

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 Survivor¹

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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¹ Patricia Mazzei & Miriam Jordan, *"You Can't Put It Behind You": School Shootings Leave Long Trail of Trauma*, N.Y. TIMES (Mar. 28, 2019), <https://www.nytimes.com/2019/03/28/us/parkland-shooting-suicides-newtown-mental-health.html> [https://perma.cc/WS6F-5SLE].

² GUN VIOLENCE ARCHIVE (Mar. 12, 2022), <https://www.gunviolencearchive.org> [https://perma.cc/Y6WG-7M7G] (numbers include homicides, accidental deaths, and suicides); see also WISQARS™ — *Web-Based Injury Statistics Query and Reporting System*, CTR. FOR DISEASE CONTROL & PREVENTION (CDC) (Dec. 2, 2021), <https://www.cdc.gov/injury/wisqars/index.html> [https://perma.cc/8X58-JGJK] [hereinafter CDC Reporting System].

³ See generally Leila Nadya Sadat & Madaline M. George, *The U.S. Gun Violence Crisis: Human Rights Perspectives and Remedies* (Wash. Univ. in St. Louis Sch. of L. Legal Studs. Rsch. Paper Series, Paper No. 19-01-11, 2019), <https://ssrn.com/abstract=3317143> [https://perma.cc/PH4A-ZSSS].

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. SCIS., 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

⁵ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, T.I.A.S. No. 94-1120.1, 1465 U.N.T.S. 85 (entered into force for the United States Nov. 20, 1994) [hereinafter Torture Convention]. There are also provisions against torture in the International Covenant on Civil and Political Rights art. 7, Dec. 16, 1966, *opened for signature* Dec. 16, 1966, T.I.A.S. No. 92-908, 999 U.N.T.S. 171 (entered into force for the United States Sept. 8, 1992) [hereinafter ICCPR]; and G.A. Res. 217 (III) A, art. 5, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR]. For a comprehensive listing of international law instruments addressing torture and ill-treatment, see David Weissbrodt & Cheryl Heilman, *Defining Torture and Cruel, Inhuman, and Degrading Treatment*, 29 LAW & INEQ. 343 (2011). Children also have rights under the U.N. Convention on the Rights of the Child, Sept. 2, 1990, 1577 U.N.T.S. 3, a discussion of which is beyond the scope of this short contribution.

⁶ Committee against Torture, General Comment No. 2, Implementation of Article 2 by states parties, ¶¶ 1, 3, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008); *see also* Leila Nadya Sadat & Madaline M. George, *Gun Violence and Human Rights*, 60 WASH. U. J.L. & POL’Y 1, 60 n.360 (2019).

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 penalty¹⁰ and to protect victims of domestic violence,¹¹ 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 treaties¹² — 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.¹³ 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,¹⁴ and provoking a sustained public outcry and renewed demands for legislative

¹⁰ In *Michael Domingues v. United States*, Case 12.285, Inter-Am. Comm’n H.R., Report No. 62/02, OEA/Ser.L/V/II.117, doc. 5 rev. 1 (2002), the Inter-American Commission on Human Rights found that the United States violated a norm of international customary law in executing offenders under the age of eighteen at the time of their crime, noting that this practice was inconsistent with prevailing standards of decency. *Id.* ¶ 84. Three years later, the U.S. Supreme Court followed suit and declared the practice unconstitutional in *Roper v. Simmons*, 543 U.S. 551, 578 (2005). See also Raffaele Marchetti, *Advocacy Strategies for Human Rights: The Campaign for the Moratorium on the Death Penalty*, 46 ITALIAN POL. SCI. REV. 355 (2016); William A. Schabas, *International Law, Politics, Diplomacy and the Abolition of the Death Penalty*, 13 WM. & MARY BILL RTS. J. 417 (2004).

¹¹ *Jessica Lenahan (Gonzales) v. United States*, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11, ¶ 5 (2011) (finding the United States responsible under the American Declaration on the Rights and Duties of Man for human rights violations suffered by Lenahan and her children resulting from violence inflicted by her ex-husband, who was subject to a domestic violence restraining order that had not been enforced by local police). Lenahan brought her case in U.S. federal courts, but eventually lost in *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005). She then turned to the Inter-American Commission on Human Rights. Caroline Bettinger-Lopez, *Introduction: Jessica Lenahan (Gonzales) v. United States: Implementation, Litigation, and Mobilization Strategies*, 21 AM. U. J. GENDER SOC. POL’Y & L. 207, 219 (2012). One of the amici in the case argued that domestic violence was a form of torture. Brief Amici Curiae of the International Women’s Human Rights Law Clinic and the Center for Constitutional Rights in Support of Petitioners Respecting the Applicability of Torture, *Gonzales*, Case 12.626. This echoed an argument made nearly two decades earlier by Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291 (1994). See also Natalie R. Davidson, *The Feminist Expansion of the Prohibition of Torture: Towards a Post-liberal International Human Rights Law?*, 52 CORNELL INT’L L.J. 109, 116 (2019). See generally MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS* 165–98 (2014) (discussing transnational networks combatting violence against women).

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).

¹⁴ Robin Lindsay & Sarah Kerr, *Filming a Rampage: Students Capture Florida School Attack*, N.Y. TIMES (Feb. 14, 2018), <https://www.nytimes.com/video/us/10000005741335/florida-school-shooting.html> [https://perma.cc/YN8G-B72B].

action.¹⁵ Government authorities were unresponsive. The Florida legislature refused to consider an assault weapons ban just days after the shooting.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.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.¹⁸ President Donald Trump initially promised concrete action,¹⁹ but soon changed his mind after meeting privately with members of the National Rifle Association²⁰ (NRA). 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."²¹

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

¹⁵ Wesley Lowery, "No More Guns!": Florida Students Rally to Denounce Political Inaction After 17 Killed in School Shooting, WASH. POST (Feb. 17, 2018), <https://www.washingtonpost.com/news/post-nation/wp/2018/02/17/no-more-guns-florida-students-and-residents-rally-to-denounce-political-inaction-after-17-killed-in-school-shooting> [<https://perma.cc/G4W2-Y6NX>].

¹⁶ Merrit Kennedy, *Florida House Declines Debate on Assault Rifles, Calls Porn a "Health Risk,"* NPR (Feb. 21, 2018, 12:19 PM), <https://www.npr.org/sections/thetwo-way/2018/02/21/587548408/florida-house-declines-debate-on-assault-rifles-calls-porn-a-health-risk> [<https://perma.cc/R6V5-RDEN>]. Students in other states have also demanded stricter gun laws. See Jim McLean, *Despite Protests, Kansas Gun Control Efforts Stalled*, KCUR (Mar. 26, 2018, 2:25 PM), <http://kcur.org/post/despite-protests-kansas-gun-control-efforts-stalled#stream/o> [<https://perma.cc/4UKW-DYW7>].

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-p1-normal.gif> [<https://perma.cc/V574-BJLV>].

¹⁸ See Alexis Diao, *Parkland Students Return to School Skeptical of Clear Backpacks*, NPR (Apr. 3, 2018, 3:26 PM), <https://www.npr.org/sections/thetwo-way/2018/04/03/599112587/parkland-students-return-to-school-skeptical-of-clear-backpacks> [<https://perma.cc/5DF9-WER7>].

¹⁹ Michael D. Shear, *Trump Stuns Lawmakers with Seeming Embrace of Comprehensive Gun Control*, N.Y. TIMES (Feb. 28, 2018), <https://www.nytimes.com/2018/02/28/us/politics/trump-gun-control.html> [<https://perma.cc/8U8S-GMXN>].

²⁰ Michael D. Shear & Sheryl Gay Stolberg, *Conceding to N.R.A., Trump Abandons Brief Gun Control Promise*, N.Y. TIMES (Mar. 12, 2018), <https://www.nytimes.com/2018/03/12/us/politics/trump-gun-control-national-rifle-association.html> [<https://perma.cc/9CD6-ZXYQ>].

²¹ Peter Overby, *NRA: "Only Thing that Stops a Bad Guy with a Gun Is a Good Guy with a Gun,"* NPR (Dec. 21, 2012, 3:00 PM), <https://www.npr.org/2012/12/21/167824766/nra-only-thing-that-stops-a-bad-guy-with-a-gun-is-a-good-guy-with-a-gun> [<https://perma.cc/N6MX-JWWG>] (transcribing the NRA's press conference in response to the Sandy Hook shooting).

²² Three months later, another mass school shooting occurred in Santa Fe, Texas. *10 Dead, 13 Hurt in Santa Fe High School Shooting, Sources Say; Explosives Found, Suspected Gunman in Custody*, NBC N.Y. (May 19, 2018, 4:49 PM), <https://www.nbcnewyork.com/news/national-international/Active-Shooter-School-Lockdown-Santa-Fe-Texas-483032921.html> [<https://perma.cc/4KUL-RPE6>]. More recently a student in Oxford, Michigan, opened fire with a semiautomatic pistol his father purchased just days earlier. Aya Elamroussi & Artemis Moshtagian, *School District Releases Details of Key Events Leading up to Michigan Shooting*, CNN (Dec. 5, 2021, 1:41

school shootings went from twelve people in the 1980s, to thirty-six in the 1990s, fourteen in the 2000s, and a high of fifty-one in the 2010s as of February 2018.²³ There were forty-two school shootings in 2021, averaging one shooting every nine days.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.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:²⁶ “[T]he gun is to gun violence as the mosquito is to malaria.”²⁷ While mental illness is often blamed,²⁸ the relationship between mental illness and gun violence is unclear.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.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

PM), <https://www.cnn.com/2021/12/05/us/michigan-oxford-high-school-shooting-sunday/index> [https://perma.cc/W9FN-A32H].

²³ Antonis Katsiyannis et al., *Historical Examination of United States Intentional Mass School Shootings in the 20th and 21st Centuries: Implications for Students, Schools, and Society*, 27 J. CHILD & FAM. STUDS. 2562, 2564 (2018).

²⁴ John Woodrow Cox & Steven Rich, “Please Help Me”: Kids with Guns Fueled a Record Number of School Shootings in 2021, WASH. POST (Dec. 31, 2021, 6:30 AM), <https://www.washingtonpost.com/dc-md-va/2021/12/31/2021-school-shootings-record> [https://perma.cc/9QAV-24SW].

²⁵ John Woodrow Cox et al., School Shooting Database, *More than 292,000 Students Have Experienced Gun Violence at School Since Columbine*, WASH. POST (Jan. 24, 2022, 12:22 PM), https://www.washingtonpost.com/graphics/2018/local/school-shootings-database/?utm_term=.6bo520326e58 [https://perma.cc/WF8P-AACC].

²⁶ See Lisa M. Hepburn & David Hemenway, *Firearm Availability and Homicide: A Review of the Literature*, 9 AGGRESSION & VIOLENT BEHAV. 417, 437 (2004).

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).

²⁸ See Jeffrey W. Swanson et al., *Mental Illness and Reduction of Gun Violence and Suicide: Bringing Epidemiologic Research to Policy*, 25 ANNALS EPIDEMIOLOGY 366, 366–67 (2015); Colleen L. Barry et al., *After Newtown — Public Opinion on Gun Policy and Mental Illness*, 368 NEW ENG. J. MED. 1077, 1081 (2013).

²⁹ See, e.g., Liza H. Gold, *Introduction to GUN VIOLENCE AND MENTAL ILLNESS*, at xxiv, xxxiii (Liza H. Gold & Robert I. Simon eds., 2016).

³⁰ Sadat & George, *supra* note 6, at 13.

more broadly.³¹ Survivors of serious gunshot injuries have elevated risks for post-traumatic stress symptoms and diminished physical health months after a shooting.³² The combination of physical injury and psychological trauma is associated with increased levels of PTSD, depression, anxiety, and physical pain.³³ 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.³⁴

Studies have established the psychological effect of mass shootings on survivors and their communities.³⁵ This includes diagnoses of PTSD among elementary school students and their parents following the 1988 mass shooting at an elementary school in Winnetka, Illinois,³⁶ and PTSD and major depression among survivors of the 1991 mass shooting at a Luby's Cafeteria in Killeen, Texas.³⁷ More recently, a study found that two weeks after shootings at Virginia Tech in 2007,³⁸ and Northern Illinois University in 2008,³⁹ seventy-one percent of the students at those campuses showed symptoms of major depression and sixty-four percent exhibited symptoms of PTSD.⁴⁰ Mass shootings are found to have a

³¹ See, e.g., Sarah R. Lowe & Sandro Galea, *The Mental Health Consequences of Mass Shootings*, 18 TRAUMA, VIOLENCE & ABUSE 62, 62–78 (2017).

³² Arlene I. Greenspan & Arthur L. Kellerman, *Physical and Psychological Outcomes 8 Months After Serious Gunshot Injury*, 53 J. TRAUMA 709, 714 (2002).

³³ Douglas Zatzick, *Interventions for Acutely Injured Survivors of Individual and Mass Trauma*, in TEXTBOOK OF DISASTER PSYCHIATRY 190, 190 (Robert J. Ursano et al. eds., 1st ed. 2007); see also Andrew J. Michaels et al., *Posttraumatic Stress Disorder after Injury: Impact on General Health Outcome and Early Risk Assessment*, 47 J. TRAUMA 460 (1999).

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 Cloitre eds., 2015); see also, e.g., Karen Slovak & Mark Singer, *Gun Violence Exposure and Trauma Among Rural Youth*, 16 VIOLENCE & VICTIMS 389, 396 (2001).

³⁵ James M. Shultz et al., *Multiple Vantage Points on the Mental Health Effects of Mass Shootings*, 16 CURRENT PSYCHIATRY REP. 469, 478 (2014).

³⁶ Eitan D. Schwarz & Janice M. Kowalski, *Malignant Memories: PTSD in Children and Adults After a School Shooting*, 30 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 931, 944 (1991).

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).

³⁸ See Christine Hauser & Anahad O'Connor, *Virginia Tech Shooting Leaves 33 Dead*, N.Y. TIMES (Apr. 16, 2007), <https://www.nytimes.com/2007/04/16/us/16cnd-shooting.html> [https://perma.cc/32F5-TJDA].

³⁹ See Steven Gray, *How the NIU Massacre Happened*, TIME (Feb. 16, 2008), <http://content.time.com/time/nation/article/0,8599,1714069,00.html> [https://perma.cc/6ACY-TV4H].

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

et al., *Emotion Regulation Difficulties as a Prospective Predictor of Posttraumatic Stress Symptoms Following a Mass Shooting*, 27 J. ANXIETY DISORDERS 188, 193 (2013).

⁴¹ Dag Ø. Nordanger et al., *Prior Adversities Predict Posttraumatic Stress Reactions in Adolescents Following the Oslo Terror Events 2011*, 5 EUR. J. PSYCHOTRAUMATOLOGY (2014).

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 (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).

⁴⁶ Lynn A. Addington, *Students' Fear After Columbine: Findings from a Randomized Experiment*, 19 QUANTITATIVE CRIMINOLOGY 367, 383 (2003).

⁴⁷ Shultz et al., *supra* note 35, at 478–79; see also Elizabeth Chuck, *Teachers Struggle with New “Default Mindset” After Florida Shooting*, NBC NEWS (Mar. 12, 2018, 4:36 PM), <https://www.nbcnews.com/news/us-news/teachers-struggle-new-default-mindset-after-florida-shooting-n852796> [<https://perma.cc/D5GC-R4Z7>]; Elizabeth C. Powell et al., *Firearm Violence Among Youth: Public Health Strategies for Prevention*, 28 ANNALS EMERGENCY MED. 204, 205 (1996).

experienced increased symptoms of acute stress.⁴⁸ These included “intrusive thoughts, sleep disturbance, distraction, fear, stomach upset, depression, disorganization, replaying of the event, and symptoms of anger.”⁴⁹

Following school shootings, government responses are often timid⁵⁰ and fraught with unintended consequences.⁵¹ An increasing number of students across the country are required to take part in mandatory active shooter drills,⁵² which parents, teachers, and children describe as “somewhere between upsetting and traumatizing.”⁵³ 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,⁵⁴ 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.”⁵⁵ Students are often uncertain whether what is happening is a drill or a

⁴⁸ Carolyn R. Fallahi & Sally A. Lesik, *The Effects of Vicarious Exposure to the Recent Massacre at Virginia Tech*, 1 PSYCH. TRAUMA: THEORY RSCH. PRAC. & POL’Y 220, 226–27 (2009).

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, 332–35 (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-Shea & 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.

⁵² Eighty-eight percent of K–12 students in the United States attend school with an emergency plan; of those schools, ninety-six percent include protocols for active shooters. U.S. GOV’T ACCOUNTABILITY OFF., GAO-16-144, EMERGENCY MANAGEMENT: IMPROVED FEDERAL COORDINATION COULD BETTER ASSIST K–12 SCHOOLS PREPARE FOR EMERGENCIES 24 (2016); see also Deborah Temkin et al., *The Evolution of State School Safety Laws Since the Columbine School Shooting*, CHILD TRENDS (Feb. 12, 2020), <https://www.childtrends.org/publications/evolution-state-school-safety-laws-columbine> [<https://perma.cc/W65W-L7LJ>].

⁵³ James Hamblin, *What Are Active-Shooter Drills Doing to Kids?*, THE ATLANTIC (Mar. 13, 2019, 9:42 AM), <https://www.theatlantic.com/health/archive/2018/02/effects-of-active-shooter/554150> [<https://perma.cc/Ry3R-FW3J>].

⁵⁴ Ed Leefeldt, *Are Active Shooter Drills Too Scary for Schoolchildren?*, CBS NEWS (Nov. 30, 2017, 5:00 AM), <https://www.cbsnews.com/news/active-shooter-drills-lockdowns-too-scary-for-schoolchildren> [<https://perma.cc/4YFA-SJN7>]; see also *School Uses Sound of Real Gunfire in Drills*, CNN (Mar. 12, 2018), <https://www.cnn.com/videos/us/2018/03/12/alaska-high-school-simulates-gunfire-in-active-shooter-drills-orig-llr.cnn> [<https://perma.cc/D9A4-2TCM>].

⁵⁵ Leefeldt, *supra* note 54.

real actual active shooter situation.⁵⁶ Not only are the drills' effectiveness unproven,⁵⁷ but they also remind children that someone might suddenly try to kill them at school.⁵⁸

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.⁵⁹ 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*.”⁶⁰ Pain or suffering can be “physical or mental,”⁶¹ 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.⁶² 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*

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_5a862079e4bo0bc49f426873 [<https://perma.cc/FHJ4-4R68>].

⁵⁷ Hamblin, *supra* note 53; see also Holly Yan, *Santa Fe High School Had Armed Cops and Active Shooter Drills. Yet 10 People Died*, CNN (May 22, 2018, 11:46 AM), <https://www.cnn.com/2018/05/21/us/santa-fe-high-school-preparations-trnd/index.html> [<https://perma.cc/3H2X-XK7W>].

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).

⁶² *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).

~~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

⁶³ Committee against Torture, General Comment No. 3, Implementation of Article 14 by states parties, ¶ 3, U.N. Doc. CAT/C/GC/3 (Dec. 13, 2012) (emphasis added).

⁶⁴ See, e.g., Kenneth Roth, *The Charade of US Ratification of International Human Rights Treaties*, 1 CHI. J. INT'L L. 347, 348 (2000).

⁶⁵ 136 CONG. REC. 36192 (1990).

⁶⁶ *Id.* at 36192–93. The CAT has consistently recommended that the United States withdraw the reservation limiting the definition of Article 16. See, e.g., Committee against Torture, Consideration of Reports Submitted by State Parties Under Article 19 of the Convention, U.N. Doc. No. CAT/C/USA/CO/2, at 10 (July 25, 2006); Comm. against Torture, Rep. of the Comm. against Torture on Its Twenty-Third Session, U.N. Doc. No. A/55/44, ch. IV, ¶ 180(a) (2000). Because most litigation under UNCAT in the United States takes place in the context of extradition or immigration proceedings in which the *non-refoulement* obligation in UNCAT Article 3 is raised, the question of ill-treatment (not included in Article 3 as triggering the right of *non-refoulement*) has not been adjudicated in U.S. courts. See, e.g., Trent Buatte, *The Convention against Torture and Non-Refoulement in U.S. Courts*, 35 GEO. IMMIGR. L. J. 701 (2021).

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 “invisible, interdependent, and interrelated. The obligation to prevent ill-treatment in practice overlaps with and is largely congruent with the obligation to prevent torture.” Committee 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,⁷¹ the obligation to prevent ill-treatment includes preventing violations committed by private persons or nonstate actors.⁷² 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.⁷³ 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.*"⁷⁴ UNCAT also requires states to ensure that victims of both torture and ill-treatment obtain full and effective redress,⁷⁵ including "guarantees of non-repetition,"⁷⁶ requiring the U.S. to "review[] and reform[] laws contributing to or allowing torture or ill-treatment."⁷⁷ By refusing to adopt reasonable legislation to reduce the likelihood of future school shootings, the United States is failing to fulfill the redress obligation.⁷⁸

The United States also cannot hide behind its federal structure as an excuse for nonperformance, particularly given the fact that at least some

⁷¹ CDC Reporting System, *supra* note 2.

⁷² *See, e.g.*, Hajrizi Dzemajl 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* Committee 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).

⁷³ Committee against Torture, *supra* note 6, ¶ 18.

⁷⁴ *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).

⁷⁵ *Dzemajl*, Complaint No. 161/2000, ¶ 9.6.

⁷⁶ Torture Convention, *supra* note 5, art. 14; Committee against Torture, *supra* note 63, ¶ 6.

⁷⁷ Committee against Torture, *supra* note 63, ¶ 8.

⁷⁸ A state's obligation to provide redress to victims of ill-treatment remains even if a nonstate actor causes the ill-treatment. *Id.* ¶ 7.

regulation at the federal level is clearly constitutional, even after *District of Columbia v. Heller*.⁷⁹ Treaties must be performed in good faith,⁸⁰ and difficulties presented by a state's municipal law cannot justify nonperformance.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.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.”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.”⁸⁴ Finally, the Inter-American Commission on Human Rights has asked the United States to redress gun violence in recent years.⁸⁵

⁷⁹ 554 U.S. 570 (2008); see also Sadat & George, *supra* note 6, at 29–36.

⁸⁰ Vienna Convention on the Law of Treaties, art. 26, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter VCLT]. Although not a party to the treaty, the United States considers most provisions of the VCLT binding as matters of customary law. See *Vienna Convention on the Law of Treaties*, U.S. DEP'T OF STATE, <http://www.state.gov/s/l/treaty/faqs/70139.htm> [<https://perma.cc/3XXJ-9CWA>].

⁸¹ VCLT, *supra* note 80, art. 27.

⁸² *Convention against Torture: Hearing Before the S. Comm. on Foreign Rels.*, 101st Cong. 41 (1990) (statement of Hon. Abraham D. Sofaer, Legal Adviser, Department of State).

⁸³ Letter from Michele Bachelet, U.N. High Comm'r for Hum. Rts., to Antony J. Blinken, Sec'y of State, U.S. (May 17, 2021), <https://lib.ohchr.org/HRBodies/UPR/Documents/Session36/US/HCLetter-USA.pdf> [<https://perma.cc/26LM-RNUA>]. This was true of earlier reviews of the U.S. human rights record. See, e.g., Rep. of the High Comm'r for Human Rts., *Human Rights and the Regulation of Civilian Acquisition, Possession and Use of Firearms*, ¶ 10, U.N. Doc. A/HRC/32/21 (Apr. 15, 2016).

⁸⁴ Human Rights Committee, *Concluding Observations on the Fourth Periodic Report of the United States of America*, ¶ 10, U.N. Doc. CCPR/C/USA/CO/4 (Apr. 23, 2014).

⁸⁵ Press Release No. 076/16, Org. of Am. States, IACHR Condemns Mass Shooting at a Gay Bar in the United States (June 14, 2016), http://www.oas.org/en/iachr/media_center/preleases/2016/076.asp [<https://perma.cc/J6SJ-MFAA>]; Press Release No. 154/17, Org. of Am. States, IACHR Condemns Mass Shooting in the United States (Oct. 6, 2017), http://www.oas.org/en/iachr/media_center/PReleases/2017/154.asp [<https://perma.cc/38FR-3VJ3>]; Press Release No. 182/17, Org. of Am. States, IACHR Condemns Mass Shooting in United States and Calls on the State to Adopt Measures to Prevent Future Tragedies (Nov. 16, 2017), http://www.oas.org/en/iachr/media_center/PReleases/

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.

2017/182.asp [https://perma.cc/8MYM-V6XR]; see also Written Statement of the Harris Institute for the Hearing on “Regulation of Gun Sales and Social Violence in the United States,” WHITNEY R. HARRIS WORLD L. INST. (Feb. 27, 2018), https://sites.law.wustl.edu/WashULaw/harris-lexlata/wp-content/uploads/sites/25/2019/03/InterAmericanCommissionHearingFebruary272018FINAL.pdf [https://perma.cc/6ZDK-VXR7].

⁸⁶ See David Finkelhor et al., *Prevalence of Childhood Exposure to Violence, Crime, and Abuse: Results from the National Survey of Children's Exposure to Violence*, 169 JAMA PEDIATRICS 746, 751 (2015).

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

⁸⁸ Dan Barry, *Gunfire Erupts at a School. Leaders Offer Prayers. Children Are Buried. Repeat.*, N.Y. TIMES (Feb. 15, 2018), https://www.nytimes.com/2018/02/15/us/florida-school-shooting-thoughts-prayers.html [https://perma.cc/9PUA-7ZJ6].