TORTURE IN OUR SCHOOLS?

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Nothing can fix what that day broke inside of me and in every child in that school. My biggest fear walking into school every day is not the homework or the tests. It is the fear that I will not live to leave at the end of the day, or that if I do, my friends will not. I cannot bear the thought of burying my friends.

— Jordan Gomes, Sandy Hook Survivor

INTRODUCTION

America’s kids are not okay. As gun violence surges2 and politicians dither,3 school shootings are traumatizing a generation of youth. While only one manifestation of America’s gun violence crisis, school shootings are shocking in their ferocity, the senseless and random nature of the violence, and their impact upon millions of young, captive, and vulnerable individuals.4 This Essay makes the claim that the suffering of America’s school children from uncontrolled gun violence may be significant enough in scale and kind to rise to the level of ill-treatment under international law, violating U.S. treaty obligations and customary international law. If so, their ill-treatment is not only a consequence of

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4 Nearly fifty-one million students were enrolled at the elementary and secondary levels (pre-kindergarten through grade twelve) in U.S. public schools in fall 2018, according to the INST. OF EDUC. SCI., U.S. DEP’T OF EDUC., REPORT ON THE CONDITION OF EDUCATION 2021 iii (2021), https://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2021144 [https://perma.cc/W3CN-PEJ7]. Another 5.7 million attended private elementary and secondary schools in 2017, id. at 11, and 16.6 million were undergraduates in 2019, id. at 24.
misguided legislative policy preferences, but a violation of their fundamental legal rights.

The most directly applicable treaty on ill-treatment (but not the only one) is the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment5 (UNCAT or the Torture Convention). The Torture Convention requires states parties not to commit torture and ill-treatment and to take effective measures to prevent such treatment on their territories. The prohibition is absolute and non-derogable.6 UNCAT distinguishes between torture, strictly speaking, and cruel, inhuman, or degrading treatment7 (“ill-treatment”). As explained below, despite this Essay’s provocative title, torture is probably not the correct characterization of the trauma and harm inflicted by gun violence. Ill-treatment, however, is.

The implementation of the Torture Convention is entrusted to the Committee Against Torture (CAT), a body of independent experts that “reviews reports on the measures taken by states parties to the Convention,” considers complaints against states, and hears individual complaints, if a state party consents.8 While international human rights bodies like the CAT cannot require the United States to comply with international law, they provide a forum in which U.S. noncompliance can be discussed, and many have already communicated their concerns to the U.S. government on gun violence.9 As human rights advocates and scholars have shown in other contexts, including litigation to abolish

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7 Torture Convention, supra note 5, art. 16, ¶ 1.

8 Weissbrodt & Heilman, supra note 5, at 354.

9 Sadat & George, supra note 6, at 55.
the death penalty and to protect victims of domestic violence, these arguments can influence U.S. courts and policymakers by bringing otherwise private violence into the public sphere or by contextualizing harm in new ways. Indeed, human rights arguments can be raised before national courts not directly as treaty rights, due to non-self-executing clauses attached to the treaties but indirectly in state and federal litigation. Finally, as a political and normative matter, until recently, the media and commentators focused almost exclusively on the “rights” of the shooters as opposed to the human rights of the victims. This Essay and my prior work seek to change that.

I. WHAT IS HAPPENING TO AMERICA’S CHILDREN?

On February 14, 2018, a nineteen-year-old opened fire in his former high school in Parkland, Florida, killing seventeen people, and provoking a sustained public outcry and renewed demands for legislative


12 Sadat & George, supra note 6, at 88.

13 Id. at 3–4; see also Jonathan Lowy & Kelly Sampson, The Right Not to Be Shot: Public Safety, Private Guns, and the Constellation of Constitutional Liberties, 14 GEO. J. L. & PUB. POL’Y 187 (2016).

action.\textsuperscript{15} Government authorities were unresponsive. The Florida legislature refused to consider an assault weapons ban just days after the shooting.\textsuperscript{16} Instead, district officials required students at Parkland High School to use clear plastic backpacks and wear mandatory identification badges, and introduced a plan to place metal detectors at school entrances.\textsuperscript{17} This retraumatized the Parkland students who were advocating for gun violence prevention measures, including gun-buyback programs and legislation restricting access to assault-style weapons.\textsuperscript{18} President Donald Trump initially promised concrete action,\textsuperscript{19} but soon changed his mind after meeting privately with members of the National Rifle Association (NRA).\textsuperscript{20} Instead, he suggested arming teachers, endorsing the NRA's argument that "[t]he only thing that stops a bad guy with a gun, is a good guy with a gun."\textsuperscript{21}

The Parkland shooting was not an isolated event.\textsuperscript{22} Indeed, school shootings have been steadily increasing since 1979. Deaths from mass

\textsuperscript{17} Letter from the Sch. Bd. of Broward Cnty., Fla. to Parkland Families (Mar. 21, 2018), https://assets.documentcloud.org/documents/4418150/pages/Letter-to-Parkland-families-pi-normal.gif [https://perma.cc/N5Y2-BJLX].
school shootings went from twelve people in the 1980s, fourteen in the 1990s, and a high of fifty-one in the 2010s as of February 2018.\textsuperscript{23} There were forty-two school shootings in 2021, averaging one shooting every nine days.\textsuperscript{24} More than 278,000 children at 298 schools (excluding colleges and universities) have experienced gun violence on their campuses since the Columbine shooting, and at least 151 individuals were killed and 351 injured in these incidents.\textsuperscript{25} Taking into account the families of students, first responders and medical professionals who treat the victims and other immediate community members, the number of individuals directly impacted by the shootings is even greater.

What is the remedy to this upswing in violence? As researchers around the world have established, unregulated gun ownership is the leading factor associated with the risk of death from gun violence: \textsuperscript{26} “[T]he gun is to gun violence as the mosquito is to malaria.” \textsuperscript{27} While mental illness is often blamed,\textsuperscript{28} the relationship between mental illness and gun violence is unclear.\textsuperscript{29} Moreover, there is no real evidence that the United States experiences higher levels of mental illness than other countries, suggesting that easy access to guns, not mental illness, drives America’s high fatality rates.\textsuperscript{30}

Mass shootings create a climate of fear and uncertainty that causes psychological stress and mental harm, including post-traumatic stress disorder (PTSD) and depression for the direct victims and Americans


\textsuperscript{27} Philip Alpers, America Already Led, Tested and Proved Many of the Solutions: One Day They Are Inevitable, 60 WASH. U. J. L. & POL’Y 255, 257 (2019).


\textsuperscript{30} Sadat & George, \textit{supra} note 6, at 13.
Threat and Posttraumatic Stress in School-Age Children

Survivors of serious gunshot injuries have elevated risks for post-traumatic stress symptoms and diminished physical health months after a shooting. The combination of physical injury and psychological trauma is associated with increased levels of PTSD, depression, anxiety, and physical pain. Exposure to violence, or learning that a friend or loved one has been exposed to violence, is associated with increased negative mental health outcomes, including PTSD and clinical depression.

Studies have established the psychological effect of mass shootings on survivors and their communities. This includes diagnoses of PTSD among elementary school students and their parents following the 1988 mass shooting at an elementary school in Winnetka, Illinois, and PTSD and major depression among survivors of the 1991 mass shooting at a Luby’s Cafeteria in Killeen, Texas. More recently, a study found that two weeks after shootings at Virginia Tech in 2007 and Northern Illinois University in 2008, seventy-one percent of the students at those campuses showed symptoms of major depression and sixty-four percent exhibited symptoms of PTSD. Mass shootings are found to have a

34 Sarah R. Lowe et al., Trauma as a Public Health Issue: Epidemiology of Trauma and Trauma-Related Disorder, in EVIDENCE BASED TREATMENTS FOR TRAUMA-RELATED PSYCHOLOGICAL DISORDERS: A PRACTICAL GUIDE FOR CLINICIANS 11, 27, 34 (Ulrich Schnyder & Marylene Clotire eds., 2013); see also, e.g., Karen Slovak & Mark Singer, Gun Violence Exposure and Trauma Among Rural Youth, 16 VIOLENCE & VICTIMS 389, 396 (2001).
37 Carol S. North et al., Posttraumatic Stress Disorder in Survivors of a Mass Shooting, 151 AM. J. PSYCHIATRY 82, 87–88 (1994); Carol S. North et al., One-Year Follow-Up of Survivors of a Mass Shooting, 154 AM. J. PSYCHIATRY 1696, 1701 (1997); see also Robert Pynoos et al., Life Threat and Posttraumatic Stress in School-Age Children, 44 ARCHIVE GEN. PSYCHIATRY 1057, 1061 (1987); Kathi Nader et al., Children's PTSD Reactions One Year After a Sniper Attack at Their School, 147 AM. J. PSYCHIATRY 1526, 1526 (1990).
40 Amanda M. Vicary & R. Chris Fraley, Student Reactions to the Shootings at Virginia Tech and Northern Illinois University: Does Sharing Grief and Support over the Internet Affect Recovery?, 36 PERSONALITY & SOC. PSYCH. BULL. 1555, 1558 (2010); see also Joseph R. Bardeen
particularly destabilizing effect on young people with a history of trauma.41

Even indirect exposure to violence can have severe mental health consequences,42 particularly for children, who may be affected by intentional harm inflicted upon others, even if they are not physically present.43 Indeed, “children who are exposed to violence [often] undergo lasting physical, mental, and emotional harm. They suffer from difficulties with attachment, regressive behavior, anxiety and depression, and aggression and conduct problems.”44

School shootings may result in a generalized fear of school45 — which most children are nonetheless required to attend. After the 1999 Columbine High School shooting, a study of students aged twelve to eighteen found small but measurable increased fear of victimization at schools nationwide.46 One researcher elaborated:

Following a school shooting, the illusion of safety within which children have lived their lives becomes unmasked with a new sense of fragility and vulnerability. Children will manifest a stress response characterized by anxiety; fear; feelings of helplessness; mood, anxiety, and behavioral symptoms; and somatic complaints. Many will experience acute stress reactions including recurring intrusive thoughts, images, nightmares, strong emotions, and avoidance of reminders. Children may also experience social withdrawal, hyperarousal symptoms (e.g., hypervigilance, startle reactions), sleep disturbances, irritability, and difficulty concentrating.47

Constant mass-media coverage and social media activity on school shootings magnifies the harm. After the Virginia Tech shooting, students at other universities who followed news coverage of the shooting

42 See, e.g., Christine A. Henriksen et al., The Psychological Impact of Terrorist Attacks: Examining a Dose-Response Relationship Between Exposure to 9/11 and Axis I Mental Disorders, 27 DEPRESSION & ANXIETY 993, 996 (2010).
43 DAVID FINKELHOR ET AL., U.S. DEP’T JUST., OFF. JUV. JUST. & DELINQUENCY PREVENTION, CHILDREN’S EXPOSURE TO VIOLENCE: A COMPREHENSIVE NATIONAL SURVEY (2 ed. 2009).
44 Id.
45 Glenn W. Muschert et al., The Columbine Effect, in RESPONDING TO SCHOOL VIOLENCE 1, 1 (Glenn W. Muschert et al. eds., 2014).
experienced increased symptoms of acute stress. These included “intrusive thoughts, sleep disturbance, distraction, fear, stomach upset, depression, disorganization, replaying of the event, and symptoms of anger.”

Following school shootings, government responses are often timid and fraught with unintended consequences. An increasing number of students across the country are required to take part in mandatory active shooter drills, which parents, teachers, and children describe as “somewhere between upsetting and traumatizing.” Schools and school districts implement these with varying degrees of realism. Some schools have students barricade themselves in locked classrooms, silently huddled under desks while an administrator jiggles door handles to simulate the attacker trying to enter the classroom. Other schools take simulations to extreme levels to make the situation as realistic as possible, including having individuals act “as ‘perpetrators’ wearing black face masks, shooting off blanks that simulate gunshots, stalking students and ‘shooting’ them with air guns to create victims with fake blood.” Students are often uncertain whether what is happening is a drill or a

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49 Id. at 227.
50 See, e.g., Allen Rostron, A New State Ice Age for Gun Policy, 10 HARV. L. & POL’Y REV. 327, 328–35 (2016) (describing congressional roadblocks to action by the Obama Administration).
51 See, e.g., Lynn A. Addington, Surveillance and Security Approaches Across Public School Levels, in RESPONDING TO SCHOOL VIOLENCE, supra note 45, at 71, 83; Aviva M. Rich-Sha & James Alan Fox, Zero-Tolerance Policies, in RESPONDING TO SCHOOL VIOLENCE, supra note 45, at 89, 90; see also Valerie Steeves & Gary T. Marx, Safe Schools Initiatives, and the Shifting Climate of Trust, in RESPONDING TO SCHOOL VIOLENCE, supra note 45, at 105–06.
55 Leefeldt, supra note 54.
real actual active shooter situation. Not only are the drills’ effectiveness unproven, but they also remind children that someone might suddenly try to kill them at school.

II. BUT DOES THIS SUFFERING REALLY AMOUNT TO TORTURE OR ILL-TREATMENT?

Indeed, it does. It may not qualify as torture, under Article 1 of the Torture Convention, because that provision requires not only that the act causes severe pain and suffering but also that it is intentionally inflicted for a specific purpose (such as coercing a confession) by or at the instigation of or with the consent or acquiescence of a public official. Article 16 of the Convention, however, seems apt. This provision requires states parties to “prevent . . . other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture . . . 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.” Pain or suffering can be “physical or mental,” and the CAT has affirmed that “anguish and distress,” particularly when met with indifference by authorities to assist or reduce the harm, can amount to an Article 16 violation. Moreover, the CAT defines the victim of an act of torture or ill-treatment as “persons who have individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of

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56 See, e.g., Phillip Timothy, Next Week, My School Will Have an “Active Shooter” Drill. Here’s What I’ll Be Thinking., HUFFINGTON POST (Feb. 19, 2018), https://www.huffingtonpost.com/entry/teacher-active-shooter-drill_us_5a862079e1b0c860a9426873 [https://perma.cc/FHJ4-R68].
58 Hamblin, supra note 53.
59 Torture Convention, supra note 5. Even if the “severe pain and suffering” threshold, id., were achieved, most mass shooters are nonstate actors who are not acting with the tolerance or acquiescence of the government and do not typically shoot people to extract a confession or coerce their schoolmates and teachers into doing something. Moreover, the physiological trauma caused by the shooting is not “intentional” as the word is commonly interpreted in the context of Article 1. See, e.g., Oona A. Hathaway et al., Tortured Reason: The Intent to Torture Under International and Domestic Law, 52 Va. J. INT’L L. 791, 823–29 (2012).
60 Torture Convention, supra note 5, art. 16, ¶ 1 (emphasis added).
61 Id. art. 1; see also Manfred Nowak, What Practices Constitute Torture? U.S. and U.N. Standards, 28 HUM. RTS. Q. 809, 830 (2006) (explaining that requirement of a specific purpose is the most decisive criteria distinguishing torture from cruel or inhuman treatment, as well as the powerlessness of the victim).
their fundamental rights, through acts or omissions that constitute violations of the Convention.63

Although the United States deposited a much-criticized reservation64 stating that its obligation of prevention is limited to ill-treatment amounting to “the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments,”65 it is not immediately apparent what impact that reservation might have, given the different contexts (civil and criminal) in which those constitutional amendments apply and the dearth of case law in the United States interpreting the reservation. In any event, the U.S. reservation would not change the definition of ill-treatment under international law,66 although it could make litigation in U.S. courts, already challenging due to the non-self-executing nature of UNCAT, even more difficult.67

The Torture Convention imposes a negative obligation on states parties not to commit torture and ill-treatment as well as a positive obligation to prevent ill-treatment.68 The obligation to prevent is expansive, and may require legislation, regulation, and effective enforcement.69 States parties are obligated to “eliminate any legal or other obstacles that impede the eradication” of ill-treatment and “take positive effective measures to ensure that such conduct and any recurrences thereof are effectively prevented.”70 In the United States, such measures

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67 But see Catherine Powell, Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States, 150 U. PA. L. REV. 245 (2001); Peter J. Spiro, The States and International Human Rights, 66 FORDHAM L. REV. 567 (1997). Additionally, to the extent that the UNCAT definition represents customary international law, it might be possible to use it in an action under the Alien Tort Statute.
68 Torture Convention, supra note 5, art. 2.
69 Measures to prevent torture must also be applied to prevent ill-treatment as these are “indivisible, interdependent, and interrelated. The obligation to prevent ill-treatment in practice overlaps with and is largely congruent with the obligation to prevent torture.” Comm. Against Torture, supra note 6, ¶ 3.
70 Id. ¶ 4.
would, at a minimum, include reasonable legislative measures to reduce gun violence. Yet neither the federal government nor most states have done so.

Although virtually all school shootings are carried out by private, nonstate actors,\footnote{\textit{CDC Reporting System}, supra note 2.} the obligation to prevent ill-treatment includes preventing violations committed by private persons or nonstate actors.\footnote{See, e.g., Hajrizi Dzemaj et al. v. Yugoslavia, Decisions Comm. Against Torture, Complaint No. 161/2000, ¶ 9.6, U.N. Doc. CAT/C/29/D/161/2000 (Dec. 2, 2000); see also Comm. Against Torture, Observations of the Committee Against Torture on the Revision of the United Nations Standard Minimum Rules for the Treatment of Prisoners (SMR), ¶ 6, U.N. Doc. CAT/C/51/4, (Dec. 16, 2013).} In the view of the CAT, the state’s failure “to exercise due diligence to intervene [and] stop” torture facilitates and enables nonstate actors to commit acts impermissible under the Convention with impunity, and, as such, “the State’s indifference or inaction provides a form of encouragement and/or de facto permission,” triggering a violation of UNCAT.\footnote{Comm. Against Torture, \textit{supra} note 6, ¶ 18.} This is particularly true when the state knows or ought to know that a person is at risk of impermissible violence by a nonstate actor and fails to take reasonable protective measures.

Because children are especially vulnerable and powerless, must attend school by law (and have a human right to do so), and mostly attend public schools funded and controlled by state and local governments, the state owes them a special duty of care. The CAT has emphasized states’ obligation to prohibit, prevent, and redress ill-treatment “in all contexts of custody or control, for example, in . . . schools, institutions that engage in the care of children . . . and other institutions as well as contexts where the failure of the state to intervene encourages and enhances the danger of privately inflicted harm.”\footnote{\textit{Id.} ¶ 15 (emphasis added); see also Larez v. Bolivarian Republic of Venezuela, Decisions Comm. Against Torture, Communication No. 456/2011, ¶ 6.10, U.N. Doc. CAT/C/54/D/456/2011 (June 26, 2015).} UNCAT also requires states to ensure that victims of both torture and ill-treatment obtain full and effective redress,\footnote{Dzemaj, Complaint No. 161/2000, ¶ 9.6.} including “guarantees of non-repetition,”\footnote{Torture Convention, \textit{supra} note 5, art. 14; Comm. Against Torture, \textit{supra} note 63, ¶ 6.} requiring the U.S. to “review[] and reform[] laws contributing to or allowing torture or ill-treatment.”\footnote{Comm. Against Torture, \textit{supra} note 63, ¶ 8.} By refusing to adopt reasonable legislation to reduce the likelihood of future school shootings, the United States is failing to fulfill the redress obligation.\footnote{A state’s obligation to provide redress to victims of ill-treatment remains even if a nonstate actor causes the ill-treatment. \textit{Id.} ¶ 7.}

The United States also cannot hide behind its federal structure as an excuse for nonperformance, particularly given the fact that at least some
regulation at the federal level is clearly constitutional, even after District of Columbia v. Heller.\textsuperscript{79} Treaties must be performed in good faith,\textsuperscript{80} and difficulties presented by a state’s municipal law cannot justify nonperformance.\textsuperscript{81} Although the U.S. instrument of ratification includes a declaration regarding implementation of UNCAT in light of the U.S. federal system, it was not included to suggest that the United States would not comply with the treaty but that there might be structural impediments to certain kinds of actions under U.S. law.\textsuperscript{82}

In addition to action under the Torture Convention, other U.N. treaty bodies and the U.N. High Commissioner for Human Rights have raised concerns about U.S. gun violence, although not the specific concerns raised by this Essay. Following the most recent Periodic Review of the United States by the U.N. Human Rights Council, the U.N. High Commissioner for Human Rights requested the United States to “implement[] effective measures to curb gun violence and to strengthen firearm control measures, including through improving and expanding the background check system for private firearm transfers and the periodic review of licenses.”\textsuperscript{83} Likewise, the U.N. Human Rights Committee has found that “the obligation [of the United States] to effectively protect [human rights] also requires efforts to curb violence that include the continued pursuit of legislation requiring background checks for all private firearm transfers.”\textsuperscript{84} Finally, the Inter-American Commission on Human Rights has asked the United States to redress gun violence in recent years.\textsuperscript{85}

\textsuperscript{79} 554 U.S. 570 (2008); see also Sadat & George, supra note 6, at 29–36.
\textsuperscript{81} VCLT, supra note 80, art. 27.
CONCLUSION: WHERE DO WE GO FROM HERE?

The trauma inflicted upon America’s schoolchildren resulting from their exposure to mass violence and the often nonexistent (or harmful) legislative responses to the problem has resulted in severe emotional and clinically observable harm. School shootings cause severe physical and mental injury and emotional suffering to those directly and indirectly involved. Given that nearly three million children in the United States witness a shooting each year,86 many in their schools, the refusal of lawmakers to adopt reasonable gun safety laws, and to subject them to traumatizing active shooter drills and other counterproductive measures, is exposing America’s children to unacceptable — and unlawful — levels of societal violence.

The decision of U.S. lawmakers not to adopt measures properly tailored to protect schoolchildren is tantamount to a decision to violate their human rights.87 Of course, this is true across a wide range of populations and for a variety of human rights. School shootings do not represent the largest number of deaths from gun violence in America, but their impact on American schoolchildren has the potential to permanently scar a generation — and they are becoming increasingly frequent and deadly. The pitiful spectacle of politicians offering “thoughts and prayers”88 as kids are buried is lamentable — and an abdication of their oath of office. Children have a fundamental human right not to suffer ill-treatment in school. America’s adults are failing them.


87 Sadat & George, *supra* note 6, at 4.