Arbitration and Protection Under the UN Convention Against Torture and Other Cruel, Inhuman, Degrading Treatment, or Punishment

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1. Introduction

In times where war and international conflict, or even national conflicts are present, tactics that have been used historically may resurface. Even though these tactics may have been used in the past, the use is often far more controversial now, especially since there are established laws to protect people from being subjected to inhuman and degrading treatment. Even in the event of serious conflict, it is important to ensure the protection of citizens in the nations that are involved in the conflict. While there are laws in place to protect people from being treated in ways that are inhumane or degrading, there may be barriers in place that make it more difficult for victims of torture to successfully file a suit and receive due compensation. Alternative Dispute Resolution practices have been used successfully in the past to solve disputes between parties, and in the situations people may face in times of warfare, arbitration can be used as a more efficient and fair way to ensure that citizens who have been subjected to inhumane treatment are compensated appropriately.

This article will discuss the UN Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Convention"), and how arbitration can be used to best serve victims who were subjected to treatment that is prohibited under the Convention. Part II will give a background on the Convention, which includes the formation of the Convention and why the Convention was a necessity at the time it was formed. Part III will introduce the arbitration provision that is included in Article 30 of the Convention, which is important to the foundation of this article. Additionally, this section will discuss how arbitration works as an Alternative Dispute Resolution procedure, and will highlight some of the benefits of arbitration over litigation. Part IV will discuss some potential objections to the use of arbitration by highlighting some of the potential disadvantages of Article 30 of the Convention. This section will also introduce the jurisdictional issues citizens may face, which includes the notion of state sovereign immunity, as well as a discussion of the possibility of torture being re-instated as a practice in the United States. Part V will propose several solutions for parties seeking relief under the Convention such as a discussion
Arbitration and Protection Under the UN Convention

of how to sue a nation, a discussion of cases that have invoked the Convention successfully, asylum as an additional form of relief, the tort exception to sovereign immunity, corporate liability to avoid sovereign immunity, and overall, why arbitration serves as the best solution for victims. Finally, Part VI will provide a conclusory discussion of the role of arbitration in facilitating proceedings under the Convention.

2. Background

In order to best understand how arbitration can serve the victims of improper treatment under the Convention, it is important to establish the background of the Convention, including how the Convention defines torture, and why it was put into effect.

a. Formation of the Convention

The governing basis for this article is the UN Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment, which was adopted in December of 1984 and later ratified in June of 1987.1 Currently, there are 83 signatories on the Convention, and 162 parties to the agreement.2 The goal of the Convention is for nations to take the appropriate steps to “end torture within their territorial jurisdiction and to criminalize all acts of torture.”3 The Convention defined torture as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is

suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.\(^4\)

Under the Convention, States are required to “prevent and punish any torture committed on its territory,” and States are prohibited from “extraditing any person to another State, whether or not a party to the Convention, where that person is likely to be tortured.”\(^5\) The United States is highly invested in the success of the Convention because the goal is similar to the Eighth Amendment, which prohibits the use of “cruel and unusual punishments,” and this interest has caused an increased effort by the United States in promoting the Convention.\(^6\)

b. Necessity of the Convention

Following the end of the World War II, several instruments were created to prevent future use of torture or other types of degrading treatment, but, unfortunately, these instruments were not implemented because the proper mechanisms for implementation did not exist.\(^7\) The historical origin of the Convention began when a Swiss banker, Jean-Jacques Gautier, “proposed the preparation of a Convention establishing a system of visits by independent experts to all places of detention [...]” and later, “the new Convention he envisaged would be of far wider scope.”\(^8\) Gautier made a proposal, which was first made into an Optional Protocol, and then was drafted into the United

\(^4\) Article 1 of the UN Convention defines torture. Danelius, supra note 1.


\(^6\) Cohen, supra note 5, at 528; Cohen, supra note 5, at 517 (discussing the role of the United States in enacting the UN Convention Against Torture and how the process works in the United States for those who have come here seeking asylum).


\(^8\) Id.
Arbitration and Protection Under the UN Convention

Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment. The Swiss Committee against Torture, which is an organization Gautier founded, worked with the International Commission of Jurists to prepare the text of the Convention, and on March 6, 1980, it was formally sent to the United Nations Commission on Human Rights. When the draft was first submitted to the United Nations, significant steps were not yet taken to fully support Gautier’s vision of the Convention to protect people against torture in Europe by working with the draft of the Protocol. Later, “in 1983, Recommendation 971 on the protection of detainees from torture and from cruel, inhuman or degrading treatment or punishment” was created as a draft to the European Convention, and was “clearly modelled on the Costa Rica draft Optional Protocol.” After negotiating for four years, the Convention was opened for signatures on November 26, 1987.

3. Arbitration Clause of the UN Convention—Article 30

Since this article is centered around the benefits of arbitration as a solution for victims seeking relief under the Convention, it is important to highlight the arbitration provision set forth by the Convention, how the process of arbitration works, and some of the benefits of using arbitration instead of litigation.

a. Article 30 of the UN Convention

Article 30 of the Convention requires that “[a]ny dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation shall, at the request

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9 Id.
10 Id.
11 Id.
12 Id.
13 Id.
of one of them, be submitted to arbitration.”14 While paragraph one of Article 30 of the Convention gives victims a method for seeking a remedy through the use of arbitration, the second paragraph of Article 30 contains a provision that allows nations adopting the Convention to use different methods for conflict resolution, and therefore nations using other forms of conflict resolution are not bound by the first paragraph’s arbitration clause.15

b. Process of Arbitration

In order to best understand how an arbitration clause can help victims recover under the Convention, it is important to understand how arbitration operates as a method of alternate dispute resolution. First, to begin the arbitration process, the party must submit a demand for arbitration.16 After the demand is filed, the respondent is notified and a deadline will be given for the respondent to answer, or file a counterclaim.17 Following the answer by the respondent, the parties must select arbitrators from a list of neutral parties.18 Then, the proceedings may begin.19 At the preliminary hearing, which is a meeting that is conducted by the arbitrator, the parties will discuss the substantive issues of the case.20 Additionally, during the preliminary hearing, other procedural matters will be discussed, such as an exchange of the witness lists.21 During the process of information exchange and preparation, the parties will work to address any information sharing, and here, the goal is to reach the stage where the parties can present the evidence and arguments in the hearings.22 During the hearings stage, the “parties have an opportunity to present testimony and evidence to the arbitrator in order to

14 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 24841 [hereinafter Convention Against Torture].
15 Convention Against Torture, supra note 14.
17 Id.
18 Id.
19 Id.
20 Id.
21 Id.
22 Id.
arrive at resolution." In the post-hearing submissions, the parties will have an opportunity to submit any additional documents as long as it is allowed by the arbitrator, and if this occurs, then it will occur soon after the conclusion of the hearings. At the conclusion of the proceedings, the arbitrator will issue a decision, which in certain cases will include the issuance of an award.

c. Benefits of Arbitration Over Litigation

In addition to understanding how arbitration works, an analysis of the advantages of arbitration can provide insight into why it is a proper forum for helping a party to recover against a nation. When evaluating the strengths of arbitration as a process, before choosing it as the method to hear a case, it is important that "counselors [...] take time to consider what kind of arbitration procedure will best serve the goals of a client," which illustrates how arbitration can be tailored to meet the particular needs of a party. With this tailored process in mind, one of the first advantages of arbitration over litigation is that it is usually quicker and less expensive than going to court to litigate a claim. Since the arbitration process is more informal than traditional litigation, the parties have a choice of who the arbitrator will be, which is not something parties in traditional civil litigation will have the power to choose. Unlike court proceedings, which are made public record, arbitration proceedings are kept private. Keeping the records private may be beneficial in a case filed under a violation of the terms of the Convention because the information is likely very personal and difficult to recount. Thus, it is understandable that the person would want the record of the proceedings.

23 id.
24 id.
25 id.
26 Thomas J. Stipanowich, *Arbitration and Choice: Taking Charge of the "New Litigation,"* 7 DEPAUL BUS. & COM. L. J. 383, 403 (2009) (discussing the procedure of arbitration and how it has benefits that can help a client have their claim heard in a more efficient manner, and when determining whether arbitration is the correct process for the party, there are a variety of factors that should be considered by the party).
27 Jean Murray, *What Are the Benefits and Drawbacks of Arbitration?,* THE BALANCE (Oct. 9, 2009), https://www.thebalance.com/what-are-the-benefits-and-drawbacks-of-arbitration-398535. Part of the reason why arbitration is a quicker and less expensive process is because the same rules of evidence are not present in arbitration proceedings as in traditional court litigation proceedings. id.
28 id.
29 id.


to be kept private and confidential. As a less expensive, less time consuming, and more tailored process that places an emphasis on confidentiality, arbitration has many benefits that can serve parties under the Convention.

4. Discussion of Potential Objections

There may be some objections to the use of the arbitration process to hear claims under the Convention, especially in light of the fact that several nations, including the United States, have declared Article 30, which contains the arbitration provision, does not apply to them.\(^{30}\) However, the benefits of arbitration and the successes of previous cases in protecting victims under the Convention promote the use of arbitration in future cases for victims of torture seeking relief.\(^{31}\) Over the course of the development of alternative dispute resolution procedures, some parties have found that arbitration “has become a relatively complex and specialized area of practice,” and therefore, parties need to determine if the arbitration is the correct procedure to fit their needs in a particular situation.\(^{32}\) To determine if arbitration is the appropriate method for achieving relief under the Convention, as within arbitration procedures in general, the party must determine if the arbitrator is the best person to decide the case, which is an important consideration a party must make since they are in a dispute against a nation.\(^{33}\) Here, this could pose a problem when an individual is suing a state under the Convention because the state may have people that it knows will favor its side, and if the state employs one of these people as the arbitrator, then it would be an injustice for the party attempting to seek relief.

a. Disadvantages of Article 30 of the Convention

One of the potential disadvantages of arbitration is the lack of a lengthy evidence process, which is a factor that some might see as a time-saving advantage.\(^{34}\) Without the lengthy and detailed evidence procedure of a traditional civil litigation proceeding held in court, arbitrators must do their

\(^{30}\) Multilateral Treaties Deposited with the Secretary-General, supra note 2.


\(^{32}\) Stipanowich, supra note 26, at 396.

\(^{33}\) Id. at 420.

\(^{34}\) Murray, supra note 27.
best to sort through the evidence they are presented with, which does not include interrogatories or depositions.\textsuperscript{35} Another disadvantage is the binding nature of arbitration as a legal proceeding.\textsuperscript{36} Unlike traditional litigation, following binding arbitration proceedings, appeals are not permitted—absent good reason that the arbitrator was biased or was not acting appropriately.\textsuperscript{37} Additionally, there is a chance that the arbitrator is not acting unbiased, for example, if the arbitrator has traditionally sided with one particular party in prior disputes, or if there is an imbalance of power during the proceedings.\textsuperscript{38}

As previously mentioned, paragraph two of Article 30 of the Convention states that

\begin{quote}
[e]ach state may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by paragraph 1 of this article. The other States Parties shall not be bound by paragraph 1 of this article with respect to any State Party having made such a reservation.\textsuperscript{39}
\end{quote}

Even though the Convention has been ratified by a multitude of nations, there are several nations that have chosen to exercise the opt-out provision of paragraph two of Article 30 of the Convention, which allows them to be part of the Convention, but they will not be bound by the arbitration clause in the event a dispute arises. Some of these nations include Afghanistan, China, Cuba, Equatorial Guinea, Eritrea, Fiji, France, Israel, Pakistan, Saudi Arabia, and United States.\textsuperscript{40}

When nations choose not to abide by paragraph one of Article 30 of the Convention, they must notify the Secretary-General of the United Nations.\textsuperscript{41} Since the Convention gives nations the option to disregard the arbitration clause, it eliminates a mandatory forum for victims to use in seeking relief. It

\textsuperscript{35} Id.

\textsuperscript{36} Id.

\textsuperscript{37} Id.

\textsuperscript{38} Id.

\textsuperscript{39} Convention Against Torture, supra note 14.

\textsuperscript{40} Multilateral Treaties Deposited with the Secretary-General, supra note 2.

\textsuperscript{41} Human Rights Web, CONVENTION AGAINST TORTURE and Other Cruel, Inhuman or Degrading Treatment or Punishment (Jan. 25, 1997), http://www.hrweb.org/legal/cat.html.
therefore presents problems if a victim is attempting to seek relief and is not being provided with the appropriate forum. This lack of designated forum can pose a problem for victims seeking relief especially in situations when it is unclear whether the rules of the Convention will apply, such as in wartimes.\textsuperscript{42} For example, the United States has declared that the ratification of the Convention applies to areas outside of the United States, such as Guantanamo.\textsuperscript{43} The United States was praised for recognizing that the Convention applies during times of “armed conflict,” which is a factor that has been an issue with other nations in the past.\textsuperscript{44} However, the United States has been criticized for treating the rules of the Convention more like an understanding.\textsuperscript{45} For example, in 2006, the Committee criticized the United States for “adopting a position that more directly and broadly excluded application of the Torture Convention.”\textsuperscript{46}

As previously mentioned, several countries have chosen to exercise the provision in Article 30 of the Convention that allows them to “opt-out” of the arbitration provision.\textsuperscript{47} The United States is one of the nations that chose not to adopt the Arbitration Clause, which is viewed by some as a disadvantage of the Convention because if large nations are not adopting the clause, then this could lead to a move towards other methods of resolving the conflict instead of arbitration.\textsuperscript{48} However, even though the United States did not adopt the arbitration provision, there are very clear processes in place that must be

\textsuperscript{42} Ryan Goodman & Eric Messinger, \textit{U.N. Committee Criticizes U.S. Record on Torture, Praises U.S. on Extraterritorial Reach of Treaty, JUST SECURITY (Nov. 28, 2014), https://www.justsecurity.org/17837/un-committee-torture-concluding-observations-united-states/}. Here, the discussion surrounds how the United States has implemented the provisions of the Convention and how the United Nations Committee Against Torture evaluated the work done by the United States. The Committee evaluated the work done by the United States in various areas, and while it was praised for the way certain areas were approached, there were some criticisms as well. The Committee discussed the military and the use of Guantanamo Bay and how that affects the United States’ work with the Convention. \textit{Id}.

\textsuperscript{43} \textit{Id}.

\textsuperscript{44} \textit{Id}.

\textsuperscript{45} \textit{Id}.

\textsuperscript{46} \textit{Id}.

\textsuperscript{47} \textit{Multilateral Treaties Deposited with the Secretary-General, supra note 2}.

\textsuperscript{48} \textit{Id}.
used when someone is seeking relief under the Convention, which will be discussed later in this article.49

b. Complications with Jurisdiction

An additional factor that may be cited as a disadvantage of using arbitration to resolve cases under the Convention is the fact that there are jurisdictional barriers parties may face when attempting to sue a nation.50 Under the Convention, the notion of jurisdiction is complicated because “[t]he notion of nation state and the related concept of territorial sovereignty imply, on the one hand, the presumption that States exercise jurisdiction over their own territory.”51 Even so, “experience shows that, for example, in the context of a belligerent occupation, States may disregard this right and exercise some of their functions on the territory of another State,” and as a result, when Conventions are formed, there are usually provisions in place to address this complication.52 These jurisdictional elements, along with the ability of nations to avoid the implementation of the arbitration clause, will hinder torture victims and victims of treatment prohibited by the Convention, in seeking relief because they may not be able to receive due compensation and justice. As a result, “courts routinely cite sovereign equality, par in parem non habet jurisdictionem, dignity, comity, and international relations as legitimate and necessary bases on which to grant immunity,” which could help parties to recover, but only if a similar exception is created.53

c. Sovereign Immunity

As mentioned earlier, in addition to difficulties with the arbitration process itself, a party may face challenges when attempting to sue the state as

49 Dagmar R. Myslinska, How to Apply for Convention Against Torture Protection, NOLO (2016), http://www.nolo.com/legal-encyclopedia/how-apply-convention-against-torture-protection.html (discussing the process a party must use when suing a nation under the Convention, and also discussing the jurisdictional barriers that party may face).
50 Walter Kalin, Extraterritorial Applicability to the Convention Against Torture Remarks, 11 N.Y. City L. Rev. 293, 297-98 (2008).
51 Id.
52 Id. at 298.
a result of sovereign immunity. Sovereign immunity can make it difficult for a party to sue a nation because the doctrine of sovereign immunity provides that “sovereigns are equal as judicial bodies and have no authority to use their own courts to sue other sovereigns without consent of the latter.” As a basic principle, this can understandably make it difficult for a party to sue a nation that subjected them to treatment covered under Article 30 if the nation does not consent to the suit. Even though the principle of sovereign immunity may present an obstacle for a party attempting to sue a state, the Nuremberg trials changed the ways that criminal behavior was treated when enacted by states. As a result of the trials, there “was [] general acceptance of the principle that States that act as aggressors abuse their sovereignty, and their leaders may be accountable directly to the international community.” Successful trials following the Nuremberg trials have illustrated that “sovereignty cannot be used to avoid international criminal responsibility, and sovereign privileges are waived for individuals who abuse their sovereign powers.” Without exception, sovereign immunity can pose a problem when parties are trying to recover under the Convention, and as a result, it is important that parties first understand how to begin proceedings against a nation to then determine if sovereign immunity will serve as a barrier.

When a party is looking to file a claim and recover for a violation of the Convention, they must understand how certain obstacles may interfere with their ability to file a suit against a nation. The process for suing a nation was recently discussed in the case of Jason Rezaian, a Washington Post Reporter, who sued Iran for torturing him. One of the first problems that parties face when trying to sue a country is that states are covered by sovereign

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55 Id. at 376.
54 Id., at 397.
53 Id. at 398.
52 Id. at 399.
51 NPR Staff, How Do You Go About Suing a Country?, NPR (Oct. 8, 2016, 8:29 AM), http://www.npr.org/2016/10/08/497164736/how-do-you-go-about-suing-a-country. This source, a transcript of an interview with Stephen Vladeck, who is a law professor at the University of Texas, details how to sue a country by referencing Jason Rezaian’s case. This ability to sue a nation has become prominent in the United States due to a law passed by Congress which will allow the families of victims killed in the 9/11 attacks to sue Saudi Arabia for providing the hijackers with financial support. Id.
immunity. According to Professor Vladeck, Professor of Law at the University of Texas, sovereign immunity is the “principle that countries have special protection in both their own courts and the courts of their sister and, you know brother countries around the world.” Additionally, “it basically requires individual countries to make exceptions before other countries can be brought into that country's courts.” Sovereign immunity was established as a principle because it is preferred that conflicts with nations are solved at the diplomatic stage instead of private civil litigation. Overall, the purpose of the sovereign immunity principle appears to be promoting friendly relations between nations and reducing conflict. This applies in the cases of parties attempting to sue nations because it requires nations to work against each other during proceedings, and in some instances, one nation will help a citizen prevail in a case against another nation. With these goals in mind, however, it is essential that parties understand their rights and how these principles will affect their ability to recover if enforced.

d. President Donald Trump’s Alleged Initiative to Allow Torture

The terms of the Convention, including the types of behaviors it prohibits, may be brought into focus in upcoming months with some recent speculation that newly inaugurated President of the United States Donald Trump is working on an executive order to reinstate torture. In his first week as President, The New York Times discussed a draft of an executive order that may have been leaked to the papers. After the news outlets reported the document leaked, the “White House disclaimed the document” and Sean Spicer, Press Secretary at the White House, stated that, the draft was “not a

60 Id.
61 Id.
62 Id.
63 Id.
64 Id.
65 Id.
White House document.” While several individuals stated the document was not connected to the White House, “three administration officials said the White House had circulated it among National Security Council staff members for review on Tuesday morning,” which has led to speculation and has caused people to voice their concerns over this possibility. The alleged leaked order does not specifically mention the re-instatement of torture, but it does discuss reviewing the possibility of returning to CIA interrogation programs that have been used in the past.

This potential order has sparked discussions about how to address difficult situations that center on “the proper rules for American detention and interrogation.” Following the September 11 attacks in 2001, the United States adopted more radical measures in eliciting confessions to combat the threats of Al Qaeda, those measures were later changed when the Bush administration transferred the prisoners to Guantanamo Bay and stopped the previously prohibited measures. Overall, the draft order would “direct executive branch officials to review detention and interrogation policy and make recommendations, including on whether to propose changes to the law.” The alleged order has sparked reactions from both Republicans and Democrats, who have expressed concern with the terms of the order and have stated that they will work against any efforts to re-instate torture as a legal practice in the United States.

This potential order has raised many questions, including whether or not it would be possible for the President to use an executive order to re-instate the use of torture. In 2015, the Senate enacted the “2016 National Defense Authorization Act,” which included an amendment that “banned torture by limiting interrogation techniques to those in the Army Field Manual.” Regarding the ability to bring back torture as an accepted method alone, the President would have to undo the measures enacted by the Justice

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68 Id.
69 Id.
70 Id.
71 Id.
72 Id.
73 Id.
74 Id.
75 Serwer, supra note 66.
76 Id.
Department’s Office of Legal Counsel.\textsuperscript{77} This would be complicated because these measures were put into place during the Bush and Obama administrations, and therefore, specific acts would be required to remove these measures and change the way the questioning process occurs.\textsuperscript{78} Additionally, with the guidelines in place, “the Obama administration never prosecuted anyone for their involvement in the torture program, and blocked attempts by former detainees to sue in civil court.”\textsuperscript{79} With these complications in mind, some believe that the use of torture in the past is still on the minds of those with the power to bring it back now, and most would not want it re-instated because its previous effects.\textsuperscript{80} This discussion brings to mind the UN Convention and how it would be implicated if the United States did in fact re-instate the use of torture during interrogations. Since torture is prohibited under the UN Convention that the United States is a part of, the United States’ use of torture would likely create problems in the future, and this unfolding discussion is something that will need to be analyzed and followed in the months and years to come.\textsuperscript{81}

5. Proposed Solution

In order to best serve the victims of torture and other degrading treatment prohibited by the UN Convention Against Torture, the arbitration practice should be enacted in order to give victims the best chance for justice and compensation. A proposal in this situation deals with the process of arbitration, and how lawyers and arbitrators can successfully arbitrate a victim’s claim. In order to determine the best practices to use, past cases citing the Convention can be analyzed to find precedent.\textsuperscript{82} When working with arbitration agreements, “[i]n the absence of an express arbitration [provision], no party may be compelled to submit to arbitration in contravention of its

\textsuperscript{77} Id.
\textsuperscript{78} Id.
\textsuperscript{79} Id.
\textsuperscript{80} Id.
\textsuperscript{81} Id.
\textsuperscript{82} Appendix 7.3 Torture Cases in the Santiago Appeals, the Constitutional and Chilean Supreme Courts, http://scholar.harvard.edu/files/bsimmons/files/APP_7_3_Chilean_court_cases.pdf?m=1360039124 (last visited Oct. 17, 2016)
rights to legal process,” which is the effect that paragraph 2 has on parties involved in conflicts with nations that did not agree to submit to arbitration.83

a. How to Sue a Nation

Since there are obstacles to recovery in suits against a nation, it is important for parties to not only understand how these obstacles may affect their case, but they must also understand how to sue a nation in order to seek recovery. According to Professor Vladeck, some nations will not attend the proceedings, and therefore a default judgment will be entered, but on the other hand, some nations will fully litigate the case.84 If a plaintiff can prove their damages in a suit against a nation, they may be able to recover monetary damages.85 When a plaintiff is seeking monetary damages, the ability to recover may be contingent on the fact of whether the assets are on US soil.86 Additionally, there is a question of whether the assets are “accessible to the court or whether they’ve already been frozen by the executive branch.”87 In similar cases, the United States has “actually seen in the specific case of Iran,” there are times when Congress will “intercede to open up assets seized by the president to be used to satisfy judgments in these kinds of cases.”88

Here, the notion of sovereign immunity can be a problem because it makes it even harder for plaintiffs to recover, especially in areas where it is often hard to recover against individuals, and furthermore, “[c]laims against individual perpetrators were occasionally successful in securing judgments, but even successful claimants almost never collected on the judgments.”89 Filing a suit against a sovereign requires the plaintiff to pursue the nation’s

84 NPR, Staff, supra note 59.
85 Id. In answering this question of whether a party can recover damages, Professor Vladeck referenced the case of Terry Anderson, who was held hostage in Lebanon. In his case, Anderson recovered a sum of around twenty-six million dollars. Id.
86 Id.
87 Id.
88 Id. According to Professor Vladeck, the question in the Rezaian case will become, “if he actually wins and obtains the money judgment, is the U.S. government going to have any interest in releasing some of the Iranian assets that they have already seized and frozen to satisfy that judgment?” The answer may relate to diplomatic relations concerns the United States may have in this situation. Id.
“accountability . . . through litigation in domestic or foreign courts, or before international tribunals.”

There can be additional problems with these kinds of lawsuits because “absent a treaty expressly providing a mechanism for resolving human rights claims before international tribunals, plaintiffs have no opportunity to pursue claims in international human rights tribunals.”

Now, if a plaintiff is pursuing relief under the Convention, there is a specified treaty provision that stipulates that the proper method of resolving the claim is through arbitration, which is provided in Article 30 of the Convention. The issue with the Convention in this instance is not the lack of treaty provision, rather, the issue is that nations may waive the arbitration provision under paragraph 2 of Article 30, which allows nations that are part of the Convention to state that they will not abide by the arbitration provision in paragraph one.

This “opt-out” provision enhances the problems that are already present when trying to pursue a claim against a sovereign because “when human rights victims have pursued claims against sovereigns, they have been met with formidable defenses[.]”

When seeking relief against a sovereign, similar to the method previously discussed by Professor Vladeck, in the United States, the party “must establish that the sovereign committed acts which justify the removal of immunity, such as engaging in commercial activity, waiving immunity, expropriating property, or committing a noncommercial tort within the United States.” These rules have led to some “convoluted arguments” about where torture would fit into these categories, and it may be difficult to find somewhere for torture to fit within the exceptions.

b. Examples of the Convention being Used in Torture Cases

In the case of Belgium v. Senegal, where the former President was accused of engaging in torture prohibited by the Convention, the International

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90 Id. at 508.
91 Id.
92 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, OHCHR.org, http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx (last visited Oct. 16, 2016).
93 Id.
94 Alford, supra note 89, at 509.
95 Id. at 510.
96 Id. at 510.
Court of Justice determined all the requirements of Article 30 were met in the case, and as a result, the Court outlined the methods for addressing a party accused of violating the Convention and how to proceed with the case.\(^7\) An important factor to note regarding the Belgium v. Senegal case is that the International Court of Justice determined the parties met the conditions for Article 30.\(^8\) First, the issue had not been settled through negotiations during the time that passed between the torturous acts and the plaintiff seeking relief.\(^9\) Second, when Belgium requested the arbitration provision be enacted and for proceedings to begin, Senegal did not respond.\(^10\) Here, the Court found jurisdiction over this case even though similar cases in the past have had different outcomes, including other disputes between nations under the Convention.\(^11\) In addition to Belgium v. Senegal, there are several different cases, sorted by country, which can provide insight into how cases have been tried in the past and what strategies can be used to best support the victims.\(^12\) This case gives insight into how courts may address some of the procedural requirements to hear a case, and assessing the same factors in other cases can help craft a strategy for filing a case.

Another case that utilized the Convention to ensure justice for victims was the prosecution of Chilean leader who engaged in behaviors prohibited by the Convention, and in this case, a Spanish judge decided to prosecute applying the Convention.\(^13\) When Augusto Pinochet, the former dictator of Chile, went to London for medical treatment, an investigation commenced looking into the dictator’s past behavior as Chile’s leader.\(^14\) With the UN Convention Against Torture in mind, lawyers commenced proceedings against Pinochet because he was under suspicion of committing or ordering

\(^8\)Id.
\(^9\)Id.
\(^10\)Id.
\(^11\)Id.
\(^12\)Id.
\(^14\)Id.
torture. Until this case, the Convention has never “been successfully used to prosecute a former head of state suspected of having ordered or committed torture, and the results were astonishing.” The case began when a judge in Spain “issued an international warrant looking to prosecute Pinochet for his responsibility in the systematic murders, torture[,] and enforced disappearances committed under his government.” Pinochet was the first leader to be targeted under the Convention, which sets an important precedent for other parties seeking to recover for treatment prohibited by the Convention. In order to proceed with the case, the “House of Lords did conclude that Pinochet could be tried for torture in the United Kingdom.” Regarding this case, the “nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed.” This principle allows parties to seek relief in torture cases since it is a serious crime with international efforts to prevent it.

Additionally, it is important to note that international law addresses that “offenses jus cogens may be punished by any state because the offenders are ‘common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution.’” Here, “jus cogens” principles are defined as “fundamental rules of international law ‘from which no derogation is permitted.’” In the Pinochet case, it is noted that this is an “example of a state asserting jurisdiction based on the universality principle for criminal violations,” and this principle “allows a state to hear a civil or criminal case regarding a matter in which it normally would have no interest.” This principle will help with the issue of state sovereign immunity that a party may face because it operates by “allowing states to assert jurisdiction over certain matters, if the result is to promote global values.” Here, in the

105 Id.
106 Id.
107 Id.
108 Id.
110 Id. at 400.
111 Nagan & Root, supra note 54, at 400.
112 Id. at 378.
113 Id. at 400.
114 Id. at 401.
Pinochet case, there certainly was a desire to promote global values of preserving human life and exercising fair treatment, which allowed the case against Pinochet to occur. Following success with the case against Pinochet, Amnesty International continued to investigate others who have also committed wrongs against human beings.\(^{115}\)

A more recent case involves circumstances where Convention could also be invoked. Yecenia Armenta from Mexico suffered torture at the hands of her government, causing her to give a false confession to killing her late husband.\(^{116}\) When Armenta was arrested and charged for her husband’s murder, she was blindfolded and put into a police car that drove her away.\(^{117}\) She “told [the] human rights group Amnesty International she was hung upside-down by her ankles, suffocated, beaten, and raped over the course of 15 hours.”\(^{118}\) In addition, she stated that police told her that they would rape her children and “cut them up into pieces.”\(^{119}\) Following hours of torture, Armenta was given a document that she signed without reading, and it was a confession to the murder of her husband, which resulted in her imprisonment.\(^{120}\) A court later ruled that she be released since she signed a document because of torture.\(^{121}\) When Amnesty International investigated this case, they stated that here and in other cases, even though Mexico ratified the Convention, they were allowing the use of torture to elicit confessions.\(^{122}\) Enforcing the Convention would allow Armenta to seek relief and to secure justice because of the torture she suffered at the hands of the Mexican Government.\(^{123}\)

\(^{115}\) ‘No safe haven for torturers’ – The rocky road to the Convention against Torture, supra note 103.

\(^{116}\) Debra Killalea, Yecenia Armenta: Woman ‘raped into confessing husband’s murder’ in Mexico, NEWS.COM.AU (Nov. 30, 2015), http://www.news.com.au/world/south-america/yecenia-armenta-woman-raped-into-confessing-husbands-murder-in-mexico/news-story/a759f0a86c618e1d20449da19e53a3. Here, the case is still developing because it was just recently that Yecenia Armenta was released from prison, and the allegations against those that tortured her into making a false confession are still being investigated. Id.

\(^{117}\) Id.

\(^{118}\) Id.

\(^{119}\) Id.

\(^{120}\) Id.

\(^{121}\) Id.

\(^{122}\) Id.

\(^{123}\) Id.
c. Applying for Asylum as a Form of Relief

If a party is not looking to file a claim under the Convention, but instead wants to be protected by the United States, they may seek another form of relief and apply for asylum. The United States, which has ratified the Convention, has specific steps for a person to apply for asylum under the Convention.\(^{124}\) In order to gain protection under the Convention, the person seeking protection must “show that it is more likely than not that [he or she] would be tortured if removed to the country from which [he or she] is claiming protection.”\(^\text{125}\) The harm feared must also meet the previously discussed definition of torture as defined by the Convention.\(^\text{126}\) Finally, the torture must be at the hands of or with the consent of the government the person is fleeing from, and the person seeking relief must not be able to get away from the torturer.\(^\text{127}\) If the conditions are all met, the United States must honor the Convention, and it cannot return someone to a country where there is a risk the torture could continue.\(^\text{128}\) When determining whether someone has met the conditions to achieve protection under the Convention, it is by an objective standard, and the person may present reports and articles from the country in question in order to prove their claim.\(^\text{129}\) The relief seeker must also present documents that detail what type of torture they fear if forced to return, and additionally, if applicable, what type of torture they suffered from previously, what kinds of torture family and friends have suffered, and how people similar to them have been tortured by the same government.\(^\text{130}\) Here, the goal of the Convention is to prevent future torture, which is why there is an emphasis on preventing situations that could make torture possible.\(^\text{131}\)

When seeking relief under the Convention, in addition to victims facing problems arbitrating the case, often times, it can be difficult getting protection under the Convention by applying for asylum in the United States. This relief

\(^{124}\) Mysliwska, supra note 49.

\(^{125}\) Id.

\(^{126}\) Id.

\(^{127}\) Id.

\(^{128}\) Id.

\(^{129}\) Id.

\(^{130}\) Id.

\(^{131}\) Id.

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can come in the form of protection from deportation, however, this form of relief is rare and “only about 2-3% of all applications for [the Convention] are granted” in the United States.\(^{132}\) In order to be granted relief, the party “must demonstrate a clear probability (more than a 50% chance) that they will be tortured either directly by or with the acquiescence of the government of their country of origin.”\(^{133}\) Applying for protection from deportation is not the same as submitting a case to arbitration, but is a way for a party to seek protection if they have already fled the nation where they were subjected to torture or other forms of cruel treatment.\(^{134}\) There are specific forms of relief from deportation, including withholding of removal, where a nation “protects a person from being deported to a country where they fear persecution.”\(^{135}\) Even though this is a form of relief, it is still a limited benefit because as previously discussed, not many people are granted this relief.\(^{136}\) Rather, arbitration would serve as a better remedy because it consists of quicker and more inexpensive proceedings that can allow a party to recover monetary damages.\(^{137}\)

d. Tort Exception to Avoid Sovereign Immunity

The tort exception outlined in 28 U.S.C. § 1605(a)(5), “gives the individuals wrongfully harmed the ability to sue a foreign state in their own domestic courts, provided the tort took place ‘in whole or in part’ in the forum state.”\(^{138}\) This statutory provision provides that a foreign state will not be immune from jurisdiction if a party is seeking monetary damages “for personal injury or death, or damages to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state.”\(^{139}\) This remedy can help parties sue nations if they were subjected to


\(^{133}\) Id.

\(^{134}\) Id.

\(^{135}\) Id.

\(^{136}\) Id.

\(^{137}\) Arbitration, supra note 16.

\(^{138}\) Nagan & Root, supra note 54, at 426.

torture in that forum and could provide a remedy for them.\(^{140}\) This remedy is a reasonable method through which a victim may seek relief, however, in order to invoke the tort exception, the party must meet all the necessary conditions, and those may not apply in all cases under the Convention\(^{141}\). Even though sovereign immunity may complicate a party’s ability to sue a state, there are ways around this disadvantage such as the tort exception.\(^{142}\)

e. Corporate Liability to Avoid Sovereign Immunity

Another recent development involving the subject of human rights violations is corporate liability as a way for a victim to file a case and recover.\(^{143}\) Under this remedy, a corporate defendant responsible for a human rights violation will be held accountable and be subject to personal jurisdiction, and the corporate defendant cannot claim immunity from a suit.\(^{144}\) In this type of suit, the focus is on the contractual relationship between the corporation and the sovereign, which establishes the corporate liability.\(^{145}\) When dealing with foreign investment agreements, there are often some interesting developments because there may be a clause in the agreement where the sovereign chooses to waive immunity.\(^{146}\) This kind of clause would help to overcome the problem of sovereign immunity, but only if the sovereign decides to be held accountable for their actions.\(^{147}\) Additionally, if more of these clauses were put into the corporate agreements, then the sovereigns would not be able to assert immunity from lawsuits.\(^{148}\) Since clauses waiving sovereign immunity are not routinely used in contracts or other international agreements, it is common for arbitration clauses to be used to establish a system where the sovereign will be held accountable.\(^{149}\) However, if the sovereign chooses not to abide by the arbitration clause, as

\(^{140}\) Nagan & Root, supra note 54, at 426.


\(^{142}\) Id.

\(^{143}\) Alford, supra note 89, at 506.

\(^{144}\) Id.

\(^{145}\) Id. at 518.

\(^{146}\) Id. at 519.

\(^{147}\) Id.

\(^{148}\) Id.

\(^{149}\) Id. at 520.
with the opt-out paragraph of the Convention, then the victim may have to search for another remedy.\footnote{Id.}

When an individual is navigating the process of holding a corporation liable for violating human rights laws, there may be problems when corporations act inappropriately and facilitate inappropriate acts while it is under the control of a sovereign.\footnote{Id. at 529.} This corporate liability is present where sovereigns and corporations form contracts so the corporations can enforce labor standards, when the sovereign cannot enforce labor rules.\footnote{Id.} Corporations typically have incentive to act properly and with ethical responsibility, however, not all corporations choose to do so.\footnote{Id. at 533.} There are several examples of nations acting through corporations to violate human rights laws where the corporation is acting with the sovereign to act inappropriately.\footnote{Id. at 518.} Burma and the corporation Unocal are currently involved in a dispute over building a pipeline that was created through the use of “forced labor” and displaced those who lived near the pipeline.\footnote{Id.} Another example includes Dow Chemical’s manufacturing of the “Agent Orange” chemical during the Vietnam War.\footnote{Id. at 518.} In cases like these, the victims would be able to file suit against the corporation and be granted relief because of that corporate liability suit.\footnote{Id. at 517.} There may be some complications with this method. Such as if corporations become concerned that they will be targeted in the lawsuit because the sovereign is immune from suit and therefore would not be subject to jurisdiction.\footnote{Id. at 509.} As a result of this possibility, corporations may fear that they will bear the burden of the entire case because the sovereign will be immune.\footnote{Id. at 509.} Even with this in mind, corporate liability is still a better remedy than having the sovereign be completely immune from suit. The victim will still have to prove their elements of the case for the corporation to be held

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id. at 529.
\item Id.
\item Id. at 533.
\item Id. at 518.
\item Id.
\item Id.
\item Id.
\item Id. at 517.
\item Id. at 509.
\end{enumerate}
\end{footnotesize}
liable, and if the sovereign chooses to align with a corporation, then this could be an appropriate remedy for a victim.

f. Arbitration as the Best Solution for Torture Victims

In order for the process of arbitration to work, the nations involved in the suit must take the appropriate steps to ensure the arbitration of the case is fair, orderly, and completed efficiently to promote the continued use of arbitration in future cases. Scholars have cited some of the best ways to help ensure fair trials for those involved in situations of unfair treatment. Part of the process of ensuring victims will be able to voice their concerns in an appropriate forum will consist of the fact that “[s]uspects must have the right to legal advice and assistance of their own choice, at all stages of criminal proceedings.” In addition, “measures which prevent the perpetrators of gross human rights violations, such as torture, from being brought before the court, tried and sentenced are incompatible with state obligations under international human rights law, including the obligations to investigate, bring to justice, and punish those responsible for gross human rights violations.” Ensuring a fair proceeding is an important priority because doing so will benefit parties by providing them with a fair case and a chance for recovery.

As previously discussed, arbitration has many benefits, making it the best possible remedy for victims of torture to seek relief. While the tort exception, applying for asylum, and the corporate exception for sovereign immunity all provide ways that the victim can seek relief, those methods all have significant drawbacks. For example, they might not apply in all cases where a person is subjected to treatment that is prohibited under the Convention because to meet the exceptions, the situation must meet the requirements set forth by that particular exception. For the corporate exception to work, the corporation must be working with or under the orders of the state, so if this is not the case and the state is the only actor, then the victim would not be able to recover under this method, however, all of these exceptions could be raised in an

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161 Foley, supra note 160.
162 Id.
163 See generally, Alford, supra note 89.
arbitration proceeding.\textsuperscript{164} Arbitration is a quicker, less expensive process that will be decided by a neutral party, which will give the victim a fair forum, and the chance to seek monetary damages.\textsuperscript{165} Since arbitration does not require a formal evidence process, it can simplify the process for a party seeking relief to make their case in front of an arbitrator because they will be able to present any evidence they have without having to worry about not having sufficient evidence to win a judgment.\textsuperscript{166} Additionally, since the forum is designated by the Convention, it will provide a victim seeking relief a forum to use.\textsuperscript{167} With an assigned forum, victims will have a better opportunity to seek the relief they deserve after being subjected to inhumane treatment prohibited under the Convention.

6. Conclusion

States must submit reports to the Committee to discuss how they are implementing the Convention in their respective states, and these reports often include cases that have been brought to the various states that are part of the Convention.\textsuperscript{168} These reports are important to understanding how the victims of cruel treatment can best be served in the future because they provide helpful insight into how the cases are proceeding and what kind of impact the Convention is having on various nations.\textsuperscript{169} The arbitration clause in the Convention is not only important because it provides a remedy for victims seeking relief and justice, but it also gives the victims and nations involved in the Convention a way to facilitate the process of hearing the claim and providing an appropriate remedy.\textsuperscript{170} Arbitration, as a simpler and often times

\textsuperscript{164} Alford, supra note 89, at 529.
\textsuperscript{165} Arbitration, supra note 16.
\textsuperscript{166} Id.
\textsuperscript{167} Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, supra note 92.
\textsuperscript{169} Id.
\textsuperscript{170} Id.
more efficient process, can help serve victims of cruel treatment by providing a proper forum for filing their claim. Thus, the arbitration process should be adopted in order to help with the state sovereignty and immunity problems and to best serve the victims of torture and other cruel treatment.