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STATEMENT OF INTEREST

Amici are professors of international law, constitutional law, criminal law, and immigration law.¹ The issues raised in this appeal concerning the definition of “torture” under the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (hereinafter, “Convention Against Torture” or “CAT”) involve areas within their respective areas of expertise. The amici are interested in having “torture” defined in a broad manner that advances the humanitarian purposes of the CAT.

To that end, the amici seek to inform the Court of principles of customary and international law, and of constitutional and criminal law involving similar concepts of “specific intent,” that are relevant to the issues pending in this case. These principles demonstrate that the exceedingly narrow definition of “torture” adopted by the Board of Immigration Appeals has no basis in law and should be rejected.

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INTRODUCTION

1. For more than a decade, the United States has been a party to the Convention Against Torture. *See* S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 (hereinafter cited as “CAT”).² Article 3 of the Convention flatly provides that “[n]o State party shall expel, return (*‘refouler’*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” CAT, Art. 3(1). In light of the Convention and the implementing U.S. laws, it is clearly “the policy of the United States not to expel, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture.” Pub. L. No. 105-277, § 2242, Div. G, 112 Stat. 2681-2761 (Oct. 21, 1998) (codified as note to 8 U.S.C. § 1231).

Article 1 of the Convention defines “torture” expansively. The definition includes “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person” in official custody, for certain prohibited

² President Ronald Reagan signed the Convention on April 18, 1988, and the Senate approved the Convention two years later with certain “reservations” and “understandings” proposed by President Reagan and President George H.W. Bush. *See* 136 Cong. Rec. S17,486, S17,491-92 (daily ed. Oct. 27, 1990). The United States became a party to the Convention on October 21, 1994, when President Bill Clinton deposited the instrument of ratification with the United Nations. *See* 1830 U.N.T.S. 320 (1994). Congress enacted the necessary implementing legislation in 1998. *See* Foreign Affairs Reform and Restructuring Act (“FARRA”), Pub. L. No. 105-227, Div. G, Tit. XXII, § 2242, 112 Stat. 2681 (codified as note to 8 U.S.C. § 1231); *see also* 18 U.S.C. § 2340-2340A (making torture a crime under federal law). The Immigration and Naturalization Service (“INS”) issued regulations implementing the Convention and FARRA. These regulations are codified at 8 C.F.R. § 208.18.

purposes, by or with “the consent or acquiescence of a public official or other person acting in an official capacity.” CAT, Art. 1(1).³ The definition is subject to a limitation reflected in one of the “understandings” adopted by the Senate along with the Convention: “in order to constitute torture, an act must be *specifically intended* to inflict severe physical or mental pain or suffering.”⁴ 136 Cong. Rec. S17,486, S17,491-92 (emphasis added). Thus, physical or mental harm must have been (1) “intentionally inflicted” *and* (2) “specifically intended” to result in severe pain or suffering in order to qualify as torture.

2. This case presents a question of vital importance to the implementation of the Convention – namely, the proper meaning of the “specifically intended” limitation on the definition of “torture.”

In a controversial 2002 ruling, the Board of Immigration Appeals (“Board” or “BIA”) construed the “specifically intended” limitation in a manner that restricts

³ See also 8 C.F.R. § 208.18(a) (incorporating Article 1’s definition of torture, “subject to the reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention”). To constitute “torture,” severe pain or suffering must not be imposed as “lawful sanctions” or an incident thereof. CAT, Art. 1(1). Instead, the pain or suffering must have been inflicted “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 committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based upon discrimination of any kind.” *Id.*; see also 8 C.F.R. § 208.18(a)(1) (listing the qualifying “purposes”); *id.* § 208.18(a)(3) (exempting “lawful sanctions” from definition of torture).

⁴ The INS regulations incorporate the “specifically intended” requirement as follows: “In order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering. An act that results in unanticipated or unintended severity of pain and suffering is not torture.” 8 C.F.R. § 208.18(a)(5). Although Article 1 and implementing U.S. laws refer only to acts and not to omissions.

legal protections against deportation or removal to countries that practice torture. Looking to the common law distinction between “general intent” and “specific intent,” the BIA found it “clear” that the “specifically intended” limitation “is a ‘specific intent’ requirement, not a ‘general intent’ requirement.” *In re J-E-*, 23 I. & N. Dec. 291, 301 (B.I.A. 2002).

Having decided that “specific intent” is required for the infliction of pain to constitute torture, the Board turned to the meaning of “specific intent.” The Board ruled that “specific intent” requires “the ‘intent to accomplish the precise criminal act that one is later charged with’ while ‘general intent’ commonly ‘takes the form of recklessness . . . or negligence.’” *Id.* (quoting BLACK’S LAW DICTIONARY 813-14 (7th ed. 1999)). Absent “the specific intent to inflict severe physical or mental pain or suffering,” the Board refuses to treat the intentional infliction of pain and suffering as torture – no matter how outrageous or likely to result in severe pain or suffering. *Id.* at 300.

3. In the decision below, the BIA applied this precedent to allow petitioner Emmanuel Dalegrand to be deported to Haiti despite the harsh conditions that await him in the jails of that country. The grim fate that awaits Mr. Dalegrand if he is deported to Haiti is obvious from this Court’s prior cases.

In *Auguste v. Ridge*, this Court gave the following description of the “brutal and harsh conditions that exist in the Haitian prison system”:

The prison population is held in cells that are so tiny that prisoners must sleep sitting or standing up, and in which temperatures can reach as high as 105 degrees Fahrenheit during the day. . . . Prisoners are occasionally permitted out of their cells for a duration of about five minutes every two or three days. Because cells lack basic sanitation facilities, *prisoners are provided with buckets or plastic bags in which to urinate and defecate*; the bags are often not collected for days and spill onto the floor, leaving the floors covered with urine and feces. There are also indications that *prison authorities provide little or no food or water*, and malnutrition and starvation is a continuous problem. *Nor is medical treatment provided to prisoners*, who suffer from a host of diseases including tuberculosis, HIV/AIDS, and Beri-Beri, a life-threatening disease caused by malnutrition.

395 F.3d at 129 (emphasis added). These inhumane conditions, as this Court has noted, are reminiscent of the infamous “slave ship[s]” that brought Africans in bondage to this country during the slave trade. *Lavira v. Attorney General*, 478 F.3d 158, 170 (3d Cir. 2007).

Mr. Dalegrand argued that to deport him to Haiti under these conditions would likely result in “torture” within the meaning of the Convention. The policy of the Haitian government is to detain indefinitely in prison Haitian citizens who are deported from other countries after conviction of crimes abroad; other Haitian deportees can be released, but *only* if they have relatives who can bail them out of prison. Individuals who are eligible for bail but have no one in Haiti to post bail for them are detained in the squalid Haitian prisons indefinitely.

Moreover, Mr. Dalegrand has serious medical needs that will go untreated in a Haitian prison. He suffers from a psychotic condition that is currently controlled

by medication. Haitian prison officials, however, do not provide medications or any form of medical treatment for their prisoners – and Mr. Dalegrand has no relatives or friends in Haiti who can procure the medications he so desperately needs or bring him food and water to avoid starvation on the meager rations supplied by Haitian prisons.

Without his medication, he is gravely at risk of relapsing into a psychotic break. Though unfortunate in its own right, the situation is even *worse* given the well-known propensity of Haitian prison officials to beat prisoners they regard as uncooperative. The “most common” form of abuse by Haitian jailers involves “[b]eatings with fists, sticks, and belts.” *Francois v. Ashcroft*, 343 F. Supp.2d 327, 329 (D.N.J. 2004) (citing State Department country report), *aff’d sub nom. Francois v. Gonzales*, 448 F.3d 645 (3d Cir. 2006). Prison guards, however, frequently resort to even more barbarous tactics. As this Court has noted, there have been reports of Haitian prisoners being “torture[d] by electric shock, as well as instances in which inmates were burned with cigarettes, choked, or were [sic] severely boxed in the ears, causing ear damage.” *Auguste*, 395 F.3d at 129 (citing State Department country reports).

Nevertheless, the BIA ruled that the indefinite detention and denial of medical care Mr. Dalegrand faces if deported to Haiti do not constitute torture. Although they would very likely result in severe pain or suffering, those harms

would not be “specifically intended” by his Haitian jailors – just a byproduct of detention in the jails of a seriously impoverished country. Therefore, absent relief from this Court, Mr. Dalegrand will be deported to Haiti and forced to suffer indefinite detention and a serious deterioration of his mental condition.

SUMMARY OF ARGUMENT

For two reasons, this Court should reverse the BIA’s deportation order, which rests on an unduly restrictive definition of “torture” under the Convention:

First, the BIA erred in imposing heightened “specific intent” requirements. Although this Court has endorsed the idea of looking to criminal law standards to give meaning to the “specifically intended” limitation on the definition of torture, *see Auguste v. Ridge*, 395 F.3d 123, 145-46 (3d Cir. 2005), it has not endorsed the sweeping notion, adopted by the BIA, that mistreatment cannot constitute torture unless the actual purpose of the mistreatment was to inflict severe pain or suffering. To the contrary, this Court has *rejected* that notion, ruling that torture can be shown when foreign officials are aware of a high likelihood that their acts or omissions will result in severe pain or suffering for the deportee. *See, e.g., Lavira v. Attorney General*, 478 F.3d 158, 171 (3d Cir. 2007)

This ruling is consistent with the broad humanitarian purposes of the Convention and customary international law and with the Eighth Amendment. As several international tribunals have ruled, cramped definitions of torture, such as the

BIA's, have no place in this area: an intentional act undertaken with the knowledge that it is very likely to cause extreme pain or suffering can constitute torture, no less that acts undertaken for the sadistic purpose of causing severe pain or suffering. Consistent with this approach, Eighth Amendment precedents have long recognized that deliberate indifference by prison officials to serious health and safety risks facing inmates can constitute "cruel and unusual punishment" even if prison officials did not specifically desire that inmates be harmed. *See, e.g., Farmer v. Brennan*, 511 U.S. 825, 842 (1994).

Second, the Board has misapplied the common law definition of "specific intent" crimes. After having adopted the criminal law's definition of "specific intent" in *In re J-E-*, the Board proceeded to mangle the notion of "specific intent." The Board purported to derive from the common law a rule that "specific intent" requires actual purpose to cause the prohibited result (here, severe pain or suffering), yet the common law of crimes clearly recognized lesser forms of "specific intent," including awareness that a prohibited result, though not specifically desired, is highly likely to result from the actor's conduct.

Accordingly, the decision below should be reversed.

ARGUMENT

In this Circuit, "specific intent" is required in order to make out a valid claim of "torture" under the Convention Against Torture and implementing U.S. laws

and regulations. This Court held as much in *Auguste v. Ridge*, concluding that both the Senate understanding and 8 C.F.R. § 208.18(a)(5) make a showing of “specific intent” a necessary element of a claim of “torture.”⁵ See 395 F.3d at 139-42. As long as *Auguste* remains the law of this Circuit, the pain or suffering inflicted on deportees must have been “specifically intended.”⁶

The question this case presents, and that several post-*Auguste* cases have presented, is the *meaning* of the “specific intent” requirement.

The BIA adheres to a stringent definition of “specific intent” that makes it needlessly difficult for persons to avoid deportation to the ordeals of Haitian jails. Under the BIA’s stringent “specific intent” standard, the serious harms and deprivations that are inflicted on deportees in Haitian jails do not qualify as “torture” unless Haitian officials actually desired that those health and safety risks

⁵ In its resolution approving the Convention, the Senate conditioned its approval on the “understand[ing] that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering.” See 136 Cong. Rec. S17,486, S17,491-92 (daily ed. Oct. 27, 1990). Similarly, the implementing regulations include the following proviso: “In order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering.” 8 C.F.R. § 208.18(a)(5). These are the sources on which *Auguste* grounded the “specific intent” requirement. Note that the “specific intent” requirement does *not* emanate from the separate requirement that suffering has to be “intentionally inflicted” in order to qualify as torture. 8 C.F.R. § 208.18(a)(1). As this Court has explained: “Although the regulations require that severe pain or suffering be ‘intentionally inflicted,’ we do not interpret this as a ‘specific intent’ requirement. Rather, we conclude that the Convention simply excludes pain or suffering that is the unintended consequence of an intentional act.” *Zubeda v. Ashcroft*, 333 F.3d 463, 473 (3d Cir. 2003). The “intentional infliction” requirement, in other words, merely serves to “distinguish[] between suffering that is the accidental result of an intended act, and suffering that is purposefully inflicted or the foreseeable consequence of deliberate conduct.” *Id.*

⁶ Several other Circuits have rejected the restrictive BIA interpretation upheld in *Auguste*. See, e.g., *Azanor v. Ashcroft*, 364 F.3d 1013, 1020 (9th Cir. 2004); *Cadet v. Bulger*, 377 F.3d 1173, 1194-1195 (11th Cir. 2004).

would result in severe pain and suffering by deportees. In *In re J-E*, the Board suggested that the harsh conditions in Haitian prisons cannot be considered “torture” because those conditions “are the result of budgetary and management problems as well as the country’s severe economic difficulties.” 23 I. & N. Dec. at 301. On this view, only a sadistic purpose to inflict severe pain or suffering can constitute torture – a standard that will be exceedingly difficult for deportees to satisfy even in a country like Haiti.

This Court should reject the BIA’s unduly narrow concept of “specific intent.” Simply put, that cramped understanding of “specific intent” cannot be reconciled with the law of this Circuit, which has properly adopted a considerably broader definition of “specific intent.” The BIA’s definition, moreover, is narrower than the international law definition of “torture” and reminiscent of the Bush Administration’s infamous “torture memorandum” – which has been withdrawn in favor of a more expansive definition of “torture.” Furthermore, the strict definition of “specific intent,” although purportedly based on common law meaning, is actually more restrictive than the “specific intent” required in U.S. criminal law and under Eighth Amendment standards of “cruel and unusual punishment.” The Board’s narrow definition of “specific intent” should be rejected.

I. THIS COURT HAS REPEATEDLY REJECTED HEIGHTENED “SPECIFIC INTENT” STANDARDS UNDER THE CONVENTION AGAINST TORTURE.

The law of this Circuit leaves no room for doubt that specific intent encompasses more than a sadistic intent to inflict severe bodily or emotional harm. Even if pain and suffering was not the conscious objective of a foreign official, “torture” results, within the meaning of the Convention and implementing U.S. laws, if the official intentionally acts (or fails to act), with the knowledge that severe pain or suffering is highly likely to result from his act or omission. The Board’s interpretation of “specific intent” is irreconcilable with this Court’s case law.

1. For proof, the Court need look no farther than its decision earlier this year in *Lavira v. Attorney General*, 478 F.2d 158 (3d Cir. 2007). *Lavira*, the Court’s most recent pronouncement in this area, unequivocally rejects the notion that only a sadistic purpose to inflict pain or suffering qualifies as “specific intent.”

Like the present case, *Lavira* involved a Haitian facing deportation to the prisons of his native land. The deportee claimed that it would violate the Convention to deport him: in Haiti, Lavira would have been indefinitely detained in prison, where he would not only face inhumane conditions but be denied medical treatment and medication for his HIV/AIDS and face hardship due to a

permanent physical disability (a leg amputation that left him wheelchair-bound).⁷ *Id.* at 163. Under these circumstances, he argued, deporting him to Haiti would likely result in “torture.”

The BIA rejected the claim for lack of “specific intent.” The many hardships Lavira would experience in prison “are not the result of specific intent to cause torture, but rather a result of the general climate in Haiti, the lack of funding.” *Id.* at 164 (quoting BIA decision).

This Court reversed the BIA. Although *Auguste* “firmly established specific intent as the appropriate standard,” the *Lavira* Court ruled that the BIA’s understanding of “specific intent” was too narrow. *Id.* at 168. “Specific intent” does not require “intent to torture”: “A showing of an intent to inflict severe pain and suffering was what the Convention required.”⁸ *Id.* at 169 n.8.

Moreover, the Court found no basis for a *per se* rule that prison conditions can never result in torture. Indeed, such a rule was specifically disclaimed in *Auguste* itself. *Id.* at 169. Even if prison conditions, as a general matter, do not result in torture, torture *can* result where the deportee possesses “characteristics or qualities unique to his situation” – such as HIV/AIDS or a physical disability – that

⁷ Under Haitian law, deportees who are returned to Haiti after having been convicted of a crime abroad are subject to indefinite preventative detention. Haitian prisons also do not provide health care or medications for inmates. *See, e.g., Auguste*, 395 F.3d at 129.

⁸ *See also, e.g., Auguste*, 395 F.3d at 146 (rejecting the “intent to torture” standard).

exposes the deportee to more severe pain or suffering than other prisoners.⁹ *Id.* at 169. This was precisely the situation in *Lavira*: “Severe pain is not ‘a’ possible consequence that ‘may result’ from placing Lavira in the facility, it is the only possible consequence given what Haitian officials know about Lavira and about their own facility. *Id.* at 170.

The incompatibility between the definitions of “specific intent” advanced by this Court and the BIA in *Lavira* could not be clearer. Although “specific intent” to cause pain or suffering certainly *includes* the sadism the BIA had in mind, it is *not limited* to the sadistic. Rather, it also includes pain and suffering that, although not specifically desired by foreign officials, will necessarily result from the actions or omissions of those officials given what they know about the hazards their conduct entails. To proceed with an action or omission despite knowledge that doing so will cause another to suffer severe pain or suffering is more than “simple recklessness”; it is “deliberate indifference” or “willful blindness” to the welfare of others. *Id.* at 171. *Lavira* squarely holds that “a finding of specific intent *c[an]* be based on deliberate indifference or willful blindness.”¹⁰ *Id.* (emphasis added).

⁹ Torture can also result from prison conditions “if there is evidence that authorities are placing an individual in such conditions with the intent to inflict severe pain and suffering on that individual.” *Lavira*, 478 F.3d at 169 (quoting *Auguste*, 395 F.3d at 154).

¹⁰ As *Lavira* explained, “deliberate indifference” or “willful blindness” exists where an actor is “subjectively aware of the high probability of the fact in question” – here, that severe pain or suffering will result from his actions or omissions – “and not merely that a reasonable man would have been aware of the probability.” 478 F.3d at 171 (quoting *United States v. Caminos*, 770 F.2d 361, 365 (3d Cir. 1985)). Of course, where foreign officials are *not* actually aware of

The interpretation adopted in *Lavira* mandates reversal in this case. Mr. Dalegrand, like the petitioner in *Lavira*, does not simply complain of the abysmal conditions that, sadly, everyone in Haitian jails endures. Rather, he has proven that he has a serious mental condition, not shared by the prison population generally, that makes it highly likely – if not *certain* – that, for him, incarceration in Haiti will result in severe pain and suffering.

That Haitian officials may not desire that result is irrelevant. All that matters under *Lavira* is that, despite their knowledge of his serious mental health needs, he will be detained indefinitely in unsanitary conditions, without medication, while his severe mental disorder goes untreated. That deliberate indifference clearly constitutes “specific intent” within the meaning of the Convention and implementing U.S. laws.¹¹

2. The BIA’s strict definition of “specific intent” also runs afoul of *Zubeda v. Ashcroft*, 333 F.3d 463 (3rd Cir. 2003). In that case, a Congolese woman sought to avoid removal. During the vicious civil war in Congo, government forces and opposition groups alike used rape to terrorize civilians,

facts giving rise to the “high probability” of pain and suffering necessary for deliberate indifference, “specific intent” can exist under *Auguste* only if those officials were motivated by a sadistic purpose to cause pain and suffering. *See Lavira*, 478 F.3d at 169-71.

¹¹ This Court has likewise endorsed concepts of “willful blindness” and “deliberate indifference” in the context of the “acquiescence” prong of the definition of torture. *See generally* supra note 3. A government need not be actually aware that torture is being committed in order to be guilty of acquiescing in the torture. Rather, it is enough to “show[] that the government is willfully blind to [those] activities.” *Silva -Rengifo v. Attorney General*, 473 F.3d 58, 69 (3d Cir. 2007).

with women frequently being gang-raped in the presence of their relatives and taken prisoner to serve as sexual slaves. *Id.* at 467-68. Indeed, Zubeda and her mother had suffered this fate. *Id.* at 467.

The Immigration Judge ruled that the sending Zubeda back to Congo to face the risk of being raped by prison officials would result in torture. In so ruling, the judge found that “the Congolese government, through its security forces, are irresponsible as a whole and *have no regard for the well being nor [sic] the human rights of its citizens.*” *Id.* at 470 (emphasis added) (quoting the Immigration Judge). It was enough that, “given the atrocious history and present country conditions of the Congo,” Zubeda “ha[d] shown the likelihood of being physically abused, perhaps raped, which is almost *modus operandi*, while detained.” *Id.*

Incredibly, the BIA reversed that decision, but this Court reinstated it. The Court’s decision was emphatic: “Rape can constitute torture.” *Id.* at 472. That was particularly true in the case of Zubeda, who was raped in the presence of family members: “This record could support a finding that the conduct described in [Congo] was for the purpose of coercing and intimidating Zubeda and/or members of her family.”¹² *Id.* at 474.

¹² The inquiry into purpose was not to determine whether or not the soldiers practicing rape in Congo acted with “specific intent.” Rather, purpose is relevant because severe pain and suffering constitutes “torture” only if inflicted for certain prohibited purposes, such as discrimination or intimidation. *See supra* note 3 (quoting the relevant language from 8 C.F.R. § 208.18(a)(1)).

Under the Board’s strict definition of “specific intent,” even widespread, systematic use of rape by soldiers as a means of terrorizing civilians might not constitute torture. If a rapist did not actually intend to cause his victims to suffer severe pain and suffering as a result of the rape, “specific intent,” as the Board understands it, would not exist – which is, itself, reason enough to reject that understanding of “specific intent.”

Importantly, the *Zubeda* Court deemed it irrelevant that the rapist might have objectives other than the infliction of severe pain and suffering. What mattered is that the rapist intentionally performed an act – sexual assault – which is virtually certain to have “scarring effects” that “compare with ‘psychological sequelae of . . . survivors of abuse constituting torture under international law.’” *Id.* at 472 (quoting *Lopez-Galarza v. INS*, 99 F.3d 954, 963 (9th Cir. 1996)). Indeed, “requiring an alien to establish the specific intent of his/her attackers could impose insurmountable obstacles to affording the very protections the community of nations sought to guarantee under the Convention Against Torture.” *Id.* at 474.

Needless to say, the difficulty of proving subjective motivation is not accepted in this Circuit as grounds for dispensing with the requirement of “specific intent.”¹³ It does, however, militate in favor of recognizing “deliberate indifference” as an alternative means of proving “specific intent” – the step this

¹³ *Auguste* expressly holds that “specific intent” is required, and rejected as dicta any contrary suggestion in *Zubeda*. See *Auguste*, 395 F.3d at 146-48.

Court took in *Lavira*. Whether or not they actually intended that their victims would be “scarred” by the experience of being raped, the rapists in *Zubeda* clearly performed an intentional act (sexual assault) that was nearly certain to result in such scarring. The “specific intent” requirement demands no more.

II. THE BROAD HUMANITARIAN PURPOSES OF INTERNATIONAL AND DOMESTIC ANTI-TORTURE NORMS DEMAND A CONSIDERABLY BROADER DEFINITION OF “SPECIFIC INTENT” THAN THE BIA’S.

The holdings of this Court are correct in light of the broad humanitarian purposes of the Convention and other principles of customary international law. International human rights tribunals agree that torture can exist without a sadistic purpose to cause pain and suffering, and the Supreme Court has likewise held that deliberate indifference to the health or safety of prisoners violates the Eighth Amendment. The Bush Administration’s Office of Legal Counsel (“OLC”) originally disagreed, equating “specific intent” with sadistic purpose, but reversed course.¹⁴ It is improper for the BIA to continue enforcing a more stringent definition of “specific intent” that has been rejected in the international law and Eighth Amendment contexts and disavowed by the OLC.

A. International Human Rights Tribunals Have Ruled That Sadistic Purpose To Harm Is Not Necessary To Prove “Torture .”

¹⁴ Memorandum from Jay S. Bybee, Assistant Att’y Gen., U.S. Dep’t of Justice, to Alberto R. Gonzales, Counsel to the President (Aug.1, 2002), *superseded by* Memorandum of Daniel Levin, Acting Assistant Attorney General OLC to OLC Deputy Attorney General, James Comey, on Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A, *available at*: <http://www.usdoj.gov/olc/18usc23402340a2.htm> (*last accessed* Nov. 19, 2007).

The decisions of international tribunals hold, in agreement with this Court's precedent, that torture, as defined in the Convention and other anti-torture norms,¹⁵ does not require a sadistic purpose to inflict pain or suffering.

An example is the decision of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") in *Prosecutor v. Kunarac*, IT-96-23-T (ICTY Appeals Chamber June 12, 2002). That case involved a charge of torture based on rape. The defense argued that it could defend on the ground that "specific intent" was lacking because the accused committed the rape not to inflict pain or suffering, but rather to achieve sexual gratification. The ICTY disallowed the defense.

The ICTY's rationale closely tracked this Court's "willful blindness" or "deliberate indifference" reasoning in *Lavira* and *Zubeda*. The Tribunal held that "even if the perpetrator's motivation is entirely sexual, it does not follow that [he] does not have the intent to commit an act of torture or that his conduct does not cause severe pain or suffering, whether physical or mental." *Id.* at ¶ 153. This was so, the Tribunal added, because, regardless of what his subjective purpose was in

¹⁵ As the Supreme Court has noted: "Among the rights universally proclaimed by all nations . . . is the right to be free of physical torture." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004). Accordingly, the prohibition against torture has gained the status of a peremptory norm, or *jus cogens*. Several foreign tribunals have recognized as such. For example, the British House of Lords has ruled that "[t]he *jus cogens* nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed." *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte* (No. 3), judgment of 24 March 1999 [2000] Appeal Cases 147. The European Court of Human Rights agrees. See *Al-Adsani v. United Kingdom*, (Application no. 35763/97, 2001).

committing the rape, pain or suffering was a “logical consequence of his conduct.” *Id.* The fact that he chose to disregard the inherent likelihood that his victim would experience pain and suffering – far from being a defense – actually proved that he acted with deliberate indifference and thus “specific intent” to cause pain and suffering.

The Inter-American Commission on Human Rights reached a similar conclusion in *Luis Lizardo Cabrera v. Dominican Republic*, Case 10.832, Report No. 35/96, Inter-Am. C.H.R., Annual Report 1997, OEA/Ser.L/V/II.98 Doc. 6 rev. (1997).¹⁶ In that case, officials were charged with indefinitely detaining in solitary confinement a prisoner in poor health. The Commission ruled that it constituted torture to keep the prisoner in solitary confinement because, given the prisoner’s evident medical problems, solitary confinement “seriously endanger[ed]” his health. *Id.* ¶¶ 85(a), 86(b).

Critically, in *Lizardo Cabrera*, the Commission did not demand proof that the prison officials actually desired to cause the pain and suffering the prisoner was experiencing in solitary confinement by virtue of his health problems. All that mattered was that the jailers had remitted the prisoner to solitary confinement knowing that his health problems would likely be exacerbated there. The fact that they merely chose to allow their prisoner’s health to deteriorate in solitary

¹⁶ The Commission’s decision is available at <http://www.cidh.oas.org/annualrep/97eng/Dom.Rep.10832.htm> (last accessed Nov. 17 2007).

confinement, as opposed to specifically desiring that result, did not prevent their conduct from being condemned as “torture.”

As these decisions suggest, there is abundant support in international law for a broader definition of “torture” that can be satisfied even in the absence of sadistic intent to inflict pain and suffering. The BIA’s view that torture cannot exist absent such sadistic intent flies in the face of the humanitarian purposes of the Convention Against Torture and related international norms against torture .

B. Deliberate Indifference to the Safety and Medical Needs of Prisoners Violates the Eighth Amendment.

The approach taken in cases from this Court and international human rights tribunals defining “torture” is consistent with relevant Eighth Amendment principles. It makes sense to look to the Eighth Amendment for guidance in this case. After all, the “primary concern” behind the Cruel and Unusual Punishments Clause was to “proscribe ‘torture[s]’ and other barbar[ous]’ methods of punishment.”¹⁷ *Estelle v. Gamble*, 429 U.S. 97, 102 (1976).

Eighth Amendment precedents make it perfectly clear that deliberate indifference by prison guards to serious health and safety risks facing their

¹⁷ Cf. 8 C.F.R. § 208.18(a)(2) (providing that “[t]orture is an extreme form of cruel and inhuman treatment”). Of course, the Eighth Amendment does not merely forbid torture but also any form of mistreatment that violates “the evolving standards of decency that mark the progress of a civilized society.” *Trop v. Dulles*, 356 U.S. 86, 101 (1958). Nevertheless, in cases involving conduct serious enough to constitute *both* “torture” under international law and “cruel and unusual punishment” under the Eighth Amendment, decisions interpreting the Eighth Amendment may be a useful guide in addressing questions of first impression under international norms against torture.

prisoners is sufficient to establish a constitutional violation. A sadistic purpose to cause pain and suffering – recognized as a “very high state of mind,” *Wilson v. Seiter*, 501 U.S. 294, 302 (1991) – is only required when prison guards use physical force against prisoners. *See, e.g., Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992) (holding that uses of force by prison guards violate the Eighth Amendment only when engaged in “maliciously and sadistically to cause harm”). As for other forms of mistreatment in prison, a lesser standard of mental culpability – “deliberate indifference” – suffices to establish liability. *See, e.g., Estelle* 429 U.S. at 105 (adopting deliberate indifference as the standard governing when inadequate medical care for prisoners violates the Eighth Amendment).¹⁸

“Deliberate indifference” is less demanding than the sadistic purpose requirement but more demanding than a simple negligence standard. As the Supreme Court put it in *Farmer v. Brennan*, 511 U.S. 825 (1994), deliberate indifference requires “more than ordinary lack of due care for the prisoner’s interests or safety.” *Id.* at 835. Rather, it requires that “the official acted or failed to act despite his knowledge of a substantial risk of serious harm.”¹⁹ *Id.*

¹⁸ *See generally Wilson v. Seiter*, 501 U.S. at 303 (“Whether one characterizes the treatment received by [the prisoner] as inhumane conditions of confinement, failure to attend to his medical needs, or a combination of both, it is appropriate to apply the ‘deliberate indifference’ standard articulated in *Estelle*.”).

¹⁹ The *Farmer* Court added: a prison official, if guilty of deliberate indifference, “knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he

Courts have applied this standard to find liability in contexts that are similar to those presented in this case. For example, in *Farmer*, the Supreme Court ruled that it could constitute deliberate indifference for prison officials to fail to take steps to protect a prisoner from being raped when they know he has special characteristics that make him especially likely to be raped. *Id.* at 843-44. In *Madrid v. Gomez*, 889 F. Supp. 1146, 1266 (N.D. Cal. 1995), the court concluded that prison officials are guilty of deliberate indifference if they place mentally-ill inmates in solitary confinement, knowing that doing so will very likely render the inmates psychotic or provoke a preexisting mental illness. Thus, Eighth Amendment precedent points to the same result as do this Court's Convention cases and international human rights decisions – namely, in favor of allowing deliberate indifference to be used, in place of sadistic intent to cause pain, to establish entitlement to relief for serious health or safety risks facing prisoners behind bars.

C. **The Office of Legal Counsel Abandoned Its Unduly Narrow View of “Specific Intent” In Favor of a Broader Definition of “Torture.”**

The position of the government in this case is not only wrong under this Court's precedents and those of international human rights tribunals; it is positively ironic. The position the government defends in this case, ironically, is the same

must also draw the inference.” 511 U.S. at 837. The awareness of risk necessary for deliberate indifference can be inferred “from the very fact that the risk was obvious.” *Id.* at 842.

position that the Executive Branch recently *rejected* in the context of interrogation of “enemy combatants.” The government’s position here merits the same fate.

In its first “torture memorandum,” the Department of Justice’s Office of Legal Counsel (“OLC”) adopted an exceedingly narrow definition of “torture.” “Aggressive interrogation techniques,” opined OLC, do not constitute “torture” absent “specific intent” of the kind the BIA demands.²⁰ *See* Memorandum from Jay S. Bybee, Assistant Att’y Gen., U.S. Dep’t of Justice, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002) (opining that causing pain “must be the defendant’s *precise objective*”) (emphasis added). Absent a sadistic purpose to inflict pain and suffering, torture does not result, even if severe pain and suffering “is *certain* to occur.” *Id.* at 4 (emphasis added).

After unrelenting criticism of this reasoning from virtually every corner – including Capitol Hill, foreign nations, and the public – OLC withdrew the Bybee memorandum. The memorandum issued in its place in December 2004 by Daniel Levin rejected the notion that “specific intent” means a sadistic purpose to inflict pain :

In the August 2002 Memorandum, this Office concluded that the specific intent element of the statute [18 U.S.C. § 2340(1)] required that infliction of severe pain or suffering be the defendant’s “precise

²⁰ OLC was interpreting 18 U.S.C. § 2340(1), which supplies the definition of “torture” for criminal prosecutions pursuant to 18 U.S.C. § 2340A. Section 2340(1), like the “specifically intended” understanding passed by the Senate and 8 C.F.R. § 208.18(a)(5), states that an act must be “specifically intended to inflict severe physical or mental pain or suffering” in order to constitute “torture.” 18 U.S.C. § 2340(1).

objective” and that it was not enough that the defendant act with knowledge that such pain “was reasonably likely to result from his actions” (or even that that result “is certain to occur”). *We do not reiterate that test here.*²¹

Nor should this Court.

III. THE BIA’S HEIGHTENED “SPECIFIC INTENT” STANDARD CONTRAVENES THE VERY CRIMINAL LAW PRINCIPLES THE BOARD PURPORTED TO ADOPT IN *IN RE J-E*.

In *In re J-E*, the BIA ruled that the meaning of the “specific intent” requirement would be determined by reference to the familiar criminal law distinction between “general intent” and “specific intent” crimes. 23 I. & N. Dec. at 301[1]. Unfortunately, the BIA proceeded to oversimplify the distinction it imported into the Convention and the implementing regulations. As the Board would have it, “specific intent is defined as the intent to accomplish the precise criminal act that one is later charged with while general intent commonly takes the form of recklessness.” *Id.* Based on this simplified view of the common law, the BIA went on to hold that the “specific intent” required for a successful torture claim demands proof that the foreign official acted with sadistic intent to inflict pain and suffering.

The Board’s description of the distinction between “specific intent” crimes and “general intent” crimes is too simplistic. Far from being an easy distinction to

²¹ (Emphasis added.) The Levin memorandum is available at: <http://www.usdoj.gov/olc/18usc23402340a2.htm> (*last accessed* Nov. 19, 2007).

draw, that distinction is one of the most difficult to comprehend in the entire common law of crimes. As one scholar has noted: “The terms ‘specific intent’ and ‘general intent’ are the bane of criminal law students and lawyers. . . . [T]he concepts are so ‘notoriously difficult . . . to define and apply . . . [that] a number of text writers recommend that they be abandoned altogether.’” Joshua Dressler, *Understanding Criminal Law*, § 10.06, at 118 (Lexis 6th ed. 1995) (footnote omitted).²²

Although the Board was correct that intent (often referred to as “purpose”) was and is classified as “specific intent” under common law rules, it is incorrect to treat intent (or purpose) as the only standard of mental culpability that qualifies as “specific intent.” As a leading treatise explains: “the word ‘intent’ in the substantive criminal law has traditionally not been limited to the narrow, dictionary definition of purpose, aim, or design, but instead has often been viewed as encompassing much of what would ordinarily be described as knowledge.” 1 Wayne R. LaFare, *Substantive Criminal Law* § 5.2(e), at 354 (2d ed. 2003).

²² In fact, the drafters of the Model Penal Code went even farther, jettisoning not only the elusive distinction between “general intent” and “specific intent” crimes, but, with it, the entire common law vocabulary of mens rea. See MODEL PENAL CODE § 2.02, comment 1. One of the major insights of the Code was that the drafters reduced the lengthy catalog of mens rea terms used by common law judges – terms that all too often were not consistently applied across different crimes – to four carefully defined terms. These terms are, ranging from most to least culpable, “purpose,” “knowledge,” “recklessness,” and “negligence.” See generally *id.* § 2.02(2)(a)-(d) (defining these mens rea terms).

More to the point, in the case of crimes, like homicide, that require a particular result in order to be completed, specific intent to cause that result may exist even if the actor did not desire for that result to occur. The LaFave treatise is clear on this point:

With crimes which require that the defendant intentionally cause a specific result, what is meant by an “intention” to cause that result? Although the theorists have not always been in agreement . . . , the traditional view is that a person who acts . . . intends a result of his act . . . under two quite different circumstances: (1) when he consciously desires that result, whatever the likelihood of that result happening from his conduct; *and* (2) *when he knows that that result is practically certain to follow from his conduct, whatever his desire may be as to that result.*

LaFave, *Substantive Criminal Law* § 5.2(a), at 341 (emphasis added).²³

This more nuanced understanding of the common law distinction between “specific intent” and “general intent” crimes sheds new light on the proper definition of the “specific intent” requirement under the Convention Against Torture and implementing U.S. laws. Contrary to the Board’s view, “specific intent” – more specifically, “specific intent” to inflict severe pain or suffering – need not be shown by evidence that the official’s actual purpose or objective was to cause pain or suffering. What the BIA failed to realize is that knowledge also counts as “specific intent.” Therefore, an official who knew that an action or omission on his part would very likely result in pain or suffering yet proceeded to

²³ Tellingly, the Levin memorandum relied on this passage in rejecting the narrow definition of “specific intent” in the Bybee memo. *See supra* note 21.

commit that act or omission – an official, in other words, who was deliberately indifferent to the possibility of causing pain and suffering – has acted with “specific intent,” no less than the sadist who acted out of a desire to cause pain and suffering.

CONCLUSION

The BIA's heightened "specific intent" standard has no place under the Convention Against Torture. The only way to achieve the purposes of the Convention and of international law norms against torture is to hold that the requisite "specific intent" can be shown by knowledge of a high likelihood that severe mental or physical harm will result from official action, even if the officials involved did not specifically desire that the harm occur.

The decision below should be reversed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 20th day of November, 2007, I caused a copy of the foregoing ‘Brief of Amicus Curiae International Law, Constitutional Law, and Criminal Law Professors in Support of Petitioner’ to be served via U.S. mail, postage pre-paid, on each of the following:

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CERTIFICATE OF COMPLIANCE

I hereby certify in accordance with Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure that the opening Brief for Petitioner was prepared using Microsoft Word 2003 as the word processing program, that the brief was prepared in Times New Roman, a proportional font with 14-point type, that I have personally conducted a word and line count of the foregoing amicus brief using this feature of Word 2003 and that this count shows the total number of lines as 599 and the total number of words as 6,996 (including headings, footnotes and quotations). I certify that the total number of words is less than the 7,000 word limitation under Rule 29(d) of the Federal Rules of Appellate Procedure for amicus briefs.

I am aware that I am subject to punishment if I have made a false statement.

Stephen F. Smith

November 20, 2007