHR, *supra* note 95.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*; The Greek Case, App. No. 3321-23,44/67, Eur. Comm'n H.R. (1968).

¹¹⁷ OHCHR, *supra* note 95.

¹¹⁸ *Id.* (“It has stated that prolonged solitary confinement is undesirable, especially where the person is detained on remand. However, in assessing whether such a measure may fall within the ambit of Article 3 of the Convention in a given case, regard must be had to the particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned.”) (quoting Esslin, Baader and Raspe v. Germany, Communication 7572/76, 7586/76 & 7587/76, Eur. Ct. H.R. (July 8, 1978)).

¹¹⁹ CAT, *supra* note 76; Kosin, *supra* note 102.

¹²⁰ OHCHR, *supra* note 95.

purpose” requirement.¹²¹ Torture must be for prohibited purposes, including procural of information, confession, punishment, intimidation, coercion, or discrimination.¹²² This list of prohibited purposes is not exhaustive, but indicative.¹²³ An interesting addition to this requirement is that the ECtHR has never classified as torture treatment that lacked this prohibited purpose requirement; therefore, some argue this element is the line drawn between treatment constituting torture and treatment constituting cruel, inhuman, or degrading treatment.¹²⁴ Others argue the prohibited purpose is not the only criteria for distinguishing between torture and other forms of ill-treatment.¹²⁵

The fourth requirement of Article 1(1) of the CAT is that the treatment must be done by a public official or a person acting in official capacity.¹²⁶ Treatment perpetuated by a public official is straightforward,¹²⁷ and actions carried out by a person acting in official capacity are slightly more open to interpretation based on time and place.¹²⁸

Finally, the fifth requirement of CAT’s Article 1(1) is that the severe pain and suffering does not arise from lawful sanctions.¹²⁹

One element that is not required for an act to constitute torture is the presence of physical violence.¹³⁰ The ECtHR has established that certain psychological harm is sufficient to satisfy the severe pain or suffering requirement of torture.¹³¹ The Inter-American Court on Human Rights has held similarly, stating, “torture can be inflicted not only via physical violence, but also through acts that produce severe physical, psychological or moral suffering in the victim.”¹³²

Multiple cases from the ECtHR establish a framework of acts that constitute torture. Article 3 of the ECHR states: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”¹³³ The court has addressed

¹²¹ CAT, *supra* note 75.

¹²² *Id.*

¹²³ OHCHR, *supra* note 95.

¹²⁴ Kosin, *supra* note 102.

¹²⁵ *Id.*

¹²⁶ CAT, *supra* note 76.

¹²⁷ OHCHR, *supra* note 95.

¹²⁸ *Id.*

¹²⁹ CAT, *supra* note 76.

¹³⁰ *Torture*, *supra* note 91.

¹³¹ *Id.*

¹³² Cantoral-Benavides v. Peru, Merits, Inter-Am. Ct. H.R. (ser. C) No. 69 §100 (Aug. 18, 2000).

¹³³ Council of Europe, European Convention on Human Rights, as amended by Protocols Nos. 11 and 14, Nov. 4, 1950, ETS 5, Art. 3, (“In particular, the assessment of whether the particular conditions of detention are incompatible with the standards of Article 3 has, in the case of mentally ill persons, to take into consideration

various issues of whether mental or psychological suffering was sufficient to violate Article 3's prohibition and, more specifically, whether certain forms of treatment regarding prisoners with suicidal tendencies would violate Article 3.¹³⁴

In *Dybeku v. Albania*, the court found there was a violation of Article 3, which was compounded because the applicant suffered from schizophrenia and this psychological condition made him more vulnerable than the average detainee.¹³⁵ This is an important concept, illustrating that what may not be deemed torture or cruel, inhuman, or degrading treatment for a "regular" detainee may be considered torture if a vulnerability exacerbates the conditions. In *Dybeku v. Albania*, the detention condition exacerbated the applicant's feelings of anguish, fear, and distress.¹³⁶ These are similar emotions to what many detainees suffering from a mental illness experience while in solitary confinement.¹³⁷ In *M.S. v. the United Kingdom*, the court found a violation of Article 3 because the length of the applicant's detention, without appropriate psychological treatment, had "diminished excessively his fundamental human dignity."¹³⁸ Again, this directly applies to detained immigrants in the United States who are not only not being provided proper mental health care, but are "treated" with a response such as solitary confinement instead.

Also, ECtHR has directly explored instances of prisoners with suicidal tendencies and the issue of whether certain treatment of these vulnerable individuals violated Article 3. In *Renolde v. France*, the applicant's brother was suffering from psychosis disorders that could result in self-harm; he was placed in a discipline cell for forty-five days and committed suicide.¹³⁹ The court held there was a violation of Article 3, and cruel, inhuman, or degrading treatment, because the form of disciplinary action used against the applicant's brother was "liable to break his physical and moral resistance."¹⁴⁰ The court went further by saying these actions constituted a violation of Article 3 and were not compatible with the standard of treatment required in respect of a mentally ill person."¹⁴¹ In

their vulnerability and their inability, in some cases, to complain coherently or at all about how they are being affected by any particular treatment . . .").

¹³⁴ *Id.*

¹³⁵ *Dybeku v. Albania*, 4 Eur. Ct. H.R. (2007).

¹³⁶ *Id.*

¹³⁷ *Immigration Detention 101*, *supra* note 6.

¹³⁸ *M.S. v. the United Kingdom*, 4 Eur. Ct. H.R. §44 (2012).

¹³⁹ European Court of Human Rights, *Factsheet-Detention and mental health*, 10 (July 2017) (citing *Renolde v. France*, 5 Eur. Ct. H.R. (2008)) [hereinafter *ECHR Factsheet*].

¹⁴⁰ *MS v. United Kingdom*, 8 Eur. Ct. H.R. (2012).

¹⁴¹ *ECHR Factsheet*, *supra* note 139, at 11 (citing *Renolde v. France*, 5 Eur. Ct. H.R. (2008)).

Ketreb v. France, where a drug addict committed suicide in a prison disciplinary cell,¹⁴² the court again held a violation of Article 3. The court found that such treatment “was not compatible with the level of treatment required in respect of such a mentally disturbed person.”¹⁴³ In sum, the European Court of Human Rights has shown that solitary confinement can violate Article 3 under certain factual circumstances.¹⁴⁴

However, the ECtHR has drawn some boundaries on what constitutes a violation of Article 3 and what treatment is considered to be cruel, inhuman, or degrading treatment. In *Novak v. Croatia*, the applicant complained that while he was in detention there had been a lack of proper medical care for his psychological condition of post-traumatic stress disorder.¹⁴⁵ The court held there had been no violation of Article 3, because the applicant had not provided any documentation to prove a connection between a lack of adequate medical care and the worsening of his disorder.¹⁴⁶ Therefore this incident did not rise to the level of cruel, inhuman, or degrading treatment.

Another case in which the ECtHR did not find a violation of Article 3 was in *Cocaign v. France*.¹⁴⁷ In this case, the applicant was imprisoned and suffered from severe psychological problems. While imprisoned, the applicant killed another inmate, and after an investigation was placed in a disciplinary cell for forty-five days.¹⁴⁸ The applicant claimed his confinement in the disciplinary cell constituted cruel, inhuman, or degrading treatment and a violation of Article 3. While detained in the disciplinary cell, the applicant still received adequate medical supervision.¹⁴⁹ The court held that the detainment did not constitute cruel, inhuman, or degrading treatment and that there was no violation of Article 3; from the facts it could not be found that the applicant’s mental illness coupled with time in the disciplinary cell constituted cruel, inhuman, or degrading treatment.¹⁵⁰ *Cocaign v. France* illustrates the fact-specific inquiry that must take place to determine what treatment reaches the threshold of cruel, inhuman, or degrading treatment.¹⁵¹

¹⁴² *Id.* (citing *Ketreb v. France*, 9 Eur. Ct. H.R. (2012)).

¹⁴³ *Id.*

¹⁴⁴ Manfred Nowak, *Torture and other cruel, inhuman or degrading treatment or punishment*, U.N. Doc. A/63/175 (July 28, 2008).

¹⁴⁵ *Novak v. Croatia*, 4 Eur. Ct. H.R. (2007).

¹⁴⁶ *Id.*

¹⁴⁷ *ECHR Factsheet*, *supra* note 139, at 4 (citing *Cocaign v. France*, 7 Eur. Ct. H.R. (2011)).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *ECHR Factsheet*, *supra* note 139, at 4 (citing *Cocaign v. France*, 7 Eur. Ct. H.R. (2011)).

The fact specific considerations and limitations to violations of Article 3 illustrated by *Novak v. Croatia* and *Cocaign v. France* are important to consider when determining whether the current U.S. practice of placing detained immigrants who are mentally ill in solitary confinement violates international law regarding torture and cruel, inhuman, or degrading treatment.¹⁵² As *Cocaign v. France* illustrates, the simple presence of a mentally ill applicant in a disciplinary confinement cell does not necessarily constitute cruel, inhuman, or degrading treatment.¹⁵³ Also, a crucial detail to note from *Cocaign v. France* is that the applicant *was* receiving proper medical supervision while in this more limiting confinement. This can easily be distinguished from the situation with detained immigrants in the United States.

First, in *Cocaign v. France*, the applicant was a prisoner who received disciplinary actions due to committing a violent act while in the general prison population, and then while being detained in a disciplinary cell still received proper medical supervision.¹⁵⁴ However, detained immigrants in the United States are being civilly detained, which should not act as a form of punishment, and are placed into solitary confinement as a form of “treatment” primarily because there are no resources to proper medical care—especially no medical supervision while detainees are in solitary confinement. In fact, the guards of the facility sometimes fail to properly supervise suicide-watch detainees placed in solitary confinement.¹⁵⁵ At the Stewart Detention Center in May 2017, guards failed to properly supervise a detainee placed on suicide-watch in solitary confinement; the protocol is to check on the detainee every thirty minutes on an irregular schedule.¹⁵⁶ However, the guards at Stewart failed to do this, which resulted in the detainee’s suicide.¹⁵⁷ Afterwards, allegations were made that the guards even falsified records of supervising detainees, mirroring the protocol of observing an isolated detainee every thirty-minute protocol.¹⁵⁸

This practice in the United States also differs from that illustrated by *Novak v. Croatia*.¹⁵⁹ The court in *Novak v. Croatia* held there was no cruel, inhuman, or degrading treatment because the applicant had not provided any documentation that his psychological condition—post-traumatic stress

¹⁵² *Novak v. Croatia*, 4 Eur. Ct. H.R. (2007); *ECHR Factsheet*, *supra* note 138, at 4 (citing *Cocaign v. France*, 7 Eur. Ct. H.R. (2011)).

¹⁵³ *ECHR Factsheet*, *supra* note 139, at 4 (citing *Cocaign v. France*, 7 Eur. Ct. H.R. (2011)).

¹⁵⁴ *Id.*

¹⁵⁵ *See Redmon*, *supra* note 1.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Novak v. Croatia*, 4 Eur. Ct. H.R. (2007).

disorder—had worsened due to the treatment inflicted upon him.¹⁶⁰ *Novak v. Croatia* illustrates that to meet the threshold of cruel, inhuman, or degrading treatment due to mental or psychological suffering with regard to an individual with a mental illness, there must be some showing that the treatment caused a worsening of their mental illness.¹⁶¹ In regards to the showing that placing detained immigrants who are mentally ill into solitary confinement, this threshold element must be evaluated on a case-by-case basis.

“Cruel, inhuman, or degrading treatment, as compared to torture, involves a lower level of suffering and need not be inflicted for a specific purpose.”¹⁶² Cruel, inhuman, or degrading treatment, unlike torture, does not require proving an actor’s intent.¹⁶³ However, the act must still reach a “minimum level of severity.”¹⁶⁴ The Human Rights Committee held that for treatment to be degrading, “the humiliation or debasement involved must exceed a particular level and must, in any event, entail other elements beyond the mere fact of deprivation of liberty.”¹⁶⁵ The Human Rights Committee also held that when determining the severity of the treatment, the court should consider all facts of the case at hand, including a large array of factors such as: duration of the treatment, characteristics of the victim (sex, age, and their beginning state of health), and the mental and psychological effects of the treatment.¹⁶⁶ Specifically in the context of solitary confinement, the former European Commission of Human Rights held that complete social and sensory isolation constituted a form of inhuman treatment, because it “destroy[ed] the personality.”¹⁶⁷

Placing immigrant detainees who are mentally ill in solitary confinement fulfills the five requirements for an act to constitute torture. This treatment (1) causes severe mental pain or suffering, it is (2) intentionally inflicted, (3) for prohibited purposes, (4) by a public official, and (5) the pain and suffering does not arise from lawful sanctions.

First, placing immigrant detainees who are mentally ill into solitary confinement surpasses the severity threshold for an act to be considered torture. International bodies, when evaluating for the severity of mistreatment, take into

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Torture, supra* note 91.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ OHCHR, *supra* note 95 (citing *Messina vs. Italy* (No 2), 94 Eur. Ct. H.R., §191 (2000)).

consideration a myriad of factors including: vulnerability of the victim, duration of the mistreatment, and mental effects of the treatment upon the individual.¹⁶⁸ Additionally, when an individual is under control by the state, in this case civil detention, the treatment is evaluated under a “strict” threshold.¹⁶⁹ Under this strict threshold, placing immigrant detainees who are mentally ill into solitary confinement meets the threshold of severe mental pain or suffering. Solitary confinement causes mental anguish in individuals who are not suffering from a mental illness. Therefore, this mistreatment coupled with the vulnerability of already suffering from a mental illness and having the compounding factor of being under state control easily meets the severity threshold required to constitute torture. Another argument for this position is that the ECtHR held in the *Greek* case that withholding food met the severity threshold; just like in the *Greek* case this treatment of mentally ill detainees withholds a basic necessity: medical treatment.¹⁷⁰

Second, this form of mistreatment is intentionally inflicted. Staff at detention centers, upon learning of a detained immigrant’s history, symptoms, or other factors pertaining to suffering from a mental illness, place these individuals into solitary confinement as a form of “treatment.” These actions are clearly intentionally inflicted.

Third, this mistreatment also meets the “prohibited purpose” requirement. To constitute torture, the “prohibited purpose” requirement includes: obtaining information or a confession, punishment, intimidation, coercion, or discrimination.¹⁷¹ Solitary confinement could serve for the purposes of both punishment and/or discrimination. Punishing detained immigrants who are mentally ill—especially the detained immigrants who are inflicting self-harm or are suicidal—because they do not follow the rules of the detention facility breaks obvious safety rules that the staff at detention centers are tasked with enforcing. Another argument is that this form of mistreatment is a form of discrimination against those with mental illnesses.

Fourth, a public official—or a person acting in official capacity—places detained mentally-ill immigrants in solitary confinement, thereby meeting the fourth requirement. This fourth requirement is met in all three types of immigration detention facilities: CDFs, SPCs, and IGSAs. In CDFs this mistreatment is committed by a person acting in official capacity; the staff

¹⁶⁸ *Id.*

¹⁶⁹ Strand, *supra* note 93.

¹⁷⁰ The Greek Case, App. No. 3321-23,44/67, Eur. Comm’n H.R. (1968).

¹⁷¹ CAT, *supra* note 76.

carrying out these actions are staff members of private prison companies who are directly contracted by ICE. However, in SPCs and IGSA's, this form of mistreatment is committed by public officials; in the case of SPCs, federal ICE agents, and with IGSA's it is local government members such as police officers.

Finally, the last requirement for a form of mistreatment to constitute torture is that the pain and suffering not arise from lawful sanctions.¹⁷² The pain and suffering arising from placing detained immigrants who are mentally ill into solitary confinement does not arise from lawful sanction. These individuals are being *civilly* detained.¹⁷³ The purpose of civil detention is “not to be punished or ‘incapacitated’ for any criminal offense.”¹⁷⁴ More specifically, the purpose of civil immigration detention is meant to guarantee that the detained individual will attend his or her immigration hearing and comply with other immigration orders.¹⁷⁵ This form of detention does not, and is not supposed to, impose “lawful sanctions” upon an individual. Since the pain and suffering inflicted upon these individuals does not arise from lawful sanctions, it meets the final requirement. Accordingly, placing detained immigrants who are mentally ill into solitary confinement meets the five internationally prescribed requirements constituting torture.

This form of treatment also constitutes cruel, inhuman, or degrading treatment. Cruel, inhuman, or degrading treatment requires a lower threshold of pain and suffering.¹⁷⁶ This form of mistreatment easily meets the higher pain and suffering threshold to constitute torture, and therefore would logically satisfy this lower standard. The Human Rights Committee held that for treatment to be cruel, inhuman, or degrading the treatment could not simply be a deprivation of liberty.¹⁷⁷ This form of mistreatment also involves more than just a mere deprivation of an individual's liberty; solitary confinement, especially for those suffering from a mental illness, has extremely serious mental and physical effects. The former European Commission of Human Rights held that solitary confinement could constitute cruel, inhuman, or degrading treatment, because it “can destroy the personality.”¹⁷⁸ The detrimental effects of solitary confinement compounded with symptoms experienced by someone who is

¹⁷² *Id.*

¹⁷³ Fernández, *supra* note 9.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ OHCHR, *supra* note 95 (citing European Court of Human Rights, *Messina vs. Italy*, Communication 25498/94, 28 Dec. 2000, par. 191).

mentally ill easily raises to this likelihood of destroying an individual's personality. Placing detained immigrants who are mentally ill into solitary confinement qualifies as cruel, inhuman, or degrading treatment.

III. U.S. DOMESTIC LAW REGARDING TORTURE

A. *U.S. Limitations on the Definition of Torture and Cruel, Inhuman, or Degrading Treatment*

The United States ratified the CAT in 1990.¹⁷⁹ However, signature and ratification were conducted with crucial U.S. reservations, understandings, and declarations (RUDs).¹⁸⁰ These reservations not only substantively affect the CAT by limiting its scope, but also procedurally affect it by limiting its usefulness in court.¹⁸¹

First, the United States limited the CAT substantively by ratifying it with reservations that limits the force in which the treaty can be domestically enforced. Primarily, the United States limited Article 16 of the CAT by stating that cruel, inhuman, or degrading punishment is defined by the Fifth, Eighth, and Fourteenth Amendments. American jurisprudence regarding these amendments is much narrower than the definition provided in the CAT, resulting in a substantially restricted CAT.

For example, Eighth Amendment jurisprudence requires further legal hurdles such as passing a two-part test.¹⁸² The Eighth Amendment further limits this definition because it protects against “cruel and unusual punishment” therefore prohibiting punishment that it is “cruel *and* unusual,” whereas the international definition includes “cruel, inhuman, *or* degrading punishment.”¹⁸³

Second, the United States procedurally limited the CAT by declaring the treaty as “non-self-executing.”¹⁸⁴ Without legislation, a non-self-executing treaty cannot be depended on by a litigant to enforce rights in a U.S. court. With

¹⁷⁹ Vasiliades, *supra* note 44.

¹⁸⁰ CAT, *supra* note 76 (“That the United States considers itself bound by the obligation under Article 16 to prevent ‘cruel, inhuman, or degrading treatment or punishment,’ only insofar as the term ‘cruel, inhuman, or degrading treatment or punishment’ means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.”).

¹⁸¹ *Ill-Equipped: U.S. Prisons and Offenders with Mental Illness*, HUMAN RIGHTS WATCH 1 (2003) 208, <https://www.hrw.org/sites/default/files/reports/usa1003.pdf>.

¹⁸² TOM JAWETZ, LITIGATING IMMIGRATION DETENTION CONDITIONS, (July 18, 2008), https://law.ucdavis.edu/alumni/alumni-events/files/mcle-files/jawetz_detention_conditions.pdf.

¹⁸³ Vasiliades, *supra* note 44.

¹⁸⁴ *Ill-Equipped: U.S. Prisons and Offenders with Mental Illness*, *supra* note 179.

regards to the CAT, no such enabling legislation has been enacted; U.S. litigants therefore cannot depend upon the CAT to enforce rights in a U.S. court.¹⁸⁵ Despite these substantive and procedural limitations, “international treaties are part of the supreme law of the land,”¹⁸⁶ thereby obligating the President of the United States to execute international treaties faithfully.¹⁸⁷

Other U.S. domestic laws also limit the definition of cruel, inhuman, and degrading treatment. 18 U.S.C. § 2340A defines torture as “acts specifically intended to inflict severe physical or mental pain or suffering.”¹⁸⁸ A major limitation—and fatal for the use of those detained or even imprisoned within the United States—is that this statute only applies to acts of torture committed outside the United States.¹⁸⁹ Civilly-detained immigrants will find no use or solace with this statute to fight against conditions in immigration detention centers, specifically with respect to the practice of placing mentally-ill detainees into solitary confinement.

B. Possible Options for Litigants in U.S. Domestic Law

One U.S. statute is uniquely helpful to civilly-detained immigrants: the Alien Tort Statute, which allows non-U.S. citizens to sue for torts violating international law in U.S. federal courts.¹⁹⁰ Specifically, the statute grants jurisdiction for “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”¹⁹¹ The Alien Tort Statute was originally ratified by Congress in 1789, however it has recently been revitalized by the courts.¹⁹² Recent decisions have determined the Alien Tort Statute “provides a vehicle for them to adjudicate substantive rights that are universally accepted by international law.”¹⁹³

Successful cases utilize the Alien Tort Statute involving claims implicating

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ 18 U.S.C. § 2340A.

¹⁸⁹ *Torture (18 U.S.C. 2340A)*, OFF. U.S. ATT’YS, <https://www.justice.gov/usam/criminal-resource-manual-20-torture-18-usc-2340a> (last visited November 28, 2018).

¹⁹⁰ *The Alien Tort Statute*, CENTER JUSTICE & ACCOUNTABILITY, <http://cja.org/what-we-do/litigation/legal-strategy/the-alien-tort-statute/> (last visit July 23, 2018).

¹⁹¹ 28 U.S.C. § 1350.

¹⁹² Michael Littenberg, Nicholas Berg, David Rojas & Grant Hodges, *Alien Tort Statute Returns to Supreme Court*, LAW 360 (Apr. 13, 2017), <https://www.law360.com/articles/912925/alien-tort-statute-returns-to-supreme-court>.

¹⁹³ *Id.*

international humanitarian law and also violations of international norms.¹⁹⁴ Under the Alien Tort Statute, non-U.S. citizens would be able to bring suit for a range of violations including torture and cruel, inhuman, or degrading treatment.¹⁹⁵ Non-U.S. citizens would also be able to sue U.S. government officials; however, litigants in the past have not achieved much success in that particular aspect.¹⁹⁶ Many Alien Tort Statute claims against U.S. officials have been rejected because of the political question doctrine, grounds of sovereign immunity, and the states-secret privilege.¹⁹⁷ However, circumstances relating to the United States' "war on terror" are arguably much different than civil-immigration detention and solitary confinement for the mentally ill.

Civily detained immigrants are uniquely positioned to use this statute to sue for violations because of their citizenships and can sue the U.S. government and government officials—primarily ICE agents. While the management of immigration detention varies from being run by the U.S. government, to private corporations such as CoreCivic, ICE is the government agency in charge of immigration detention. Stipulated under this statute, the defendant must be a government official, member of the security forces (military, police, etc.), or an individual working with or on the behalf of such individuals.¹⁹⁸ This still allows the statute to be useful for the purpose of illustrating that the United States is violating international law by placing immigration detainees who are mentally ill into solitary confinement.

Another U.S. statute of use to this particular "treatment" of detained immigrants is the Detainee Treatment Act of 2005, particularly in §1003.¹⁹⁹ The Detainee Treatment Act of 2005 §1003 states: "No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment."²⁰⁰ This is applicable to detained immigrants because they are "under the physical control" of the U.S. government, and the Detainee Treatment Act of 2005 applies "regardless of nationality or physical location."²⁰¹

¹⁹⁴ *Id.*

¹⁹⁵ *The Alien Tort Statute, supra* note 190.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ 42 U.S.C. § 2000 (2005).

²⁰⁰ *Id.*

²⁰¹ *Id.*

However, the United States' reservations to the CAT hampers a potential litigant's ability to utilize this statute: "In this section, the term 'cruel, inhuman, or degrading treatment or punishment' means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments."²⁰² Therefore, for potential litigants who desire to use this statute to sue for the practice of placing immigrant detainees who are mentally ill into solitary confinement would have to show how this practice constitutes cruel and unusual punishment as defined by Eighth Amendment jurisprudence.

CONCLUSION

Placing immigrant detainees into solitary confinement has serious, tragic consequences. As the number of immigrants being detained within the United States continues to dramatically rise, this mistreatment is a reality many migrants will have to suffer. Solitary confinement causes life-altering physical and mental consequences to those who do not have a history of mental illness; individuals who are mentally ill are therefore at an even greater risk of experiencing disastrous effects from solitary confinement. Additionally, immigrants are civilly detained which means this form of detention should not be a form of punishment. Yet, this type of mistreatment is obviously a punishment, inflicting both psychological and physical pain upon the recipients. International bodies have been hesitant to administer a single definition of what constitutes torture. However, this form of mistreatment satisfies the internationally-defined five criteria required for establishing what is torture. Placing detained immigrants who are mentally ill into solitary confinement is torture. This mistreatment can also be described as cruel, inhuman, or degrading treatment. The United States has severely limited the interpretation of international treaties regarding torture and cruel, inhuman, or degrading treatment; thus, it has made such treaties practically useless in U.S. courts for individuals who have suffered from such mistreatment. There may be some limited options available for such individuals in U.S. courts, but the United States still has a long journey to achieve the prohibition of this practice within its borders and the granting of justice to these victims.

ERIKA VOREH*

²⁰² *Id.*

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