

Torture in US Jails and Prisons: An Analysis of Solitary Confinement Under International Law

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Abstract: One of the most serious human rights violations today is occurring throughout the US. In US jails and prisons, individuals are held in solitary confinement for weeks, months and even years. Solitary confinement can cause significant psychological damage, including cognitive delays, increased suspicion and paranoia, increased anxiety, fear, aggression and hostility, heightened feelings of helplessness and depression, and increased thoughts and attempts at self-mutilation and suicide. Many prisoners held in this severe form of isolation are juveniles or individuals with serious mental illness, to whom it is particularly damaging. Although solitary confinement is common in the rest of the world, nowhere is it more prevalent as a long-term prisoner management tool than in the United States. US courts have found that solitary confinement is a violation of the Eighth Amendment to the US Constitution in certain situations, yet the practice persists.

As a global movement against solitary confinement grows, the United Nations and regional human rights tribunals have spoken out against the practice. A robust body of international case law has defined the contours of when solitary confinement is cruel, inhuman or degrading treatment, and the instances in which it is torture. International bodies prohibit solitary confinement for juveniles, prisoners with mental illness, and prisoners on death row or with life sentences. International tribunals generally find solitary confinement for all prisoners contrary to applicable law where it constitutes incommunicado detention, where it is unnecessarily prolonged without justification, and where the totality of conditions of confinement cross a threshold into unacceptable cruelty.

As international law prohibiting solitary confinement crystallizes, the practice in the United States may be curtailed through reliance on international law by US judges. Further, the US executive may take an increased interest in curbing solitary confinement to avoid reputational damage among the global community.

Keywords: solitary confinement, torture, cruel, inhuman or degrading treatment, prison, incarceration.

'I found solitary confinement the most forbidding aspect of prison life. There is no end and no beginning; there is only one's mind, which can begin to play tricks. Was that a dream or did it really happen? One begins to question everything.'¹

I. Introduction

The incarceration of thousands of prisoners in solitary confinement in US jails and prisons, many of whom are juveniles or mentally ill, is a large-scale human rights viola-

* The views expressed herein are the author's alone, and do not reflect the policy of the ACLU or the ACLU of Montana.

1 Nelson Mandela, *The Long Walk to Freedom* (1994) 47

tion. While the United States has largely insulated itself from judicial review by international tribunals, a global perspective on the practice shows that solitary confinement is uniformly condemned, and highlights the need for the United States to curb the use of solitary confinement in jails and prisons nationwide. A mental health crisis, over incarceration, and a 'tough on crime' non-rehabilitative approach toward prisoners has allowed solitary confinement to mushroom. While widespread use of prolonged solitary confinement as a prison management tool is unique to the United States, the practice is used in other countries for pre-trial detainees pending investigation, to detain political prisoners, suspected terrorists, and vulnerable groups of prisoners.

A robust body of cases from international tribunals now exists to provide contours regarding when solitary confinement is torture or cruel, inhuman or degrading treatment in violation of international law. Most recently, the European Court of Human Rights found that extradition of a prisoner with paranoid schizophrenia from the United Kingdom to the United States violated Article 3 of the European Convention on Human Rights given the possibility of placement in a supermax prison and the potential for deterioration of his mental health as a result.² A rule of international law prohibiting solitary confinement of juveniles and prisoners with mental illness and significantly restricting the practice for mentally-well prisoners is crystallizing.

How international law analyzes solitary confinement is increasingly important as global interest in the use and impact of solitary confinement gains momentum. US courts are increasingly willing to consider international law when interpreting the 'evolving standard of decency' in Eighth Amendment analyses. As the international legal prohibition on prolonged solitary confinement becomes more concrete, it will be increasingly difficult for US judges to reject challenges to solitary confinement by prisoners. In addition, as the global community rallies against solitary confinement, the United States will suffer increased reputation damage globally should the practice continue to persist in US jails and prisons.

Both globally and in the United States, prisoners and human rights advocates are challenging the use of solitary confinement, and its use is being limited as a result. The UN Special Rapporteur on Torture has explicitly characterized solitary confinement as cruel, inhuman and degrading treatment that can constitute torture, and sought the end to the practice.³ Across the globe, media attention regarding solitary confinement is growing,⁴ and UN monitoring has resulted in a reduction of the practice.⁵ In the United States, the federal government and many states are looking closely at the use of solitary

2 *Aswat v United Kingdom* App no 17299/12 (ECtHR, 16 April 2013).

3 See *infra*, § III.

4 See eg, Lance Tapley, 'The Worst of the Worst: Supermax Torture in America' *Boston Review* (November/December 2010); George Will, 'The Torture of Solitary Confinement' *Washington Post* (20 February 2013); Editorial, 'Adolescents in Grown-up Jails' *The New York Times* (15 October 2013); Rafael Mathus Ruiz, 'Máxima seguridad y mínimos derechos en la prisión heredera de Alcatraz' *La Nación* (20 January 2013) (describing solitary confinement as 'a form of imprisonment that, under certain circumstances, is considered torture') (translation by author); Sadhbh Walshe, 'How Prisons Became Asylums, But Worse: Confinement Without Treatment' *The Guardian* (18 January 2013); Jennifer Parish, 'City Jails Use Solitary Confinement Excessively' *New York Times* (22 August 2013).

5 See eg, *National report submitted in accordance with paragraph 15(a) of the annex to Human Rights Council resolution 5/1*, Denmark, UN Doc A/HRC/WG.6/11/DNK/1, K(1)68 (17 February 2011) (in Denmark, '[t]he Government has launched several initiatives in this area, and in 2007 the rules on solitary confinement were changed with a view to a general restriction on the length of time spent in solitary confinement [...] The total number of days in solitary confinement was the lowest ever recorded.').

confinement. In June 2012, the US Senate Judiciary Committee held its first ever hearing on solitary confinement.⁶ The US Bureau of Prisons recently announced it will conduct its first review of the use of solitary confinement in federal prisons.⁷ The US Department of Justice recently completed an investigation into two Pennsylvania prisons' use of solitary confinement for prisoners with mental illness, finding multiple violations of the US Constitution and Americans with Disabilities Act.⁸ The US Immigration and Customs Enforcement Agency ('ICE') recently revised its segregation procedures for ICE detainees.⁹

Several non-profit organizations have made stopping solitary confinement a top priority, which has led to increased litigation challenging the practice.¹⁰ Religious groups are speaking out against solitary confinement as a desecration of human dignity and the human spirit.¹¹ Earlier this year, Tamms 'Supermax' Prison in Illinois, one of American's most notorious supermax prisons, permanently closed its doors.¹²

This article examines how various global human rights paradigms analyze solitary confinement under international law. This analysis unearths a global movement to prohibit solitary confinement for juveniles and prisoners with mental illness, and to substantially limit the practice for mentally-well prisoners to the shortest time possible as a last

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- 6 Senate Judiciary Committee, Subcommittee on the Constitution, Civil Rights and Human Rights, *Reassessing Solitary Confinement: The Human Rights, Fiscal and Public Safety Consequences* (19 June 2012) <<http://www.judiciary.senate.gov/hearings/hearing.cfm?id=6517e7d97c06eac4ce9f60b09625ebe8>> accessed 14 November 2013.
- 7 See *Press Release: Durbin Statement on Federal Bureau of Prisons Assessment of its Solitary Practices* (4 February 2013) <<http://www.durbin.senate.gov/public/index.cfm/pressreleases?ID=07260483-4972-4720-8d43-8fc82a9909ac>> accessed 14 November 2013.
- 8 See *Investigation of the State Correctional Institution and Cresson and Notice of Expanded Investigation* (31 May 2013) <<http://www.ada.gov/cresson-lof.htm>> accessed 14 November 2013 (finding Cresson's use of isolation on prisoners with serious mental illness violates the Eighth Amendment of the US Constitution and Cresson's use of isolation for prisoners with serious mental illness and intellectual disabilities violates the Americans with Disabilities Act, 42 U.S.C. §§12131-12134).
- 9 See US Immigration and Customs Enforcement Policy 11065.1 (4 September 2013) <http://www.ice.gov/doclib/detention-reform/pdf/segregation_directive.pdf> accessed 14 November 2013.
- 10 An example of recent successful litigation is *Indiana Prot & Advocacy Serv Comm'n v Comm'r*, Indiana Dept of Correction, 1:08-CV-01317-TWP, 2012 WL 6738517 (SD Ind, 31 December 2012) ('[...] it is inconceivable that any representative portion of our society would put its imprimatur on a plan to subject the mentally ill and other inmates described above to the SHU, knowing that severe psychological consequences will most probably befall those inmates. Thus, with respect to this limited population of the inmate class, plaintiffs have established that continued confinement in the SHU, as it is currently constituted, deprives inmates of a minimal civilized level of one of life's necessities.').
- 11 See eg, National Religious Campaign Against Torture, *FAQs – Prolonged Solitary Confinement in US Prisons* <http://www.nrcat.org/storage/documents/usp_solitaryfaqcondensedhandout.pdf> accessed 14 November 2013 ('[p]rolonged solitary confinement desecrates a person's inherent dignity, denies the essential human need for community, and impedes genuine rehabilitation'); Rabbinical Assembly, *Resolution on Prison Conditions and Prisoner Isolation* (May 2012) <<http://www.rabbinicalassembly.org/story/resolution-prison-conditions-and-prisoner-isolation?tp=377>> accessed 14 November 2013 ('[...] prolonged solitary confinement is widely recognized around the world as a destructive practice that destroys prisoners' minds, denies the opportunity for community, and violates the dignity and worth of every person. '); 'We are One Body: Catholics Raise Voices Against the Use of Solitary Confinement', *America, the National Catholic Review* (15 July 2013) <<http://americanmagazine.org/issue/we-are-one-body>> accessed 14 November 2013; *California Bishops Issue Statement on Prison Hunger Strike and Isolation Policies*, *Restorative Justice* (12 July 2013) <<http://www.cacatholic.org/index.php/issues2/restorative-justice/712-hunger-s>> accessed 14 November 2013.
- 12 See James Ridgeway and Jean Casella, 'Big Labor's Lock 'Em Up Mentality: How otherwise progressive unions stand in the way of a more human correctional system' *Mother Jones* (22 February 2013) <<http://www.motherjones.com/politics/2013/02/biggest-obstacle-prison-reform-labor-unions>> accessed 14 November 2013.

resort, only for justifiable reasons and with judicial oversight. In section II, background information on solitary confinement is set forth, including a globally-accepted definition, the history of solitary confinement, and medical and judicial discussions on solitary confinement's detrimental effects.

Section III analyzes how the UN human rights paradigm has addressed solitary confinement, and the increasingly vocal calls for prohibition of the practice by the current and most recent Special Rapporteurs on Torture. This section sets forth relevant treaty provisions in the Convention Against Torture ('CAT'), the International Covenant on Civil and Political Rights ('ICCPR'), the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities, as well as pertinent decisions by the Committee Against Torture and the Human Rights Committee. In particular, this section considers the scope of the United States' obligations pursuant to the CAT and ICCPR in light of US reservations entered when ratifying these conventions. Despite reservations on key provisions in these treaties, because US federal courts view solitary confinement of individuals with mental illness as cruel and unusual punishment in violation of the Eighth Amendment, the practice is cruel, inhuman or degrading treatment in violation of these treaties, and can constitute torture.

Section IV looks at regional human rights paradigms, including the Council of Europe, the Organization of American States, the Organization of African Unity and other ad hoc tribunals and national courts. These regional tribunals have developed multi-factor tests to determine when solitary confinement constitutes torture or cruel, inhuman and degrading treatment, and confirm that solitary confinement on death row, as well as incommunicado detention, violate international law. Where a government holds a prisoner in solitary confinement without a valid and justifiable reason, for a disproportionate amount of time relative to the reason, in extreme isolation, with poor medical or mental health monitoring and care, or when the prisoner has a pre-existing vulnerability, regional tribunals will generally find a violation of international law.

Section V asks what ramifications arise from the assumption that the United States' widespread use of solitary confinement violates international law. In reality, the United States is insulated from review by international tribunals. However, international views on solitary confinement can inform the 'evolving standard of decency' applied by US courts in Eighth Amendment analyses, and result in increased reputational damage globally should the practice continue to persist in US jails and prisons. In addition, recent ECtHR case law suggests nations may become reluctant to extradite individuals with mental illness to the United States where they may be housed in solitary confinement.

II. History and Background of Solitary Confinement

A. Definition

'Solitary confinement' is the confinement of prisoners in cells for 22 to 24 hours a day with minimal sensory stimuli and little to no social interaction. Common characteristics of solitary confinement include limited to no social interaction with other prisoners, religious chaplains, or education or other treatment personnel.¹³ Interaction with corrections

¹³ See *Torture and other cruel, inhuman or degrading punishment: Note by the Secretary-General, Sixty-sixth Session*, UN Doc A/66/268 (5 August 2011), 20, 25 (defining solitary confinement as 'the physical isolation of individuals who are confined to their cells for 22 to 24 hours a day' and setting

officers is limited to receiving meals through a slot in the cell door three times a day, or being restrained in handcuffs, leg irons or restraints and belly chains, and transported to a shower or one hour of outdoor or indoor 'recreation'. Such recreation generally consists of one hour a day, five days a week, in a small room or small caged area with or without exposure to fresh air and sunlight. In most solitary confinement units, prisoners receive a few minutes per week in which a mental health professional will speak with them through their cell door in the presence of a corrections officer and within earshot of other prisoners.¹⁴ Generally, individuals in solitary confinement reside in cells with no view of the outside and limited natural light through a tiny frosted window or in windowless cells. Prisoners in solitary confinement often have limited to no visiting or mail privileges or contact with the outside world through radio, television or newspapers.

Solitary confinement is used in penal institutions throughout the world for various reasons, including as a disciplinary punishment for prisoners, often for minor rule infractions, to hold political prisoners, to house prisoners with mental illness who are unable to follow the rules in general population, to isolate pre-trial detainees during an ongoing criminal investigation, for housing suspected gang or organized crime members, and as a tool for managing vulnerable groups of prisoners, such as protective custody prisoners and prisoners with mental health issues or juveniles.¹⁵ Solitary confinement is found in a variety of US corrections facilities. It is used not only in 'supermax' facilities in which the entire facility is comprised of solitary cells, but also in wings or housing units of county jails and state prisons.

The amount of time a prisoner can spend in solitary confinement can vary from a few days to indefinitely. Solitary confinement is particularly detrimental when used for extended periods. The current Special Rapporteur on Torture defines 'prolonged solitary confinement' as 'solitary confinement exceeding 15 days.'¹⁶ The American Bar Association's Standards On the Treatment of Prisoners define 'long-term segregated housing' as

forth 'three common elements that are inherently present in solitary confinement – social isolation, minimal environmental stimulation, and minimal opportunity for social interaction'). See Stuart Grassian, 'Psychiatric Effects of Solitary Confinement' (2006) 22 Wash UJL & Pol'y 325, 327 (defining solitary confinement as 'the confinement of a prisoner in a cell for all, or nearly all, of the day with minimal environmental stimulation and minimal opportunity for social interaction'); Craig Haney & Mona Lynch, 'Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement' (1997) 23 NYU Rev L & Soc Change 477, 496-98 (discussing definitional contours of 'solitary confinement'). See also *Berch v Stahl*, 373 FSupp 412, 420 (WDNC 1974) ('solitary confinement by definition means confinement alone and removed from sustained contact with other human beings. Its severity as punishment is drastically increased when isolation is accompanied by [...] "sensory deprivation" [...]'). Prisoners can be held in solitary in both single cells, that is, cells that they reside in by themselves, or double cells in which two prisoners live together. Although at first glance, double celled isolation appears to be less harsh, in fact, it is often described as the worst of both worlds. See Haney & Lynch (n 12) 497 (double celled solitary is 'simultaneously and paradoxically isolated and overcrowded').

14 See Grassian (n 12) 333 ('in solitary confinement settings, mental health screening interviews are often conducted at the cell front, rather than in private settings, and inmates are generally quite reluctant to disclose psychological distress in the context of such an interview since conversation would inevitably be heard by other inmates in adjacent cells, exposing them to stigma and humiliation in front of their fellow inmates').

15 See *The Istanbul Statement on the Use and Effects of Solitary Confinement, Annex to Torture and other cruel, inhuman and degrading treatment or punishment*, UN Doc A/63/175 (28 July 2008) (hereinafter 'Istanbul Statement'); UN Doc A/66/268 (n 12) 40-45 (discussing various rationales for solitary).

16 UN Doc A/66/268 (n 12) 61.

'segregated housing that is expected to extend or does extend for a period of time exceeding 30 days.'¹⁷ Reports of prisoners spending years in solitary confinement are common.¹⁸

B. The Damaging Impact of Solitary Confinement, Particularly to Vulnerable Prisoners, Including Individuals With Mental Illness and Juveniles

Solitary confinement can be very destructive to mentally-well prisoners, and is particularly damaging to prisoners with existing vulnerabilities, such as prisoners with mental illness, health problems, or juveniles. Based on the vast empirical literature and consistent judicial decisions establishing that prolonged solitary confinement causes severe psychological damage, the real deleterious effects cannot seriously be disputed. Researchers in countries throughout the world have conducted thorough experiments on the effects of isolation, both generally and in specific instances, including prisons and other types of confinement.¹⁹ Several symptoms of prolonged solitary confinement are well-established. Many individuals subject to prolonged solitary confinement, either as a prisoner of war, a prisoner in jail or prison, or other context, suffer from Post Traumatic Stress Disorder ('PTSD'), which can include 'detachment and estrangement from others, depression, rage and anger regarding the trauma' and 'loss of control of aggressive impulses.'²⁰ Other symptoms that arise from solitary confinement include a decreased ability to concentrate on mental tasks, increased suspicion and paranoia, increased anxiety and fear, heightened feelings of aggression and hostility toward correction officers and other prisoners, heightened feelings of helplessness and depression, and increased thoughts and attempts at self-mutilation and suicide.²¹ All these symptoms arise from the lack of sensory stimuli and social isolation inherent in solitary confinement.²²

One US researcher, Stuart Grassian, opines that the common symptoms seen in prisoners subjected to solitary confinement combine to form a syndrome arising from pro-

17 ABA Criminal Justice Standards for the Treatment of Prisoners (3rd edn, 2010) 23-1.

18 I have spoken to numerous individuals held in administrative segregation for up to many years at the Montana State Prison.

19 Psychiatrists have long studied and voiced concern regarding solitary confinement in a wide variety of contexts, including intensive care units, military situations, and polar, space and submarine expeditions. Grassian (n 12) 327. For a useful examination of existing literature, see Peter Scharff Smith, 'The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature' (2006) 34 *Crime & Just* 441. Examples of studies on the importance of human interaction for individuals generally include Charlie Horton Cooley, *Human Nature and the Social Order* (1902); George Herbert Mead, 'The Genesis of the Self and Social Control' (1925) 35 *Int'l J of Ethics* 251; Leon Festinger, 'A Theory of Social Comparison Processes' (1954) 7 *Human Relations* 327; Irving Sarnoff & Philip G Zimbardo, 'Anxiety, Fear and Social Affiliation' (1961) 62 *J Abnormal Soc Psychol* 356; Susan Houston, 'Inquiry Into the Structure of Mentation Processes' (1967) 7 *Human Relations* 327; John Bowlby, *Attachment and Loss: Loss, Sadness and Depression* (1980) 442; James M Olson (ed), *Relative Deprivation and Social Comparison: The Ontario Symposium Vol 4* (1986); Haney & Lynch (n 12).

20 Haney & Lynch (n 12) 509-10.

21 *ibid* 512-13; Robert G Slater, 'Psychiatric Intervention in an Atmosphere of Terror' (1986) 7 *Am J Forensic Psych* 5, 6; Grassian (n 12) 333; Scharff Smith (n 18); Istanbul Statement (n 14) 2 ('[a] long list of symptoms ranging from insomnia and confusion to hallucinations and psychosis has been documented'). A useful list of effects of solitary confinement can be found in the Istanbul Statement.

22 See Istanbul Statement (n 14) ('[t]he central harmful feature of solitary confinement is that it reduces meaningful contact to a level of social and psychological stimulus that many will experience as insufficient to sustain health and well-being').

longed solitary confinement.²³ Similar to other researchers' findings, Grassian concluded the expected symptoms include hyperresponsivity to external stimuli, perceptual distortions, difficulties with cognitive functioning, obsessive thought patterns, paranoia, and impulse control issues.²⁴

I spent a significant amount of time talking with prisoners in solitary confinement throughout jails and prisons in Montana. Many prisoners in solitary confinement have explained to me that their inability to interact with others and vent their frustrations in an extremely stressful environment leads to a 'bottling up' of aggression and rage. I have witnessed individuals in solitary confinement become paranoid, severely depressed and hopeless, increasingly angry, and less able to communicate and interact with others. What is most disturbing is those prisoners near their discharge date after many years of solitary confinement. After spending so many years of their lives subject to the psychological damage of solitary confinement, they are less able to reintegrate into society and more dangerous than when they entered prison.

Many psychologists assert that isolation, including solitary confinement, is particularly damaging to juveniles and prisoners with mental health issues.²⁵ The impact of solitary confinement on prisoners with mental illness is particularly important given they represent a sizeable percentage of most jail and prison populations. The United States houses a substantial number of individuals with mental illness and developmental disabilities in solitary confinement as a standard prison housing and discipline tool. The US Bureau of Prisons estimates that over half of current jail and prison populations have mental health problems.²⁶ Current studies estimate that approximately 30% or more of prisoners in solitary confinement are mentally ill.²⁷ It is quite common for prisons and jails to warehouse difficult mentally ill prisoners in solitary confinement without adequate mental or medical services or monitoring.²⁸ The defunding of mental health institutions, the lack of community resources, and the rise in solitary confinement have created a public health crisis for Americans with mental illness funneled into the corrections system

23 Grassian (n 12) 335-36.

24 *ibid.*

25 Jeff Mitchell & Christopher Varley, 'Isolation and Restraint in Juvenile Correctional Facilities' (1990) 29 *J Am Acad Child Adolescent Psych* 251; Haney & Lynch (n 12) 510 ('persons with less sturdy personalities appear to be more vulnerable to the stressors that lead to [PTSD]'); Grassian (n 12) 332 ('[t]hose most severely affected [by solitary confinement] are often individuals with evidence of subtle neurological or attention deficit disorder, or with some other vulnerability. These individuals suffer from states of florid psychotic delirium, marked by severe hallucinatory confusion, disorientation, and even incoherence, and by intense agitation and paranoia'). For a useful discussion of post-World War II studies on isolation, see Scharff Smith (n 18) 470.

26 Doris J James & Lauren E Glaze, *Mental Health Problems of Prison and Jail Inmates* (Bureau of Justice Statistics Special Report, 1, Department of Justice, Bureau of Justice Statistics 14 December 2006) ('At midyear 2005 more than half of all prison and jail inmates had a mental health problem, including 705,600 inmates in State prisons, 78,800 in Federal prisons, and 479,900 in local jails. These estimates represented 56% of State prisoners, 45% of Federal prisoners, and 64% of jail inmates'). See also Scharff Smith (n 18) 453-54.

27 James Ridgeway & Jean Casella, 'Locking Down the Mentally Ill: Solitary Confinement Cells Have Become America's New Asylums' *The Crime Rep* (20 February 2010) <<http://www.thecrimereport.org/archive/locking-down-the-mentally-ill>> accessed 14 November 2013; Mary Beth Pfeiffer, *Crazy in America?: The Hidden Tragedy of our Criminal Mentally Ill* (2007); Jennifer R Wynn, Alisa Szatrowski & Gregory Warner, *The Corrections Assoc. of New York, Mental Health in the House of Corrections: A Study of Mental Health Care in New York State Prisons* (2004) 48.

28 See Istanbul Statement (n 14) 1 ('[i]n many jurisdictions solitary confinement is also used as a substitute for proper medical or psychiatric care for mentally disordered individuals').

and quieted away in solitary confinement to get even worse. As noted below, the number of prisoners with serious mental health issues in prisons has mushroomed since the defunding of mental health institutions throughout the nation in the 1980s. Corrections will likely continue to be responsible for individuals with mental illness as the US federal government and US states cut already insufficient mental health resources.²⁹

US courts have held that solitary confinement of prisoners with mental illness is cruel and unusual.³⁰ Indeed, one US court has referred to the practice of incarcerating mentally ill in solitary confinement as 'torture'.³¹ Most recently, in December 2012, the American Psychiatric Association issued a Position Statement on Segregation of Prisoners with Mental Illness, stating, in part, 'prolonged segregation of adult inmates with serious mental illness, with rare exceptions, should be avoided due to the potential for harm to such inmates.'³² The US National Alliance on Mental Health ('NAMI') also recently issued a policy 'oppos[ing] the use of solitary confinement and equivalent forms of extended administrative segregation for persons with mental illness' and acknowledged that 'solitary confinement of persons with mental illness causes extreme suffering, has adverse long-term consequences for cognitive and adaptive functioning, disrupts treatment, and exacerbates illness.'³³ Similar to the American Medical Association's prohibition on physicians participating in executions,³⁴ the Israeli Medical Association prohibits physicians from participating in separation and isolation in Israeli prisons.³⁵ Yet, the practice persists widespread throughout US jails and prisons.

29 State budget crises have resulted in further mental health cuts that will result in jails and prisons housing even greater numbers of individuals with mental illness. See eg, National Alliance on Mental Health ('NAMI')'s recent report *State Mental Health Cuts: The Continuing Crisis* (November 2011) <<http://www.nami.org/ContentManagement/ContentDisplay.cfm?ContentFileID=147763>> accessed 14 November 2013.

30 See eg, *Madrid v Gomez*, 889 FSupp 1146, 1265-66 (ND Cal 1995) ('those who the record demonstrates are at a particularly high risk for suffering very serious or severe injury to their mental health, including overt paranoia, psychotic breaks with reality, or massive exacerbations of existing mental illness as a result of the conditions in the SHU. Such inmates consist of the already mentally ill, as well as persons with borderline personality disorders, brain damage or mental retardation, impulse-ridden personalities, or a history of prior psychiatric problems or chronic depression. For these inmates, placing them in the SHU is the mental equivalent of putting an asthmatic in a place with little air to breathe. The risk is high enough, and the consequences serious enough, that we have no hesitancy in finding that the risk is plainly "unreasonable." [...] Such inmates are not required to endure the horrific suffering of a serious mental illness or major exacerbation of an existing mental illness before obtaining relief'); *Jones 'El v Berge*, 164 FSupp 2d 1096 (WD Wis 2001).

31 See *Ruiz v Johnson*, 37 FSupp 2d 855, 914 (SD Tex 1999) rev'd on other grounds by *Ruiz v United States*, 243 F 3d 941 (5th Cir 2001) ('[i]t goes without question that an incarceration that inflicts daily, permanently damaging, physical injury and pain is unconstitutional. Such a practice would be designated as torture. Given the relatively recent understanding of the primal necessity of psychological well-being, the same standards that protect against physical torture prohibit mental torture as well-including the mental torture of excessive deprivation').

32 See *APA Position Statement on Segregation of Prisoners with Mental Illness* <<http://www.psychiatry.org/advocacy--newsroom/position-statements>> accessed 14 November 2013.

33 National Alliance on Mental Illness, 'Policy Platform 9' <http://www.nami.org/Template.cfm?Section=NAMI_Policy_Platform&Template=/ContentManagement/ContentDisplay.cfm&ContentID=38253> accessed 14 November 2013.

34 See American Medical Association, Opinion 2.06 <<http://www.ama-assn.org//ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion206.page>> accessed 14 November 2013.

35 Israeli Medical Association, *Prohibition of Physician Participation in the Isolation or Separation of Prisoners* (April 2009) <<http://www.ima.org.il/ENG/ViewCategory.aspx?CategoryId=7749>> accessed 14 November 2013.

Similarly, juveniles are routinely held in solitary confinement in the United States. Solitary confinement of juveniles occurs in both juvenile and adult facilities for the same reasons as adult prisoners discussed above, and to put juveniles in protective custody to avoid sexual and physical assault by older prisoners. Juvenile prisoners are subjected to the same restrictive and psychologically damaging conditions as adult prisoners in solitary confinement, but to an even greater detriment. Given that juveniles are continuing to develop mentally and physically,³⁶ they are severely and permanently damaged by such conditions to a greater extent than adults. Not only does solitary confinement exacerbate psychological suffering for juveniles, it also deprives them of much needed treatment and educational programs in group settings to further rehabilitation and ultimately reduce recidivism. The medical community is also becoming increasingly vocal on this point. For example, in April 2012, the American Academy of Child and Adolescent Psychiatry issued a statement that it 'opposes the use of solitary confinement in correctional facilities for juveniles.'³⁷

C. Solitary Confinement in the United States

The history of solitary confinement begins in Pennsylvania in the late 1700s in Quaker-run penitentiaries.³⁸ These facilities were designed to give criminals a quiet reflective space away from other criminals to free themselves from the encumbrances of the outside world, with an aim toward rehabilitating socially deviant behavior.³⁹ However, after a short number of years the high incidence of madness resulting from solitary confinement resulted in almost total abandonment of the practice.⁴⁰ The US Supreme Court acknowledged this failed experiment in 1890, when it described the 'infamous punishment' of solitary confinement as follows:

'[E]xperience demonstrated that there were serious objections to it. A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community. It became evident that some changes must be made in the system.'⁴¹

36 See Jay N Giedd, 'Structural Magnetic Resonance Imaging in the Adolescent Brain' (2004) 1021 *Annals NY Acad Sci* 77 <<http://intramural.nimh.nih.gov/research/pubs/giedd05.pdf>> accessed 14 November 2013 (discussing key differences in adolescent and adult brains observable through magnetic resonance imaging); Laurence Steinberg, 'Cognitive and Affective Development in Adolescence' (2005) 9 *Trends in Cognitive Sci* 69 <<http://www.temple.edu/psychology/Ids/documents/CognitiveandAffectiveDevelopmentTICS.pdf>> accessed 14 November 2013 ('there is considerable evidence that the second decade of life is a period of great activity with respect to changes in brain structure and function, especially in regions and systems associated with response inhibition, the calibration of risk and reward, and emotional regulation').

37 Amer Acad Of Child & Adolescent Psychiatry, *Policy Statement on Solitary Confinement of Juvenile Offenders* (April 2012) ('[d]ue to their developmental vulnerability, juvenile offenders are at particular risk of such adverse reactions [to solitary confinement]').

38 See UN General Assembly, *Torture and other cruel, inhuman or degrading treatment or punishment: note by the Secretary General* (28 July 2008) UN Doc A/63/175, 81.

39 See Grassian (n 12) 328; Scharff Smith (n 18) 456-57.

40 See Grassian (n 12) 328.

41 In *Medley*, 134 US 160, 168, 10 S Ct 384, 386, 33 L Ed 835 (1890).

Charles Dickens provided one of the earliest critiques of solitary confinement after his visit to Pennsylvania's Eastern Penitentiary. Dickens observed '[t]he system here is rigid, strict, and hopeless solitary confinement. I believe it, in its effects to be cruel and wrong.'⁴² Dickens went on to recognize strikingly similar effects of solitary confinement as researchers observe today, and repeatedly described it as torture.⁴³ The disastrous consequences of the solitary confinement experiment resulted in a near complete abandonment of the practice for a period of time in the 1800s and early 1900s. However, some prisons, such as Alcatraz, retained the practice for the 'worst of the worst' criminals transferred from other prisons nationwide.⁴⁴

The real resurgence of solitary that remains with us today began in the 1980s. In 1983, the federal prison in Marion, Illinois instituted a lockdown policy after a riot in which the entire prison population was placed in solitary confinement.⁴⁵ As a result of Marion's short-term success reducing prison violence through solitary confinement, the practice quickly spreading throughout the United States in the 1980s and subsequent decades. As solitary confinement's popularity grew, US federal courts were in the tail end of the 'hands off' period of judicial deference to prison administrators, which resulted in reluctance to limit or abolish the practice by courts. Today, researchers estimate that approximately 80,000 prisoners are in solitary confinement throughout the United States.⁴⁶ This number is vastly greater than any other country.

In the last fifty years, corrections in the United States has been at the center of a perfect storm. Factors include the 'hands off' period, a drastic increase in prison populations due to mandatory drug sentencing, and the design and building of jails and prisons by a handful of architecture and engineering firms. A strong cultural current exists viewing the goal of corrections as punishment, rather than rehabilitation, of prisoners and being 'tough on crime'. Perhaps not coincidentally, the popularity of solitary confinement has co-existed with a strong cultural current viewing the goal of corrections as punishment, rather than rehabilitation, of prisoners.⁴⁷ This attitude has led to short sighted non-rehabilitative view of prisons that places prisoners 'out of sight and out of mind.' The

42 Charles Dickens, *American Notes* (1883) 109.

43 *ibid* 111–123. Dickens observed detrimental psychological effects ('I hold this slow and daily tampering with the masteries of the brain to be immeasurably worse than any torture of the body'), anxiety ('he is a man buried alive; to be dug out in the slow round of years; and in the meantime dead to everything but torturing anxieties and horrible despair'), nonrehabilitative aspects of solitary ('[solitary] wears the mind into a morbid state, which renders it unfit for the rough contact and busy action of the world. It is my fixed opinion that those who have undergone this punishment MUST pass into society again morally unhealthy and diseased') and cognitive deficiencies ('[solitary] makes the senses dull and by degrees impairs the bodily faculties, I am quite sure'). In a visit to New York prisons, Alex de Tocqueville similarly described solitary confinement as follows: 'this experiment, of which the favorable results had been anticipated, proved fatal for the majority of prisoners. It devours the victims incessantly and unmercifully; it does not reform, it kills.' Gustave de Beaumont & Alexis de Tocqueville, *On the Penitentiary System in the United States and its Application in France* (1883).

44 See Tracy Hresko, 'In the Cellars of the Hollow Men: Use of Solitary Confinement in U.S. Prisons and its Implications under International Laws Against Torture' (2006) 18 *Pacer Int'l L Rev* 1.

45 *ibid* 7–8.

46 Jean Casella and James Ridgeway, 'How Many Prisoners are in Solitary Confinement in the United States?' *Solitary Watch* (1 February 2012) <<http://solitarywatch.com/2012/02/01/how-many-prisoners-are-in-solitary-confinement-in-the-united-states/>> accessed 14 November 2013.

47 See Bryan B Walton, 'The Eighth Amendment and Psychological Implications of Solitary Confinement' (1997) 21 *Law & Psychol Rev* 271, 271 (overcrowding of prisoners is a symptom of 'the growing belief that retribution not rehabilitation, should be the goal of imprisonment').

common perception appears to be that prisoners are 'bad' people and have hurt others, so they deserve whatever cruel treatment they receive while incarcerated, without regard to the incredibly high number of individuals with mental illnesses and developmental disabilities in prisons and jails. By dehumanizing prisoners, we grow calloused and insensitive regarding how we confine them as a society.

D. Use of Solitary Confinement Outside the United States

After the initial experiments in Pennsylvania with solitary confinement in the late 1700s, several hundred facilities were built world-wide reproducing this incarceration paradigm.⁴⁸ As in the United States, most countries quickly abandoned the practice of isolating prisoners after seeing pronounced deleterious effects on prisoners.⁴⁹ Despite the initial abandonment of the practice, many countries continue to utilize solitary confinement in a myriad of situations, including to hold suspected terrorists, political prisoners, death row prisoners, gay, lesbian, transgender and bisexual prisoners and pre-trial detainees.⁵⁰

Solitary confinement has persisted throughout Europe. Solitary confinement is openly used in Scandinavian countries for pre-trial detainees, and in fewer cases, as punitive segregation.⁵¹ Israel and other countries in the Middle East, Africa, Russia, Eastern Europe and Asia also utilize prolonged solitary confinement.⁵² Although initially this practice was justified using the same moral argument set forth in Pennsylvania in the 1700s – to avoid contact with other immoral criminals – its current justifications include to avoid collusion during police investigations of conspiratorial offenses, to punish prisoners, to avoid prisoners interacting with each other, and to house both potentially dangerous and potentially vulnerable prisoners.⁵³

Solitary confinement in Scandinavian countries is far less harsh than US prisons' use of solitary confinement. Generally, it is used only for a period of weeks for mentally-well pre-trial detainees with judicial participation in the initial sentence to solitary confine-

48 Scharff Smith (n 18) 457; UN Doc A/63/175 (n 37) 81.

49 Scharff Smith (n 18) 465-69; UN Doc A/66/268 (n 12) 23 ('[b]eginning in the 1830s, European and South American countries adopted this practice').

50 UN Doc A/66/268 (n 12) 20 (describing the practice of solitary confinement 'to be global in nature and subject to widespread abuse').

51 See eg, Committee against Torture, *Concluding observations on the combined sixth and seventh periodic reports of Norway, adopted by the Committee at its forty-ninth session (29 October to 23 November 2012)* (13 December 2012) UN Doc CAT/C/NNOR/CO/6-7.

52 See eg, Yaakov Katz, 'Barghouti released from solitary cell' *Jerusalem Post* (6 January 2005); 'Fayyad Urges Action Over Prisons' *World News Connection (Newswire)* (11 February 2013) (criticizing Israel's practice of holding Palestinian prisoners in solitary confinement); 'Bahrain: Court Upholds Death Sentence Based on Coerced Confessions' *States News Service* (10 February 2013) (discussing solitary confinement of prisoner in Bahrain); Jennifer Bell, 'Dubai to review case against Nakheel executives at Australia's request' *National (UAE)*, 8 February 2013) (discussing two Australian executives who spent three months in solitary confinement in Dubai); William Kremer and Claudia Hammond, 'How do people survive solitary confinement?' *BBC News* (12 June 2013) (discussing solitary confinement practices in North Africa and Eastern Europe); Ben Hubbard, 'Rights Group Says it Finds Proof of Torture in Syria' *New York Times* (17 May 2013); UN Doc A/66/268 (n 12) 44 (discussing China's practice of holding political prisoners in solitary confinement). See eg, ECtHR cases involving Russia, Bulgaria and Ukraine, at *infra*, § IV.B.

53 Scharff Smith (n 18) 444-45.

ment and any extension of time in solitary confinement.⁵⁴ Similarly, Scandinavian countries are far smaller than the United States, are easier to monitor by the United Nations and other non-governmental organizations, and have made significant attempts to comply with international law mandates to limit the practice.⁵⁵

III. Solitary Confinement In the UN Human Rights Paradigm

The prohibition against torture and cruel, inhuman and degrading treatment is both a jus cogens norm and customary international law.⁵⁶ Over 50 years ago, the Universal Declaration of Human Rights ('the Declaration') stated '[n]o one shall be subject to torture or cruel, inhuman or degrading treatment or punishment.'⁵⁷ Although non-binding, the Declaration establishes a floor of basic rights and obligations for UN member states, and many of its provisions, including the prohibition on torture and cruel, inhuman and degrading treatment or punishment, have become customary international law.⁵⁸

For over 20 years, UN representatives have publicly decried the use of solitary confinement as a violation of the CAT and ICCPR in certain circumstances.⁵⁹ UN principles specifically addressing incarcerated individuals also prohibit torture, cruel, inhuman and degrading punishment or treatment.⁶⁰ The Basic Principles for the Treatment of Prisoners, adopted by the UN General Assembly in 1990 ('Basic Principles'), state 'all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declara-

54 For example, the average length of stay in solitary confinement for Danish pre-trial detainees is approximately 38 days. Scharff Smith (n 18) 446. The use of solitary confinement for pre-trial detainees implicates detainees' rights to access to justice and courts as it can have the effect of inducing detainees to plead guilty or take plea deals just to get out of solitary as quickly as possible. See *ibid* 503.

55 *ibid* 446-48.

56 Regarding the prohibition on torture as a jus cogens norm, see *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* 2009 ICJ 139, 99 ('In the Court's opinion, the prohibition of torture is part of customary international law and it has become a peremptory norm [jus cogens]'). Regarding torture as prohibited by international law, see *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* 2002 ICJ 3 ('torture, like piracy, could be considered an "offence against the law of nations"'). See also Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Comment 2 ('[s]ince the adoption of the Convention against Torture, the absolute and non-derogable character of this prohibition has become accepted as a matter of customary international law. The provisions of article 2 reinforce this peremptory jus cogens norm against torture and constitute the foundation of the Committee's authority to implement effective means of prevention, including but not limited to those measures contained in the subsequent articles 3 to 16, in response to evolving threats, issues, and practices'); Statement by Abraham D Sofaer in Hearing before the Senate Committee on Foreign Relations, 101st Congress, (1990) ('[i]nternational law already condemns torture. In that sense, the Convention breaks little new ground.').

57 Universal Declaration of Human Rights, adopted 10 December 1948, GA Res 217A (III), UN Doc A/810, 71.

58 See (n 55).

59 See eg, Human Rights Committee, *General Comment 20*, Article 7, 6 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev, 30 (1994) ('[t]he Committee notes that prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by article 7'); *Report of the Human Rights Committee, Vol II, A/49/40* (1992), 180 ('total isolation of a detained or imprisoned person may amount to acts prohibited by article 7').

60 *The Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment* GA Res 43/173, UN GAOR 43rd Sess, Supp No 49, annex, 298, Principle 6, UN Doc A/43/49 (1988), Principle 6 ('[n]o circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment').

tion of Human Rights, and, where the State concerned is a party [...] the International Covenant on Civil and Political Rights [...] as well as such other rights as are set out in other United Nations covenants.⁶¹ With regard to solitary confinement specifically, the Basic Principles make clear '[e]fforts addressed to the abolition of solitary confinement as a punishment, or to the restriction of its use, should be undertaken and encouraged.'⁶² Although these principles are non-binding, regional tribunals rely on them in cases dealing specifically with prisoners.⁶³

In recent years, UN representatives have stepped up efforts to end the practice of solitary confinement world-wide, spearheaded largely by the most recent and current UN Special Rapporteurs on Torture, Manfred Nowak and Juan Mendez. These Special Rapporteurs have repeatedly unequivocally stated that prolonged solitary confinement is cruel, inhuman or degrading treatment, and may amount to torture.⁶⁴ While such statements are not primary sources of international law, the assertion of '[n]onbinding norms have complex and potentially large impact on the development of international law' as a source of customary law and provide useful definitional contours for provisions of the Torture Convention.⁶⁵

Some of the most important recent statements against solitary confinement include the Istanbul Statement Against Solitary Confinement issued in 2007 by a group of psychiatrists, doctors, and human rights advocates, including then-Special Rapporteur on Torture Manfred Nowak.⁶⁶ Any time a prisoner is subject to solitary confinement for an indefinite period of time without meaningful and well-established remedies for challenging the detention, the special rapporteur has concluded that such confinement amounts to torture or cruel, inhuman and degrading treatment, as well as a violation of the prisoner's right to due process.⁶⁷ In August 2013, Mr Mendez specifically urged the US government to eliminate the use of prolonged or indefinite solitary confinement in response to the hunger strike by prisoners in solitary confinement in California prisons.⁶⁸

61 *Basic Principles for the Treatment of Prisoners*, Principle 7, GA res 45/111, annex, 45 UN GAOR Supp (No 49A) 200, UN Doc A/45/49 (1990).

62 *ibid.*

63 For example, the ECtHR case law regarding solitary confinement generally tracks the European Prison Rules, as amended in 2006. See *infra*, §IV.B.1.

64 See *Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, Note by Secretary-General A/63/174, 77 ('[t]he prolonged isolation of detainees may amount to cruel, inhuman or degrading treatment or punishment and, in certain instances, may amount to torture'); Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Human Rights Council, 234, UN Doc A/HRC/13/39/Add.5 (5 February 2010) (then Special Rapporteur Manfred Nowak stated '[s]olitary confinement and similar forms of deprivation of human contact for a prolonged period of time also amount to inhuman or degrading treatment'); UN Doc (n 12) 16 ('[t]he special Rapporteur reiterates that, in his view, any imposition of solitary confinement beyond 15 days constitutes torture or cruel, inhuman or degrading treatment or punishment, depending on the circumstances').

65 See Dinah Shelton, 'Normative Hierarchy in International Law' (2006) 100 *Am J Int'l L* 291, 320 ('In recent years, nonbinding instruments have sometimes provided the necessary statement of legal obligation [opinio juris] to evidence the emergent custom and have assisted in establishing the content of the [customary international law] norm. The process of drafting and voting for nonbinding normative instruments may also be considered a form of state practice.').

66 Istanbul Statement (n 14).

67 UN Doc A/66/268 (n 12) 75.

68 Press Release: California Jails: 'Solitary confinement can amount to cruel punishment, even torture', UN rights expert (23 August 2013) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13655&LangID=E>> accessed 14 November 2013.

The UN paradigm expressly prohibits solitary confinement of juveniles and individuals with mental illness. Over twenty years ago, the UN Rules for the Protection of Juveniles Deprived of their Liberty stated '[a]ll disciplinary measures constituting cruel, inhuman, or degrading treatment shall be strictly prohibited, including corporal punishment, placement in a dark cell, closed or solitary confinement or any other punishment that may compromise the physical or mental health of the juvenile concerned.'⁶⁹

The current Special Rapporteur espouses the view that the imposition of solitary confinement on juveniles and individuals with mental illness for any length of time is categorically cruel, inhuman and degrading treatment.⁷⁰ He explained his position as follows:

'Juveniles and individuals with mental disabilities should never be subjected to solitary confinement, and alternative ways of treating mental illness should be found. Because of the severe mental suffering inflicted on juveniles and the mentally ill by the practice when used as a punishment, solitary confinement amounted to torture or cruel, inhuman or degrading treatment or punishment in those cases, depending on the severity of the conditions [...].'⁷¹

In 1955, the First UN Congress on the Prevention of Crime and the Treatment of Offenders adopted Standard Minimum Rules for the Treatment of Prisoners, which were subsequently approved by the Economic and Social Council.⁷² Two rules pertinent to solitary confinement include the following:

'31. Corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments shall be completely prohibited as punishments for disciplinary offences.

32. (1) Punishment by close confinement or reduction of diet shall never be inflicted unless the medical officer has examined the prisoner and certified in writing that he is fit to sustain it.'⁷³

In 2010, an inter-governmental working group was established by the Commission on Crime Prevention and Criminal Justice at the request of the General Assembly to consider updating the UN Standard Minimum Rules for the Treatment of Prisoners.⁷⁴ The group met twice in 2012, and issued a Draft Report on its second meeting in December

69 UN Rules for the Protection of Juveniles Deprived of Their Liberty, UN Doc A/RES/45/113 (14 December 1990).

70 UN Doc A/66/268 (n 12) 77, 78.

71 General Assembly, *Third Committee Summary record of the 21st meeting* UN Doc A/C.3/66/SR.21 (9 February 2012) 44. See also *Special Rapporteur on Torture Tells Third Committee Use of Prolonged Solitary Confinement on Rise, Calls for Global Ban on Practice, Sixty-Sixth General Assembly, Third Committee, 21st & 22nd meetings* UN Doc GA/SHC/4014 (18 October 2011) ('[j]uveniles, given their physical and mental immaturity, should never be subjected to solitary confinement, he said. Equally, individuals with mental disabilities should under no circumstances be subjected to solitary confinement, even when there was reason to believe they might be a threat to themselves or others, as it only aggravated their state of mental health and the risk of harm.')

72 UN Standard Minimum rules for the Treatment of Prisoners (30 August 1955) <<http://www.unhcr.org/refworld/docid/3ae6b36e8.html>> accessed 14 November 2013.

73 *ibid* Rule 31.

74 See GA Res 65/230, UN Doc A/RES/65/230 (21 December 2010).

2012.⁷⁵ Salient recommendations include a prohibition on using prolonged and indefinite solitary confinement as a punishment for disciplinary offenses, as well as a prohibition on placing juveniles, pregnant women, women with infants, breastfeeding women, prisoners with mental disabilities, death row prisoners and prisoners sentenced to life, among others, in solitary confinement.⁷⁶ The group also recommended prohibiting solitary confinement as an extortion technique for pre-trial detainees, and limiting solitary confinement as a 'last resort to be applied by the competent authority, to be applied in exceptional circumstances only and for as short a time as possible.'⁷⁷

A. Solitary Confinement and the Convention Against Torture

The CAT obligates all parties to the convention to prevent and criminalize torture. The CAT is widely-ratified, and the United States has ratified the CAT with certain reservations.⁷⁸ For well over a decade the UN Committee Against Torture has expressed concern regarding the use of solitary confinement in its review of specific countries and recommended it be substantially reduced or abolished all together.⁷⁹

1. Solitary Confinement as Torture

Article 1 of the CAT defines torture as follows:

'[A]ny 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.'⁸⁰

⁷⁵ *Draft Report on the Meeting of the Expert Group on the Standard Minimum Rules for the Treatment of Prisoners held in Buenos Aires from 11 to 13 December 2012*, UNODC/CCPC/EG.6/2012/L.4 ('Draft Report').

⁷⁶ *ibid* 4–5.

⁷⁷ *ibid*.

⁷⁸ See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res 39/46, 39 UN GAOR, 39th Sess, Supp No 51, 197, UN Doc A/39/51 (1984) (entered into force 26 June 1987) ('CAT').

⁷⁹ See eg, Committee Against Torture, *Summary Record of the Public Part of the 357th Meeting, Conclusions and Recommendations Concerning the Initial Report of Iceland* UN Doc CAT/C/SR.357 (5 October 1999) (the committee 'is equally concerned about the use of solitary confinement, particularly as a preventive measure during pre-trial detention' and recommending 'the Icelandic authorities review the provisions regulating solitary confinement during pre-trial detention in order to reduce considerably the cases to which solitary confinement could be applicable'); UN Doc CAT/C/SR.379 (10 May 1999) (criticizing the use of solitary for up to six months in Bulgarian prisons); UN Doc CAT/C/NOR/CO/6-7 (13 December 2012) (criticizing Norway's widespread use of prolonged solitary confinement for pre-trial detainees and recommending Norway reduce the use of solitary confinement to exceptional circumstances).

⁸⁰ Article 1 CAT.

Based on the plain language of Article 1, intentionally inflicting severe mental pain or suffering on an individual as punishment is torture. Similarly, a state party violates Article 1 by adopting a policy known to be cause severe pain and suffering.⁸¹ As discussed above, it is well-accepted that '[t]he adverse acute and latent psychological and physiological effects of prolonged solitary confinement constitute severe mental pain or suffering.'⁸² Assuming it is true that solitary confinement inflicts severe mental pain and suffering, particularly on juveniles and individuals with mental illness, it is torture where inflicted intentionally for one of Article 1's stated purposes.

A state actor commits torture where he intentionally commits an act that constitutes torture for the purpose of interrogation, coercion, punishment, intimidation or for a discriminatory reason. As explained by the UN Special Rapporteur on Torture, '[t]he element of intent contained in the definition of torture in the Convention requires that severe pain or suffering be intentionally inflicted on the victim in order to achieve a certain purpose.'⁸³

Both acts and omissions can constitute torture where the requisite elements are met.⁸⁴ Reckless disregard for severe pain and suffering may also establish intent.⁸⁵ For example, where a prison official recklessly disregards the obvious decompensation of a prisoner with a serious mental illness in solitary confinement, such an act may constitute torture. A state may be liable for acts of torture by state officials by explicitly sanctioning the act for one of the purposes set forth in the convention as part of official policy.⁸⁶ By enacting policy that mandates acts known to and that actually do result in severe pain and suffering as a form of punishment, a state intentionally tortures.

Interpretation of related treaties is instructive when determining what level of intent is required for torture. For example, the European Court of Human Rights found Turkey had engaged in torture when officials stripped a detainee naked and hung him from his hands with his hands tied behind his back while detained. Without making a finding that the state actor intended to cause intense pain and suffering, the court concluded 'this treatment could only have been deliberately inflicted; indeed, a certain amount of preparation and exertion would have been required to carry it out. It would appear to have been administered with the aim of obtaining admissions or information from the applicant. [...]

81 Aditi Bagchi, 'Intention, Torture, and the Concept of State Crime' (2009) 114 Penn St L Rev 1, 4 ('states too might engage in torture by adopting torture as a state policy or by systematically employing it as a means of governance').

82 UN Doc A/66/268 (n 12) 76.

83 UN Doc A/HRC/13/39/Add.5 (n 61) 34. This report is discussed in detail in Oona A Hathaway, Aileen Nowlan and Julia Spiegel, 'Tortured Reasoning: The Intent to Torture Under International and Domestic Law' (2012) 52 Va J Int'l L 791, 801.

84 See *Report by United Nations Voluntary Fund for Victims of Torture regarding Interpretation of Torture in Light of the Practice and Jurisprudence of International Bodies* 4/30 <http://www.ohchr.org/Documents/Issues/Torture/UNVFVT/Interpretation_torture_2011_EN.pdf> accessed 14 November 2013 ('Interpretation of Torture').

85 *ibid* ('[p]ain and suffering must intentionally be inflicted to the victim in order to qualify as torture. Therefore, even if it has been recalled at one occasion that negligence is "a well-established subjective component of criminal liability" nevertheless, for the time being, negligence is not sufficient to qualify an act as torture under international law, whereas recklessness might suffice.').

86 Bagchi (n 80) 8 ('[t]he state's mental state comprises both its choice of action or inaction and the reasons behind those choices. State torture might encompass all acts of torture by state actors that are traceable to active or passive choices made by the state, or it might further require that those choices be made with particular motivations.').

The Court considers that this treatment was of such a serious and cruel nature that it can only be described as torture.⁸⁷

Accordingly, where a prison official classifies a prisoner to solitary confinement for the purpose of punishing him or as a condition of his sentence, and that prisoner subsequently experiences severe pain and suffering as a result, either physical or mental, this is torture.⁸⁸ Under this analysis, the implementation of federal, state and county jail and prison classification and housing policies that provide for the housing in solitary confinement, that results in severe pain and suffering by prisoners housed in solitary confinement, constitutes torture.

The current and most recent UN Special Rapporteurs on Torture have in fact acknowledged that prolonged solitary confinement for one of the purposes set forth in Article 1 constitutes torture.⁸⁹ Specifically, the Special Rapporteur posits that solitary confinement constitutes torture and cruel, inhuman or degrading punishment where it is used as a punishment,⁹⁰ or is 'imposed as a result of a breach of prison discipline' and 'the pain and suffering experienced by the victim reaches the necessary severity.'⁹¹

Where solitary confinement is used intentionally during pretrial detention 'as a technique for the purpose of obtaining information or a confession, it amounts to torture [...] or to cruel, inhuman or degrading treatment.'⁹² The pain and suffering arising out of solitary confinement can result in involuntary confessions or cooperation with the prosecution that undermine the due process of law.⁹³ Whether non-pre-trial detention of mentally-well adults amounts to torture depends largely on the specific conditions of incarceration, including the degree of isolation, allowed visits, and physical conditions. In addition, the special rapporteur has concluded '[w]here the physical conditions of solitary confinement are so poor and the regime so strict that they lead to severe mental and physical pain or suffering of the individuals who are subjected to the confinement' it may amount to torture.⁹⁴

87 *Aksoy v Turkey* App No 21987/93 (ECtHR, 18 December 1996). This case and its relevance to an intent analysis under Article 1 of the CAT is discussed in Hathaway, Nowlan & Spiegel (n 82) 834-35.

88 Article 1 CAT somewhat cryptically states that 'torture' 'does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions'. I have come across no sources relying on this language to allow a punishment meted out as an official sanction that would otherwise constitute torture. Indeed, the United States observed in its RUD that it 'understands that a State Party could not through its domestic sanctions defeat the object and purpose of the Convention to prohibit torture.' US reservations, declarations and understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, II(1)(a), Cong Rec S17486-01 (daily ed, 27 October 1990) ('US CAT RUD'). As such, even where a statute or judge explicitly provides for solitary confinement, which is uncommon in the United States, that fact alone would not allow the intentional infliction of severe pain and suffering for purposes of punishment.

89 UN Doc A/HRC/13/39/Add.5 (n 63) 55 ('[m]ock executions, sleep deprivation, the abuse of specific personal phobias, prolonged solitary confinement, etc. for the purpose of extracting information, are equally destructive as physical torture methods').

90 UN Doc A/66/268 (n 12) 272 ('solitary confinement, when used for the purpose of punishment, cannot be justified for any reason, precisely because it imposes severe mental pain and suffering beyond any reasonable repudiation for criminal behaviour and thus constitutes an act defined in article 1 or article 16 of the [CAT] and a breach of article 7 of the [ICCPR]').

91 *ibid* 72.

92 *ibid* 73; UN Doc A/C.3/66/SR.21 (n 70) 45-46.

93 UN Doc A/C.3/66/SR.21 (n 70) 45.

94 UN Doc A/66/268 (n 12) 74; UN Doc A/C.3/66/SR.21 (n 70) 47 ('[c]ertain physical conditions in places of detention, when combined with the prison regime of solitary confinement, failed to respect the inherent dignity of the human person and caused severe mental and physical suffering. Depending

The question of whether the United States' widespread use of solitary confinement violates CAT is complicated. When ratifying CAT, the United States entered a number of reservations regarding the definition of torture and intent requirement.⁹⁵ With regard to the definition, the United States stated 'in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering.'⁹⁶ The US State Department made clear when transmitting the treaty to the Senate that the proposed reservations did not intend to set a higher standard for intent.⁹⁷ Regardless, the explicit specific intent to cause severe pain and suffering set forth by the United States has been criticized as 'defining torture so narrowly that only the handiwork of sadists could satisfy the definition.'⁹⁸

The United States also entered an 'understanding' setting forth a heightened standard for when mental pain and suffering constitute torture. It requires that the mental harm be prolonged and result from either intention or threatened infliction of severe physical pain or suffering, administration of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality, or imminent death for either the individual or another person.⁹⁹ The result of the Reservations, Understandings and Declarations ('RUDs') is that an act is only torture in the United States if the person acting had the specific intent to inflict severe physical pain or suffering. Further, if psychological (as opposed to physical) harm results, such psychological harm must be the result of threatened or actual severe physical pain or suffering, drug-induced states or the threat of imminent death. Essentially, psychological torture without physical injury or 'profound disruption' of the senses or personality is not torture in the United States.

Several countries criticized the narrow definition of mental pain or suffering and asserted that the US understanding did not alter its obligation under the CAT.¹⁰⁰ Extreme mental and physical pain and suffering are sometimes hard to parse. For example, '[I] oneliness, as induced [...] by solitary confinement, floods the body with stress hormones, raises blood pressure, accelerates aging, damages cognition, and weakens the immune

on the severity of the conditions, the length of the solitary confinement regime and the absence of mitigating factors, such as family visits, the isolation of inmates in such conditions amounted to cruel, inhuman or degrading punishment or – in more severe cases – to torture').

95 US CAT RUD (n 87).

96 *ibid.*

97 See Statement by Abraham D Sofaer in 'Hearing before the Senate Committee on Foreign Relations' 101st Congress (1990) ('no higher standard was intended') (discussed by Hathaway, Nowlan and Spiegel (n 82) 807-09).

98 David Luban & Henry Shur, 'Mental Torture: A Critique of Erasures in U.S. Law' (2012) 100 *Geo LJ* 823, 850.

99 US CAT RUD (n 87).

100 See eg, Objection by the Netherlands (26 February 1996) <<http://treaties.un.org>> accessed 14 November 2013 ('[t]he Government of the Kingdom of the Netherlands considers the following understandings to have no impact on the obligations of the United States of America under the Convention: II. 1 a This understanding appears to restrict the scope of the definition of torture under article 1 of the Convention. 1 d This understanding diminishes the continuous responsibility of public officials for behaviour of their subordinates [...]. The Government of the Kingdom of the Netherlands reserves its position with regard to the understandings II. 1b, 1c and 2 as the contents thereof are insufficiently clear.'). Objection by Sweden (27 February 1996) ('[I]t is the view of the Government of Sweden that the understandings expressed by the United States of America do not relieve the United States of America as a party to the Convention from the responsibility to fulfil the obligations undertaken therein'). These objections are discussed by Luban & Shur (n 97) 839.

system.¹⁰¹ Recognition of this interconnectedness makes reliance on narrow definitions of mental pain and suffering, such as the one utilized by the United States, less tenable. Although solitary confinement is generally thought of as largely psychological torture, researchers have discovered physical deleterious effects, including a change in the brain's normal manner of processing information,¹⁰² and in extreme cases, atrophy of muscles. Where a person's brain and body show physical signs of deterioration, the line between psychological and physical torture blurs. Regardless, because the global community has time and again defined torture to include psychological suffering by itself,¹⁰³ a prohibition on psychological torture arguably constitutes customary international law to which all countries are bound.

2. Solitary Confinement as Cruel, Inhuman or Degrading Treatment or Punishment

More widely accepted than the proposition that solitary confinement can constitute torture is the assertion that it constitutes cruel, inhuman or degrading treatment in violation of the CAT. As discussed above, multiple special rapporteurs on torture have pronounced that prolonged solitary confinement constitutes cruel, inhuman or degrading treatment.¹⁰⁴ In particular, the international community has unequivocally prohibited solitary confinement of juveniles and individuals with mental illness.¹⁰⁵

The unique RUDs that the United States entered when ratifying the CAT create a strange state of affairs. The US RUDs stated '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 inhuman treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.'¹⁰⁶ When a reservation has the effect of watering down the protections provided to the persons the treaty is meant to protect, arguably, it is contrary to the object and purpose of the treaty. Such reservations are prohibited in international law.¹⁰⁷ Despite this, if one accepts that the US RUDs are valid and not contrary to the object and purpose of the CAT, then the United States is only violating Article 16 of the CAT if the a US government actor conducts or allows behavior that violates the Eighth Amendment to the US Constitution. Ultimately, the US RUDs on the CAT require it to do nothing more than the US Constitution requires. The result is that the use of prolonged solitary confinement in the United States only violates Article 16 if it violates the US constitution.

101 Luban & Shur (n 97) 830. Luban and Shur rely on a number of sources for this assertion, including Stuart Grassian and other psychologists.

102 See Grassian (n 12) 331 ('even a few days of solitary confinement will predictably shift the electroencephalogram (EEG) pattern toward an abnormal pattern characteristic of stupor and delirium').

103 See eg, *Estrella v Uruguay*, Human Rights Committee Communication, No 74/1980 (finding applicant subjected to physical and psychological torture).

104 See eg, UN Doc A/66/268 (n 12) 81 ('where the physical conditions and the prison regime of solitary confinement fail to respect the inherent dignity of the human person and cause severe mental and physical pain or suffering, it amounts to cruel, inhuman or degrading treatment or punishment').

105 See supra, § III.

106 US CAT RUD (n 87) I(1).

107 UN Vienna Convention on the Law of Treaties (23 May 1969) United Nations, Treaty Series, vol 1155, p 331, Article 19(d) ('[a] State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless: [...] the reservation is incompatible with the object and purpose of the treaty').

With regard to the Eighth Amendment, this is particularly troubling given the Court's increasingly high bar regarding what constitutes a violation of the Eighth Amendment.¹⁰⁸ Even pursuant to this high standard, prolonged and restrictive solitary confinement, as well as solitary confinement of prisoners with mental illnesses and juveniles, violates Article 16 because US federal courts have found solitary confinement violates the Eighth Amendment in these situations. With regard to solitary confinement of juveniles and individuals with mental illness, courts have repeatedly held solitary confinement is cruel and unusual.¹⁰⁹ Federal courts have equated placing a prisoner with mental illness in solitary confinement with 'putting an asthmatic in a place with little air to breathe.'¹¹⁰ Most recently, a federal court held 'it is inconceivable that any representative portion of our society would put its imprimatur on a plan to subject the mentally ill and other inmates described above to the [Segregated Housing Unit ("SHU")], knowing that severe psychological consequences will most probably befall those inmates.'¹¹¹ In *Santana v Collazo*, the First Circuit held 'it would not be unreasonable to assume that society's conscience might be shocked by the conditions of confinement imposed on a juvenile in an isolation cell, when it would be unwilling to label the same treatment, given to an adult, cruel and unusual.'¹¹² As one federal district court put bluntly over thirty years ago in *Feliciano v Barcelo* – 'Solitary confinement of young adults is unconstitutional.'¹¹³ Because US courts have held solitary confinement of juveniles and individuals with mental illness violates the Eighth Amendment, pursuant to the US RUD that Article 16's contours will be interpreted as parallel to the Eighth Amendment's contours, the US practice of holding juveniles and individuals with mental illness in solitary confinement violates Article 16 of CAT.

108 See eg, *Harmelin v Michigan*, 501 US 957 (1991) ('punishment must be cruel **and** unusual without reference to the underlying offense') (emphasis added). One scholar has pointed to the growing rift between the Court's interpretation of the scope of Eighth Amendment and international law. Martin Geer argued that the Court's view that the Eighth Amendment prohibits only punishment that is both cruel and unusual is contrary to language in the CAT and other treaties explicitly prohibiting punishment or treatment that is cruel or inhuman or degrading. Martin Geer, 'Human Rights and Wrongs in Our Own Backyard: Incorporating International Human Rights Protections Under Domestic Civil Rights Law – A Case Study of Women in United States Prisons' (2000) 13 Harv Hum Rts J 71, 111.

109 See eg, *Inmates of Boys' Training Sch v Affleck*, 346 FSupp 1354, 1372 (DRI 1972) ('solitary confinement may be psychologically damaging, anti-rehabilitative, and at times inhumane'); *Lollis v New York State Dept of Soc Services*, 322 FSupp 473 (SDNY 1970); *RG v Koller*, 415 FSupp 2d 1129, 1155 (D Haw 2006) ('long-term segregation or isolation of youth is inherently punitive and is well outside the range of accepted professional practices'). For an excellent discussion of solitary confinement of juveniles and judicial treatment of the subject, see Sandra Simkins, et al, 'The Harmful Use of Isolation in Juvenile Facilities: The Need for Post-Disposition Representation' (2012) 38 Wash UJL & Pol'y 241 (2012). An excellent collection of sources is compiled in *The Statement of the ACLU to the US Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights* (19 June 2012).

110 *Madrid v Gomez*, 889 FSupp 1146, 1265-66 (ND Cal 1995). See also *Jones 'El v Berge*, 164 FSupp 2d 1096 (WD Wis 2001).

111 *Indiana Prot & Advocacy Services Comm'n v Comm'r, Indiana Dept of Correction*, 1:08-CV-01317-TWP, 2012 WL 6738517 (SD Ind, 31 December 2012).

112 *Santana v Collazo*, 714 F 2d 1172, 1179 (1st Cir 1983).

113 *Feliciano v Barcelo*, 497 FSupp 14, 35 (DPR 1979).

B. Solitary Confinement and the International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights ('ICCPR'), which codified the Declaration's core provisions, also explicitly prohibits torture and cruel, inhuman and degrading punishment and treatment. Article 7 states 'no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.'¹¹⁴ Unlike many of the ICCPR's provisions, Article 7 sets forth nonderogable rights that cannot be violated in times of public emergency.¹¹⁵ Accordingly, there can be no penological or other justification for the use of solitary confinement if it constitutes torture or cruel, inhuman and degrading punishment. Like the CAT reservation, the United States' ICCPR reservations interpret Article 7's prohibition on cruel, inhuman and degrading punishment by reference to the Eighth Amendment's cruel and unusual punishment standard. As such, if government action violates the Eighth Amendment, it also violates Article 7.¹¹⁶

Solitary confinement also implicates Article 10 of the ICCPR, which states, in part: '(1) All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. [...] (4) The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. [...]'¹¹⁷ As discussed above, solitary confinement causes the degeneration of prisoners, and makes them more maladaptive and unable to function upon release.¹¹⁸ Solitary confinement is the antithesis of reform and rehabilitation of prisoners, and contravenes Article 10(4) of the ICCPR. The Special Rapporteur has specifically reached this conclusion, reasoning '[l]ong periods of isolation do not aid rehabilitation or re-socialization of detainees.'¹¹⁹ Similarly, depriving a prisoner of all human contact strips him of the fundamental essence of what makes him human – interaction with others – and consequently deprives him of his inherent dignity as a human in violation of Article 10(1).

The Human Rights Committee ('HRC') is a body of independent experts established by the ICCPR that analyzes state parties' compliance by evaluating periodic reports submitted from state parties, considers complaints between state parties to the ICCPR, and hears individual complaints alleging violations of the ICCPR brought against states that have ratified the First Optional Protocol to the ICCPR.¹²⁰ HRC decisions against a state

114 International Covenant on Civil and Political Rights, GA Res 2200A (XXI), 21 UN GAOR Supp (No 1) 52, UN Doc A/6316 (1966), 999 UNTS 171, entered into force 23 March 1976, Art 7 ('ICCPR') ('[n]o one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment').

115 *ibid* Art 4(2).

116 See US reservations, declarations, and understandings, International Covenant on Civil and Political Rights, 138 Cong Rec S4781-01, I(3) (daily ed, 2 April 1992).

117 Art 10(1) & (4) ICCPR.

118 One recent study found prisoners held in solitary confinement in intensive management units ('IMU') 'released directly from IMU into the community had significantly higher rates of felony recidivism than those who had some prerelease period in social prison settings'. See David Lovell and Clark Johnson, *Felony and Violent Recidivism Among Supermax Prison Inmates in Washington State: A Pilot Study* (18 April 2004) 19.

119 UN Doc A/66/268 (n 12) 76. See also UN Doc A/C.3/66/SR.21 (N 70) 45 (solitary confinement 'preclude[s] the possibility of rehabilitation and reform, which should always be the object of the penalty').

120 Optional Protocol to the International Covenant on Civil and Political Rights, GA Res 2200A (XXI), 21 UN GAOR Supp (No 16) at 59, UN Doc A/636 (1966), 999 UNTS 302, entered into force 23 March 1976.

party require that state party respond to the HRC within 6 months specifying what remedy, if any, was provided.¹²¹ HRC decisions, comments and observations provide useful guidance on the meaning of the ICCPR provisions at issue, and what actions may constitute a treaty breach or violation of customary international law where the treaty provision at issue represents existing customary international law.

In 1992, the HRC adopted General Comment 21 concerning human treatment of persons deprived of liberty, which states '[t]reating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule. Consequently, the application of this rule, as a minimum, cannot be dependent on the material resources available in the State party.'¹²² In 2006, the HRC included in its Concluding Observations to the United States a concern that solitary confinement in supermax prisons violated Article 10(1) and 10(4) of the ICCPR, and concern regarding the high number of mentally ill persons in US prisons and jails.¹²³

Also in 2006, the UN Economic and Social Council's Commission on Human Rights, observed with concern that in Guantánamo Bay, '[r]eports indicate that although 30 days of isolation was the maximum period permissible, detainees were put back in isolation after very short breaks, so that they were in quasi-isolation for up to 18 months.'¹²⁴ The Commission observed '[a]ccording to the jurisprudence of the Human Rights Committee, prolonged solitary confinement and similar measures aimed at causing stress violate the rights of detainees under article 10(a) ICCPR to be treated with humanity and with respect for the inherent dignity of the human person, and might also amount to inhuman treatment in violation of article 7 ICCPR.'¹²⁵ The US representative agreed before the General Assembly that according to US constitutional law, 'solitary confinement should not be used without a careful analysis of its nature, duration and reasons, as well as of the risk of unreasonable psychological or physical harm that might result from extended isolation.'¹²⁶

The HRC has repeatedly heard alleged violations of Articles 7 and 10 of the ICCPR from prisoners subject to solitary confinement. On many occasions, the HRC has found solitary confinement, coupled with other conditions of confinement, violates these articles.¹²⁷

121 *ibid* Art 4(2).

122 General Comment No 21: Replaces general comment 9 concerning humane treatment of persons deprived of liberty (Art 10) CCPR General Comment No 21, Forty-fourth session, 1992.

123 Human Rights Comm, 7th Sess, 10-28 July 2006, *Concluding Observations of the Human Rights Committee: United States of America* 32, UN Doc CCPR/C/USA/CO/3/Rev 1 (18 December 2006) ('The Committee reiterates its concern that conditions in some maximum security prisons are incompatible with the obligation contained in article 10 (1) of the Covenant to treat detainees with humanity and respect for the inherent dignity of the human person. It is particularly concerned by the practice in some such institutions to hold detainees in prolonged cellular confinement, and to allow them out-of-cell recreation for only five hours per week, in general conditions of strict regimentation in a depersonalized environment. It is also concerned that such treatment cannot be reconciled with the requirement in article 10 (3) that the penitentiary system shall comprise treatment the essential aim of which shall be the reformation and social rehabilitation of prisoners. It also expresses concern about the reported high numbers of severely mentally ill persons in these prisons, as well as in regular in U.S. jails.')

124 The Economic and Social Council's Commission on Human Rights, *Situation of Detainees at Guantánamo Bay* 45 ILM 716 (15 February 2006).

125 *ibid*.

126 UN Doc A/C.3/66/SR.21 (n 70).

127 See eg, *Estrella v Uruguay*, Comm No 74/1980, UN Doc CCPR/C/18/D/74/1980 (1983); *Violeta Stetlich v Uruguay*, Comm No 63/1979, UN Doc CCPR/C/OP/1 (1985); *Xavier Evans v Trinidad and*

According to the HRC, 'persons deprived of their liberty must not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons.'¹²⁸ Similar to the European Court of Human Rights' test discussed below, the HRC's test for whether conditions of confinement constitute inhuman or degrading treatment 'depends on all the circumstances of the case, such as the duration and manner of the treatment, its physical or mental effects as well as the sex, age and state of health of the victim.'¹²⁹ The HRC requires a 'serious and detailed justification' for holding prisoners in solitary confinement, particularly for prolonged periods of time.¹³⁰

The HRC has found denial of medical treatment and solitary confinement of already vulnerable individuals, including juveniles and disabled prisoners, violates Articles 7 and 10,¹³¹ as well as the solitary confinement of political prisoners.¹³² The HRC has also found that highly restrictive solitary confinement constitutes a violation of Articles 7 and 10.¹³³

C. Solitary Confinement of Juveniles and the Convention on the Rights of the Child

A prohibition on torture and cruel, inhuman and degrading treatment and punishment is also found in UN treaties addressing specific categories of persons, including the Convention on the Rights of the Child ('CRC').¹³⁴ The CRC specifically requires that parties to the convention ensure incarcerated children must be 'treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into

Tobago, Comm No 908/2000, UN Doc CCPR/C/77/D/908/2000 (1999); *Yong-Joo Kang v Republic of Korea*, Comm No 878/1999, UN Doc CCPR/C/78/D/878/1999 (2003); *Charles Gurmurkh Sobhraj v Nepal*, Comm No 1870/2009, UN Doc CCPR/C/99/D/1870/2009 (2010).

128 *Corey Brough v Australia*, Comm No 1184/2003, UN Doc CCPR/C/86/D/1184/2003 (2006).

129 *Violeta Stetlich* (n 126).

130 *Yong-Joo Kang* (n 126) 7.3.

131 *Violeta Stetlich* (n 126); *Charles Gurmurkh Sobhraj v Nepal*, Comm No 1870/2009, UN Doc CCPR/C/99/D/1870/2009 (2010) ('placement in solitary confinement, shackling with a possibility to appeal, and alleged lack of appropriate health care, fail to respect the inherent dignity of the human person in violation of article 10, paragraph 1 of the Covenant').

132 *Yong-Joo Kang* (n 126) ('solitary confinement [for 13 years], apparently on the sole basis of his presumed political opinion, fails to meet that such particularly high burden of justification, and constitutes at once a violation of article 10, paragraph 1, protecting the inherent dignity of the author, and of paragraph 3, requiring that the essential aim of detention be reformation and social rehabilitation').

133 See eg, *Polay Campos v Peru*, CCPR/C/61/D/557/1994 (1998) 8.8 ('[t]he Committee finds that the conditions of Mr. Polay Campos' detention, especially his isolation for 23 hours a day in a small cell and the fact that he cannot have more than 10 minutes' sunlight a day, constitute treatment contrary to article 7 and article 10'); *Corey Brough* (n 127) 9.4 ('the author's extended confinement to an isolated cell without any possibility of communication, combined with his exposure to artificial light for prolonged periods and the removal of his clothes and blanket, was not commensurate with his status as a juvenile person in a particularly vulnerable position because of his disability and his status as an Aboriginal'). Beginning around 2000, the HRC began solely relying on Article 10 when considering conditions of confinement. See eg, *Xavier Evans* (n 126) 6.4 (finding a violation of Article 10(1), and concluding '[i]n light of this finding, in respect of Article 10, a provision of the Covenant dealing specifically with the situation of persons deprived of their liberty and encompassing for such persons the elements set out generally in article 7, it is not necessary separately to consider the claims arising under Article 7 of the Covenant').

134 Convention on the Rights of the Child, GA Res 44/25, UN GAOR, 44th Sess, Supp No 49, 167, UN Doc A/44/49 (1989), entered into force 20 September 1990 ('CRC').

account the needs of persons of his or her age.¹³⁵ The CRC mandates that state parties treat juvenile prisoners 'in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.'¹³⁶ As discussed above, courts, psychologists and international organizations have repeatedly concluded that putting children in solitary confinement creates psychological damage and makes reintegration more difficult.¹³⁷

D. Solitary Confinement of Prisoners with Mental Illness and the Convention on the Protection of the Rights of Persons with Disabilities

The UN Convention on the Protection of the Rights of Persons with Disabilities ('CPRD') entered into force on 3 May 2008.¹³⁸ This convention is particularly pertinent given the large number of prisoners with mental illness in solitary confinement throughout the United States, and the severely detrimental impact of solitary confinement on these individuals. As the Special Rapporteur on Torture noted, '[g]iven their diminished mental capacity and that solitary confinement often results in severe exacerbation of a previously existing mental condition, [...] its imposition, of any duration, on persons with mental disabilities is cruel, inhuman or degrading treatment.'¹³⁹

Upon ratification of the CPRD, state parties 'undertake to refrain from engaging in any act or practice that is inconsistent with the present Convention and to ensure that public authorities and institutions act in conformity with the present Convention.'¹⁴⁰ One scholar has argued that subjecting prisoners to solitary confinement violates the CPRD's protection against 'disablement', defined as governmental actions that inflict disabilities.¹⁴¹ Disablement occurs when a government action results in a long-term physical, mental, intellectual or sensory impairment that 'hinders an individual's full and effective participation in society on an equal basis with others.'¹⁴² Disablement must be intentional, defined as action purposefully undertaken with knowledge that it will result in disablement.¹⁴³ Disablement occurs where the government actor intends to do the action, and does not require a specific intent to disable.¹⁴⁴

135 Art 37(c) CRC.

136 Art 40 CRC.

137 See supra, § IIIB. At least one US circuit court has assumed that the CRC has risen to the level of customary international law. *Cabrera-Alvarez v Gonzales*, 423 F 3d 1006, 1010 (9th Cir 2005) ('we assume, without deciding, that the Convention has attained the status of "customary international law"').

138 Convention on the Rights of Persons with Disabilities, UNTS, vol 2515, p 3, entered into force 3 May 2008 ('CRPD').

139 UN Doc A/66/268 (n 12) 78.

140 Art 4(d) CRPD.

141 See Kathryn D DeMarco, 'Disabled by Solitude: The Convention on the Rights of Persons with Disabilities and its Impact on the Use of Supermax Solitary Confinement' (2012) 66 U Miami L Rev 523, 528 ('[c]onfining an individual to a supermax facility in essence creates a mental disability').

142 *ibid*, quoting Article 1 CPRD.

143 *ibid*.

144 *ibid*.

It is widely accepted that solitary confinement creates long-term deleterious effects. These effects often render it difficult if not impossible for prisoners to re-engage in general population or into society once discharged from the corrections system. The chances of these negative effects are quite high, thereby rendering it predictable that they will occur as a result of prolonged solitary confinement. This predictability is nowhere more apparent than for prisoners with pre-existing mental illnesses subject to solitary confinement.¹⁴⁵

Another potentially relevant provision of the CPRD is Article 15, which specifically prohibits torture and cruel, inhuman or degrading treatment or punishment, and requires state parties to ensure that individuals with disabilities are equally protected from such treatment as individuals without disabilities. Article 15 is implicated where solitary confinement housing units in jails and prisons, or supermax prisons generally, have a disproportionate number of individuals with serious mental illness or developmental disabilities. In fact, in prisons and jails across the country, individuals are placed in solitary solely because of their disability, which obviously fails to protect them from torture and cruel, inhuman or degrading punishment. As discussed above, many jails and prisons use solitary confinement as a way to warehouse prisoners with mental illness who cannot be easily integrated into general population in lieu of providing housing specifically for prisoners with mental illness that addresses their needs. To the extent a disproportionate number of prisoners with a serious mental illness are subject to solitary confinement, resulting in increased severity of mental illness and severe pain and suffering, Article 15 is violated.

IV. Regional Human Rights Paradigms' Views on Solitary Confinement

Regional human rights paradigms also prohibit torture and cruel, inhuman and degrading punishment or treatment, including the American Convention on Human Rights,¹⁴⁶ the European Convention on Human Rights,¹⁴⁷ and the African Charter on Human and People's Rights.¹⁴⁸ Decisions of the European Court of Human Rights ('ECtHR') and Inter-American Court of Human Rights ('IACtHR'), as well as ad hoc tribunals and national courts, have found solitary confinement violates the rights set forth in the respective regional human rights treaties in certain circumstances. Tribunal decisions not

145 See David Lovell and Clark Johnson (n 117) 19 (finding prisoners held in solitary confinement in intensive management units ['IMU'] 'released directly from IMU into the community had significantly higher rates of felony recidivism than those who had some prerelease period in social prison settings').

146 American Convention on Human Rights, Art 5(2), 1144 UNTS 123, entered into force 18 July 1978 ('[n]o one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.').

147 European Convention for the Protection of Human Rights and Fundamental Freedoms, Art 3, 5 November 1950, Europe TS No 5, 213 UNTS 221, entered into force 3 September 1953 ('No one shall be subjected to torture or to inhuman or degrading treatment or punishment').

148 African [Banjul] Charter on Human and People's Rights, Art 5, adopted 27 June 1981, OAU Doc CAB/LEG/67/3 rev 5, 21 ILM 58 (1982), entered into force 21 October 1986, ('[a]ll forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited').

only bind regional treaty members, but also are sources of international law relied upon by other tribunals and looked to as evidence of emerging customary international law.¹⁴⁹

A substantial body of decisions from these tribunals has established the conditions in which solitary confinement rises to the level of torture or cruel, inhuman or degrading treatment. Generally, where an individual is detained in solitary confinement incommunicado or after receiving a death sentence, these regional paradigms find international law violations. Similarly, where a vulnerable individual is put in solitary confinement, or where a government does not provide a good justification for holding an individual in solitary confinement, regional international law is violated. In all other cases, international tribunals look at a myriad of factors to determine whether cumulative conditions of confinement violate regional treaties, including the degree of isolation, size of cell, access to food, water, a sink and toilet, in cell privileges, access to outdoor exercise and fresh air, level of medical and mental health treatment provided, and sanitary conditions.

A. The Inter-American Human Rights Paradigm and Solitary Confinement

The Inter-American regional paradigm is the most vocal global voice against solitary confinement, as seen by the prison rules promulgated in 2006 and multiple decisions of the IACtHR. The Inter-American paradigm has a strict zero tolerance for solitary confinement as punishment and for juveniles. As expressly stated in the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas: 'The law shall prohibit solitary confinement in punishment cells' and '[i]t shall be strictly forbidden to impose solitary confinement to [...] children deprived of liberty.'¹⁵⁰ With regard to solitary confinement of adults for non-punitive reasons, 'the disposition of solitary confinement shall be authorized by the competent authority and shall be subject to judicial control, since its prolonged, inappropriate or unnecessary use would amount to acts of torture, or cruel, inhuman, or degrading treatment or punishment.'¹⁵¹

Article 5(2) of the Inter-American Convention on Human Rights states '[n]o one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.'¹⁵² The Inter-American Convention to Prevent and Punish Torture ('IACPPT') also prohibits torture.¹⁵³ The Inter-American Commission on Human Rights interpreted 'torture' as used in the IACPPT to require three elements: '1. it must be an intentional act through which physical and mental pain and suffering is inflicted on a person; 2. it must be committed with a purpose; 3. it must be committed by a public official or by a private person acting at the instigation of the former.'¹⁵⁴ The American Convention requires that persons deprived of their liberty shall be treated 'with respect for the inherent dignity of the human

149 Statute of the International Court of Justice, Art 38(1), 26 June 1945, 59 Stat 1031, 33 UNTS 993.

150 Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, Approved by the Commission during its 131st regular period of sessions, 3-14 March 2008, Principle XXII(3).

151 *ibid.*

152 Art 5(2) American Convention.

153 OAS Treaty Series No. 67, entered into force 28 February 1987, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/SerLV/II.82 doc 6 rev 1 at 83 (1992).

154 *Martín de Mejía v Perú*, Report No 5/96, Case No 10.970 (1 March 1996). This case and its relevance to an intent analysis under Article 1 of the CAT is discussed in Hathaway, Nowlan & Spiegel (n 77) 834-35.

persons,¹⁵⁵ and mandates that incarceration of prisoners should have the aim and purpose of rehabilitation and reintegration.¹⁵⁶

For over 20 years, the IACtHR and Inter-American Commission on Human Rights have repeatedly held that prolonged solitary confinement is cruel and inhuman treatment, and in some cases torture, that harms the psychological makeup, moral integrity and dignity of the detainee.¹⁵⁷ In many cases, solitary confinement was in the form in incommunicado detention, which the Court expressly found violates Article 5(2) as 'isolation from the outside world [that] produces moral and psychological suffering in any person, places him in a particularly vulnerable position, and increases the risk of aggression and arbitrary acts in prison.'¹⁵⁸

The Court has repeatedly taken issue with Peru's practice of holding suspected terrorists in isolated incommunicado detention while awaiting trial in military tribunals.¹⁵⁹ In *Loyaza-Tamayo v Peru*, the court held that Peru's act of holding a suspected terrorist in 'incommunicado detention, being exhibited through the media wearing a degrading garment, solitary confinement in a tiny cell with no natural light, blows and maltreatment, including total immersion in water, intimidation with threats of further violence, a restrictive visiting Schedule [...] all constitute forms of cruel, inhuman or degrading treatment in the terms of Article 5(2).'¹⁶⁰ This language suggests that each of these acts independently constitutes cruel, inhuman or degrading treatment, including solitary confinement in a small cell with no natural light.

In 2000, in *Cantarol-Benavides v Peru*, the Court went beyond prior holdings, and held that solitary confinement in a small cell with no ventilation or natural light for

155 Art 5(2) American Convention ('[a]ll persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person').

156 Art 10 ICCPR ('[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation'); Art 5(6) American Convention ('[p]unishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners').

157 See *Velázquez-Rodríguez v Honduras*, 29 July 1988, Series C No 4, 156 ('prolonged isolation and deprivation of communication are in themselves cruel and inhuman treatment, harmful to the psychological and moral integrity of the person and a violation of the right of any detainee to respect for his inherent dignity as a human being. Such treatment, therefore, violates Article 5 of the Convention'); *Godínez-Cruz v Honduras*, 20 January 1989, Series C No 5, 164 (same); *Fairén-Garbi and Solís-Corrales v Honduras*, 15 March 1989, Series C No 6, 149 ('[p]rolonged and coercive isolation is, by nature, cruel and inhuman treatment, harmful to the mental and moral integrity of the person and the right to dignity inherent to the human being. Thus, it also violates Article 5 of the Convention'); *Bámaca-Velásquez v Guatemala*, 25 November 2000, Series C No 70, 150; *Montero Aranguren, et al v Venezuela*, 5 July 2006, 94 ('solitary confinement cells must be used as disciplinary measures or for the protection of persons only during the time necessary and in strict compliance with the criteria of reasonability, necessity and legality. Such places must fulfill the minimum standards for proper accommodation, sufficient space and adequate ventilation, and they can only be used if a physician certifies that that the prisoner is fit to sustain it.');

Lizardo Cabrera v Dominican Republic, OEA/Ser L/V/II.98, Report No 35/96, Case No 10/832 (19 February 1998), 86-87.

158 *Suárez-Rosero v Ecuador*, 12 November 1997, Series C No 35, 90; *Montero Aranguren, et al v Venezuela*, 5 July 2006, 94 ('the Court emphatically points out that confinement in a dark cell and incommunication are forbidden'). Although solitary confinement and incommunicado detention are distinguishable concepts in that incommunicado detention is a situation where nobody, apart from the authorities, has contact with the detainee, the isolation and resultant effects are often discussed in the larger context of solitary confinement.

159 See eg, *Loyaza-Tamayo v Peru*, 17 September 1997, Series C No 33, 58; *Castillo Petruzzi et al v Peru*, 30 May 1999, Series C No 52; *Cantarol-Benavides v Peru*, 18 August 2000, Series C, No 69.

160 *Loyaza-Tamayo v Peru*, 17 September 1997, Series C No 33, 58 (emphasis added).

23.5 hours per day, and monthly no-contact visits with family, for the purposes of obtaining a confession and for punishment constituted torture.¹⁶¹ The Court reasoned that 'international jurisprudence has been developing the notion of psychological torture' and 'according to international standards for protection, torture can be inflicted not only via physical violence, but also through acts that produce severe physical, psychological or moral suffering in the victim.'¹⁶² *Cantarol-Benavides* relied on European Court of Human Rights jurisprudence to conclude 'certain acts that were classified in the past as inhuman or degrading treatment, but not as torture, may be classified differently in the future, that is, as torture, since the growing demand for the protection of fundamental rights and freedoms must be accompanied by a more vigorous response in dealing with infractions of the basic values of democratic societies.'¹⁶³ In addition to Article 5(2), the Commission has also found a violation of Article 25, which prohibits arbitrary detention, where political prisoners are held incommunicado in solitary confinement.¹⁶⁴

The Inter-American Commission is increasingly critical of US solitary confinement practices. Earlier this year the Commission issued a press release expressing concern over the excessive use of solitary confinement in the United States.¹⁶⁵ The Commission stated that 'international human rights law establishes as a standard that the use of solitary confinement should be absolutely prohibited in the following circumstances: for children under the age of 18, for persons with mental disabilities, and for death row and life-sentenced prisoners by virtue of their sentence.'¹⁶⁶ The press release went on to note 'solitary confinement should be used only in exceptional circumstances, for the shortest period possible and only as a measure of last resort,' and outlined several minimum protections for prisoners in solitary, including judicial oversight, cells that meet minimum international standards, and strict medical supervision.¹⁶⁷

In a 2009 report issued regarding US immigration detention facilities, the Inter-American Commission's Rapporteurship on the Rights of Migrant workers and their Families emphasized:

'The Rapporteurship was distressed at the use of solitary confinement to ostensibly provide personal protection for vulnerable immigrant detainees, including homosexuals, transgender detainees, detainees with mental illness, and other minority problems. The use of solitary confinement as a solution to safeguard threatened populations effectively punishes victims. The Rapporteurship urges the U.S. Government to establish alternatives to protect vulnerable populations in detention and to provide the mentally-ill with appropriate treatment in a proper environment.'¹⁶⁸

161 *Cantarol-Benavides* (n 158) 62, 104.

162 *ibid* 100, 102. The Commission has also concluded that solitary confinement of a prisoner on a hunger strike constitutes torture. *Lizardo Cabrera* (n 156) 86-87.

163 *Cantarol-Benavides* (n 158) 102.

164 See *Oscar Elías Biscet et al v Cuba*, Report No 67/06, Case 2.476 (21 October 2006) 153-158.

165 Organization of American States Press Release, IACHR Expresses Concern over excessive use of solitary confinement in the United States (18 July 2013) <http://www.oas.org/en/iachr/media_center/Preleases/2013/051.asp> accessed 14 November 2013.

166 *ibid*.

167 *ibid*.

168 *Inter-American Commission on Human Rights Press Release No 53/09: IACHR Visits U.S. Immigration Detention Facilities* (28 July 2009), <<http://www.cidh.org/Comunicados/English/2009/53-09eng.htm>> accessed 14 November 2013.

B. The Council of Europe and Solitary Confinement

Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, states 'no one shall be subjected to torture or to inhuman or degrading treatment or punishment.'¹⁶⁹ The ECtHR regularly hears cases brought by prisoners alleging solitary confinement practices they have been subject to constitute torture or cruel, inhuman or degrading treatment in violation of Article 3. The Court also hears cases under Article 3 involving extradition challenges where an individual is being extradited to a country in which solitary confinement is likely. The recent ECtHR decision in *Aswat v United Kingdom* (discussed below) shows that extradition challenges may be the most effective avenue for challenging US solitary confinement practices, particularly where the prisoner being extradited is a juvenile or a prisoner with mental illness.

1. ECtHR Cases Relating to Torture and Cruel, Inhuman and Degrading Treatment

The case decisions generally track the rules set forth in the European Prison Rules, as amended in 2006, which discourage the use of solitary confinement and state that it shall be used sparingly for as short a time as possible.¹⁷⁰ The test utilized by the ECtHR to determine whether conditions of confinement violate Article 3, taken from *Ireland v the United Kingdom*,¹⁷¹ is well-established. While the Court has concluded that highly restrictive solitary confinement coupled with physical beatings and the denial of food is torture in violation of Article 3,¹⁷² the court most often analyzes whether conditions of confinement constitute cruel, inhuman or degrading treatment. The test is nearly always set forth as follows:

'Article 3 [...] enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behavior. [...] In order to fall under Article 3, ill-treatment must attain a minimum level of severity. The assessment of this minimum level is relative; it depends on the circumstances of the case, such as the duration of treatment, its physical and mental effects and, in some cases, the state of the health of the victim. [...] Although the purpose of such treatment is a factor to be taken into account, in particular the question of whether it was intended to humiliate or debase the victim, the absence of any such purpose does not inevitably lead to a finding that there has been no violation of Article 3. [...]

The Court has consistently stressed that the suffering and humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment. [...] Measures depriving a person of his liberty may often involve an element of suffering or humilia-

169 European Convention for the Protection of Human Rights and Fundamental Freedoms, Art 3, 5 November 1950, Europe TS No 5, 213 UNTS 221 (entered into force 3 September 1953).

170 See Council of Europe, Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules (11 January 2006), Rule 60.5 ('[s]olitary confinement shall be imposed as a punishment only in exceptional cases and for a specified period of time, which shall be as short as possible').

171 *Ireland v United Kingdom* App no 5310/71 (ECtHR, 18 January 1978) 162.

172 *Ilascu et al v Moldova and Russia* App no 48787/99, (ECtHR, 8 July 2004) 443–447.

tion. However, the State must ensure that a person is detained under conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured.¹⁷³

The Court considers treatment to be 'inhuman' where it was premeditated, applied for hours at a time, and caused actual bodily injury or intensive physical and mental suffering.¹⁷⁴ 'Degrading' treatment is treatment that 'arous[es] in [its] victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance.'¹⁷⁵ Like the Eighth Amendment's 'evolving standards of decency' analysis, the Court has recognized that the European Convention 'must be interpreted in the light of present-day conditions' with regard to 'commonly accepted standards in the penal policy of the member States of the Council of Europe.'¹⁷⁶ The Court has explicitly held that a state's lack of resources cannot justify prison conditions that violate Article 3.¹⁷⁷

The Court has made clear that 'complete sensory isolation, coupled with total social isolation, can destroy the personality and constitutes a form of inhuman treatment which cannot be justified by requirements of security or any other reason.'¹⁷⁸ In most cases, *complete* sensory and social isolation is not imposed, but instead, severely restricted isolation is imposed. The Court has held that 'all forms of solitary confinement without appropriate mental and physical stimulation are likely, in the long term, to have damaging effects, resulting in deterioration of mental faculties and social abilities.'¹⁷⁹ Where solitary confinement does not entail 'complete isolation', the Court looks at 'particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned' to determine whether the conditions of confinement violate Article 3.¹⁸⁰

The burden of proof for establishing an Article 3 violation is 'beyond a reasonable doubt', however, 'proof may follow from sufficiently strong, clear and concordant infer-

173 *AB v Russia* App no 1439/06 (ECtHR 14 October 2010) 99-100. This test is set forth in nearly every case analyzing solitary confinement under Article 3, including *Poltoratskiy v Ukraine* App no 48787/99 (ECtHR, 29 April 2006) 130-133; *Dankevich v Ukraine* App no 40679/98 (ECtHR, 29 April 2003) 121-123; *GB v Bulgaria* App no 42346/98 (ECtHR, 11 March 2004) 69-71. More recent tests include the age and sex of the applicant in the analysis. See eg, *Ilascu* (n 171) 427; *Rohde v Denmark* App no 69332/01 (ECtHR, 21 July 2005) 89-91.

174 *Soering v United Kingdom* App no 14038/88 (ECtHR, 7 July 1989) 100.

175 *ibid*; *Ramirez Sanchez v France* App no 59450/00 (ECtHR, 4 July 2006) 97.

176 *Soering* (n 173) 102; *Dankevich* (n 172) 124.

177 *Poltoratskiy* (n 172) 148. See also Council of Europe, 2006 Prison Rules, Basic Principle 4 ('[p]rison conditions that infringe prisoners' human rights are not justified by lack of resources').

178 *Babar Ahmad et al v United Kingdom* Apps no 24027/07, 36742/08, 66911/09 and 67354/09 (ECtHR, 10 April 2012) 206; *Ensslin, A Baader and J Raspe v Federal Republic of Germany* App no 7572/76, 7587/76 & 7587/76 (Commission Decision, 8 July 1978). See Interpretation of Torture (n 83) 10/30-11/30 (discussing this case). See also *Krocher v Switzerland* App no 8463/78 (Commission Decision, 16 December 1982) 24, 53, P 62 (again setting forth the rule that 'complete sensory isolation coupled with total social isolation, can destroy the personality and constitutes a form of treatment which cannot be justified by the requirements of security or any other reason').

179 *GB v Bulgaria* (n 172) 84.

180 *Ahmad* (n 177) 209; *Palushi v Austria* App no 42346/98 (ECtHR, 22 December 2009) 68.

ences or of similar un rebutted presumptions of fact.¹⁸¹ In addition, '[w]here the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries occurring during such detention. Indeed, the burden of proof may be regarded as lying with the authorities to provide a satisfactory and convincing explanation.'¹⁸² While the Court will generally accept the facts established by the member state's domestic court, 'the Court is not bound by the findings of domestic courts' and in Article 3 challenges in particular, 'the Court must apply a particularly thorough scrutiny.'¹⁸³

Like the IACtHR, the ECtHR has condemned incommunicado solitary confinement as a violation of Article 3, particularly where incommunicado detention is intended to intimidate a prisoner.¹⁸⁴ The Court has nearly always found a violation of Article 3 when a person who has been sentenced to death is confined, even for short periods, in solitary confinement.¹⁸⁵ The Court has special concern for the 'death row phenomenon', in which a condemned prisoner in isolation grapples with 'anguish and mounting tension of living in the ever-present shadow of death.'¹⁸⁶ The Court has found violations of Article 3 for condemned prisoners even where no evidence of death row phenomenon symptoms are present and a reliable moratorium on executions is in place.¹⁸⁷ For both pre-trial detainees, or 'remand' prisoners, and sentenced prisoners held in solitary confinement, the Court generally finds a violation of Article 3 where the person is particularly vulnerable prior to confinement, such as when a person has mental health issues prior to entering solitary confinement.¹⁸⁸

Despite the Court's repeated assertion that '[t]he nature of the offence allegedly committed by the applicant is [...] irrelevant for the purposes of Article 3,¹⁸⁹ where a suspected terrorist is held in solitary confinement, the Court has been reluctant to find a violation of Article 3. The Court has ruled solitary confinement is reasonable for very dangerous suspected terrorists as an 'extraordinary security measure.'¹⁹⁰ This subset of

181 *Palushi* (n 179) 54.

182 *ibid.*

183 *ibid.* 55.

184 See eg, *El-Masri v Former Yugoslavia Republic of Macedonia* App no 39630/09 (ECtHR, 13 December 2012).

185 For example, in *Soering v United Kingdom*, the Court found a violation of Article 3 despite relatively unrestrictive conditions on confinement on the basis that the applicant would be subject to the 'death row phenomenon' in the United States, which amounts to cruel, inhuman or degrading treatment. *Soering* (n 173). Other cases include *Poltoratskiy* (n 172) (finding violation of Article 3 where applicant spent substantial time in highly restrictive solitary confinement after being sentenced to death because 'the conditions of detention which the applicant had to endure [...] must have caused him considerable mental suffering, diminishing his human dignity'); *Ilascu* (n 171).

186 *Soering* (n 173) 106; *GB v Bulgaria* (n 172); *Ilascu* (n 171) 429 ('in certain circumstances, the imposition of [a death] sentence might entail treatment going beyond the threshold set by Article 3, when for example a long period of time must be spent on death row in extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty').

187 *Dankevich* (n 172); *Iorgov (II) v Bulgaria* App no 36295/02 (ECtHR, 2 September 2010).

188 See eg, *Palushi* (n 179) (finding prisoner in advanced stages of hunger strike was sufficiently vulnerable that placement in solitary was Article 3 violation).

189 See eg, *Ramirez Sanchez* (n 174) 96 ('unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15, §2 even in the event of a public emergency threatening the life of the nation'); *Ilascu* (n 171) 424.

190 See eg, *Ramirez Sanchez* (n 174) 101, 120; *Öcalan v Turkey* App no 46221/99 (ECtHR, 12 May 2005) 192.

cases appears to contradict the non-derogable nature of the rights enshrined in Article 3, as expressly recognized by the Court. If the cumulative conditions of solitary confinement violate Article 3, there is no justification for the imposition of those conditions.

Aside from the above specific categories of cases, the Court generally looks at the cumulative effect of following factors: the size of the cell, sanitary conditions, ventilation, natural light and the absence or presence of windows, regularity of meals, out of cell and outside time, visiting privileges and actual visits, mail privileges, the prisoner's opportunity for interpersonal interaction, level of medical and mental health care received by prisoner, monitoring of the prisoner's medical and mental health,¹⁹¹ programming available to prisoner, duration of time in solitary confinement, whether the prisoner experienced pain and suffering as a result of solitary confinement, including mental decompensation, the state and prison's justification for holding the prisoner in solitary confinement, and the prisoner's ability to meaningfully challenge placement in solitary confinement.¹⁹²

Where a cell is exceedingly small, dirty, not well-ventilated, without windows or natural light, these physical conditions increase the chance of an Article 3 violation. Similarly, where a prisoner has had very restricted visiting and/or mail privileges, little to no interaction with prison staff or other prisoners, no access to newspapers, television and radio, or limited out of cell and outside time,¹⁹³ an Article 3 violation is more likely. If a prisoner is placed in solitary confinement and goes generally unmonitored by medical and mental health staff, particularly if there is a pre-existing condition or allegations of decompensation while in solitary confinement, a violation is more likely.¹⁹⁴ Recent cases show an increased emphasis on the level of health care received by prisoners in solitary confinement when analyzing whether the cumulative conditions of confinement violate Article 3.¹⁹⁵

The Court has grown increasingly stringent in demanding a good explanation for why a prisoner is held in solitary confinement, and will find a violation of Article 3 if no reason is given, or if the reason is not proportional to the restrictive nature of solitary confinement.¹⁹⁶ Authorities' reason for holding a prisoner in solitary confinement must be more

191 See *Onoufriou v Cyprus* App no 24407/03 (ECtHR, 7 January 2010) 70 (stating 'a system of regular monitoring of the prisoner's physical and mental condition should also be put in place in order to ensure that the solitary confinement measures remain appropriate in the circumstances'); *AB v Russia* (n 165) 108 (restating the rule set forth in *Onoufriou* and finding Article 3 violation where a prisoner spent three years in solitary confinement and 'the applicant's physical or psychological aptitude for long-term isolation was never assessed by a medical specialist'). See eg, *Palushi* (n 179) 72-75 (finding Article 3 violation where prisoner was placed in disciplinary detention in advanced stages of hunger strike without adequate medical care and monitoring).

192 A useful list of factors considered and relevant cases can be found at *Ahmad* (n 177) 178.

193 See *Ahmad* (n 177) 213; *Yevgeniy Alekseyenko v Russia* App no 41833/04 (ECtHR, 27 January 2011) 88; *Gladkiy v Russia* App no 3242/03 (ECtHR, 21 December 2010) 69; *Skachkov v Russia* App no 25432/05 (ECtHR, 7 October 2010) 54.

194 *Palushi* (n 179) 72-75. It is noteworthy that satisfactory medical and mental health care alone are not sufficient. As the Court in *GB v Bulgaria* (n 172) noted, '[while] the applicant benefited from psychiatric and psychological assistance, such assistance could not replace the need of human contact'. See eg, *Palushi* (n 179) (finding prisoner in advanced stages of hunger strike was sufficiently vulnerable that placement in solitary was Article 3 violation).

195 See eg, *Palushi* (n 179) 72-75; *Onoufriou* (n 183) 68 ('the authorities are under an obligation to protect the health of persons deprived of liberty. [...] The lack of appropriate and timely medical care may amount to treatment contrary to Article 3').

196 See *Onoufriou* (n 183) 70 ('in order to avoid any risk of arbitrariness resulting from a decision to place a prisoner in solitary confinement, the decision must be accompanied by procedural safeguards guaranteeing the prisoner's welfare and the proportionality of the measure. [...] solitary

compelling as solitary confinement continues in duration.¹⁹⁷ The Court has emphasized that not only must the authorities have a compelling reason to hold someone in solitary confinement, but 'it is essential that a prisoner should be able to have an independent judicial authority to review the merits of and reasons for a prolonged measure of solitary confinement.'¹⁹⁸ All of these factors are combined with the duration of solitary confinement. Even in the absence of these factors, indefinite solitary confinement is strictly prohibited.¹⁹⁹

2. ECtHR Extradition Cases

In the seminal extradition case, *Soering v United Kingdom*, the Court concluded that Article 3 includes an 'inherent obligation not to extradite' individuals where 'the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by [Article 3];' and concluded extradition where an individual would be subject to the death row phenomenon violated Article 3.²⁰⁰ In 2012, a group of individuals detained in the United Kingdom and indicted in the United States as co-conspirators in establishing a *jihad* camp in Oregon sought to block extradition from the United Kingdom to the United States. The applicants argued that they could be subject to the death penalty if found guilty, and were at risk of extraordinary rendition and solitary confinement while detained. Specifically, applicants argued that there was a real risk they would be detained at the supermax federal prison in Florence, Colorado,

confinement measures should be ordinarily ordered only exceptionally and after ever precaution has been taken [...]. The decision imposing solitary confinement must be based on genuine grounds both ab initio as well as when its duration is extended. [...] [T]he authorities' decisions should make it possible to establish that they have carried out an assessment of the situation that takes into account the prisoner's circumstances, situation and behaviour and must provide substantive reasons in their support. The statement of reasons should be increasingly detailed and compelling as time goes by'. Ultimately, *Onofriou* concluded that unclear disciplinary reasons not communicated to the prisoner did not justify his detention in solitary confinement. The Court emphasized Cyprus' 'lack of an adequate justification for the applicant's detention' as one of several reasons for its conclusion. *Onofriou* (n 183) 73. See also *AB v Russia* (n 165) 106 ('the Court is deeply concerned by the fact that a person may be placed in an individual cell designed for prisoners convicted to life imprisonment without being offered at the very least an explanation for such isolation'); *Affaire X v Turkey* App no 24626/09 (ECtHR, 9 October 2012) (finding violation of Article 3 where pre-trial detainee was placed in solitary confinement for mere fact of being homosexual). See *Ahmed* (n 170) 211 ('although it is not for this Court to specify which security measures may apply to prisoners, it has been particularly attentive to restrictions which apply to prisoners who are not dangerous or disorderly, [...] restrictions which cannot be reasonably related to the purported objective of isolation [...] and to restrictions which remain in place after the applicant has been assessed as no longer posing a security risk'); *GB v Bulgaria* (n 172) 85 ('it is significant that the Government have not invoked any particular security reasons requiring the applicant's isolation and have not mentioned why it was not possible to revise the regime of prisoners in the applicant's situation so as to provide them with adequate possibilities for human contact and sensible occupation'); *Mathew v The Netherlands* App no 24919/03 (ECtHR, 29 September 2005). See also Council of Europe, 2006 Prison Rules, Basic Principle 4 ('[r]estrictions placed on persons deprived of their liberty shall be the minimum necessary and proportionate to the legitimate objective for which they are imposed').

197 *Onofriou* (n 183) 73; *AB v Russia* (n 165) 108 ('in order to avoid any risk of arbitrariness, substantive reasons must be given when a protracted period of solitary confinement is extended' and '[t]he statement of reasons will need to be increasingly detailed and compelling the more time goes by').

198 *AB v Russia* (n 165) 111.

199 See *Ahmed* (n 170) 210 ('solitary confinement, even in cases entailing relative isolation, cannot be imposed in a prisoner indefinitely').

200 *Soering* (n 173) 88.

commonly termed 'ADX', which would exacerbate existing medical and mental health maladies.²⁰¹

The ECtHR resolved several of the petitioners' claims together in *Babar Ahmad et al v United Kingdom*,²⁰² and disjoined the claim of one petitioner, Mr Aswat, on the basis that his petition deserved special consideration given his established mental illness of paranoid schizophrenia and placement in a psychiatric hospital in the United Kingdom.²⁰³ In *Ahmad*, the Court found that adequate due process existed for prisoners to challenge their ADX placement, that prisoners receive 'a great deal of in-cell stimulation' including 'television, radio channels, newspapers, books, hobby and craft items and education programming', that they are entitled to 'regular telephone calls and social visits' and mail privileges to write to family members.²⁰⁴ The Court also concluded, based on submissions by the US government, that prisoners could talk to other inmates 'through the ventilation system' and 'during recreation periods'.²⁰⁵

From a human rights perspective, *Ahmed* was a disappointing lost opportunity to highlight the human rights abuses occurring in prisons throughout the United States. However, *Aswat* is an important step forward in curbing solitary confinement of prisoners with mental illness. Mr Aswat was one of a group of individuals indicted in the US on terrorism-related charges. He suffered severe symptoms, including auditory hallucinations and thought delusions, which were well-controlled only through the use of anti-psychotic medication.²⁰⁶ Given Mr Aswat's mental illness, the ECtHR disjoined his application from the petitioners in *Ahmed*, and considered whether in his case, the fact that he was in a psychiatric hospital changed the Article 3 analysis, whether US authorities would assess Mr Aswat's fitness to stand trial, and whether if convicted, 'his mental health condition would properly be taken into account in determining where he would be detained.'²⁰⁷ Mr Aswat argued that uprooting him from a clinical environment and moving him to an unknown and unidentified future environment with a risk of placement in solitary confinement violated Article 3.²⁰⁸ He asserted that the harsh conditions at ADX, including isolation and force-feeding of prisoners on hunger strikes, would 'likely cause him significant pain and distress.'²⁰⁹

The ECtHR found that US government submissions resulted in an uncertainty as to where Mr Aswat would be detained, both in pre-trial and if convicted.²¹⁰ The Court was troubled by this uncertainty, holding it would violate Article 3 to transfer Mr Aswat to a country 'where he has no ties and where he will face an uncertain future in an as yet undetermined institution.'²¹¹ Specifically, the Court was troubled that 'there is no guarantee that if tried and convicted he would not be detained in ADX Florence, where he would be exposed to a "highly restrictive" regime with long periods of social isolation.'²¹² The

201 *Ahmed* (n 170) 37.

202 *ibid* 22.

203 *Aswat* (n 1).

204 *Ahmad* (n 177) 222.

205 *ibid*.

206 *Aswat* (n 1) 22.

207 *ibid* 10.

208 *ibid* 39.

209 *ibid* 42.

210 *ibid* 52.

211 *ibid* 56.

212 *ibid* 57.

Court specifically distinguished *Amhad* from *Aswat* on the basis of the severity of Mr Aswat's condition, and found 'a real risk that the applicant's extradition to a different country and to a different, and potentially more hostile, prison environment would result in a significant deterioration in his mental and physical health and that such a deterioration would be capable of reaching the Article 3 threshold.'²¹³ *Aswat* strongly suggests that an Article 3 challenge in the non-extradition context would be successful given that *Aswat* held that a higher bar regarding severity of treatment exists in an expulsion or extradition case than an Article 3 case regarding existing conditions in a member state.²¹⁴

C. Solitary Confinement in Other Regional and Ad Hoc Tribunals and National Courts

Other international tribunals and national courts have also addressed solitary confinement. International Criminal Tribunal for the Former Yugoslavia has concluded: 'Solitary confinement is not, in and of itself, a form of torture. However, in view of its strictness, its duration, and the object pursued, solitary confinement could cause great physical or mental suffering of the sort envisaged by this offence. To the extent that the confinement of the victim can be shown to pursue one of the prohibited purposes of torture and to have caused the victim severe pain or suffering, the act of putting or keeping someone in solitary confinement may amount to torture.'²¹⁵

The African Charter prohibits torture and cruel, inhuman or degrading treatment and asserts the inviolability of human dignity.²¹⁶ The African Charter also establishes the right to mental health treatment by mandating: '1. Every individual shall have the right to enjoy the best attainable state of physical and mental health. 2. States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.'²¹⁷ Courts and psychiatrists world-wide have recognized solitary is particularly detrimental to individuals with mental health issues.²¹⁸ Use of solitary confinement for these individuals violates their right to enjoy the best attainable state of mental health, and represents a violation of state parties' obligation to ensure medical attention for sick individuals. In *Liesbeth Zegveld and Messie Ephrem v Eritrea*, the African Commission on Human and Peoples' Rights concluded 'prolonged incommunicado detention and/or solitary confinement could be held to be a form of cruel, inhuman or degrading punishment and treatment.'²¹⁹

The Eritrea Ethiopia Claims Commission has concluded that solitary confinement of prisoners of war, in addition to other abuses, violated international law.²²⁰ Non US national courts have also found solitary confinement violates constitutional rights. Canadian Courts have repeatedly held highly restrictive and indefinite solitary confine-

213 *ibid.*

214 *ibid* 57.

215 *Prosecutor v Krnojelac*, 2002 WL 32750388, Case No IT-97-25-T (15 March 2002).

216 African [Banjul] Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc CAB/LEG/67/3 rev 5, 21 ILM 58 (1982), entered into force 21 October 1986, Art 5.

217 Art 16 African [Banjul] Charter on Human and Peoples' Rights.

218 *See supra*, § III.B.

219 *Liesbeth Zegveld and Messie Phrem v Eritrea*, African Commission on Human Rights, Comm 250/2002 92003, 55. This case is also discussed at Interpretation of Torture (n 83) 12/30.

220 Prisoners of War Ethiopia's Claim 4, Partial Award, 1 July 2003.

ment constitutes cruel and unusual punishment in violation of the Canadian Charter of Rights.²²¹

V. Analysis and Conclusion: Why Does it Matter if Solitary Confinement Violates International Law?

It is quite likely that the HRC, ECtHR, and IACtHR, and potentially the International Court of Justice (if given the opportunity) would find that thousands of the individuals detained in US jails and prisons in solitary confinement are being subjected to torture or cruel, inhuman and degrading punishment. Prisons and jails throughout the US routinely use prolonged solitary confinement as disciplinary detention for minor disciplinary offenses received while in prison, and to house vulnerable populations, such as juveniles, individuals with mental illness and gay, lesbian, bi-sexual and transgender prisoners. Further, many prisoners spent years in solitary confinement, and do not receive adequate medical or mental health treatment or monitoring. There is no judicial oversight of the placement or removal of individuals in solitary confinement, and with the exception of Eighth Amendment litigation, individuals have no ability to challenge their placement in solitary confinement in any meaningful way.

However, the United States has insulated itself from any official sanction for international violations by not submitting to the jurisdiction of the HRC, the ICJ or the IACtHR. The United States entered a reservation on the CAT provision in which state parties accept the International Court of Justice's jurisdiction over disputes arising under the treaty,²²² and has not ratified the ICCPR's Optional Protocol accepting the jurisdiction of the HRC. Over 25 year ago, the United States withdrew its acceptance of ICJ compulsory jurisdiction,²²³ and has never ratified the American Convention, which requires state parties to submit to the IACtHR's jurisdiction. Accordingly, the only feasible method by which international tribunals can judge solitary confinement practices in the United States is through extradition challenges, which *Aswat* has shown may be particularly effective where vulnerable prisoners, such as juveniles or prisoners with mental illness, are in danger of extradition to the United States.

Despite the lack of jurisdiction by international tribunals over the United States, more nuanced sanctions in the form of reputational interest and reciprocity may provide some pressure for the United States to consider the use of solitary confinement in its jails and prisons. Countries, including the United States, generally value preserving their reputational status internationally.²²⁴ In recent years the United States has worked hard to ameliorate the fact that its human rights reputation suffered in relation to practices used in Guántanamo Bay, such as waterboarding. As human rights organizations globally highlight US practices regarding solitary confinement, and the global sentiment against solitary confinement grows, the United States will suffer reputational damage. Reciprocity is also discussed as a fundamental reason why states follow international law. One

221 *McCann v R*, 1 FC 580, 1975 CarswellNat 108 (FCC 1975); *Bacon v Surrey Pretrial Serv Centre*, 2010 CarswellBC 1401, 2010 BCSC 805 (BCSC 2010).

222 US CAT RUD (n 87) I(2).

223 *US Terminates Acceptance of ICJ Compulsory Jurisdiction* (DEP'T ST BULL, January 1986) 67.

224 See eg, Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1995); Harold Hongju Koh, 'Why do Nations Obey International Law?' (1997) 106 Yale LJ 2599.

assumes that the United States would not look kindly on Americans, particularly juveniles and individuals with mental illness, being held in solitary confinement in other countries in any context.

In order to move from the current global landscape of burgeoning standards and international tribunals prohibiting solitary confinement in certain situations to a more robust and well-established prohibition, a global network of advocates is needed to monitor domestic jails and prisons and continue to bring challenges before the international tribunals discussed above. This includes reparations actions against countries that have extradited individuals to the United States who subsequently experienced pain and suffering in solitary confinement while in US jails or prisons. Ultimately, existing standards and decisions will lead to a treaty obligating states to curb the use of solitary confinement, and providing a monitoring and enforcement mechanism. A viable treaty would obligate state parties not to use solitary confinement on juveniles or prisoners with mental illness, and set forth concrete parameters for acceptable justification, duration and conditions of solitary confinement for mentally-well prisoners. All signs point toward the prohibition of solitary confinement, particularly for vulnerable prisoners, moving quickly on the trajectory of international law formation from its current position toward customary international law. As the global prohibition on solitary confinement crystallizes, informal sanctions for the persistent use of solitary confinement will grow.

In the meantime, US courts can look to existing international law when analyzing whether solitary confinement violates the US Constitution. The US Supreme Court measures prison conditions under the Eighth Amendment by 'the evolving standards of decency that mark the progress of a maturing society.'²²⁵ Over strenuous dissents, a majority of the US Supreme Court has repeatedly utilized comparative and international law to interpret the contours of the Eighth Amendment.²²⁶

225 *Trop v Dulles*, 356 US 86, 101 (1958). For example, in *Bacon v Surrey Pretrial Serv Centre*, 2010 CarswellBC 1401, 2010 BCSC 805 (BCSC 2010), the British Columbia relied heavily on existing international law to conclude that solitary confinement of the plaintiffs was cruel and unusual punishment in violation of the Canadian Charter of Rights.

226 *Roper v Simmons*, 543 US 551, 575, 125 S Ct 1183, 1198, 161 L Ed 2d 1 (2005) (observing at least from the time of the Court's decision in *Trop*, the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments' and relying on various treaties and the laws of other countries to conclude the execution of juveniles violates the Eighth Amendment). *Roper* justified the court's reliance on international and comparative law by noting other instances in which the court relied on these sources. See *Roper*, 543 US at 575; *Trop*, 356 US at 102–103, 78 S Ct 590 (plurality opinion) ('The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime'); see also *Atkins v Virginia*, 536 US 304, 317, n 21 (2002) (recognizing that 'within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved'); *Thompson v Oklahoma*, 487 US 815, 830–831, and n 31 (1988) (plurality opinion) (noting the abolition of the juvenile death penalty 'by other nations that share our Anglo-American heritage, and by the leading members of the Western European community,' and observing that '[w]e have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual'); *Enmund v Florida*, 458 US 782, 796–797, n 22 (1982) (observing that 'the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe'); *Coker v Georgia*, 33 US 584, 596, n 10 (1977) (plurality opinion) ('It is [...] not irrelevant here that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue'). See also Elizabeth Vasiliades, 'Solitary Confinement and International Human Rights: Why the U.S. Prison System Fails Global Standards' (2005) 21 Am U Int'l L Rev 71, 85–89 (2005).

An increased willingness by judges to consider international law would go a long way toward more caselaw finding solitary confinement is cruel and unusual. US courts' willingness to repeatedly intervene in executive actions in Guantánamo suggests that US judges are willing to prohibit egregious human rights violations against detainees.²²⁷ To that end, decisions by international and regional tribunals and the UN Rapporteur on Torture's continued outspoken rejection of prolonged solitary provide useful support for US judges analyzing the constitutionality of prolonged solitary confinement.²²⁸ An increased willingness by judges to look to international and comparative law would facilitate reliance on the increasingly well-established prohibitions on solitary confinement in international law. An optimist would hope the judiciary will continue its trend away from the hands off doctrine and establish what history, the rest of the world, and common sense tells us – solitary confinement is cruel, unusual, inhuman, degrading, and in some instances, torture.

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227 See eg, *Hamdan v Rumsfeld*, 548 US 557 (2006).

228 See Melissa Waters, 'Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties' (2007) 107 Colum L Rev 628; Ralph Steinhardt, 'Recovering the Charming Betsy Principle' (2000) 94 Am Soc'y Int'l L Proc 49.

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