

TORTURE AND CRUEL, INHUMAN OR DEGRADING TREATMENT: A DEFINITIONAL APPROACH

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INTRODUCTION

O.K. was fifteen years old when U.S. military officials at Bagram Airfield, Afghanistan, captured him in July 2002.¹ The officials treated him roughly, despite his young age and poor physical condition.² They interrogated him repeatedly and on several occasions, officials had to resort to using a stretcher to bring O.K. into the interrogation room.³ Interrogators brought barking dogs into the interrogation room while his head was covered with a bag.⁴ Interrogators also threw cold water on him or tied his hands above the door frame and made

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¹ O.K. v. Bush, 377 F. Supp. 2d 102, 103 (D.D.C. 2005).

² *Id.* at 106.

³ *See id.*

⁴ *Id.*

him dangle painfully for hours at a time.⁵ While his wounds were still healing, interrogators made O.K. clean the floors on his hands and knees.⁶ They forced him to carry heavy buckets of water, which hurt his left shoulder, where he had been previously shot during his capture.⁷ During the interrogation, he was not even allowed to use the bathroom and was forced to urinate on himself.⁸

O.K.'s experiences while in U.S. custody are distressingly one of countless equally, if not more, horrifying accounts of individuals detained by sovereign states.⁹ Perhaps even more distressing is the reality that these practices are not only widespread, but also rarely result in legal consequences against the officials or interrogators. The notion of human rights as a universal, fundamental principle governing the behavior of every individual and sovereign state is well established.¹⁰ Accordingly, it is not only indisputable that a fifteen-year old boy is entitled to an inalienable privilege to have his rights as a human being respected, but that such conduct irreparably violates those rights.

In the U.S., aggressive interrogation techniques, when coupled with the stress of indefinite and arbitrary detention, have caused prisoners tremendous psychological and physical injury.¹¹ In Guantánamo Bay, Cuba, for example, most prisoners have been kept in debilitating conditions.¹² Othman Abdulraheem lived under fluorescent lights for twenty-three hours a day for three years.¹³ He woke up every morning with eye pain and dizziness.¹⁴ These

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ See *id.* at 107-08 (stating that petitioners find many of these allegations to be consistent with the reports of federal officials who have visited Guantánamo Bay, Cuba).

¹⁰ See, e.g., U.N. Charter, June 26, 1945, 1 U.N.T.S. XVI; Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948) [hereinafter UDHR]; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; S. Exec. Doc. E, 95-2 (1978); S. Treaty Doc. 95-20, 6 I.L.M. 368 (1967); International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, S. Exec. Doc. C, 95-2 (1978); S. Treaty Doc. 95-18; 660 U.N.T.S. 195, 212; American Convention on Human Rights, Nov. 21, 1969, O.A.S. T.S. No. 36; 1144 U.N.T.S. 143; S. Treaty Doc. No. 95-21, 9 I.L.M. 99 (1969); Inter-American Convention to Prevent and Punish Torture, O.A.S. Treaty Series No. 67, entered into force Feb. 28, 1987, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc. 6 rev.1 at 83, 25 I.L.M. 519 (1992); European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Oct. 10, 1994, E.T.S. 126, entered into force Feb. 1, 1989.

¹¹ CTR. FOR CONSTITUTIONAL RIGHTS, REPORT ON TORTURE AND CRUEL, INHUMAN, AND DEGRADING TREATMENT OF PRISONERS AT GUANTANAMO BAY, CUBA 9 (July 2006), available at http://ccrjustice.org/files/Report_ReportOnTorture.pdf.

¹² *Id.*

¹³ *Id.* at 17.

¹⁴ *Id.*

experiences are not atypical, as many other prisoners have reported developing serious untreated medical problems. These grave conditions are attributed to the inhumane living conditions or physical punishment that detainees experience at Guantánamo Bay.¹⁵ “Some have lost their sanity. Numerous prisoners have tried to commit suicide, some multiple times.”¹⁶ Numerous accounts like these have been compiled over the years and lead to the inexorable conclusion that although expressly prohibited, acts constituting both torture and cruel, inhuman or degrading treatment have occurred in U.S. detention facilities.¹⁷

While there has been much academic discourse surrounding the term “torture,” there has been a contrasting dearth of discussion surrounding the term “cruel, inhuman, and degrading treatment” or CIDT. The term “torture” has garnered considerable stigma in the realm of international law such that its use seems to amount to an affront or insult to sovereign states. “The avoidance of labeling the illegal acts ‘torture’ . . . illustrates the power of the term – reviled such that courts avoid using it and governments do not want to be guilty of torture even if it means evading a finding of torture without necessarily changing practices.”¹⁸ Indeed, the discourse surrounding torture appears not to be focused on whether such acts are in fact reprehensible, but on whether individual acts of the sovereign actually warrant the heinous label. Conversely, accusations of CIDT fall well short of the gravity of comparable accusations of torture.

Placing a stigmatized term, such as torture, on a spectrum inherently assumes that some acts not termed as torture, while morally reprehensible or universally appalling, are typically not criminally punishable. That is to say, at one end of the spectrum lies torture—conduct that most states have criminalized and vowed to prohibit. The rest of the spectrum constitutes CIDT—conduct that most states also have vowed to prohibit, yet have not criminalized. The simple fact is that creating a spectrum and placing torture at such a high level inevitably leads to the issue of what to do with conduct that does not quite rise to the level of torture. This creates a situation where many states do not categorize the vast majority of heinous acts as torture. However, the definition of CIDT falls woefully short of providing any means of functionally prohibiting its occurrence. In contrast to the definition of torture, CIDT lacks a specific definition with elements and criteria, often functioning more as a residual category for everything that does not belong under torture.

¹⁵ *Id.* at 9.

¹⁶ *Id.*

¹⁷ See Torture Support and Survivor Support Coalition, Int’l, *Torture by the United States of America: The Survivors’ Viewpoint*, available at http://webcache.googleusercontent.com/search?q=cache:h6ZLEb6SCS0J:www2.ohchr.org/english/bodies/hrc/docs/ngos/final_icc_pr_tasscreport.doc+&cd=16&hl=en&ct=clnk &gl=us.

¹⁸ GAIL H. MILLER, *DEFINING TORTURE* 3 (Floersheimer Center for Constitutional Democracy, Benjamin N. Cardozo School of Law 2006).

ARTICLE OUTLINE

This article provides a more specific definition of the term “cruel, inhuman, or degrading treatment.” The purpose of this approach is twofold: first, by developing the working definition of CIDT into a series of elements, states may identify, prohibit, and punish such conduct more easily. Second, a more specific definition of CIDT will help narrow the definition and scope of torture. This is because often times acts that are not severe enough to rise to the level of torture are, by default, deemed as CIDT. Creating a more specific definition of the latter will provide further clarity to the former.

The examination proceeds in three parts. While this article attempts to objectively compare the two terms, their normative development is intrinsic to the discussion. Therefore, Part I first investigates the evolution of defining and prohibiting certain types of conduct, like torture and CIDT, in the international sphere. The resulting consensus is that both torture and CIDT should be prohibited to the same extent. Yet, despite their similar evolution as *jus cogens*¹⁹ norms, only torture has received widespread efforts toward its prohibition. Therefore, the article turns to examining the specific definitions of the two terms to understand the cause of this trend.

Part II explores the existing definitions of “torture” and “cruel, inhuman, and degrading treatment.” International treaties have codified the definitions of both terms with differing specificity.²⁰ Since the definition of torture has been the subject of lengthy interpretive debate, it is valuable to examine how a reluctant state, like the U.S., has implemented the international definition of torture. The U.S.’s interpretation is of particular significance because many accounts of reprehensible acts involve U.S. actors. Examining the definition in this way offers insight into the important considerations surrounding the mechanisms used for defining such a term. These considerations will then be extrapolated to a much broader definition of CIDT to identify key elements of such conduct.

After examining the normative and definitional constructions of the two terms, Part III offers an element-specific definition of CIDT. This definition is based on the recognition that while torturous acts are more extreme than those constituting CIDT, they are equally reprehensible under international law. Yet, while there has been unequivocal agreement on the prohibition of both categories of wrongdoing, only torture has garnered attention. In other words, CIDT often goes unpunished, at least criminally, or is dealt with insufficiently. One reason for this discrepancy, this article argues, lies in the differing levels of specificity in their definitions. Therefore, to deter and prohibit CIDT just as much as torture, the definition of CIDT must include comparable specificity.

¹⁹ Refers to certain fundamental, overriding principles of international law, from which no derogation is ever permitted.

²⁰ See *infra* Part III.

Before beginning, it is important to acknowledge the limitations of this article. While desirable, the article does not seek to offer a comprehensive solution to combatting and eliminating the practice of torture or other cruel, inhuman or degrading acts. Undoubtedly, this discussion implicates numerous concerns, including torture as a counter-terrorism strategy and the evolution of international human rights law. Unfortunately, the article will not discuss them. Such an approach would necessarily have to take into account a myriad of other factors, such as enforcement mechanisms and/or norms of international treaty interpretation. This approach does not imply that such considerations are not vital to the prevention of such heinous crimes. Indeed, "[t]he exclusion of lawful sanctions therefore enables Parties to violate the Convention without being found in breach of it."²¹ However, such an approach is beyond the means of the present article. This article focuses on examining only the normative and definitional implications of the terms "torture" and "cruel, inhuman, and degrading treatment." The aim is to examine the shortcomings of the current definition of CIDT to provide one piece for the larger prevention framework.

I. NORMATIVE CONSIDERATIONS

A. *Development of Definitions – International Treatises*

Over the past fifty years, the struggle against torture has become a central concern of human rights law.²² The totalitarian regimes that established themselves between World War I and II used torture and other cruel, inhuman or degrading punishments as a deliberate tool for extracting information during wartime.²³ It was against this background that the prohibition of all such practices began to be explicitly included in international legal jurisprudence.²⁴ In 1984, the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "CAT" or "Convention") became the first binding international instrument exclusively dedicated to the prevention of such heinous acts.

The 1984 CAT was the culmination of a long history developing international norms articulating the boundaries of acceptable state conduct. The Universal Declaration of Human Rights of 1948 ("UDHR") was the first worldwide attempt to codify both the terms "torture" and "cruel, inhuman, and

²¹ AHCENE BOULESBAA, *THE UN CONVENTION ON TORTURE AND THE PROSPECTS OF ENFORCEMENT* 39 (The Hague: Martinus Nijhoff Publishers 1999).

²² See *infra* Part III outlining the development of several international treatises.

²³ J. HERMAN BURGERS & HANS DANIELIUS, *THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT* 10 (Martinus Nijhoff Publishers 1988).

²⁴ See Walter Kälin, *The Struggle against Torture*, 324 INT'L REV. OF THE RED CROSS 1 (Mar. 9, 1998), available at <https://www.icrc.org/eng/resources/documents/misc/57jpg5.htm>.

degrading treatment.” This fundamental document states that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”²⁵ Several provisions of the UDHR have become part of customary international law.²⁶ As a result, they legally bind all states regardless of whether the state is a party to a specific universal or regional instrument.²⁷ The prohibition of torture and CIDT by international customary law is an example of such an obligation where the entire international community is bound to enforce, through the exercise of universal jurisdiction, the prohibition against the suspects found in their territory.²⁸ However, while the UDHR did codify a commitment to prohibit such conduct, it did not offer a definition of the prohibited acts.²⁹

In 1966, The United Nations General Assembly adopted the International Covenant on Civil and Political Rights (“ICCPR”). The ICCPR elaborates the principles laid out in the UDHR. Article 7 of the UDHR, which states that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,”³⁰ prohibits both torture and CIDT. This provision cannot be suspended or limited even in times of emergency.³¹ Thus the ICCPR reinforces the norm that both torture and CIDT are to be prohibited in all situations. Additionally, it is important to note that like the UDHR, the ICCPR also prohibits both torture and CIDT in the same sentence.³² By mandating the prohibition of both categories of wrongs in such proximity suggests that the drafters of both conventions must have thought that prohibiting torture and CIDT were of equal importance. However, similar to the UDHR, the ICCPR also prohibits torture and CIDT without providing a legal definition of these acts.

Geneva Conventions, promulgated in 1949, also condemn torture and CIDT.³³ Specifically, they prohibit “cruel treatment and torture” and “outrages

²⁵ UDHR art. 5.

²⁶ Customary international laws are those aspects of international law that derive from custom. Along with general principles of law and treaties, custom is considered by the International Court of Justice, jurists, the United Nations, and its member states to be among the primary sources of international law.

²⁷ See Kälén, *supra* note 24.

²⁸ See UDHR art. 2.

²⁹ See *id.* art. 5 (stating, “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,” but not defining what conduct constitutes as torture or CIDT.).

³⁰ G.A. Res 2200A (XXI) art. 7, U.N. GAOR Supp. No. 21, U.N. Doc. A/6316 (Dec. 16, 1966).

³¹ *Id.* art. 4.

³² U.N. Office of the High Comm’r for Human Rights, *International Covenant on Civil and Political Rights* art. 7 (Mar. 23, 1976), available at <http://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf> [hereinafter ICCPR].

³³ Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 75 U.N.T.S. 31.

upon personal dignity, in particular humiliating and degrading treatment” of civilians and persons “hors de combat,” or non-combatants, such as civilians or those not actively taking part in hostilities.³⁴ Moreover, specific provisions of the four Geneva Conventions prohibit torture and cruel treatment.³⁵ “Torture or inhuman treatment” and “[w]ilfully causing great suffering or serious injury to body or health” constitute grave breaches of the Geneva Conventions and are war crimes under the Statute of the International Criminal Court.³⁶ The prohibition of torture and outrages upon personal dignity, in particular humiliating and degrading treatment, are recognized as fundamental guarantees for civilians and persons hors de combat by Additional Protocols I and II of the Geneva Conventions.³⁷ As provided in these Additional Protocols, such acts “are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents.”³⁸

In similar fashion, regional organizations have consistently reaffirmed their commitment to prohibiting both torture and CIDT, without attempting to specify further on their precise definitions.³⁹ Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms reads “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.”⁴⁰ Similar provisions are contained in the 1969

³⁴ See *id.*

³⁵ *Id.* art. 12; see also Geneva Convention relative to the Treatment of Prisoners of War arts. 17, 85, 87, 89, Oct. 21, 1950, 75 U.N.T.S. 135; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War art. 32, Aug. 12, 1949, 75 U.N.T.S. 287.

³⁶ Int’l Criminal Court [ICC], Rome Statute of the International Criminal Court art. 8, ICC Doc. A/CONF.183/9 (July 17, 1998) [hereinafter Rome Statute].

³⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 75, para. 2 (June 8 1977) [hereinafter Additional Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 4, para. 2 (June 8, 1977).

³⁸ Additional Protocol I, *supra* note 37.

³⁹ See Organization for the Security and Co-operation in Europe [OSCE], *Concluding Document of the Vienna Meeting 1986 of Representatives of the Participating States of the Conference on Security and Co-operation in Europe, Held on the Basis of the Provisions of the Final Act Relating to the Follow-up to the Conference*, at 10 (1989) (stating that the member states will undertake to “prohibit torture and other cruel, inhuman or degrading treatment or punishment and take effective legislative, administrative, judicial and other measures to prevent and punish such practices”); OSCE, *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE*, at 11 (1990) (stating that members “reaffirm their commitment to prohibit torture and other cruel, inhuman or degrading treatment or punishment, to take effective legislative, administrative, judicial and other measures to prevent and punish such practices”); OSCE, *Charter of Paris for a New Europe*, at 3-4 (1990) (stating that “no one will be: subject to torture or other cruel, inhuman or degrading treatment or punishment”).

⁴⁰ European Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, Rome, 4.XI., amended by Convention Protocols No. 11 and No. 14,

American Convention on Human Rights⁴¹ and the African Charter on Human and Peoples' Rights⁴² from 1981. "The existence of a general obligation under international law not to subject anyone to torture, or cruel, inhuman or degrading treatment or punishment is beyond doubt."⁴³ Thus, the norm is well established that torture and CIDT should be prohibited, yet prior to the CAT, the terms were lacking precise definitions.

B. The Need for Precise Definitions

Before the CAT, the numerous treaties that concerned torture and CIDT charged their state signatories to prohibit such conduct, yet failed to offer a precise definition of exactly what wrongs states are responsible for prohibiting.⁴⁴ It is impossible that this was simply an oversight by the drafters of these important texts. The absence of a specific definition of such terms must have been deliberate. Indeed, there is a reasonable argument that the international community had no need for precise definitions.

In fact, the United Nations Human Rights Committee, a drafter of the ICCPR, noted that "[t]he Covenant does not contain any definition of the concepts covered by article 7 nor does the Human Rights Committee consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different types of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied."⁴⁵ Since the ICCPR's inception, it has been argued that this position allowed the Human Rights Committee to develop dynamic case law by broadening the concept of torture. This case-by-case approach could enable the Human Rights Committee to exercise its limited jurisdiction over acts that would not necessarily fall within the concept of torture if a strict legal definition was adopted.⁴⁶

available at <http://conventions.coe.int/treaty/en/treaties/html/005.htm>.

⁴¹ American Convention on Human Rights art. 5, para. 2, Nov. 22, 1969, 1144 U.N.T.S. 123 ("No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.").

⁴² African Charter on Human and Peoples' Rights art. 5, June 27, 1981, 1520 U.N.T.S. 217 ("Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.").

⁴³ RACHEL MURRAY ET AL., *THE OPTIONAL PROTOCOL TO THE UN CONVENTION AGAINST TORTURE* 1 (2011).

⁴⁴ See, e.g., *supra* notes 25-26, 32, 34, 39.

⁴⁵ U.N. Human Rights Comm., 44th Sess., 1992, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies* at 135, U.N. Doc. HRI/GEN/1/Rev.6 (2003).

⁴⁶ U.N. Office of the High Comm'r for Human Rights, *Interpretation of Torture in the Light of the Practice and Jurisprudence of International Bodies* 3 (2011), available at

This argument would have been very persuasive before the CAT. As will be explored in the following section, however, the post-CAT reality is that terms like torture have been codified with specific definitions. As a result, it currently matters little whether or not one ascribes to the view that precise definitions are unnecessary to prohibit the conduct they delineate. Thus, the most appropriate avenue for continuing the prohibition espoused by the UDHR or the ICCPR is to ensure that these definitions are functionally able to aid in the prohibition of such heinous conduct.

II. DEFINITIONS

A. *Torture*

1. Definition from the UN Convention Against Torture

Similar to its predecessors, the CAT codifies the customary norm of blanket, absolute prohibition. Article 2(2) of the CAT states, “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”⁴⁷ In recent Concluding Observations by the U.S. Convention Against Torture Committee, it was confirmed that the CAT “applies at all times, whether in peace, war or armed conflict . . . without prejudice to any other international instrument.”⁴⁸ Additionally, the academic discourse surrounding the use of torture adopts a similar normative stance: “[t]o allow for torture in exceptional situations is quite simply to allow torture. Hence, absolute opposition to it remains essential.”⁴⁹

While they share the same view on how the prohibition against torture should be, the CAT is unique in that it provides a specific definition of the conduct to be prohibited. Article 1(1) states:

For the purposes of this Convention the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has

http://www.ohchr.org/Documents/Issues/Torture/UNVFVT/Interpretation_torture_2011_EN.pdf.

⁴⁷ U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2, para. 2, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter UN CAT].

⁴⁸ WORLD ORGANISATION AGAINST TORTURE, SEEKING REMEDIES FOR TORTURE VICTIMS: A HANDBOOK ON THE INDIVIDUAL COMPLAINTS PROCEDURES OF THE UN TREATY BODIES 208 (2006), available at http://www.omct.org/files/2006/11/3979/handbook4_eng_04_part4.pdf.

⁴⁹ Karima Bennouna, *Terror/Torture*, 26 BERKELEY J. INT’L L. 1, 35-36 (2008).

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.⁵⁰

The definition used in the CAT is comprised of the following elements: (1) an act; (2) severe pain or suffering; (3) either physical or mental pain; (4) intent; and (5) purpose.⁵¹ This article will consider each element to examine the definition set forth in the Convention.

The first element requires an "act" that causes a person severe pain or suffering, whether mental or physical.⁵² Some CAT signatories have enacted laws that may broaden the scope of behaviors that constitute torture. For example, Columbia's interpretation of the CAT stipulates that anyone who subjects another person to severe physical or mental pain or suffering shall be liable.⁵³ Under this reading, either affirmative acts or omissions that cause severe pain or suffering constitute an act and satisfy this element.

The second element requires that the act produce "severe pain or suffering."⁵⁴ "The CAT contemplates torture as falling at the extreme end of a spectrum of pain-inducing acts."⁵⁵ Torture constitutes an aggravated or extreme form of cruel, inhuman or degrading treatment.⁵⁶ Indeed, the first draft of the CAT defined torture in this exact way.⁵⁷ While the term "severe" has been interpreted in numerous ways, there is some consensus that this is a subjective standard that considers the impact of the act on the particular victim.⁵⁸ The European Court for Human Rights has considered factors such as the physical and mental effects, the duration of the act, and the age, sex, and culture of the person experiencing the harm.⁵⁹

The third element extends to pain or suffering that is either "physical or mental."⁶⁰ The CAT does not delineate what constitutes mental or physical pain,

⁵⁰ UN CAT art. 1, para. 1.

⁵¹ *Id.*

⁵² *Id.*

⁵³ MILLER, *supra* note 18, at 7.

⁵⁴ UN CAT art. 1, para. 1.

⁵⁵ MILLER, *supra* note 18, at 8.

⁵⁶ BURGERS & DANIELIUS, *supra* note 23, at 41 (stating that the original Swedish draft proposes: "Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.").

⁵⁷ *See id.*

⁵⁸ MILLER, *supra* note 18, at 10.

⁵⁹ *Id.*

⁶⁰ UN CAT art. 1, para. 1.

nor does it draw a distinction between the two.⁶¹ Yet in naming both, the Convention inherently acknowledges a difference between the two. This element has received the least attention in international interpretive discourse. It therefore simply serves to acknowledge that there are two types of pain and suffering covered by the Convention.

Finally, the CAT requires that severe pain and suffering be “intentionally inflicted” on a person.⁶² While it is common in U.S. jurisprudence to distinguish between general and specific intent, the CAT itself does not expressly require that one or the other be present. Nevertheless, the inclusion of an intent element serves to exclude accidental harm. Citing numerous international authorities, the Third Circuit Court of Appeals in *Zubeda v. Ashcroft* determined that the CAT definition distinguishes “between suffering that is the accidental result of an intended act, and suffering that is purposefully inflicted or the foreseeable consequence of deliberate conduct.”⁶³

The CAT definition of torture includes a “purpose” limitation.⁶⁴ This inclusion further narrows the definition of “acts” to those performed for certain purposes. It is evident from the text that not simply any purpose will suffice, since Article 1(1) lists examples of qualifying purposes.⁶⁵ It includes the phrase “such purposes as,” indicating that the list is illustrative, not comprehensive.⁶⁶

2. Definition Under the International Tribunal Jurisprudence

Torture, cruel treatment, and outrages upon personal dignity, particularly humiliating and degrading treatment, constitute war crimes under the Statute of the International Criminal Court.⁶⁷ The Elements of Crimes for the International Criminal Court provides that the war crime of torture consists of the infliction of “severe physical or mental pain or suffering.”⁶⁸

In the early *Delalić* and *Furundžija* cases in 1998, the International Criminal Tribunal for the former Yugoslavia (“ICTY”) considered the definition contained in Article 1 of the CAT to be analogous to the established customary international law applicable in armed conflict.⁶⁹ In the subsequent *Kunarac*

⁶¹ *See id.*

⁶² *Id.*

⁶³ *Zubeda v. Ashcroft*, 333 F.3d 463, 473 (3d Cir. 2003).

⁶⁴ UN CAT art. 1, para. 1.

⁶⁵ *Id.* (“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 is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind . . .”).

⁶⁶ *See id.*

⁶⁷ Rome Statute, *supra* note 36 art. 8.

⁶⁸ *See* Elements of ICC Crimes, Article 7(1)(f), available at <http://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>.

⁶⁹ *See* Prosecutor v. Zdravko Mucic aka “Pavo”, Hazim Delic, Esad Landzo aka “Zenga”,

case in 2001, however, the ICTY concluded that “the definition of torture under international humanitarian law does not comprise the same . . . definition [as] generally applied under human rights law.”⁷⁰ In particular, the ICTY agreed with the definition set forth in the CAT.⁷¹

3. U.S. Definition of Torture

In ratifying the CAT, the U.S. criminalized torture accordingly. The U.S.’s definition of torture, like the CAT’s definition, contains several elements that must be met for an act or series of acts to constitute torture.⁷² The first element is severity. It appears that U.S. jurisprudence requires that the act cause “severe” mental or physical pain and suffering.⁷³ The U.S. has interpreted the term “severe” in connection with the second element—that the pain be either physical or mental.⁷⁴ In order for physical pain to be “severe,” it must have indications of ailments that are likely to result in permanent and serious physical damage in the absence of immediate medical treatment.⁷⁵ Such pain must rise to the level of sufficiently serious physical condition or injury, such as death, organ failure, or serious impairment of body functions.⁷⁶

The aspect of mental pain and suffering lends further malleability to the “severe” element. In order to prove “severe mental pain or suffering” the U.S. definition requires proof of “prolonged mental harm” that was caused by or resulted from one of the five enumerated acts:

1. The intentional infliction or threatened infliction of severe physical pain or suffering;

Zejnir Delalic, Case No. I.C.T.Y. 96-21-T, Judgment, 167 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998), *available at* <http://www.icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf>; Prosecutor v. Anto Furundzija, Case No. I.C.T.Y. 95-17/1-T, Judgment, 62 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998), *available at* http://www.icty.org/x/file/Legal%20Library/jud_supplement/supp1-e/furundzija.htm.

⁷⁰ Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, Case No. I.C.T.Y. 96-23-T and Case No. I.C.T.Y. 96-23/1-T, Judgment, 170 (Int’l Trib. for the Former Yugoslavia Feb. 22, 2001).

⁷¹ *Id.*; see also Prosecutor v. Anto Furundzija, Case No. I.C.T.Y. 95-17/1-T, Judgment, 62 (Int’l Trib. for the Former Yugoslavia Dec. 10, 1998) (defining torture as “the intentional infliction of severe pain or suffering, whether physical or mental, caused by acts or omissions of acts rendered for purposes of obtaining information or a confession, or punishing, intimidating or coercing the victim or a third person, or discriminating on any ground, against the victim or a third person.”).

⁷² Memorandum for Alberto R. Gonzales, Counsel to the President, from Jay C. Bybee, Assistant Attorney General, Office of Legal Counsel, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A, 5-7 (Aug. 1, 2002) [hereinafter Bybee Memo].

⁷³ *Id.* at 6.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

2. The administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or
3. The personality;
4. The threat of imminent death; or
5. The threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.⁷⁷

These additional requirements are not found anywhere in the actual text of the CAT. They have been essentially created in U.S. jurisprudence as a result of an interpretation of how the elements in the Convention translate to U.S. domestic legal principles.⁷⁸ Whether or not these specific elements are properly extrapolated from the CAT can be reasonably argued both ways. One could argue that international treaties are inherently, or necessarily, vague and intentionally leave it to signatory states to determine the specific application within their domestic legal frameworks not to be inconsistent with the expressed principles and intentions of the treatise. On the other hand, the application of these fairly high standards, found nowhere in the text of the Convention, could simply be a means of evading the very principles the Convention sought to codify, namely an absolute prohibition on heinous acts constituting torture. Whichever view the reader chooses to espouse, highly charged terms like torture will always be subject to the intentions and norms of the states implementing them.

What is notable is that U.S. law has precisely reproduced the elements articulated by the CAT. While the interpretation of the elements differs, the actual terms of art are identical. Thus, providing more specific definitions with articulable elements forces resistant states, like the U.S., to greatly narrow their definitions. Indeed, when contrasted with its prior iterations in texts like the UDHR or the ICCPR, the term torture as defined by the CAT and implemented by the U.S. is significantly more precise.

The third element of torture, as the U.S. defines, is the intentionality of the act.⁷⁹ The UN CAT jurisprudence requires that the perpetrator intend to cause the high level of pain and suffering in order for it to be classified as “torture.”⁸⁰ It states that an act will not ordinarily constitute torture if that same act is unlikely to cause great suffering to an ordinary person, as the perpetrator is

⁷⁷ *Id.* at 6-7.

⁷⁸ Compare UN CAT art. 1, para. 1, with Bybee Memo, *supra* note 72, at 6-7.

⁷⁹ See Bybee Memo, *supra* note 72.

⁸⁰ See *id.* at 8.

unlikely to have the requisite intent to cause extreme pain.⁸¹ If, however, the perpetrator is aware of the particular sensitivities of the victim, then the relevant act may constitute torture.⁸²

Similarly, U.S. law specifies that for a defendant to have specific intent, he must expressly intend to achieve the forbidden act.⁸³ Put another way, the infliction of such pain must be the defendant's precise objective.⁸⁴ Thus, even if the defendant knows that severe pain will result from his actions or omission of actions, if causing such harm is not his objective, he lacks the requisite specific intent. That is, a defendant is guilty of torture only if he acts with the express purpose of inflicting severe pain or suffering upon a person within his custody or physical control.⁸⁵

The U.S. implementation of the CAT's definition of torture reveals the functional purpose behind attempting to define the term with greater specificity. While the U.S. appears to have adopted the five-element approach articulated by the CAT, it added additional nuances to the intent and injury elements. For an act to constitute torture in the U.S., the victim must experience intense pain or suffering that is equivalent to the pain associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body function.⁸⁶ If that pain or suffering is psychological, that suffering must result from one of the acts set forth in the statute.⁸⁷ In addition, these acts must cause long-term mental harm.⁸⁸ In adopting the CAT approach, the U.S. understood torture to involve "extreme anguish of body or mind."⁸⁹ The U.S. statute almost identically reproduces the five elements that the CAT requires.⁹⁰ While the U.S. has gone several steps further in interpreting the specific elements, the fact remains that the text of the CAT forms the basis for a criminal cause of action in the U.S. In contrast, the definition of "cruel, inhuman or degrading treatment," in U.S. jurisprudence is essentially void of any specific discussion or interpretation of how it applies. Furthermore, as it currently exists in the domestic American legal system, acts constituting CIDT are not criminalized.

⁸¹ *See id.*

⁸² *Id.* at 16.

⁸³ *Id.* at 3.

⁸⁴ *Id.*

⁸⁵ *Id.* at 4.

⁸⁶ *Id.* at 13.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Compare 18 U.S.C. § 2340, with UN CAT art. 1, para. 1.

B. Cruel, Inhuman or Degrading Treatment

1. International Definition

In both international treaties and domestic legislation, the definition of CIDT is less specific than that of torture. While the two are almost always mentioned in the same sentence, there has been a considerable dearth of discourse surrounding the precise definition of CIDT. There are, however, multiple texts which attempt to identify and codify acts constituting this form of conduct. Perhaps the most widely accepted and most specific definition, like that of torture, is found in the CAT. Article 16(1) states:

Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular the obligations contained in articles 10, 11, 12, and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.⁹¹

This international definition of CIDT has some similarities to the definition of torture, but is lacking in several key areas. Most notably, the definition includes language purporting to prohibit CIDT. The words “shall” and “prevent” connote an express intention that, like torture, conduct satisfying the elements are to be prohibited. Indeed, it outlines specific instances where such acts are to be prohibited; for example, if committed by or at the instigation or with the consent of a public official.⁹² However, Article 16 is more analogous to the corresponding texts of the UDHR or ICCPR, rather than the element-specific definition of torture in the CAT’s Article 1. Effectively, just as Article 16 requires its signatories to prohibit torture, it also requires signatories to prohibit CIDT, yet fails to provide signatories a definition with comparable definiteness.⁹³

Recognizing the nature of Article 16, the UN Committee Against Torture (the “Committee”) appears to have adopted the position that a specific definition of CIDT would be too restricting.⁹⁴ The Committee decided to implement an “I

⁹¹ UN CAT art. 16, para. 1.

⁹² *Id.*

⁹³ *See id.*

⁹⁴ CHRIS INGELSE, THE UN COMMITTEE AGAINST TORTURE: AN ASSESSMENT 274

know it when I see it" approach and criticized certain specific practices, such as being cruel, inhuman or degrading.⁹⁵ Reminiscent of the drafters of the ICCPR, the Committee turned to the text of the CAT to identify such specific practices. Under this framework, once CIDT was distinguished from torture in the CAT, the Committee had to establish which Convention obligations were applicable in the case of torture, and which in the case of CIDT.

"The Committee has provided very little clarity on the precise substance of the concepts of cruel, inhuman or degrading treatment or punishment. However, the Committee did regularly indicate in the reporting procedures which situations and cases were covered by article 16."⁹⁶ These situations and obligations require each signatory to ensure a variety of preventative measures. Signatories must provide that "education and information regarding the prohibition against torture are fully included in the training of" those who may be involved in the "treatment of any individual subjected to any form of arrest, detention, or imprisonment."⁹⁷ They must "keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment . . . with a view to preventing any cases of torture."⁹⁸ Signatories ought to ensure that its "authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed."⁹⁹ Finally, they must also "ensure that any individual who alleges he has been subjected to torture . . . has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities."¹⁰⁰ This is in contrast to the CAT's definition that explicitly references the obligations contained in other articles as expressly applying to CIDT in the exact same way as they would apply to acts constituting torture.¹⁰¹ Ultimately, what the CAT and the Committee have created is a definition of CIDT that is essentially any act that does not rise to the severity of torture that signatories should prohibit nonetheless.

Ordinarily, defining terms by providing specific examples of prohibited conduct may be an appropriate approach. However, such an approach is inappropriate when dealing with CIDT because it is placed on a spectrum with torture. Perpetrators are able to avoid torture convictions due to the high bar of the severity requirement. As a less extreme form of torture, such instances should be easily encompassed by the definition of CIDT. The Committee's definition of CIDT allows perpetrators to distinguish their acts from the list of

(Kluwer Law International 2001).

⁹⁵ *Id.*

⁹⁶ *Id.* at 288.

⁹⁷ UN CAT art. 10, para. 1.

⁹⁸ *Id.* art. 11.

⁹⁹ *Id.* art. 12.

¹⁰⁰ *Id.* art. 13.

¹⁰¹ *See id.* art. 16.

specific examples provided, and as a result, they may fall through the cracks and avoid any legal consequences. However, the benefits accorded to the definition of CIDT by the “specific example” approach actually inhibit the purpose of defining the term—to prevent and prohibit precisely—because it is inseparable from the definition of torture. Without attempting to attach specific elements to the definition of the term, the effective prohibition of acts constituting CIDT becomes significantly more difficult. As will be examined in the following section, the “specific example” approach to defining the term produces precisely this result.

2. U.S. Definition

U.S. jurisprudence has not yet specifically defined CIDT. Currently, the U.S. has only recognized CIDT as a concept for the purpose of distinguishing torture from acts that are not prohibited by law.¹⁰² The U.S. ratified the CAT in 1994, subject to several Reservations, Understandings and Declarations (“RUDs”). For example, the U.S. limited its obligation under Article 16, which provides, “[e]ach State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1 . . . [under color of law].”¹⁰³ The U.S. declared that CIDT should be consonant with the prohibition of unusual or inhuman treatment under the Fifth, Eighth, and/or Fourteenth Amendments to the U.S. Constitution.¹⁰⁴ However, recognizing the concern that CIDT could be construed to go beyond these constitutional standards, the Senate supported the inclusion of a RUD establishing the Constitution as the baseline for determining whether conduct amounted to CIDT.¹⁰⁵ In its report to the Committee, the U.S. State Department declared that the protections of the Fifth, Eighth, and/or Fourteenth Amendments “reach much of the conduct and practice to which article 16 is in fact addressed.”¹⁰⁶

The scope and motivation of this reservation have been the source of some question. “In the view of the United States, it was necessary to limit [its] undertakings under this article primarily because the meaning of the term ‘degrading treatment’ is at best vague and ambiguous.”¹⁰⁷ “Although the Eighth Amendment’s protections against cruel and unusual punishment apply only to

¹⁰² See 8 C.F.R. § 208.18(a)(2) (2014) (“Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture.”).

¹⁰³ UN CAT art. 16, para. 1.

¹⁰⁴ CTR. FOR CONSTITUTIONAL RIGHTS, *supra* note 11, at 32.

¹⁰⁵ See *id.*

¹⁰⁶ U.S. Consideration of Reports Submitted by States Parties under Article 19 of the Convention, CAT/C/28/Add.5, 65 (Feb. 9, 2000), available at <http://www.state.gov/documents/organization/100296.pdf>.

¹⁰⁷ *Id.*

those subject to ‘punishment’ within the Amendment’s meaning, the Fourth Amendment protects all individuals against unreasonable intrusions upon their bodily integrity and security of person.”¹⁰⁸ Thus, it is readily apparent that the infliction of mental pain and suffering that is not severe enough to constitute torture cannot be punished as CIDT because the Fifth, Eighth, and/or Fourteenth Amendments may not cover it. If the pain and suffering is not intended as punishment, then it will not trigger Eighth Amendment protection. If the pain and suffering is purely mental in nature, then it will not necessarily trigger Fourth Amendment protection. These are but a few examples of how the U.S. interpretation of CIDT is insufficient to achieve the goals of the CAT. It is precisely because the CAT fails to provide elements, like in the definition of torture, that the U.S. was able to formulate its definition of CIDT in such a manner.

A memorandum written by John C. Yoo served as the interpretive authority on how to apply the CAT to U.S. jurisprudence.¹⁰⁹ Principally, the memo argued to keep U.S. officials from being charged with crimes for the way prisoners were detained and interrogated.¹¹⁰ It began its analysis recognizing that the parties to the CAT could not reach a consensus about the meaning of CIDT.¹¹¹ Without a consensus, the memo viewed the term as simply “too vague to be included in a convention which was to form the basis for criminal legislation in the Contracting States.”¹¹² This view was referenced to reaffirm the U.S. interpretation of the CAT as purposely reserving criminal penalties for torture alone. Thus, U.S. officials interpreted the CAT to establish a category of acts that states should endeavor to prevent, but need not criminalize—namely those constituting CIDT, but not satisfying the exceptionally high standards for torture. According to the memo, the Convention “reserves for torture alone the criminal penalties and the stigma attached to those penalties. In so doing, the CAT makes clear that torture is at the farthest end of impermissible actions, and that it is distinct and separate from the lower level of “cruel, inhuman, or degrading treatment or punishment.”¹¹³

¹⁰⁸ *Id.*

¹⁰⁹ See Memorandum for William J. Haynes II, General Counsel of the Department of Defense, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States*, 54 (Mar. 14, 2003).

¹¹⁰ *See id.*

¹¹¹ *Id.* at 54.

¹¹² *Id.*

¹¹³ *Id.* at 49.

3. Distinguishing “Torture” and “Cruel, Inhuman or Degrading Treatment”

Torture and CIDT are concepts that are difficult to distinguish. Torture is the most severe form of inhuman treatment, but it has been argued that “there is no objective element of distinction between the two categories.”¹¹⁴ Acts at stake are usually identical and only the level of intensity or severity of the ill-treatment, taking into account the vulnerability of the victim, may vary. The difference between the torture and inhuman treatment prohibited under article 3 of the European Court for Human Rights (“ECHR”) lies in the subjective aspect of the treatment, namely the severity. In *Ireland v. United Kingdom*, the ECHR specified the distinction in further detail. The ECHR there indicated that the distinction between torture and CIDT was in the intensity of the suffering caused.¹¹⁵ Since the distinctive element is subjective, the whole complexity of this distinction is readily apparent. The ECHR found acts to constitute torture only if they were “deliberate inhuman treatment causing very serious and cruel suffering.”¹¹⁶

This interpretation is similarly applicable to the definitions provided in the CAT. Thus, the key distinctions between the terms are based on their precise elements—primarily the severity, the type of suffering, the intent and purpose of the act, and the status of the actor performing the act. Therefore, the articulation of specific elements constituting the crime of CIDT would significantly aid the purpose of defining both torture and CIDT.

III. A NOVEL FRAMEWORK

There is a very reasonable argument to be made that attempting to pin down a precise, element-specific definition of ambiguous international norms like “cruel, inhuman or degrading treatment” is counterproductive. Indeed, one need only look to the realities surrounding the definition of torture, a much more precisely defined term. The U.S. is a prime example of the lack of uniformity in the definition of torture, illustrating not only that a definition of torture differs among countries, but that clarifications to the definition of torture through understandings of the CAT or statutory definitions have either muddled or overly-narrowed the definition. However, in light of all these disagreements surrounding the precise definition of torture, the undeniable reality is that the element-specific framework created by the CAT has given rise to a myriad of domestic legislation that further the cause of defining the elusive term. The

¹¹⁴ U.N. HUMAN RIGHTS, INTERPRETATION OF TORTURE IN THE LIGHT OF THE PRACTICE AND JURISPRUDENCE OF INTERNATIONAL BODIES 6 (2011), available at http://www.ohchr.org/Documents/Issues/Torture/UNVFVT/Interpretation_torture_2011_EN.pdf.

¹¹⁵ *Ireland v. United Kingdom*, App. No. 5310/71, Judgment, at 58 (Eur. Ct. H.R. Jan. 18, 1978), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57506#{%22001-57506%22}}>.

¹¹⁶ *Id.* at 59.

development of torture as a prohibited act, from its inception as a *jus cogens* norm of international customary law, to the important step taken in the CAT, has indisputably led to the adoption of a specific definition by sovereign states around the world. The same discourse and development must occur with regards to CIDT. The international legal community must not passively allow heinous acts to be tolerated through co-opting sleights of hand. Terms like torture and CIDT are more than simple norms or principles. They carry the weight of humanity's basic sense of morality. Consequently, when used by governments, these terms must have precise legal meanings.¹¹⁷

It is precisely because the two terms are distinguished on their subjective nature that there is a need for comparable definitions. As discussed in the previous section, states like the U.S. have imposed extremely high standards for acts to be labeled "torture." Additionally, the fact that torture is an extreme form of CIDT logically creates countless situations where truly terrible acts are unable to be prosecuted or criminalized as torture. This is because they fail to satisfy the extremely high bar set by legal interpretations in states like the U.S. Therefore, these reprehensible acts are relegated to the realm of CIDT.

Unlike the definition of torture, which contains elements giving rise to a cause of action, CIDT has not been defined in a similar fashion. This reality is incongruous with the expressed norm codified over decades in international treaties and customary law—that both torture and CIDT should be prohibited to the same degree.¹¹⁸ While this principle implicates numerous considerations involving the complicated approach to prohibiting the practices internationally, one aspect that can aid in this endeavor is the appropriate definitions of the two terms. As has been demonstrated, the definition of torture is significantly more specific than that of CIDT. This specificity forces even resistant states like the U.S. to criminalize conduct amounting to torture in a manner prescribed by the CAT. Therefore, a comparable amount of specificity must be given to defining the term CIDT to allow for similar criminalization.

The main distinction between the definitions of the two terms is the inclusion of precise elements. The definition of torture utilizes a series of elements that if met, unequivocally label a given act as torture. These elements have been almost identically reproduced from the CAT in U.S. jurisprudence.¹¹⁹ While it has been seen that the actual interpretation of the elements has been somewhat skewed by the U.S., the reality is that the CAT's element-specific language formed the basis for criminalizing conduct in the U.S. Therefore, what is needed is a comparable, element-specific articulation of CIDT, such that it too can form the basis for a criminal cause of action.

¹¹⁷ MILLER, *supra* note 18, at 37.

¹¹⁸ See *supra* note 10.

¹¹⁹ See Bybee Memo, *supra* note 72.

A. A Proposed Definition for CIDT

This article proposes the following definition for CIDT: an act will constitute cruel, inhuman or degrading treatment, and thus be reprehensible to the fullest extent possible, if it causes (1) serious pain and suffering that is (2) either physical or mental, inflicted with the (3) intent and (4) purpose of causing such pain and suffering, and is (5) performed by a person acting in a public capacity or with the acquiescence or knowledge of a governmental entity.

The “serious” requirement, element (1), reinforces the notion that torture is an extreme form of CIDT. Thus, acts that do not rise to the level of torture are nonetheless encompassed by the crime of CIDT. Including a modifier to the pain and suffering requirement ensures that not all acts that cause pain and suffering warrant criminal sanction. This recognizes the fact that some infliction of pain and suffering is sometimes a necessary aspect of detention and interrogation. However, the purpose of criminalizing CIDT is to prevent pain and suffering when it becomes cruel or inhuman. Thus, the definition of CIDT includes serious pain and suffering as a requisite.

The definition of CIDT, similar to that of torture, should encompass both mental and physical suffering, element (2). The inclusion of a subjective and objective aspect to the definition ensures that such conduct is effectively prohibited. Moreover, explicitly articulating that CIDT can manifest in both mental and physical ways further specifies the category of acts to which the crime applies.

Intent and purpose, elements (3) and (4) are included to reflect the definition of torture. As discussed above, the main distinction between the two crimes lies in the subjective element (the severity of the mental or physical pain and suffering). Furthermore, recognizing that torture is an extreme form of CIDT, it is appropriate that the two terms should require similar intent and purposes. Indeed, the CAT includes the identical purpose requirement for both torture and CIDT.

Similarly, the inclusion of the fifth element, which prohibits conduct by government officials, or those acting with the acquiescence or knowledge of a government entity, reflects the intention articulated by the CAT and its predecessors as imposing limitations on the conduct of sovereign states. Likewise, the articulation of an element-specific definition of CIDT intends to promote the adoption of specific prohibitive measures by state actors.

CONCLUSION

This article attempts to offer a single component set in the larger machine devoted to the international prohibition of both torture and CIDT. While there are numerous aspects related to the prohibition of both, the specificity of their definitions is an essential component. “The definition of an act as an international crime is highly significant at the national judicial level. It has important consequences even if there are no international institutions for

prosecution.”¹²⁰ Recognizing the unique relationship between the definitions of torture and CIDT elevates the importance of their comparable definitional specificity. “Clarifying and eliminating the deficiencies that exist in Article I of the Convention will make it far more difficult for State Parties to justify torture, or to rationalize their failure to prevent it. Moreover, the Convention, properly clarified, may prove to be a deterrent to States in the practice of torture and promote the authentic attainment of the Convention’s goals.”¹²¹ Perhaps by comparably specifying the definition of cruel, inhuman or degrading treatment to that of torture, the effective prohibition of such conduct would become more of a reality.

¹²⁰ WILLIAM SCHABAS, *UNIMAGINABLE ATROCITIES: JUSTICE, POLITICS, AND RIGHTS AT THE WAR CRIMES TRIBUNALS* 29 (Oxford University Press 2012).

¹²¹ BOULESBAA, *supra* note 21, at 3.