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Torture and Its Legal Limits:
Examining the Severity Threshold in International Humanitarian Law
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Abstract

This research investigates the legal and practical implications of the absence of a clearly defined threshold for torture within International Humanitarian Law (IHL), particularly concerning state compliance and the prosecution of offenders. While torture is unequivocally prohibited under various international legal instruments—including the Geneva Conventions, their Additional Protocols, and the Convention Against Torture (CAT)—there remains significant ambiguity in determining the severity required for an act to qualify as "torture" under IHL. The CAT defines torture as the intentional infliction of severe physical or mental pain or suffering, yet the Geneva Conventions do not specify the threshold of severity, leaving room for interpretative discrepancies and legal uncertainty. This legal gap complicates efforts to enforce accountability and prosecute perpetrators at international tribunals, as seen in landmark cases adjudicated by the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Court (ICC), and others. Through a normative-empirical legal research method, this study analyzes relevant treaties, customary international law, and judicial decisions to evaluate how torture has been defined, applied, and challenged in practice. It also explores how the undefined threshold hinders effective enforcement. The research concludes with specific legal and policy recommendations aimed at clarifying the definition of torture, enhancing state compliance, and strengthening international mechanisms to prevent and punish acts of torture in armed conflict and custodial settings.

Keywords: International Humanitarian Law, Torture, Severity Thresholds.

A. Introduction

A significant obstacle in addressing torture within the framework of International Humanitarian Law (IHL) lies in the challenge of defining its severity. The 1949 Geneva Conventions³ and their Additional Protocols⁴, key legal foundations of IHL, do not establish a clear threshold for what constitutes torture. The term itself covers a

broad spectrum of acts, ranging from intense physical suffering to profound psychological distress, which complicates the task of formulating consistent and universally accepted standards for its identification and legal prosecution. This absence of a concrete and universally recognized severity threshold hinders efforts to ensure state accountability and to

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³ Rome Statute of the International Criminal Court (2002) Art.8(2)(a)(ii).

⁴ Geneva Convention of the International Committee of the Red Cross (ICRC) (1977) AP (I).

effectively bring perpetrators to justice. Under the 1984 Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT), torture is characterized as the deliberate infliction, either by direct action or omission of intense physical or mental pain or suffering, carried out for specific purposes such as extracting information or confessions, imposing punishment, intimidating or coercing individuals, or discriminating against them.⁵

Torture constitutes grave breaches of humanitarian law and is considered a war crime under the Statute of the International Criminal Court.⁶ Historically, torture has been wielded as a tool of punishment, coercion, and oppression, inflicting severe physical and psychological suffering on its victims. The horrors witnessed during times of war highlight the urgent need for a clear and specific threshold for the severity of torture to prevent and punish such acts. IHL serves as a beacon of hope amidst the darkness and injustice of armed conflict, aiming to restrict and reduce the suffering inflicted upon people, whether civilians or combatants. Rooted in the principles of humanity, distinction, precaution, and proportionality, IHL comprises those rules of international law which establish minimum standards of humanity that must be respected and complied with in any situation of armed conflict, whether international or non-international in nature.⁷

Central to the principles of IHL is the unequivocal prohibition of torture. This prohibition is enshrined in numerous

treaties and conventions, including the Geneva Conventions of 1949,⁸ their additional protocols,⁹ the Convention Against Torture,¹⁰ the Lieber Code,¹¹ the Charter of the International Military Tribunal at Nuremberg,¹² as well as various national laws. International and regional human rights treaties, within their respective fields of application, also list the prohibition of torture as non-negotiable. The absolute prohibition of torture reflects a global acceptance of the fundamental rights and dignity of every human being, both in times of war and peace.

Despite the unequivocal condemnation and prohibition of torture under IHL and other human rights instruments, its practice still persists in various forms and contexts. Employed by both state and non-state actors, torture continues to haunt the corridors of power, leaving a trail of inhumanity and injustice in its wake. The brutal torture witnessed in the trenches of World War I (1914-1918)¹³ and in the concentration camps of World War II (1939-1945) serves as a stark reminder of human cruelty during armed conflict. After the cataclysm of World War II, which saw massive atrocities committed not only against wounded, captured, and surrendering combatants¹⁴ but also against millions of civilians in occupied territories, the 1949 Diplomatic Conference adopted a revised and completed set of four Geneva Conventions.¹⁵

This research examines the issue of torture within the framework of International Humanitarian Law (IHL), with

⁵ Instructions for the Government of Armies of the United States in the Field (Lieber Code) (1954).

⁶ Rome Statute of the International Criminal Court Art.8(2)(a)(ii).

⁷ A. Alexander, "A Short History of International Humanitarian Law," *European Journal of International Law* 26, no. 1 (2015): 109–38, <https://doi.org/10.1093/ejil/chv002>.

⁸ Geneva Convention of the International Committee of the Red Cross (ICRC) AP (I).

⁹ Geneva Convention of the International Committee of the Red Cross (ICRC) Annex (I), AP (I).

¹⁰ Natasha Mavronicola, *Torture, Inhumanity and Degradation Under Article 3 of the ECHR: Absolute Rights and Absolute Wrongs*, 1st ed. (Hart Publishing, 2021).

¹¹ Instructions for the Government of Armies of the United States in the Field (Lieber Code).

¹² Laura Considine, "Contests of Legitimacy and Value: The Treaty on the Prohibition of Nuclear Weapons and the Logic of Prohibition," *International Affairs* 95, no. 5 (2019): 1075–92, <https://doi.org/10.1093/ia/iiz103>.

¹³ Geneva Convention of the International Committee of the Red Cross (ICRC) Art.2.

¹⁴ Knut Dörmann and Louis Maresca, "The International Committee of the Red Cross and Its Contribution to the Development of International Humanitarian Law in Specialized Instruments," *Chicago Journal of International Law* 5, no. 1 (2004).

¹⁵ Alexander, "A Short History of International Humanitarian Law."

a specific focus on analyzing the thresholds of severity as articulated in relevant international treaties and legal instruments. It seeks to understand how the concept of "severity" is interpreted in legal texts and applied in practice, particularly in cases adjudicated by international tribunals. Utilizing a normative-empirical legal research methodology, the research combines doctrinal analysis of primary sources—such as the Geneva Conventions, Additional Protocols, and the Convention Against Torture (CAT)—with empirical examination of landmark cases from international courts, including the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).

The research aims to uncover the legal and practical challenges that arise due to the absence of a universally accepted threshold for what constitutes torture under IHL. It also explores the underlying reasons for the persistent violation of torture prohibitions by parties involved in armed conflict, despite clear legal prohibitions. By offering a comprehensive assessment of legal definitions, judicial interpretations, and state practices, the research aspires to propose actionable recommendations to improve accountability mechanisms, strengthen legal clarity, and support global efforts to eradicate torture in both conflict and custodial contexts.

B. Discussion

1. The Threshold of Severity of torture and its impact on the compliance of torture under IHL

The absence of a specific threshold to determine the severity of acts that

constitute torture under International Humanitarian Law presents a significant challenge in holding parties accountable for such actions and ensuring compliance with the laws prohibiting torture. To begin with, the principle of universal criminality asserts that international crimes, including acts of torture, are inherently subject to prosecution and punishment on a global scale. This universality signifies that such crimes are recognized as violations of fundamental international norms,¹⁶ irrespective of where they are committed, thereby underscoring the imperative of universal compliance with prohibitions against torture under International Humanitarian Law.¹⁷

Despite the universally agreed prohibition of torture, violations persist by both state and non-state actors. The absence of a clear and specified threshold for what constitutes torture has significantly impacted compliance with this prohibition under International Humanitarian Law. This lack of clarity undermines the credibility and effectiveness of international legal frameworks designed to prevent and punish acts of torture, resulting in the continued perpetration of these violations.¹⁸ The ongoing debate concerning the role of severity in distinguishing between various forms of ill-treatment highlights a critical gap in the legal framework of International Humanitarian Law (IHL). This debate is predominantly characterized by two distinct models: the vertical/hierarchical and the horizontal/qualitative approaches.¹⁹

The hierarchical model posits a spectrum of severity with torture²⁰ at its apex, characterized by the highest intensity of pain and suffering, followed by cruel and

¹⁶ Kevin Jon Heller, "What Is an International Crime? (A Revisionist History)," *SSRN Electronic Journal*, ahead of print, 2016, <https://doi.org/10.2139/ssrn.2836889>.

¹⁷ *Ibid* (37).

¹⁸ Amanda C. De C Williams and Jannie Van Der Merwe, "The Psychological Impact of Torture," *British Journal of Pain* 7,

no. 2 (2013): 101–6, <https://doi.org/10.1177/2049463713483596>.

¹⁹ Kerime vn Opijnen, *The Element of Severe Pain in the Definition of Torture: Guidelines for Armenia*, September 3, 2021.

²⁰ ECTHR, *Ireland V. the United Kingdom (révision)*, No. 5310/71 (ECTHR March 20, 2018).

inhuman treatment requiring a relatively lower, yet still severe, degree of suffering, and degrading treatment, which does not necessarily involve severe pain but rather focuses on humiliation. This model has historically influenced judicial reasoning, as seen in cases like *Ireland v. UK*, which introduced the principle of “special stigma” for acts of torture. Despite its foundational role in European jurisprudence, the hierarchical approach has faced criticism and a gradual shift away in favor of interpretations aligned with the United Nations Convention Against Torture (UNCAT).²¹

On the other hand, the horizontal or qualitative model offers a different perspective, emphasizing the qualitative differences among these forms of ill-treatment based on factors other than severity. This model argues that torture, cruel, and inhuman treatment should be understood as distinct categories not necessarily differentiated by the intensity of suffering but by their purpose and context.²² For example, cruel and inhuman treatment might involve severe pain, like torture, but lacks the additional dimensions of intent or purpose that elevate the act to torture. Degrading treatment, meanwhile, centers on humiliation and debasement rather than severity or purpose, suggesting that it can occur even in the absence of severe suffering.²³

The absence of a clear, determinative threshold for the severity of acts constituting torture has profound implications for compliance with the prohibition of torture under IHL. This ambiguity complicates the process of distinguishing torture from other forms of

ill-treatment, such as cruel, inhuman, or degrading treatment.²⁴ The lack of consensus on what constitutes a sufficient level of severity to qualify as torture allows perpetrators to exploit these grey areas, thereby undermining accountability and the enforcement of IHL prohibitions. The hierarchical model’s focus on severity creates a tiered system that may obscure the true nature of certain acts, leading to an overemphasis on the degree of suffering rather than the context and intent behind the act.²⁵

Moreover, the hierarchical model’s reliance on the severity of pain as the primary differentiating factor creates significant challenges in legal settings.²⁶ It permits individuals and entities accused of torture to argue that the acts in question do not meet the requisite threshold of severity, thereby evading prosecution and accountability. This loophole undermines the effectiveness of international legal instruments designed to prevent and punish acts of torture and erodes the broader commitment to protecting human dignity. This ambiguity enables perpetrators to hide under the umbrella of less severe categorizations, thereby evading accountability and weakening compliance with the prohibition of torture under IHL.²⁷

Furthermore, the lack of a specific threshold for determining the severity of acts that qualify as torture creates divergence in the interpretation and application of what constitutes torture between international and national jurisdictions. Consequently, acts deemed torture under international law may not be recognized as such within some national legal frameworks, leading to inconsistent

²¹ UNHR, “Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment” (Geneva, Switzerland, 1984), <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-against-torture-and-other-cruel-inhuman-or-degrading>.

²² Rome Statute of the International Criminal Court Art.8(2)(a)(ii).

²³ Malcolm D. Evans, “Getting to Grips with Torture,” *International and Comparative Law Quarterly* 51, no. 2 (2002): 365–83, <https://doi.org/10.1093/iclq/51.2.365>.

²⁴ Geneva Convention of the International Committee of the Red Cross (ICRC) Art.8(2)(a)(ii).

²⁵ *Cestaro v. Italy*, No. 6884/11 (European Court of Human Rights April 7, 2015).

²⁶ De C Williams and Van Der Merwe, “The Psychological Impact of Torture.”

²⁷ Alexander, “A Short History of International Humanitarian Law.”

application of justice and protection for victims.²⁸ For example, in the case of *Ireland v. United Kingdom* (1978), the European Court of Human Rights (ECHR) evaluated the use of the "five techniques" by British authorities—wall-standing, hooding, subjection to noise, deprivation of sleep, and deprivation of food and drink. While the ECHR classified these methods as inhuman and degrading treatment, it controversially did not recognize them as torture. This decision has faced significant criticism for underestimating the severity of these techniques and failing to meet the expectations set by international human rights standards.²⁹

However, in the national level, there are notable cases where acts recognized as torture under international law are not classified as such. In the United States, for example, the use of waterboarding—a form of simulated drowning—has been widely condemned by international bodies, including the United Nations, as torture due to the extreme physical and psychological distress it causes. However, during the Bush administration, legal opinions from the Department of Justice categorized waterboarding as an "enhanced interrogation technique" rather than torture, arguing that it did not meet the threshold of "severe" pain required for the classification under U.S. law at the time.

In Israel, methods such as shaking detainees or forcing them into stress positions were initially not considered torture. The Israeli Supreme Court, in the case of *Public Committee Against Torture in Israel v. The State of Israel* (1999)³⁰ determined that certain interrogation techniques used by the Israeli Security

Agency did not amount to torture, reasoning that the severity of pain inflicted did not meet the necessary threshold. This ruling reflects a national interpretation that diverges from the broader international consensus on what constitutes torture.³¹

This gap allows national jurisdictions to adopt narrower definitions that may exclude certain acts from being classified as torture.³² For example, psychological methods of coercion, such as prolonged solitary confinement or sleep deprivation, are often considered severe under international standards but may not meet the required threshold for torture under some national laws. This discrepancy allows perpetrators to evade accountability by arguing that the inflicted pain or suffering does not reach the necessary level of severity to constitute torture. Over the past few decades, significant strides have been made in developing a robust framework for international humanitarian law. However, this progress has not been matched by corresponding advancements in compliance, leaving the issue of prohibiting torture unresolved. Although various treaties address human rights and environmental offenses, none offer a comprehensive discussion on the non-compliance by state parties involved in conflicts.³³

This article acknowledges this critical gap and aims to raise awareness about the persistent issue of non-compliance, particularly stemming from the lack of a specific threshold for determining the severity of acts that constitute torture.³⁴ By advocating for clearer guidelines and stronger enforcement mechanisms, this study seeks to highlight the urgent need for

²⁸ Alan M. Dershowitz, *Why Terrorism Works: Understanding the Threat Responding to the Challenge* (New Haven (Conn.): Yale university press, 2002).

²⁹ Jameel Jaffer and Amrit Singh, *Administration of Torture: A Documentary Record from Washington to Abu Ghraib and Beyond* (New York: Columbia University Press, 2010).

³⁰ United Nations, "The Public Committee Against Torture in Israel V. The Government of Israel - Summary of Judgment - Israeli Supreme Court Ruling/Non-UN Document" (Israel, 1977), <https://www.un.org/unispal/document/auto-insert-193738/>.

³¹ felix, "Accountability Denied the Absence of Investigation and Punishment of Torture in Israel," February 29, 2024, <https://stoptorture.org.il/en/accountability-denied-the-absence-of-investigation-and-punishment-of-torture-in-israel/>.

³² De C Williams and Van Der Merwe, "The Psychological Impact of Torture."

³³ Mavronicola, *Torture, Inhumanity and Degradation Under Article 3 of the ECHR: Absolute Rights and Absolute Wrongs*.

³⁴ *Op.Cit*, Raoul Wallenberg Institute, "The Element of Severe Pain in the Definition of Torture."

reforms to ensure that international humanitarian law is not only robust in its framework but also effective in its implementation.³⁵

2. Variations in International and Regional Interpretation of Severe Pain

The concept of severity is central to the interpretation of torture under International Humanitarian Law (IHL). This element plays several important roles, serving as both an intensifying factor and a differentiating marker between various forms of ill-treatment. It also encapsulates the essence of a victim's experience.³⁶ However, the term "severe" is subjective and has been interpreted differently across various jurisdictions. This lack of specificity results in significant differences in how countries classify and address acts of torture.³⁷

For instance, some countries may have domestic laws that closely mirror the UNCAT definition and include comprehensive measures to address torture. In contrast, other countries may have narrower definitions that exclude certain acts or set a higher threshold for what constitutes "severe" pain or suffering. Consequently, the notion of severity is recognized as intricate and multifaceted:

a. Severe Pain as Aggravating Factor

The word "severe" is a long-standing term in relation to defining and interpreting torture. There is a specific legal rationale and a consequentialist viewpoint at play, where the extent of "damage inflicted" is seen as closely correlated with the "severity

of the wrongdoing." It's crucial to recognize from the beginning and maintain throughout the discussion that suffering, damage, or injury does not encompass the entirety of the wrongdoing. The wrongdoing extends beyond the inflicted suffering and includes other factors such as intentionality and purpose (*mens rea*), which also contribute to its wrongfulness.³⁸

To clarify, terms such as "gravity,"³⁹ "intensity,"⁴⁰ "degree,"⁴¹ or "level" of pain or suffering, as discussed in the literature and case law, do not carry any special technical meanings beyond indicating different extents of harm. Therefore, these terms can be considered nearly synonymous or interchangeable. It's helpful to remember the drafting history, which includes rejected state proposals. Notably, proposals to add "extremely" before or "extreme"⁴² instead of "severe" were put forward, reflecting certain prevailing attitudes, although these have been decisively dismissed. The European Court of Human Rights has also frequently used related phrases such as "very serious and cruel suffering" and "particularly serious and cruel"⁴³ to describe severity. A review of the Inter-American Court mentions terms such as "grave, extreme, barbarous, intense,"⁴⁴ and refers to conduct described as acts of aggression or extremely aggressive or severe acts of violence. Other legal authorities have used terms like "serious physical pain and suffering"⁴⁵ and "considerable physical pain, fear, anguish, and mental suffering."

³⁵Dennis J. Baker, *The Right Not to Be Criminalized: Demarcating Criminal Law's Authority*, Applied Legal Philosophy (London: Routledge, 2016), <https://doi.org/10.4324/9781315553481>.

³⁶Opijnen, *The Element of Severe Pain in the Definition of Torture: Guidelines for Armenia*.

³⁷Manfred Nowak, "What Practices Constitute Torture? US and UN Standards," *Human Rights Quarterly* 28, no. 4 (2006): 809–41, <https://doi.org/10.1353/hrq.2006.0050>.

³⁸Opijnen, *The Element of Severe Pain in the Definition of Torture: Guidelines for Armenia*.

³⁹Egmez v. Cyprus, No. 36243/13, 58234/13, 58891/13, 59100/13, 64345/13, 77071/13, 80984/13 (European Court of Human Rights 2000).

⁴⁰*Ireland V. the United Kingdom (révision)*, No. 5310/71.

⁴¹*Ibid.*

⁴²US Departement, *Nomination of John a. Rizzo to Be General Counsel of the Central Intelligence Agency* (New York, 1987), <https://www.congress.gov/110/chrg/shrg41205/CHRG-110shrg41205.htm>.

⁴³Bati and Others V. Turkey, No. 61805/00 (European Court of Human Rights 2004).

⁴⁴Steven Dewulf, *The Signature of Evil: (Re) Defining Torture in International Law* (Intersentia; Distribution for the USA and Canada, International Specialized Book Services, 2011).

⁴⁵Aydin V. Turkey, 42361/17, 43092/17, 50657/17, 58371/17, 9357/18 (European Court of Human Rights 1997).

Although the European Court now acknowledges the universal application of the UNCAT⁴⁶ definition, its case law still occasionally reflects on older, problematic decisions such as *Ireland v. UK*. This case, despite being forward-looking in some respects, also held the view that there must be more than just severe pain for an act to be classified as torture.⁴⁷ To clarify, current European jurisprudence requires only "severe" pain to meet the threshold for torture, following the explicit adoption of the UNCAT definition in *Semoun case*.⁴⁸

b. Severe Pain as Differentiating Factor

The hierarchical model traditionally used in European jurisprudence categorizes forms of ill-treatment by the severity of pain inflicted, placing torture at the apex, requiring the most intense pain. Prominent commentators argue that there is no textual justification for making severity the key factor in distinguishing forms of ill-treatment. This is partly because both torture and cruel or inhuman treatment often involve similar levels of severe pain. Thus, if an act involves cruel or inhuman treatment but includes an additional element, such as intent or purpose, it becomes aggravated and elevated to the level of torture.⁴⁹

Degradation, in contrast, operates under a different logic, centered on humiliation or debasement rather than severity, intent, or purpose. This means that degradation can occur even if the threshold of severe pain has not been met. The common thread among torture, cruel or inhuman treatment, and degradation is that they all represent affronts to human dignity.⁵⁰

The concept of "cruelty" adds another layer of complexity. The UN Convention Against Torture (UNCAT) explicitly mentions "cruelty," while the European Convention does not. Consequently, cruelty has not received as much attention in literature as the categories of "torture," "inhuman," and "degrading" treatment. It is often paired with "inhuman" to form "cruel and inhuman," which typically implies severe pain. Analysis of how the European Court uses "cruel" or "cruelty" reveals further confusion regarding its categorization. The Court has sometimes included these terms in its severity assessments and shifted towards an objective evaluation of the nature of the treatment, describing it with phrases like "very serious and cruel suffering" or "the level of cruelty required to attain the threshold of torture". Such formulations suggest that cruelty is distinct from the intensity of suffering, but these are often loose judicial expressions without significant impact.⁵¹

An early study of the European Committee for the Prevention of Torture (CPT)⁵² identified terminological inconsistencies but attempted to clarify the issue. The study noted that the CPT tends to reserve the term "torture" for particularly extreme forms of violence, typically involving physical ill-treatment by the police,⁵³ which is a narrow interpretation that has since been broadened. The study also highlights the inconsistent use of adjectives and the importance of relative and contextual assessments. Importantly, the CPT serves as a preventive mechanism, not as an interpretive or adjudicatory body, and thus does not determine or qualify acts as torture or otherwise.⁵⁴

⁴⁶ *Op.Cit.*, UNHR, "Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment."

⁴⁷ Nigel Rodley et al., *The Treatment of Prisoners Under International Law*, Third Edition, Third Edition (Oxford, New York: Oxford University Press, 2009).

⁴⁸ ECHR, *Selmouni v. France*, No. 26856/06, 26449/08, 61815/09, 30395/10, 50999/10, 58287/10, 63120/10, 36942/11 (ECHR [GC] July 28, 1999).

⁴⁹ Dörmann and Maresca, "The International Committee of the Red Cross and Its Contribution to the Development of International Humanitarian Law in Specialized Instruments."

⁵⁰ Nowak, "What Practices Constitute Torture? US and UN Standards."

⁵¹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of United Nation of Human Rights (UNHR).

⁵² Evans, "Getting to Grips with Torture."

⁵³ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of United Nation of Human Rights (UNHR) Art.3.

⁵⁴ Rodley and Pollard, *The Treatment of Prisoners Under International Law*.

The complexities surrounding the interpretation of severe pain as a key differentiator in defining forms of ill-treatment under International Humanitarian Law (IHL) underscore significant challenges in upholding the prohibition of torture. The variations in legal interpretations and terminological inconsistencies, as discussed, reflect the intricate and multifaceted nature of severity. This ambiguity complicates compliance and enforcement, as it affects the consistent classification and understanding of what constitutes torture.⁵⁵ Addressing these interpretive challenges is essential for strengthening protections against torture and ensuring a more uniform application of human rights standards across international and regional frameworks.⁵⁶

c. Enforcement Challenges and Selective Application

The implementation of anti-torture laws poses significant challenges. Even in nations with strong legal frameworks, the application of these laws can be inconsistent or biased, often swayed by political, cultural, or security factors. The absence of a well-defined threshold for what constitutes severe torture further complicates enforcement, as authorities may find it difficult to ascertain whether certain actions qualify as torture. Selective application of anti-torture laws is particularly problematic in contexts where torture is used as a tool of state policy or is tacitly accepted for security purposes.⁵⁷ For example, in some countries (United States, Turkey, Israel, Russia, China, Syria)⁵⁸ acts of torture may be overlooked or justified in the context of national security, such as during counter-terrorism operations. This

selective enforcement undermines the rule of law and erodes public trust in the justice system.⁵⁹

A significant illustration of these inconsistencies is the controversy surrounding "enhanced interrogation techniques" in the United States. Following the terrorist attacks on September 11, 2001,⁶⁰ The U.S. government approved the use of several interrogation methods on suspected terrorists. These methods, which included waterboarding, sleep deprivation, and stress positions, are widely regarded by international human rights organizations and legal experts as forms of torture under international law.⁶¹

In contrast, under U.S. federal law and as interpreted by the Department of Justice, these techniques were not deemed to be torture. Legal documents, commonly known as the "Torture Memos," asserted that for an action to be classified as torture under U.S. law, it must cause pain akin to "organ failure, impairment of bodily function, or even death." This interpretation established a considerably higher threshold for what constitutes torture compared to international standards, thereby permitting practices that could be regarded as torture elsewhere to remain unpunished domestically.

The disparity in national legislation and enforcement diminishes the effectiveness of international treaties such as the UNCAT and hampers the global campaign against torture. When countries do not align their domestic laws with international standards, it creates legal loopholes that can be exploited by offenders. This inconsistency undermines international initiatives to establish a universal norm against torture and complicates the process of holding violators accountable.

⁵⁵ *Ibid* (5).

⁵⁶ ICRC, "Guardian of International Humanitarian Law," June 26, 2024, <https://www.icrc.org/en/article/guardian-international-humanitarian-law>.

⁵⁷ John Rawls, *A Theory of Justice* (Oxford University Press, 1999).

⁵⁸ Mavronicola, *Torture, Inhumanity and Degradation Under Article 3 of the ECHR: Absolute Rights and Absolute Wrongs*.

⁵⁹ Dörmann and Maresca, "The International Committee of the Red Cross and Its Contribution to the Development of International Humanitarian Law in Specialized Instruments."

⁶⁰ S. Rept. 113-288 - Laporan Komite Senat (1989).

⁶¹ Geneva Convention of the International Committee of the Red Cross (ICRC) AP (I).

d. Challenges in Monitoring and Reporting

Monitoring and reporting mechanisms play a vital role in enforcing International Humanitarian Law (IHL) and holding violators accountable, especially for acts of torture. These mechanisms depend significantly on having clear and consistent standards to evaluate compliance and document violations. However, the absence of a well-defined threshold for determining the severity of acts that qualify as torture presents substantial challenges for international organizations and NGOs responsible for this important work. They include:

1. United Nations (UN)⁶²

Various UN bodies, including the Office of the High Commissioner for Human Rights (OHCHR) and the UN Human Rights Council,⁶³ are crucial in overseeing and reporting human rights violations, such as torture. They conduct fact-finding missions and appoint special rapporteurs to investigate complaints and offer recommendations.

2. International Committee of the Red Cross (ICRC)⁶⁴

The International Committee of the Red Cross (ICRC) operates in conflict areas around the globe, overseeing adherence to International Humanitarian Law (IHL) and delivering humanitarian aid.⁶⁴ It engages in confidential discussions with conflict parties to address

breaches and encourage compliance with international norms.

3. Non-Governmental Organizations (NGOs)

Non-governmental organizations such as Amnesty International⁶⁵ and Human Rights Watch⁶⁶ play a crucial role in collecting information on human rights violations, including torture. They release detailed reports, advocate on behalf of victims, and exert pressure on governments to adhere to their international commitments.

While these monitoring mechanisms are put in place, in practice, field monitors and investigators often face significant challenges in conflict zones, including security risks and limited access. The ambiguity surrounding torture thresholds adds an additional layer of complexity, as it can be difficult to identify and report acts of torture accurately under these conditions.

e. The Potential Mitigation Strategy

1. Harmonization of Legal Definitions

To mitigate the challenges of variations in international and regional interpretation of severe pain, it is crucial to encourage countries to align their domestic definitions with the broad and inclusive definition provided by the UNCAT, given that the crime of Torture is one of the crimes of international concern whether committed domestically or internationally.⁶⁷ Aligning international

⁶² F. Nawabi, *Violation of Human and Women's Rights by the Taliban in Afghanistan: The Taliban's Takeover and Its Consequences* (Raoul Wallenberg Institute of Human Rights and Humanitarian Law, 2023).

⁶³ Nicola Palladino and Mauro Santaniello, "IANA Functions, ICANN, and the DNS War," in *Legitimacy, Power, and Inequalities in the Multistakeholder Internet Governance*, by Nicola Palladino and Mauro Santaniello (Springer International Publishing, 2021), https://doi.org/10.1007/978-3-030-56131-4_3.

⁶⁴ ICRC, "Guardian of International Humanitarian Law."

⁶⁵ Joe Han G., "Afghanistan: Death in Slow Motion: Women and Girls Under Taliban Rule," Amnesty International, July

27, 2022, <https://www.amnesty.org/en/documents/asa11/5685/2022/en/>.

⁶⁶ Human Rights Watch, *Schools Are Failing Boys Too: The Taliban's Impact on Boys' Education in Afghanistan* (Human Rights Watch, 2023), <https://www.hrw.org/report/2023/12/06/schools-are-failing-boys-too/talibans-impact-boys-education-afghanistan>.

⁶⁷ Heller, "What Is an International Crime? (A Revisionist History)."

and domestic definitions of torture necessitates thorough legislative reform. Nations must scrutinize and revise their current laws to align them with international norms. This undertaking not only entails embracing the definitions set forth by international treaties but also embedding specific provisions that capture the intricate aspects of torture as acknowledged by these treaties.

Reforming legislation can be a complicated and politically delicate endeavor. It typically involves a comprehensive review of current laws,⁶⁸ consultations with stakeholders, and a dedication to protecting human rights. Despite its challenges, it is a critical step toward establishing a strong legal framework to effectively address torture. Aligning domestic laws with international definitions helps to eliminate inconsistencies resulting from different national interpretations and ensures that acts of torture are uniformly recognized and penalized across all jurisdictions.⁶⁹

While this may require a thorough implementation, it is however not impossible as there have been practical examples of successful harmonization efforts. A prominent example of successful harmonization efforts is found among European nations through the European Court of Human Rights (ECHR). Initially, European countries had varied definitions and interpretations of torture, resulting in inconsistencies in the enforcement of anti-torture laws. However, over time, the ECHR has facilitated the alignment of these definitions with those established by the United Nations Convention Against Torture (UNCAT). This has led to a more consistent and unified approach to addressing and combating torture across Europe.

The European Court of Human Rights (ECHR) has played a crucial role in advancing the harmonization of anti-torture standards, particularly through its landmark ruling in *Selmouni v. France*. In this case, the Court notably adopted the definition of torture as articulated in the United Nations Convention Against Torture (UNCAT), marking a significant legal development. By endorsing a broad and inclusive interpretation that covers all forms of severe physical and mental suffering, the ECHR established an influential precedent. This has prompted European states to revise their national laws to reflect the international definition, thereby fostering greater consistency in the implementation of anti-torture obligations across the region.

In a similar vein, the Inter-American Court of Human Rights in Latin America has actively advanced the alignment of domestic legal frameworks with international anti-torture standards. The Court has repeatedly called on member states to amend their national legislation to incorporate a comprehensive definition of torture. These judicial efforts have led to notable legal reforms throughout Latin America, contributing to a more unified and effective regional response to the prevention and punishment of torture as a grave violation of human rights.

2. Strengthening International Oversight and Accountability.

Improving international oversight and accountability mechanisms is vital for the proper enforcement of anti-torture laws and ensuring that offenders are held accountable. This strategy aims to strengthen the roles and capacities of international bodies tasked with overseeing

⁶⁸ Johann Wagner, "The European Union's Model of Integrated Border Management: Preventing Transnational Threats, Cross-Border Crime and Irregular Migration in the Context of the EU's Security Policies and Strategies," *Commonwealth & Comparative Politics* 59, no. 4 (2021): 424–48, <https://doi.org/10.1080/14662043.2021.1999650>.

⁶⁹ Nicolas Bueno et al., "The EU Directive on Corporate Sustainability Due Diligence (CSDDD): The Final Political Compromise," *Business and Human Rights Journal* 9, no. 2 (2024): 294–300, <https://doi.org/10.1017/bhj.2024.10>.

compliance with anti-torture regulations and addressing breaches.⁷⁰

A key step in strengthening international oversight is to enhance the monitoring mechanisms of international bodies like the UN Committee Against Torture (UNCAT) and regional human rights courts. These entities are vital in ensuring state compliance with international anti-torture standards. However, their effectiveness is frequently hindered by limited resources and capacity. To overcome this, it is crucial to provide these bodies with increased resources, including financial support, personnel, and technological tools.⁷¹ This enhancement would enable these organizations to conduct more comprehensive and timely investigations into allegations of torture and improve their ability to monitor compliance effectively.⁷²

Moreover, strengthening the methodologies used by monitoring bodies is essential for improving their effectiveness. This involves integrating advanced tools and techniques—such as satellite imagery, digital forensics, and other technological innovations—to more accurately detect and document instances of torture and ill-treatment. Enhancing the training and professional capacity of investigators and personnel involved in these monitoring processes is equally important, as it can greatly improve the precision, credibility, and overall reliability of the evidence they gather.⁷³

Another crucial measure to bolster international oversight is mandating countries to submit regular reports on their adherence to international anti-torture standards. These reports should provide

detailed accounts of specific cases of alleged torture, actions taken to address them, and the overall efforts by the state to prevent and combat torture. By requiring regular reporting, international bodies can maintain continuous oversight and ensure state accountability.⁷⁴

To make this reporting mechanism effective, clear guidelines and standards for the content and format of the reports are essential. This will ensure that the information provided is thorough, consistent, and comparable across different countries. Moreover, international bodies should periodically review these reports and give feedback to states, pointing out areas of concern and recommending specific actions to address the identified issues.⁷⁵

Empowering international bodies to conduct independent investigations into allegations of torture is essential for strengthening oversight and accountability. Often, domestic mechanisms may be inadequate or compromised,⁷⁶ hindering impartial and effective investigations. Therefore, international entities such as the UN Human Rights Council, the International Criminal Court (ICC), and regional human rights courts⁸⁰ should be granted the authority to initiate and conduct independent investigations in instances where domestic systems fail to deliver justice.

These investigations should be conducted by teams of experienced and unbiased investigators with expertise in human rights law, forensic science, and other relevant fields. The findings from these investigations should be made public, and states should be mandated to

⁷⁰ 'Abdallāh Aḥmad an-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law*, 1st ed., Contemporary Issues in the Middle East (Syracuse University, 2005).

⁷¹ The Universal Declaration of Human Rights (1948).

⁷² Robert Cryer, "The Boundaries of Liability in International Criminal Law, or 'Selectivity by Stealth,'" *Journal of Conflict & Security Law* 6, no. 1 (2001): 3–31.

⁷³ Rumiana Yotova, "Regulating Genome Editing Under International Human Rights Law," *International and*

Comparative Law Quarterly 69, no. 3 (2020): 653–84, <https://doi.org/10.1017/S0020589320000184>.

⁷⁴ S. Rept. 113-288 - Laporan Komite Senat.

⁷⁵ Yulianto Achmad et al., "ASEAN Non-Intervention Principles: An Alternative Settlement Towards Human Rights Violation in Rohingya," *Jurnal Media Hukum* 28, no. 1 (2021): 118–35, <https://doi.org/10.18196/jmh.v28i1.10892>.

⁷⁶ Nuraini Sekar Warasti et al., "The Impact of United States of America Intervention On Israeli-Palestinian Conflict," *Global Political Studies Journal* 6, no. 1 (2022): 47–57, <https://doi.org/10.34010/gpsjournal.v6i1.6089>.

implement the recommendations provided by the investigating bodies. By undertaking independent investigations, international bodies can ensure that allegations of torture are thoroughly investigated and that perpetrators are held accountable.⁷⁷

A practical example of bolstering international oversight is the creation of a permanent task force by the UN Human Rights Council, dedicated to investigating and reporting on instances of torture and ill-treatment. This task force would consist of experts in human rights law, forensic science, psychology, and other pertinent fields. Its mandate would include conducting independent investigations, reviewing state compliance reports, and providing regular updates and recommendations to member states. The task force would function independently, with the authority to initiate investigations and access relevant information and evidence. It would collaborate closely with other international and regional bodies⁷⁸ to ensure a coordinated and comprehensive approach to combating torture. By offering regular updates and recommendations, the task force would maintain continuous oversight and exert pressure on states to adhere to international anti-torture standards.

C. CONCLUSION

The complexity involved in defining and enforcing the prohibition of torture within International Humanitarian Law (IHL) poses substantial challenges, affecting the effectiveness and consistency of international legal frameworks. This thesis has delved into the crucial issue of the lack of a specific threshold for determining the severity of acts that constitute torture and its impact on compliance and accountability.

By thoroughly examining various models and legal interpretations, the study

has illuminated the ongoing ambiguities and their harmful effects on the enforcement of anti-torture laws. One of the key findings of this thesis is the profound effect that the lack of a clear threshold for the severity of acts of torture has on compliance with IHL. The debate between hierarchical and horizontal models for distinguishing ill-treatment has exposed fundamental weaknesses in the current legal frameworks. The hierarchical model, which classifies ill-treatment based on severity, has traditionally shaped judicial reasoning but has been criticized for its limitations. Conversely, the horizontal model, which focuses on qualitative differences based on purpose and context, offers an alternative view but does not entirely resolve the ambiguity.

This ambiguity presents considerable challenges for legal practitioners, human rights advocates, and international bodies responsible for enforcing anti-torture laws. In the absence of a universally accepted threshold, there is potential for varied interpretations, leading to inconsistent application of justice. Such inconsistency undermines the credibility of international legal instruments and hampers efforts to hold perpetrators accountable.

The absence of a specific threshold for severity complicates the task of distinguishing between torture and other forms of ill-treatment, such as cruel, inhuman, or degrading treatment. This distinction is vital for ensuring appropriate legal responses and penalties. The hierarchical model's emphasis on the degree of suffering can obscure the true nature of certain acts, enabling perpetrators to argue that their actions do not meet the threshold for torture. This loophole undermines the effectiveness of international legal frameworks and erodes

⁷⁷ Council of Europe, "Ethics and Human Rights Must Guide Any Use of Genome Editing Technologies in Human Beings - Human Rights and Biomedicine - www.Coe.int," Human Rights and Biomedicine, November 30, 2018.

⁷⁸ Josefa Dolores Ruiz Resa, "Legal Culture on Justice and Truth: The Tribunals of Inquiry About Bloody Sunday," *The Age of Human Rights Journal*, no. 15 (December 2020): 73–104, <https://doi.org/10.17561/tahrj.v15.5777>.

the broader commitment to protecting human dignity.

Moreover, the divergence in national and international interpretations of what constitutes torture exacerbates the issue. Cases like *Ireland v. United Kingdom* and the United States' use of "enhanced interrogation techniques" illustrate how varying national definitions can lead to inconsistent protection for victims and allow perpetrators to escape accountability. This disparity weakens the effectiveness of international treaties like the UN Convention Against Torture (UNCAT) and impedes global efforts to establish a universal norm against torture.

To address these challenges, this thesis recommends several measures to enhance the effectiveness of international legal frameworks in combating torture. Harmonizing legal definitions is essential to ensure uniform recognition and penalization of torture across various jurisdictions. Aligning domestic definitions with the broad and inclusive definition provided by the UN Convention Against Torture (UNCAT) can help eliminate inconsistencies and bolster global efforts to combat torture.

Strengthening international oversight and accountability mechanisms is also critical. Enhanced monitoring systems, regular reporting, and independent investigations can significantly improve the enforcement of anti-torture laws. Providing international bodies with increased resources and authority to conduct independent investigations can ensure that allegations of torture are thoroughly examined and perpetrators are held accountable, even when domestic mechanisms fail. The prohibition of torture is a fundamental principle of International Humanitarian Law (IHL) and a cornerstone of human rights protection. However, the absence of a specific threshold for determining the severity of acts that constitute torture weakens the effectiveness of international legal frameworks and allows perpetrators to

exploit these ambiguities. This thesis has emphasized the necessity for clearer guidelines, stronger enforcement mechanisms, and harmonized legal definitions to ensure that IHL is both robust in its framework and effective in its implementation.

Addressing these issues demands a concerted effort from international bodies, national governments, and civil society organizations. By advocating for clearer definitions and stronger enforcement mechanisms, this thesis aims to contribute to the ongoing efforts to eradicate torture and uphold the principles of human dignity and justice. The challenges are significant, but with sustained commitment and collaborative efforts, it is possible to strengthen the global prohibition of torture and ensure greater protection for all individuals under IHL.

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