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DEFINING TORTURE: BRIDGING THE GAP BETWEEN RHETORIC AND REALITY

Julianne Harper*

In extreme situations when human lives and dignity are at stake, neutrality is a sin. It helps the killers, not the victims.

—Elie Wiesel

I. TORTURE: A TOOL OF TERROR

Gabriel Shumba was a lawyer and activist for the Zimbabwe Human Rights NGO Forum. On January 14, 2003, Zimbabwean officials arrested Gabriel; at the time, he was defending an opposition Member of Parliament. The officials detained Gabriel and four others for three days. In an underground torture chamber, more than twenty members of the secret police and army personnel interrogated Gabriel. His torturers subjected him to electric shocks on his feet, tongue, and genitals. The torturers urinated upon him and

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4. Id.

5. Id.


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forced him to drink his own blood. Following his release, Gabriel received numerous threats; knowing he would be killed if he remained in Zimbabwe, he fled to South Africa. He remains in exile. Gabriel brought his case before the African Commission on Human and People's Rights (the "ACHPR") in December 2005. Although the ACHPR was due to announce its verdict on Gabriel's case during its thirty-ninth ordinary session in May 2006, it deferred its decision until the following session, scheduled for November 2006. However, during its fortieth session, the ACHPR again failed to address Gabriel's case.

Torture stands today as one of the most proscribed practices under international law. Described as "a cruel assault upon the defenseless," its "general aim [is] . . . to destroy a human being, destroy his personality, identity, . . . [and] soul." Torture is considered universally abhorrent, regarded as a jus cogens norm of international human rights law. This is reflected through the unqualified condemnation of both torture and cruel and inhuman treatment or punishment found in every major international human rights treaty to date. Moreover, the prohibition of torture is the

9. Id.
10. Id.
11. Id.
12. Id.
16. See Van Schaack & Slye, supra note 13, at 496. A jus cogens norm is "[a] mandatory or peremptory norm of general international law accepted and recognized by the international community as a norm from which no derogation is permitted." Black's Law Dictionary 876 (8th ed. 2004).
subject of its own widely recognized multilateral treaty.\textsuperscript{18} Torture has been denounced by the International Criminal Tribunals in both the former Yugoslavia (the "ICTY")\textsuperscript{19} and Rwanda (the "ICTR"),\textsuperscript{20} by judges throughout the world, and by authoritative statements of international law.\textsuperscript{21} Torture is officially proscribed by every government and under all circumstances, even in cases of war or national emergency.\textsuperscript{22} Indeed, the prohibition is absolute.

Yet, despite universal condemnation of torture and ill-treatment, a true definition of what constitutes "torture" under international law has yet to be determined. The 1984 United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (the "Torture Convention"),\textsuperscript{23} a multilateral treaty designed to provide the guiding authority in the international case against torture, offers a blurred and interpretive definition of torture.\textsuperscript{24} Due to this amorphous definition, signatory States charged with implementing laws that prohibit torture into their own domestic codes enjoy a considerable degree of discretion when defining the term. Many States have strayed from the Torture Convention's definition considerably,
publicly condemning torture in accordance with the Torture Convention’s mandate, but narrowly defining it so as to allow individuals to engage in behavior that defies the Torture Convention’s aim.\(^2\) Notwithstanding the clear prohibition in many areas of the world, torture remains a tool of state policy that is deeply engrained in law enforcement practices.\(^2\)

The search for a clear definition of torture has become a pressing legal issue within the international community.\(^2\) Such a definition is necessary for the creation of conclusive, binding standards against torture and thus is the essential catalyst to spur a worldwide commitment to eradicating torture.\(^2\)

This comment begins with an examination of the definition of torture provided by the Torture Convention, and it highlights how this definition has manifested in existing definitions of torture found in both international criminal and humanitarian law.\(^2\) Next, the analysis turns to the implications of the Torture Convention’s vague definition of torture, which has allowed States to stray substantially from the Torture Convention’s mandate in domestic prohibitions of torture. The many disparate definitions have led to significant global under-enforcement of torture prohibition and the perpetuation of the practice.\(^2\) This comment then analyzes how signatory States have implemented the Torture Convention’s definition into their own domestic codes, focusing upon the States’ most significant departures from the stance taken by international courts.\(^2\) Lastly, this comment proposes methods to create a more uniform definition of torture. It recommends that the Torture Convention’s framers clarify and restructure the definition of torture so that the international fight to eradicate torture may gain new strength.\(^2\)

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26. Id.
27. Id.
28. Id. at 5.
29. See infra Part II.
30. See infra Part III.
31. See infra Part IV.
32. See infra Part V.
II. DEFINITIONS OF TORTURE IN INTERNATIONAL LAW

Most definitions of torture within international law derive from Article 1, section 1 of the 1984 United Nations Torture Convention. With its 145 parties, the Torture Convention contains the most widely accepted definition of torture and embodies "a consensus . . . representative of customary international law." The Torture Convention has certain notable features. For instance, Article 2 obligates all States party to the Torture Convention to take "effective legislative, administrative, judicial, or other measures to prevent acts of torture in any territory under its jurisdiction." Article 4 serves to "ensure that all acts of torture are offenses under its [national] criminal law." Additionally, the Torture Convention follows the principle of compulsory universal application: its mandate is applicable to all States of the world such that even acts of torture committed in non-signatory States are punishable within a State party to the Torture Convention. In this vein, signatory States may not extradite any person if there are substantial grounds to believe that the person may be subjected to torture in the State requesting the extradition. Further, the Torture Convention seeks to ensure that an individual charged with committing an act of torture cannot claim as a defense that the act or acts were ordered by a

33. Torture Convention, supra note 18, art. 1, ¶ 1.
35. See MILLER, supra note 25, at 6; see also VAN SCHAAK & SYLVE, supra note 13, at 499.
37. Torture Convention, supra note 18, art. 2, ¶ 1.
38. Id. art. 4, ¶ 1.
40. Torture Convention, supra note 18, art. 3, ¶ 1 ("No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.").
superior officer of public authority. 41 Lastly, under the
Torture Convention, evidence obtained through torture must
be rendered inadmissible in the criminal justice system of any
signatory State. 42

The Torture Convention defines 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. 43

This definition includes four elements: 44 (1) the
intentional infliction (2) of severe pain or suffering (3) for one
of the enumerated purposes (4) by someone acting on behalf
of a State. 45 Signatory States throughout the international
community have developed these elements more fully as they
endeavor to implement the Torture Convention’s mandate
into their own jurisprudence. Each element represents an
integral part of an ever-evolving definition of torture.

A. The Intentional Infliction Requirement

Under the Torture Convention, acts alleged to constitute
torture must be inflicted intentionally. 46 Thus, if one were to
suffer severe pain at the hands of an individual, but that
individual did not intend to inflict harm through his actions,
the act would not amount to torture. Both the ICTY and the
ICTR have retained this general intent requirement as

41. Id. art. 2, ¶ 3.
42. Id. art. 15.
43. Id. art. 1, ¶ 1.
44. See MILLER, supra note 25, at 6; VAN SCHAAK & SYE, supra note 13,
at 499.
45. VAN SCHAAK & SYE, supra note 13, at 499.
46. Id. This is a general intent requirement. Id. In the first draft of the
Torture Convention to the United Nations, two Swedish representatives
explained that “where pain or suffering is the result of an accident or mere
negligence, the criteria for regarding the act as torture are not fulfilled.”
BURGERS & DANELIUS, supra note 39, at 118.
provided by the Torture Convention.\textsuperscript{47} The European Court of Human Rights (the "ECHR") also has retained the Torture Convention's intent requirement, but it has created a less stringent standard by shifting the burden of proof from the victim to the government.\textsuperscript{48} For example, in \textit{Selmouni v. France},\textsuperscript{49} the ECHR concluded that "where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent \textit{on the state} to provide a plausible explanation of how those injuries were caused."\textsuperscript{50} Thus, even though the ECHR uncovered no explicit evidence of intent (nor the identity of the perpetrator), it concluded that the State had tortured the individual because the State could not offer an explanation as to how the injuries occurred.\textsuperscript{51} The physical evidence of harm while the victim was in police custody, coupled with the testimony of the victim, was sufficient to trigger a presumption of intent.\textsuperscript{52}

The Inter-American Convention to Prevent and Punish Torture, a multilateral South American treaty signed in 1985, similarly retained the intent requirement.\textsuperscript{53} It states that "torture shall be understood to be any act intentionally performed."\textsuperscript{54} In examining this definition, the Inter-American Court of Human Rights (the "IACHR") took an even more expansive stance than did the ECHR with respect to the meaning of "intent." In \textit{Morales v. Guatemala},\textsuperscript{55} the IACHR

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\textsuperscript{47} VAN SCHAACK \& SLYE, \textit{supra} note 13, at 499. Reinforcing the importance of this element, the ICTY explained in the 2002 case, \textit{Prosecutor v. Kunarac}, that

\textit{even if a perpetrator's motivation is entirely sexual, it does not follow that the perpetrator does not have the intent to commit an act of torture or that his conduct does not cause severe pain or suffering, whether physical or mental, since such pain or suffering is a likely and logical consequence of his conduct.}

\textit{Prosecutor v. Kunarac, Case No. IT-96-23 \& IT-96-23/1-A, Judgment, ¶ 153 (June 12, 2002).}

\textsuperscript{48} MILLER, \textit{supra} note 25, at 13.


\textsuperscript{50} \textit{Id.} at 193.

\textsuperscript{51} See \textit{id.}

\textsuperscript{52} See \textit{id}; see also MILLER, \textit{supra} note 25, at 13.

\textsuperscript{53} Inter-American Convention to Prevent and Punish Torture art. 2, Dec. 9, 1985, O.A.S. T.S. No. 67, 25 I.L.M. 519 [hereinafter Inter-American Convention].

\textsuperscript{54} \textit{Id.}

found that Guatemalan officials had committed torture on the basis of autopsies that reliably revealed signs of beating, tying, and visible cuts and burns to the victim’s face and body. At a public hearing set to determine the amount of the victim’s reparations, the Court stated unequivocally that the damage inflicted on the victim is evident because it is only human nature that any person subjected to the aggression and abuse that she endured (unlawful detention, torture, and death) experiences profound physical and mental suffering. The Court considers that no evidence is required to reach this conclusion.

In this case, the court inferred the perpetrator’s intent from circumstances and consequently reached a torture conviction without ever examining the true intent of the perpetrator. While the torture analysis often hinges upon whether the intent requirement has been met, international courts appear to construe the element liberally.

B. The Severe Pain or Suffering Requirement

To constitute torture under the Torture Convention’s definition, the harm inflicted upon a victim must amount to “severe pain or suffering.” However, since the Torture Convention provides no definition of the key term, “severe,” international courts tend to interpret it broadly. During the early stages of the Torture Convention’s creation, the drafters aggressively debated the inclusion of the word “severe.” A number of proposals were made for its deletion; however, all such proposals were defeated upon the conclusion that the ‘severity’ of the pain or suffering is the essential ingredient for establishing that the conduct amounts to torture.
Unfortunately, it is "virtually impossible" to ascertain how severe inhuman treatment must be to qualify as torture. Accordingly, the lack of clarity regarding what constitutes "severe pain or suffering" has given international courts remarkable latitude in their interpretations of the Torture Convention's severity requirement.

The ECHR was one of the first courts to examine the measure of severity required for an act to constitute torture under its own treaty, the European Convention on Human Rights. The court concluded that torture fell at the extreme end of a wide spectrum of pain-inducing acts. In Ireland v. United Kingdom, the court evaluated certain "sensory deprivation" techniques applied by security forces in Northern Ireland as a means to obtain information from detainees of suspected terrorist activities. The court held that the five techniques, including wall-standing, hooding, subjection to continuous noise, deprivation of sleep, and deprivation of food and drink, did not rise to the level of torture but did constitute inhuman and degrading treatment. The court concluded that the European Convention on Human Right's "distinction [between torture and inhuman or degrading treatment] derives principally from a difference in the intensity of the suffering inflicted," and that the term "torture" "attache[d] a special stigma to deliberate inhuman treatment causing very serious and cruel suffering." The five techniques thus "did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood."

The ECHR found support for the notion of a hierarchical relationship between torture and other cruel, inhuman, and degrading treatment ("CIDT") in General Assembly
Resolution 3452 (XXX). Adopted unanimously by the members of the United Nations in 1975, this Resolution states that “[t]orture constitutes an aggravated and deliberate form of cruel, inhuman, or degrading treatment or punishment.” Both the jurisprudence of international human rights and international criminal law reflect this concept of hierarchy by employing a sliding scale to determine whether an act constitutes torture or CIDT.

However, in Selmouni v. France, the ECHR modified its position, declaring that “certain acts which were classified in the past as ‘inhuman and degrading treatment’ as opposed to ‘torture’ could be qualified differently in the future.” It held that “the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly . . . requires greater firmness in assessing breaches of the fundamental values in democratic societies.”

In determining whether an act causes severe pain or suffering, some courts examine the subjective impact on the particular victim. To measure the subjective impact, courts consider a particular victim’s physical or mental disposition, including the vulnerability of children and pregnant women. To illustrate, in Z and Others v. United Kingdom, the ECHR evaluated factors such as “the physical and mental effects on the person experiencing the harm, the duration of the act,
and the age, sex, and culture of the person experiencing the harm.”\textsuperscript{76} The court held specifically that the State had an obligation to protect children from severe harm.\textsuperscript{77}

Confounding the issue even further, the ICTY created a case-by-case test in evaluating the severity requirement, considering both objective and subjective factors to distinguish torture from CIDT.\textsuperscript{78} The ICTY evaluates not only objective standards such as the “nature, purpose, and consistency of the acts committed,” but also subjective factors like “the physical or mental condition of the victim, the effect of the treatment, . . . the victim’s age, sex, state of health, and position of inferiority.”\textsuperscript{79} Taking the analysis one step further, in one instance, the ICTY considered “the specific social, cultural, and religious background of the victims,”\textsuperscript{80} maintaining that “in certain circumstances the suffering can be exacerbated by social and \textit{cultural} conditions.”\textsuperscript{81}

Due to ambiguity surrounding the severity requirement, establishing a dividing line between torture and CIDT has proven a difficult task. This has created a dilemma for States; while the Torture Convention prohibits both torture and “other forms of cruel, inhuman, or degrading treatment,” it only requires that States criminalize torture.\textsuperscript{82} This invites States to commit inhumane acts, so long as they can evade the requisite level of severity that constitutes torture. If an act is defined as CIDT, a lesser violation, States generally do not criminalize the act. As a result, States lack standards by which to determine precisely what treatment is prohibited.\textsuperscript{83}

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 131.
\item VAN SCHAACK & SLYE, \textit{supra} note 13, at 517; \textit{see also} Prosecutor v. Brdanin, Case No. IT-99-36-T, Judgment (Sept. 1, 2004).
\item \textit{Brdanin}, Case No. IT-99-36-T at ¶ 484.
\item Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment, ¶ 237 (Nov. 30, 2005).
\item \textit{Id.} (emphasis added).
\item Torture Convention, \textit{supra} note 18, arts. 4–5; VAN SCHAACK & SLYE, \textit{supra} note 13, at 513.
\item \textit{See} MILLER, \textit{supra} note 25, at 2–5. However, the ICTR has made proactive steps in this direction by criminalizing “cruel treatment,” “outrages upon personal dignity, in particular humiliating and degrading treatment” and “other inhumane acts.” ICTR Statute, \textit{supra} note 20, arts. 3–4.
\end{enumerate}
\end{footnotesize}
C. The Enumerated Purposes Requirement

A particular act will only constitute torture if the perpetrator acts with a specific purpose to punish or intimidate the victim. By the Torture Convention's standards, the torturer must have committed the act for "such purposes as obtaining from [the victim] or a third person information or a confession, punishing him for an act he or a third person has committed . . . or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind . . . " The purpose requirement thus distinguishes torture from other types of mistreatment, including indiscriminate acts of violence.

While drafting the Torture Convention, parties disputed whether the definition of torture should include a reference to the actor's purpose for intentionally inflicting severe pain or suffering. This debate resulted in a compromise—the Torture Convention lists certain common purposes, but the list is not exhaustive. Of course, purposes other than those listed may qualify under the definition; however, the words "such . . . as" imply that the other purposes must bear similarity to the purposes that are enumerated explicitly.

With the exception of crimes against humanity, as defined in Article 7 of the Rome Statute for the International Criminal Court, the notion of purpose seems to be central to the understanding of the concept of torture in international law. A reference to purpose is included in both Article 2 of the Inter-American Torture Convention and the Elements of

84. See Torture Convention, supra note 18, art. 1, ¶ 1.
85. Id.
86. Van Schaack & Slye, supra note 13, at 501.
87. BURGERS & DANIELUS, supra note 39, at 118. France considered the motives of the perpetrators to be irrelevant, while the United States suggested that the definition of torture should state that the act must be deliberate and malicious. Id. at 46.
88. Id. at 118.
89. Id.
90. Rome Statute of the International Criminal Court art. 7, ¶ 1, July 17, 1998, 37 I.L.M. 999, available at http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_English.pdf [hereinafter Rome Statute] (" 'Crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) murder, (b) extermination, (c) enslavement, . . . (f) torture . . . ").
91. Rodley, supra note 73, at 481.
92. Inter-American Convention, supra note 53, art. 2.
Crimes concerning the war crime of torture under the Rome Statute with respect to both international and non-international armed conflict.  

Within international human rights law, the Torture Convention's purpose requirement carries particular strength. The ECHR has employed the Torture Convention definition consistently. Beginning this trend in The Greek Case in 1969, the ECHR stated that torture is inhuman treatment "that has purpose, such as the obtaining of information or confessions, or the infliction of punishment." Recently, the Court required the purposive element in two cases against Cyprus: the ECHR held in both Egmez v. Cyprus and Denizci v. Cyprus that, while officials had subjected victims to varying degrees of ill-treatment intentionally, such treatment did not amount to torture because the victims could not establish that the officers' aim was to extract a confession.

The International Criminal Tribunals also have required the purposive element consistently, particularly in recent cases in which the trial chambers equated rape with torture. For instance, in Prosecutor v. Delalic, the ICTY accepted those purposes listed in the Torture Convention as "representative;" however, the trial chamber reaffirmed that "there is no requirement that the conduct . . . be solely perpetrated for a prohibited purpose." Further, the trial

93. Rome Statute, supra note 90, art. 8, ¶ 2.
96. Rodley, supra note 73, at 493.
98. Id. The Trial Chamber elaborated on this proposition by drawing a distinction between a "prohibited purpose" for which torture is inflicted, and a purely private purpose, such as rape or sexual assault. Id. It concluded that, though these acts traditionally have been considered private conduct, and thus precluded from punishment under international law, "the purposive elements of intimidation, coercion, punishment or discrimination can often be integral components of behaviour, thus bringing the relevant conduct within the
court in *Prosecutor v. Furundzija* retained the list of enumerated purposes contained in the Torture Convention, but added that "among the possible purposes of torture one must also include that of humiliating the victim." The court based this conclusion upon the general spirit of international humanitarian law, the primary purpose of which is to safeguard human dignity.

**D. The State Action or Public Official Requirement**

Finally, to establish an act of torture under the Torture Convention, the act must be "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." Thus, even the most egregious forms of abuse will not be considered torture in violation of the Torture Convention unless the State is somehow involved. This requirement stems from the idea that only torture for which the authorities can be held responsible should fall within the Torture Convention's definition. The drafters reasoned that if a private individual criminally committed torture without the involvement of any State authority, the traditional functions of the domestic legal system would manage the prosecution and punishment of the perpetrator.

In most human rights treaties, the definition of torture expressly requires state action. However, in some

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100. Id.
102. MILLER, *supra* note 25, at 17. During the travail préparatoires, much discussion was devoted to whether or not an act of the kind referred to in Article 1 should be regarded as torture irrespective of who committed the act. BURGERS & DANELIUS, *supra* note 39, at 119.
104. Id. at 119–20.
105. VAN SCHAAK & SLYE, *supra* note 13, at 502. The major exceptions to
instances, the state action requirement has been interpreted broadly, arguably granting courts the power to ignore the requirement altogether. For example, in 1992, the Human Rights Committee (the "HRC") stated that the protection offered by Article 7 of the International Covenant of Civil and Political Rights\textsuperscript{106} was not limited to acts committed by or at the instigation of public officials and announced that States have a responsibility to protect individuals from interference by private parties.\textsuperscript{107} The U.N. Special Rapporteur on Torture echoed this sentiment a decade later, declaring that the state action requirement was satisfied when public officials were "unwilling to provide effective protection from ill-treatment (i.e. fail to prevent or remedy such acts), including ill-treatment by non-State actors."\textsuperscript{108} The Special Rapporteur's conclusion indicated that state inaction in the face of private violence may constitute a violation of the treaty provision on torture.\textsuperscript{109}

In \textit{Z and Others v. United Kingdom}, the ECHR adopted a similarly broad understanding of the state action requirement, holding the government accountable for inhuman and degrading treatment inflicted upon four children by their parents.\textsuperscript{110} The court held that beyond the state official requirement articulated in the Torture Convention, States must take measures to ensure that individuals within their particular jurisdiction are not subjected to torture or ill treatment, including ill-treatment administered by private individuals.\textsuperscript{111} The court ruled that since the State knew or should have known that the children were at risk of severe parental abuse, the State had an affirmative obligation to prevent torture or inhuman or

\begin{itemize}
\item this are acts of torture committed as a part of genocide, crimes against humanity, or war crimes. \textit{Id.}
\item \textsuperscript{106} ICCPR Statute, \textit{supra} note 17, art. 7 ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.").
\item \textsuperscript{107} \textit{See} Prosecutor \textit{v.} Kunarac, Case No. IT-96-23 \& IT-96-23/1-A, Judgment, ¶ 166 (June 12, 2002).
\item \textsuperscript{108} MILLER, \textit{supra} note 25, at 18. For a discussion on the role of the U.N. Special Rapporteur on Torture, see OHCHR FACT SHEET, \textit{supra} note 101, at ¶ 8.
\item \textsuperscript{109} MILLER, \textit{supra} note 25, at 18 (emphasis added).
\item \textsuperscript{110} \textit{Id.}
\item \textsuperscript{111} \textit{See} \textit{Z} and Others \textit{v.} United Kingdom, App. No. 29392/95, 34 Eur. H.R. Rep. 97, 131 (2002).
\end{itemize}
degrading treatment.\textsuperscript{112} Despite the broad interpretation of the state action provision adopted by the U.N. and the ECHR, the Torture Convention does not state that the inaction of public officials to prevent or punish private abuses is a violation of its precepts.\textsuperscript{113}

The Committee Against Torture, the body created to monitor State compliance with the Torture Convention, has relaxed the state action requirement somewhat in cases involving States that lack an effective government.\textsuperscript{114} To illustrate, in \textit{Elmi v. Australia}, a Somali citizen brought a claim challenging an Australian decision ordering that he return to Somalia.\textsuperscript{115} The Committee Against Torture, noting the lack of effective government or legitimate state actors in Somalia, held that a fear of severe ill treatment at the hands of groups that have established “quasi-governmental institutions” and that “\textit{de facto} . . . exercise certain prerogatives that are comparable to those normally exercised by legitimate governments” constitutes torture.\textsuperscript{116}

International criminal law has been less consistent in requiring state action than international human rights law, and in many instances it has not attached any particular status to the perpetrator.\textsuperscript{117} In the protections afforded to victims under the Geneva Convention, the status of the \textit{victim} rather than that of the perpetrator determines criminal responsibility.\textsuperscript{118} Similarly, Article 75 of Additional Protocol I

\begin{thebibliography}{2}
\bibitem{112} Id. at 131-32.
\bibitem{113} MILLER, supra note 25, at 18.
\bibitem{114} See id. at 18-20.
\bibitem{116} Elmi v. Australia, Comm. No. 120/1998, U.N. Comm. Against Torture, 22d Sess., U.N. Doc. CAT/C/22/D/120/1998, ¶¶ 6.5-7 (1999). However, three years later the region had stabilized and the court reconsidered its holding in \textit{Elmi}, limiting that decision to the “exceptional situation” at the time that \textit{Elmi} was decided. H.M.H.I. v. Australia, Comm. No. 177/2000, U.N. Comm. Against Torture, 28th Sess., U.N. Doc. CAT/C/28/D/177/2001 (2002), ¶ 6.4 (“[W]ith three years elapsing since the \textit{Elmi} decision, Somalia currently possesses a State authority in the form of the Transitional National Government . . . [a]ccordingly, the Committee does not consider this case to fall within the exceptional situation in \textit{Elmi}, and takes the view that acts of such entities as are now in Somalia commonly fall outside the scope of article 3 of the Convention.”)
\bibitem{117} Rodley, supra note 73, at 487.
\bibitem{118} Geneva Convention III, supra note 17, art. 130; Geneva Convention IV,
omits the “state official” requirement altogether. This article prohibits torture under all circumstances, whether committed by a military official or a civilian. The Rome Statute for the International Criminal Court further demonstrates the trend to omit the public official requirement in international criminal definitions of torture, stating plainly that “‘torture’ means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused.” Additionally, the statute dedicates an entire article to denoting the “[i]relevance of official capacity” of the perpetrator, providing that the statute shall apply “equally to all persons without any distinction based on official capacity.”

While the ICTY has not declared with any consistency that state action is required for a conviction of torture, its latest decisions indicate that the Tribunal has joined the international criminal law movement toward omission of this requirement. Both the trial chamber in Prosecutor v. Delalic and the appeals chamber in Prosecutor v. Furundzija required the involvement of a public official. However, in a more recent case, following a lengthy analysis of the crime of torture under both international human rights and international criminal law, the appeals chamber in Prosecutor v. Kunarac determined that “the public official

supra note 17, art. 147 (guaranteeing the protection of wounded and sick soldiers on the battlefield and at sea, shipwrecked persons, prisoners of war, and civilians under enemy control).


120. Id.

121. The International Criminal Court is an independent, permanent court that tries persons accused of the most serious crimes of international concern, namely genocide, crimes against humanity, and war crimes. See generally Rome Statute, supra note 90.

122. Id. art. 7, ¶ 2.

123. Id. art. 27.

124. Id. art. 27, ¶ 1.

125. VAN SCHAAK & SYE, supra note 13, at 511.


127. Prosecutor v. Furundzija, Case No. IT-95-171-T, Judgment, ¶ 111 (Dec. 10, 1998). The court additionally stated that the crime required that someone acting in a non-private capacity commit the act. Id.
requirement is not a requirement under customary international law in relation to the criminal responsibility of an individual for torture outside of the framework of the Torture Convention.”

The Torture Convention has settled firmly into the mechanisms of international law, serving as the helm that steers the various international bodies’ decisions. Some noted interpretative differences have surfaced, including the movement toward omission of the state action requirement in international criminal law, as well as the broadening and narrowing of certain elements; however, “torture” as defined in the Torture Convention has grown to represent a consensus definition within the international community. Nonetheless, the Torture Convention’s vague definition has left signatory States considerable license to interpret and innovate. The consensus reached in the international community regarding the Torture Convention’s principles does not always translate into States’ national and local laws as intended. Accordingly, the term “torture” has been redefined and altered, and in many State domestic codes, the definition fails to capture conduct that the Torture Convention resolutely prohibits.

III. LEGAL ISSUE: IMPLICATIONS OF A VAGUE CONVENTIONAL DEFINITION

It is well established that torture is widely condemned. Currently, 145 States have ratified the Torture Convention, and by doing so, have pledged to “take effective legislative, administrative, judicial, or other measures to prevent acts of torture in any territory under its jurisdiction.” However, few member States have implemented the definition of torture as it exists in the text of the Torture Convention. The nebulous nature of the Torture Convention’s definition has provided States with a considerable degree of discretion to serve their own interests when translating the Torture Convention’s mandate into domestic law. The lack of consensus as to precisely what constitutes torture has led to

129. See MILLER, supra note 25, at 6, 18–19.
130. Torture Convention, supra note 18, art. 2, ¶ 1.
DEFINING TORTURE

numerous definitional innovations.

Notably, States have departed from the definition by substantially altering the standards of the severity requirement, and by omitting the requirement that the act be committed by a public official. Further, many States have failed to provide a definition of torture in their legislative codes altogether, thereby failing to establish effective standards of behavior. This distorted implementation of the Torture Convention’s pronouncements has prevented the institution of a uniform prohibition.

The Torture Convention’s unclear definition translates into a vague understanding of its mandate; imprecise language diminishes both the strength and enforceability of the Torture Convention. This is demonstrated by a deficiency in the enforcement and punishment of torture under domestic criminal codes, especially when public officials are involved. The State Reports submitted to the U.N. Committee Against Torture (the “CAT”) reflect this assertion, as they provide evidence of an unbalanced number of violations of torture in comparison with the number of convictions that result. In 2004, the CAT stated that it was concerned about Argentina’s “many allegations of torture and ill-treatment committed in a widespread and habitual manner by the State’s security forces and agencies, both in the provinces and the federal capital,” noting a distinct and disturbing “lack of proportion between the high number of reports of torture and ill-treatment and the very small number of convictions for such offenses, as well as unjustifiable delays in the investigation of cases of torture.”

The CAT also pointed to the suspected impunity of public officials whose acts amounted to torture, stating among its concerns that there exists a repeated practice of “miscategorization” of actions by judicial officials “who treat the crime of torture as a minor offense (such as

131. See infra Part IV.B.
132. See infra Part IV.C.
133. See infra Part IV.A.
134. MILLER, supra note 25, at 6.
unlawful coercion), which carries a lesser punishment, when in fact such actions should be categorized as torture."137

The CAT's reports to both Albania138 and Uganda produced similar results. In its report to Uganda, the CAT expressed its concerns about the "continued allegations of widespread torture and ill-treatment by the State's security forces and agencies, together with the apparent immunity enjoyed by its perpetrators."139 Again, the CAT lamented "the disproportion between the high number of reports of torture and ill-treatment and the very small number of convictions for such offences, as well as the unjustifiable delays in the investigation of torture, both of which contribute to the impunity prevailing in this area."140

The CAT gave the same condemnation to the Russian Federation's Criminal Code, adopted in 1996 and amended in 2002. The CAT noted that Russia had taken some positive steps toward eradicating torture and other inhumane treatment.141 However, the CAT expressed deep concern over the numerous and consistent allegations of widespread torture and other CIDT or punishment of detainees committed by law enforcement personnel, particularly in attempts to obtain confessions.142 Russia's latest state report to the CAT did not mention any cases in which state officials had been convicted of torture under Article 117.143

Though many States have signed the Torture Convention, reports demonstrate that the international community struggles to adhere to the guidelines provided.

137. Id. ¶ 34(b).
138. U.N. GAOR, 34th Sess., Report of the Committee Against Torture ¶ 83(c), U.N. Doc. A/60/44 (May 2–20, 2005) ("[A] climate of de facto immunity prevails for law enforcement personnel who commit acts of torture or ill-treatment in view of: (i) the numerous allegations of torture and ill-treatment by law enforcement personnel, especially at the moment of arrest and during interrogation . . . (iv) the absence of conviction in cases of torture under article 86 of the Criminal Code, and the limited number of convictions of torture with serious consequences under article 87 of the Criminal Code.").
140. Id. ¶ 93(e).
142. Id. at 30–31 ¶ 9.
Reports of torture continue to flood in, with torture occurring in eighty-one countries around the world, and reported deaths attributable to torture, cruel and inhuman treatment, and cruel treatment and punishment in prisons.\textsuperscript{144}

In failing to guide States toward an acceptable, enforceable definition of torture, the Torture Convention thwarts its very purpose: to punish and prevent torture worldwide. The institution of torture persists internationally, and many instances of torture have gone unnoticed or unpunished, as evidenced by the CAT reports.\textsuperscript{145} Further, apart from torture's devastating effects upon its victims, it has broader consequences for world order.\textsuperscript{146} It attacks the authority and legitimacy of the State, provokes or intensifies social conflict, and undermines the very idea of peace.\textsuperscript{147} In its tacit claim to unlimited social control, it challenges the idea of the rule of law itself.\textsuperscript{148} 

IV. ANALYSIS: DEPARTURES FROM THE TORTURE CONVENTION'S MANDATE BY MEMBER STATES

As an international human rights treaty, the Torture Convention has developed through the jurisprudence of many international courts; however, as member States implement the prohibition of torture into their own legal codes as mandated by the Torture Convention, many fail to translate the guiding law as directed. The definitions of torture assembled in the State reports submitted to the CAT between the years 2000 and 2006\textsuperscript{149} confirm that States have deviated from the Torture Convention's definition in three main areas: (1) a distinct lack of any definition of torture in legislative codes, (2) significant divergence from the Torture Convention's severity requirement, and (3) the omission of the state action or public official requirement.

\begin{footnotes}
\footnote{145. See U.N. Treaty Body Database, supra note 135.}
\footnote{146. Winston P. Nagan & Lucie Atkins, The International Law of Torture: From Universal Proscription to Effective Application and Enforcement, 14 HARV. HUM. RTS. J. 87, 90 (2001).}
\footnote{147. Id.}
\footnote{148. Id.}
\footnote{149. U.N. Treaty Body Database, supra note 135.}
\end{footnotes}
A. Failure to Define Torture

Perhaps most alarming is the fact that many of the Torture Convention's member States have failed to sufficiently define, if define at all, the crime of torture in their domestic legal codes. In 2004, the CAT expressed to both Switzerland and Finland as a "[s]ubject of concern" that "no specific definition of torture exists in criminal law covering all the constituent elements of [A]rticle 1 of the Convention."\(^{150}\) Similar reports were administered to Austria, Azerbaijan, Kyrgyzstan, Uzbekistan, El Salvador, and Paraguay in 2000,\(^{151}\) noting specifically "[t]he incompleteness of the definition of torture, which leaves unpunished certain aspects of torture as defined in [A]rticle 1 of the Convention."\(^{152}\) Additionally, definitions of torture are simply "not listed" or "not incorporated" in the State reports of twenty-eight parties to the CAT, including Costa Rica, the Republic of Korea, Argentina, Belgium, Denmark, Israel, and the Russian Federation.\(^{153}\)

In 1999, the Israeli Supreme Court illustrated the difficulties arising with the failure to define torture sufficiently when it evaluated the legality of interrogation methods applied to Palestinian captives held within Israeli territory.\(^{154}\) Both the CAT and the Special Rapporteur on Torture had concluded previously that the techniques employed by Israeli officials constituted torture.\(^{155}\) Despite these views, the Israeli Supreme Court, while declaring that a number of these techniques were prohibited interrogation practices under Israeli law, never made reference specifically


\(^{151}\) See U.N. Treaty Body Database, supra note 135.


\(^{153}\) MILLER, supra note 25, at A1–A56.


\(^{155}\) VAN SCHAACK & SYE, supra note 13, at 518. The techniques in question included shaking a captive forward and backward, holding someone in the "Shabach" position, forcing persons being interrogated into a "frog crouch," depriving prisoners of sleep, and subjecting detainees to loud music. See Legality of S.S. Interrogation Methods, supra note 154 at ¶ 14.
to "torture" or made any efforts to define its limits.\textsuperscript{156} Instead, the court used conclusory language to invalidate the practices, noting that the methods employed "cause[d] the suspect suffering"\textsuperscript{157} and that they "infringe[d] upon the suspect's dignity, his bodily integrity and his basic rights in an excessive manner."\textsuperscript{158} Though it certainly declared these practices illegal under Israeli law, the court never expressly affirmed that the acts amounted to torture.

The State's reluctance to label illegal acts "torture" in this case illustrates the power of the term; courts avoid using it to protect their governments from the stigma of the crime.\textsuperscript{159} Essentially, States evade a finding of torture while illegal state practices persist.\textsuperscript{160} In States that have failed to provide effective definitions of torture within their criminal codes, citizens and officials find it difficult to distinguish torture from permissible acts. Consequently, the special status that the Torture Convention assigns to the term has deteriorated steadily.

\textbf{B. States' Divergence from the Torture Convention's "Severity" Requirement}

The "severity requirement" represents a second area of the Torture Convention that has seen significant degrees of variation. The Egyptian legislature, somewhat an anomaly, broadened the term, "impos[ing] no prerequisites concerning the degree or extent of pain or suffering."\textsuperscript{161} It provided that "the offense of torture obtains however slight or negligible the pain may be and whether or not the torture leaves marks."\textsuperscript{162} By contrast, several States employ rather cryptic, ambiguous definitions of the severity requirement. For example, Latvia requires that the act must "caus[e] particular pain or

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{156} See Legality of S.S. Interrogation Methods, supra note 154, at ¶¶ 18–32.
\item \textsuperscript{157} Id. at ¶ 29.
\item \textsuperscript{158} Id. at ¶ 27.
\item \textsuperscript{159} MILLER, supra note 25, at 3.
\item \textsuperscript{160} Id.
\item \textsuperscript{161} U.N. Comm. Against Torture, 34th Sess., Considerations of Reports Submitted by State Parties under Article 19 of the Convention: Addendum to Supplementary Report of Egypt, ¶ 49, U.N. Doc. CAT/C/34/Add.11 (Jan. 28, 1999) ("The provisions of Egyptian law are broader and more general than those of the Convention.").
\item \textsuperscript{162} Id. ¶ 47(c).
\end{enumerate}
\end{footnotesize}
suffering to victims." While this definition does provide some threshold, the phrase "particular pain" is imprecise and unclear, making it difficult to charge the crime of torture, and easy to circumvent altogether. Similarly, Luxembourg uses the word "acute" rather than "severe" in its definition of torture. While the term "acute" is roughly synonymous with "severe," the lack of guidance on what constitutes "severe" or "acute" pain or suffering or what distinguishes "particular pain" from the type of pain that would not be criminalized renders States without effective standards. Further, it provides States with the opportunity to commit acts that evade their own domestic definitions of torture and to undermine the intent of the Torture Convention.

No signatory State has demonstrated the truth of this paradigm more than the United States. Eliciting a rather contentious response to its ratification of the Torture Convention, the United States attached an "understanding," specifying that specific intent is required for an act to constitute torture. According to the United States' "understanding," "individuals who in good faith did not intend to inflict such a level of pain would be innocent of torture, even if their actions resulted in the infliction of such pain."

United States federal law provides for the prohibition of torture through the Torture Victim Protection Act, the Alien Tort Claims Act, and the Foreign Sovereign Immunities Act. These Acts provide civil remedies for American citizens and non-citizens in American courts. However, to meet its obligations under the Torture Convention, Congress enacted 18 U.S.C. § 2340A, which specifically criminalized acts of torture committed "outside the United States."

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165. See VAN SCHAAK & SLYE, supra note 13, at 500.
166. Id.
In 2002, (then) Assistant Attorney General Jay S. Bybee wrote a memo to the former Council to the President, Alberto Gonzales, interpreting § 2340(2) (the "Bybee Memo"); this memo established an extraordinarily high threshold to satisfy the "severe pain" requirement. Assistant Attorney General Bybee stated that for an act to qualify as causing "severe pain" under U.S. law, it must rise to "the level that would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impediment of bodily functions." The Bybee memo detailed that additionally, "[t]he victim must experience intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body function will likely result."

The Bybee Memo reflected the official United States policy on torture until information about acts of torture committed by United States military personnel emerged in the summer of 2004. Photographs taken from Abu Ghraib prison in Iraq depicted dogs snarling at prisoners, women ordered at gunpoint to expose their breasts, and forced homosexual acts between prisoners. As a result of these abuses, in June 2004, the Bybee memo was "withdrawn," and replaced in December 2004 by a new memorandum written by the subsequent Assistant Attorney General, Daniel Levin (the "Levin Memo").

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172. Id.
173. Id. The Bybee Memo also provides that "prolonged mental harm is required to prove severe mental pain or suffering." Id.
174. Id.
176. VAN SCHAACK & SLYE, supra note 13, at 534 (providing a summary of Assistant Attorney General Daniel Levin's interpretation of the standards of conduct for interrogation required by 18 U.S.C. § 2340A). Although the Levin Memo interpreted the "severe pain" requirement of the Torture Convention in a less restrictive manner than the Bybee Memo, Levin's interpretation did not define the broad principles it elaborated, and thus deviated from the purpose of the Torture Convention. See id. The Levin Memo undercuts the Bybee Memo by stating the United States does "not believe that Congress intended to reach only conduct involving 'excruciating and agonizing pain or suffering.'" Id.
Initially, the restatement of United States policy on torture in the Levin Memo seemed to suggest the possibility of improved adherence to the Torture Convention's definition. However, even with newer, slightly broader standards, the Levin Memo articulated that after "review[ing] this Office's prior opinions addressing issues involving treatment of detainees [we] do not believe that any of their conclusions would be different under the standards set forth in this memorandum." Arguably, the new interpretation of the torture definition did not provide new practices; it merely shielded the United States with ambiguous phrasing.

The latest report submitted by the United States to the CAT resulted in the CAT's further dissatisfaction with the United States' interpretation of the Torture Convention's mandates. The CAT expressed several concerns and recommended that the United States enact and enforce a federal statute that would prohibit acts of torture committed outside of its borders. It also urged the United States to adopt "clear legal provisions to implement the principle of absolute prohibition of torture in its domestic law without any possible derogations." Though the Bybee Memo is no longer considered representative of official United States policy on the issue of torture and the Levin Memo purports to improve U.S. adherence to the Torture Convention's definition of torture, it appears that current United States practices fail to meet CAT standards.

Torture may be understood as either severe physical suffering or severe physical pain, thus broadening the prohibited conduct, but no definition is provided for either "suffering" or "pain." Also, the "severe physical suffering" must be a condition of some extended duration or persistence as well as intensity; but no definition is provided for what constitutes "extended duration." Id.


179. Id. ¶ 22.

180. Id. ¶ 19. Further, the CAT recommended that the United States ensure that acts of psychological torture are not limited to "prolonged mental harm." Id. ¶ 13.

181. Despite the United States' past defiance against meeting its obligations...
C. The Omission of the State Action or Public Official Requirement

As seen through the current trend in international criminal law, many States have deviated from the Torture Convention's definition of torture with respect to the "public official" or "state action" requirement. In consideration of the initial Albanian report in May 2005, the CAT noted that "the definition of torture in the Criminal Code does not cover all the elements contained in Article 1 of the Convention, especially regarding persons acting in an official capacity." 182 Similarly, in 2000, the CAT criticized "the impossibility of prosecuting under existing Uzbek law, an individual guilty of torture at the instigation of a law-enforcement officer." 183 In many of its communications with State parties, the CAT has recommended that members include the "state action" requirement, which reflects the reality that this particular provision of the Torture Convention has been ignored widely in the domestic definitions. Brazil, Canada, Columbia, Egypt, Kazakhstan, Norway, and the Russian Federation are among the many states that have omitted the "state action" requirement in their definitions of torture. 184

The omission of the state actor requirement in the domestic codes of State parties reflects a growing international trend. As evidenced through its recommendations, the CAT urges States continually to
recognize the importance of the state action requirement. The CAT's concern is that failing to include this requirement shields public officials who commit acts of torture from falling within domestic definitions. On the other hand, the omission of the state action requirement, if coupled with a more clearly defined definition of torture, in fact may be a positive development. As expressed by the ICTY in Kunarac, "a violation of one of the relevant articles of the [torture] Statute will engage the perpetrator's individual criminal responsibility. In this context, the participation of the state becomes secondary . . . [w]ith or without the involvement of the State, the crime remains of the same nature and bears the same consequences." 

D. The Need for Clarity and Uniformity

Articulating a precise and universal definition of torture for the international community is essential. First, governments must be bound by clear and constant standards that cannot be manipulated, especially in times of crisis. Second, public officials need legislative guidance to determine the lawfulness of certain tactics, particularly with respect to interrogation and detention. Finally, the international community must be able to hold States accountable for their torturous acts with an unambiguous and unitary definition that clearly delineates which acts constitute torture. When all can agree upon those acts that amount to torture, States will no longer be able to escape the damaging effects of public and political shaming that must accompany their crimes.

The legal conundrum before the international community is not the lack of a definition; of those, there are many. The challenge governments face is providing clarity to existing definitions and creating uniformity among them. The lack of a single definition "not only impedes torture prevention, but bolsters a state's ability to avoid consequences through dishonesty and hypocrisy." A universal definition of torture

185. See BURGERS & DANELIUS, supra note 39, at 45.
187. MILLER, supra note 25, at 1.
188. Id.
189. Id.
190. See id. at 4.
would infuse the international community's rhetoric—which so vehemently condemns torture—with meaning; it would ensure that governments are held to the high standards claimed in their anti-torture pronouncements.¹⁹¹

V. PROPOSAL FOR CHANGE

The Torture Convention serves as a guidepost for States throughout the world in the development of domestic codes prohibiting torture. However, the main impediment to the Torture Convention's ability to curb torture is its lack of a clear definition of torture.¹⁹² The duty to create a precise definition and to provide governments with immutable limits thus lies with the drafters of the Torture Convention. The text of the Torture Convention must be revisited and amended.

To make meaningful advances, the drafters must (1) clarify ambiguous terms in the definition by either (a) collapsing the Article 1 definitions of torture and CIDT into one offense or (b), providing a hybrid test to determine what constitutes "severe pain and suffering;" (2) omit the state action requirement to open liability to private individuals as well as public officials; and (3) amend Article 2 to require that all member States employ the Torture Convention's definition.

A. Clarify Ambiguous Terms in the Article 1 Definition

First, the Torture Convention must strive to clarify terms that have created ambiguity in the past. The Supreme Court of Israel explained in Public Committee Against Torture in Israel v. Israel that successful interrogation requires a measure of discomfort and an unequal balance of power.¹⁹³ Richard Posner suggested that torture begins at "the point along a continuum at which the observer's queasiness turns into revulsion."¹⁹⁴ This type of approach, which employs subjective tests and standards that fail to provide specific guidance, reflects international adherence to an unworkable paradigm. The Torture Convention must create a line that

¹⁹¹ Id. at 5.
¹⁹² See id. at 36.
¹⁹³ See Legality of S.S. Interrogation Methods, supra note 154, at ¶ 22.
separates permissible levels of discomfort from unlawful acts.\textsuperscript{195} Two alternative paths may potentially accomplish this task.

1. \textit{Collapse the Definition of Torture and CIDT under Article 1}

Rather than continue to engage in the difficult task of drawing distinctions between torture and CIDT, the Torture Convention could collapse the two definitions into one. In doing so, all acts that reach the lowest threshold, amounting to CIDT, would be proscribed under international law and criminalized accordingly. Because the Torture Convention requires that States criminalize only acts of torture and not CIDT,\textsuperscript{196} one of the most troublesome aspects of torture jurisprudence traditionally arises when courts face the thorny task of placing acts on either side of the dividing line. Thus, collapsing the two prohibitions found in Article 1 would serve two important objectives. It would allow courts to evaluate acts with a standardized template, creating consistency in judicial decisions. If the range of impermissible actions were broadened, courts would be likely to strike a more uniform pattern of decisions. This option would also take an aggressive step toward the eradication of torture by substantially lowering the punishable standard.

While this method would simplify a court's evaluation of violations under the Torture Convention and would take an ambitious stance in the fight to eliminate the practice of torture and other CIDT, it presents important potential drawbacks. First, despite its prohibition, no international legal definition of CIDT currently exists.\textsuperscript{197} Although it may be easier to distinguish what amounts to CIDT in the context of the enumerated purposes than to place certain acts upon a continuum between CIDT and torture, a large degree of ambiguity remains. Second, because collapsing the definition broadens the range of illegal acts, States may be less willing

\textsuperscript{195} MILLER, \textit{supra} note 25, at 36.
\textsuperscript{196} Torture Convention, \textit{supra} note 18, arts. 4–5.
\textsuperscript{197} KERSTY MCCOURT \& MANUEL LAMBERT, \textsc{Organisation Mondiale Contre le Torture-Europe}, \textsc{Interpretation of the Definition of Torture or Cruel, Inhuman, or Degrading Treatment or Punishment in the Light of European and International Case Law} 8 (2004), available at http://www.omct.org/pdf/OMCT_Europe/2004/OMCTreport_Definition_EU_301004.pdf.
to sign or remain loyal to the Torture Convention. Clearly, States that engage currently in torturous acts are the subjects the Torture Convention seeks to target. With a broadened definition, it is likely that these States would withdraw completely from the Torture Convention, knowing that if they were to remain parties, their actions would come under strong criticism. Finally, collapsing Article 1's provisions ultimately could have the international effect of debasing the value of the word "torture," which would undermine the goal of the Torture Convention altogether.

2. Implement a Hybrid Test to Determine What Constitutes "Severe Pain and Suffering"

Alternatively and more realistically, the drafters should rewrite the Torture Convention to include a clear definition of the standards by which to evaluate the "severe pain and suffering" requirement. Currently, this requirement is ambiguous and creates the most confusion in a State's interpretation of the Torture Convention's definition. The term "severe" is undefined in most state domestic codes or so narrowly defined that little, if any, conduct meets its high threshold. The first task is to provide a precise legal definition to which States will universally adhere.

Sculpting a clear definition of the term "severe" is understandably difficult. The inherent subjectivity of the term makes the defining characteristic of torture intangible. Elaine Scarry speaks tellingly of the "unshareability" of pain, expressing the truth that underlies the dilemma: "[P]hysical pain does not simply resist language, but actively destroys it, bringing about an immediate reversion to a state anterior to language, to the sounds and cries a human being makes before language is learned." Scarry speaks to the fact that no matter which words are employed to describe pain, one can never know the internal pain or suffering of another, for it is relative to the particularized experience and sensibility of that individual.

The concept of "unshareability" demonstrates the strong need for a subjective element in the test to determine whether

199. Id.
200. See id. at 4–5.
an act meets the "severity" requirement. It is for this reason that, in the past, courts traditionally have considered the duration of the treatment and its physical and mental effects on the sex, age, and state of health of the victim. However, the high level of subjectivity currently applied when interpreting the "severity" requirement has created an inconsistent application of the term.

To accommodate this, courts should employ a hybrid test involving both objective and subjective factors. One such test is used commonly in tort law, where the general standard of care involves a duty to act as a reasonable person in the same or similar circumstances. As articulated in a case from the New York State Court of Appeals, "[t]he standard of conduct which the community demands must be an external and objective one . . . of the particular actor." Courts apply this standard because it "provides sufficient flexibility . . . for all of the particular circumstances of the case which may reasonably affect the conduct required."

This "reasonable person" principle should be translated into the realm of torture jurisprudence. Courts should analyze the effect that the acts in question would have upon the average prudent person within the international community. Additionally, to accommodate the need for subjectivity in the determination of "severe pain," the Torture Convention should mandate an added component that considers the totality of the circumstances such as the age, sex, health, and possible disabilities affecting the victim, and the nature, purpose, and duration of the acts upon the victim.

Courts may expand upon this idea by analyzing the particular sensitivities of the victim, adhering to the tort concept of the "eggshell-skull" plaintiff. Under this principle, the perpetrators essentially "take the victim as they find him." In the torture context, this would mean that if the perpetrator's actions caused an aggravation of the victim's pre-existing condition or sensitivity, courts could hold the

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204. RESTATEMENT (SECOND) OF TORTS § 283 cmt. c (1997).
205. See FRANKLIN, RABIN & GREEN, supra note 202, at 401.
206. Id. at 403.
perpetrator liable for the full extent of the victim's injuries, even where the reasonable person would not have felt “severe pain” at all. While this principle would be applied after-the-fact for purposes of determining liability, it could serve as a significant deterrent if torturers were aware that they were subject to a standard that weighed heavily in favor of victims. Using this hybrid standard, courts would exact more consistent interpretations that would not vary as significantly from case to case. The objective element would ground the analysis in precedent while the subjective element would allow each situation to be individualized to the particular circumstances of the case.

In addition to the articulation of an analytical standard, the Torture Convention’s new description of the “severity” requirement should assign a comprehensive, but non-exhaustive list of practices that cause “severe” pain or suffering. The CAT provides hundreds of opinions that are administered to signatory States. In these reports, CAT specifically identifies certain elements of State procedures that it considers to be violative of the Torture Convention’s Article 1(1). These reports provide a source for the identification of prohibited practices. Alternatively, the proposed amendment to the Torture Convention’s “severity” requirement could include a positive definition, defining the types of interrogation techniques and detention procedures that are considered acceptable, specifying that derogation from these accepted practices constitutes a violation under the Torture Convention. In either case, specific examples of what conduct is proscribed or accepted, recorded in a non-exhaustive list, are necessary to propel the international community toward a uniformly understood definition of torture.

B. Remove the State Action Requirement

Third, to provide greater clarity and standardization in the Torture Convention’s definition of torture, the drafters should omit the “state action” requirement. This omission would stand as both a strengthening and unifying platform. That so many courts, both international and domestic, have eliminated this factor from their evaluation of torture reflects

207. See id.
a new consensus. Elimination of this element would demonstrate that courts and States have recognized the repugnance of torture and choose to focus upon individual criminal liability, regardless of the perpetrator’s status. The customary definition of torture encompassed by a treaty designed to implicate State liability is no longer a viable option; since international criminal law applies to the criminal conduct of individuals as well as state officials, it is unreasonable to limit the prohibition of torture simply to acts of torture committed by state actors. Further, the purposive requirement would remain in effect and would serve primarily to implicate public officials, mitigating the risk that public officials will be shielded from culpability.

C. Require All Member States to Implement the Torture Convention’s Definition into Their Domestic Codes

Lastly, and most importantly, the drafters of the Torture Convention must revisit and amend Article 2. Allowing States to implement individualized definitions of what constitutes torture has resulted in a surfeit of definitions and contradictions and a sense of unpredictability in courts’ decision-making. Moreover, it has allowed many States to innovate in ways that allow them to officially placate the Torture Convention while conducting practices that clearly violate the Torture Convention’s ideals. Torturers must not be mollified by the freedom to create narrow definitions of torture, undermining agreements that pledge adherence to the universal prohibition of torture. Article 2 must demand that parties to the Torture Convention apply its (amended) definition for torture into their own domestic codes. This would give the Torture Convention a binding quality, and it would represent a powerful and dynamic stride toward the eradication of torture.

VI. CONCLUSION

Torture is considered to be an atrocious violation of human dignity and the human spirit. Indeed, it is a pariah of State practice, condemned without qualification throughout international and domestic legal codes. Yet the devastating and permanent effects of torture continue to pervade the lives

208. See van der Vyver, supra note 64, at 432–33.
of too many victims. The practice of torture persists, though often cloaked in secrecy and shapelessness. The Torture Convention, through its emphatic pronouncements, serves an instrumental role in the international fight against torture. However, since many elements of the Torture Convention’s definition remain unclear, States have been unsuccessful in reaching agreement upon a universal understanding of the definition of torture. Numerous definitions of the term have manifested in torture jurisprudence. By incorporating the prohibition of torture into their legal codes as commanded by the Torture Convention, some States have been able to define torture in ways that allow them to effectively escape the reach of the crime. These State innovations have allowed governments to employ impermissible methods of interrogation and punishment and to evade the consequences effectively.

If torture is ever to be eradicated, the definition contained in the Torture Convention must be amended: the Torture Convention must clarify the terms of the definition of torture so that State governments can no longer elude their obligations. To do so, the drafters must revisit Article 1 of the Torture Convention. First, the definition of torture and CIDT contained in Article 1 should be collapsed so that all acts categorized between ill-treatment and torture are criminalized. Second, the “severity” requirement must be defined with clarity by employing a combined subjective and objective test to determine if the “severe” pain and suffering threshold has been met. That requirement also must include a non-exhaustive list of acts that indisputably cause “severe” pain and suffering. This will provide guidance for governments and a more rigid standard to which individuals must adhere. Third, the drafters should omit the state action requirement to open liability to private individuals as well as public officials. Finally, Article 2 of the Torture Convention must be amended to demand that signatory States employ the official (amended) Torture Convention definition of torture. This will unify States’ practices and hold governments internationally accountable for their torturous actions.

Indeed, these proposals are aggressive, and they require the international community to take a tremendous step forward in the battle against torture and CIDT. However, the
Torture Convention’s continued evolution demonstrates that the international community can no longer tolerate torture. Even if States that currently employ torture within their territories are deterred from signing or adhering to the Torture Convention, international shaming likely has the potential to force the State’s hand; States may feel politically compelled to comply with the terms to protect their other international interests.

States can no longer afford to turn a blind eye, allowing the crushing “neutrality” to inflict further suffering upon innocent victims. In the end, “[f]reedom from torture is a fundamental human right that must be protected under all circumstances. Growing awareness of international legal instruments and protection mechanisms gives hope that the wall of silence around this terrible practice is gradually being eroded.”

209. See Wiesel, supra note 1.