Return to Sender, Intent Unknown: The Effects of the Third Circuit's Interpretation of the Convention against Torture's Intent Requirement on Haitian Criminal Deportees

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RETURN TO SENDER, INTENT UNKNOWN: THE EFFECTS OF THE THIRD CIRCUIT’S INTERPRETATION OF THE CONVENTION AGAINST TORTURE’S INTENT REQUIREMENT ON HAITIAN CRIMINAL DEPORTEES

I. Introduction

"[P]risoners [in Haiti] must sleep sitting or standing up . . . [and] temperatures can reach as high as 105 degrees Fahrenheit. . . . Prisoners are occasionally permitted out of their cells for a duration of about five minutes every two to three days."¹ Since 2000, Haiti has engaged in a policy of mandatory detention for Haitian citizens who have been convicted and sentenced for crimes committed in the United States.² Despite the federal courts’ recognition of the deplorable conditions and instances of physical abuse that occur in Haitian prisons, the courts are in agreement that such circumstances do not constitute “torture” as defined by the Convention Against Torture (CAT).³

The United Nations General Assembly adopted the CAT on December 10, 1984 to “make more effective the struggle against torture and other cruel, inhuman, or degrading treatment or punishment throughout the world.”⁴ Article 1 of the CAT defines “torture” as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . .”⁵ In the landmark Haitian deportee case of In re J-E,⁶ the Board of Immigration Appeals (BIA) interpreted the CAT’s “inten-

². See id. (noting history of Haiti’s mandatory detention policy). “The policy appears to have been motivated by the belief that criminal deportees pose a threat to recidivist criminal behavior after their return to Haiti. The length of detention can vary, lasting in many instances upwards of several months.” Id.; see also Brief for Dalegrand as Amici Curiae Supporting Respondent at 5, Dalegrand v. Att’y Gen., 288 F. App’x 838 (3d Cir. 2008) (Nos. 06-4766, 07-2800) (“[O]ther 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.”).
³. For a discussion of the resolution issue in the Third Circuit and in other circuit courts of appeals, see infra notes 48-95 and accompanying text.

(777)
tionally inflicted" language to be a narrow "specific intent" requirement, as defined by criminal law jurisprudence.\(^7\) The BIA further found that the claimant failed to satisfy the CAT's specific intent requirement because there was "no evidence that [Haitian authorities] are intentionally and deliberately creating and maintaining such prison conditions in order to inflict torture."\(^8\)

This Casebrief examines the Third Circuit's often inconsistent approaches to defining "specific intent" under the CAT, and argues that its most recent decision in *Pierre v. Attorney General*\(^9\) is overly restrictive and effectively eliminates CAT relief for Haitian criminal deportees.\(^10\) Part II examines the historical relationship between the United States and Haiti, the Haitian prison conditions that the Third Circuit finds do not constitute torture, and the legislative history and enactment of Article 1 of the CAT.\(^11\) Part III examines the BIA's interpretation of the specific intent

7. See id. at 301 ("[Specific intent requires] 'intention to accomplish the precise criminal act that one is later charged with' while 'general intent' commonly 'takes the form of recklessness ... or negligence.") (quoting *BLACK'S LAW DICTIONARY* 813-14 (7th ed. 1999))). The BIA is an administrative appellate agency within the Department of Justice that addresses immigration issues, including claims under the CAT. See United States Department of Justice Executive Office for Immigration Review: Board of Immigration Appeals, http://www.usdoj.gov/eoir/biainfo.htm (last visited July 27, 2009). The Department of Justice explains that:

The Board of Immigration Appeals (BIA or Board) is the highest administrative body for interpreting and applying immigration laws. It is authorized up to 15 Board Members, including the Chairman and Vice Chairman who share responsibility for Board management. . . . Generally, the Board does not conduct courtroom proceedings—it decides appeals by conducting a "paper review" of cases. On rare occasions, however, the Board does hear oral arguments of appealed cases, predominately at headquarters.

The Board has been given nationwide jurisdiction to hear appeals from certain decisions rendered by Immigration Judges and by District Directors of the Department of Homeland Security (DHS) in a wide variety of proceedings in which the Government of the United States is one party and the other party is either an alien, a citizen, or a business firm. In addition, the Board is responsible for the recognition of organizations and accreditation of representatives requesting permission to practice before DHS, the Immigration Courts, and the Board. Decisions of the Board are binding on all DHS officers and Immigration Judges unless modified or overruled by the Attorney General or a Federal court. All Board decisions are subject to judicial review in the Federal courts. The majority of appeals reaching the Board involve orders of removal and applications for relief from removal.

Id.

9. 528 F.3d 180 (3d Cir. 2008).
10. See *Pierre v. Gonzales*, 502 F.3d 109, 117 (2d Cir. 2007) ("No federal circuit court considering the case of a Haitian criminal deportee has declined to follow *in re J-E*, though there are wrinkles in the Third Circuit."). For a further discussion of the court's rationale in *Pierre*, see infra notes 78-90 and accompanying text.
11. For further historical perspective on United States and Haitian relations, see infra notes 16-25 and accompanying text. For further description of Haiti's
requirement under the CAT, as well as the Third Circuit’s often inconsistent interpretations of specific intent. Part IV analyzes the Third Circuit’s most recent holding in Pierre, as well as other circuit courts’ interpretations of the specific intent requirement and the implications for Haitians. Part V examines both international and criminal law arguments in favor of a more expansive reading of the CAT’s specific intent requirement—which, hopefully, will aid immigration practitioners advocating for a more expansive interpretation. Finally, Part VI concludes by noting the unfortunate yet foreseeable consequences of the Third Circuit’s adoption of the BIA’s overly restrictive interpretation of specific intent under the CAT.

II. BACKGROUND

A. The United States’ Treatment of Haitian Asylum Seekers

Beginning under the Reagan Administration in 1981, the United States established an interdiction agreement with Jean-Claude Duvalier, the then-dictator of Haiti, authorizing the U.S. Coast Guard to board and inspect Haitian vessels and interrogate passengers. Because the United States perceived Haitians “as economic migrants deserting one of the poorest countries in the world,” the U.S. Coast Guard returned all undocumented Haitians unless an alien volunteered information that he or she would suffer persecution if returned to Haiti. As a result, of the 22,940 Haitians interdicted at sea between 1981 and 1990, only eleven qualified to apply for asylum in the United States.

prison conditions and mandatory detention policy, see infra notes 26-32 and accompanying text. For a detailed history of the CAT and the legislative history of Article 1, see infra notes 32-40 and accompanying text.

12. For an analysis of the BIA’s opinion in In re J-E, see infra notes 41-47 and accompanying text. For a further discussion of conflicting cases in the Third Circuit, see infra notes 48-77 and accompanying text.

13. For an analysis of the Third Circuit’s holding in Pierre, see infra notes 78-90 and accompanying text. For a discussion of other circuit courts’ interpretations of specific intent under the CAT, see infra notes 91-95 and accompanying text.

14. For a discussion of international case law concerning the consequences of deportation and torture, see infra notes 96-117 and accompanying text. For an explanation of the less restrictive definition of “specific intent” commonly applied in United States criminal law, see infra notes 118-28 and accompanying text.

15. For an explanation of the barrier that the BIA’s interpretation creates for CAT claims of Haitian criminal deportees, see infra notes 129-33 and accompanying text.


17. See id. at CRS-2 (noting general view of United States that Haitians did not have legitimate asylum claims).

18. See id. at CRS-3 (noting small number of Haitians admitted to United States due to Reagan’s policy).
In 1991, Haiti's first democratically elected president was deposed in a military coup d'état, which led the State Department to reconsider its interdiction policy.\textsuperscript{19} When options for safe havens in other countries in the region proved inadequate for the large number of Haitians seeking asylum, the Bush Administration paroled approximately 10,490 Haitians into the United States in 1991 and early 1992.\textsuperscript{20} This large increase led the Bush Administration to return to the prior policy of intercepting and returning all Haitians discovered at sea without first interviewing them to determine whether they were at risk of persecution upon their return.\textsuperscript{21}

The most recent change in United States policy affecting Haitians occurred approximately one year after the September 11, 2001 attacks.\textsuperscript{22} The Immigration and Naturalization Service (INS) published a notice placing many Haitians in expedited removal proceedings, concluding "that illegal mass migration by sea threatened national security."\textsuperscript{23} The

\textsuperscript{19} See id. (noting beginning of political turmoil in Haiti that led United States to alter its policy towards Haitians).

\textsuperscript{20} See id. (noting increased number of Haitians admitted to United States).

\textsuperscript{21} See id. (noting change in Bush Administration policy that led to large influx of Haitian asylum seekers was quickly altered to almost completely eliminate asylum options for Haitians); see also The Detention and Treatment of Haitian Asylum Seekers: Hearing Before the Subcomm. on Immigration of the S. Comm. on the Judiciary, 107th Cong. 7 (2002) [hereinafter Hearing] (statement of John Conyers, Rep. from Mich.) (noting treatment of Haitians under new policy).

[T]he main problem here . . . is that Haitian arrivals into this country, particularly through Florida, seeking asylum are treated differently from everybody else that comes to the United States—everybody. There is a policy of, number one, turning them away right on the spot, no questions asked. They turn the boats around. You may say, do they need food or nourishment, or are they sick, or is their little raft capable of going back? They turn it around. That is it, no questions asked. That is in violation, of course, of our immigration laws, but it more seriously contravenes any spirit of the treatment that human beings should be afforded anywhere in the world, much less coming to the shores of the United States.

\textit{Hearing}; see also John Pain, U.S. Haitian Immigration Policy Condemned, WASH. POST, Feb. 27, 2004, available at http://www.washingtonpost.com/wp-dyn/articles/A13357-2004Feb27.html ([A]ctivists called on Bush to take more action to stop the fighting in Haiti to avoid a mass exodus of Haitians to Florida. Under Haiti's military dictatorship between 1991 and 1994, more than 65,000 Haitians were intercepted at sea by the Coast Guard. Most were sent home.").

\textsuperscript{22} See \textit{WASEM}, supra note 16, at CRS-4 (discussing November 2002 INS clarification regarding certain expedited removal proceedings involving national security risks).

\textsuperscript{23} Id. (noting post-9/11 shift in how United States dealt with illegal mass migration by sea); see also Nina Bernstein, Deportation Case Focuses on Definition of Torture, N.Y. TIMES, Mar. 11, 2005, available at http://www.nytimes.com/2005/03/11/nyregion/11torture.html (stating rationale for change in U.S. deportation proceedings). After the 9/11 attacks on the United States, "several scholars . . . [noted] there was a sudden convergence between a longer-standing domestic agenda of quicker deportation of illegal immigrants and 'criminal aliens,' and the administration's resolve to 'take the gloves off' in seeking intelligence that could prevent terrorist attacks." Bernstein, supra. This policy "not only affected ex-convicts, but women fleeing harm based on their sex, like genital cutting, rape and domestic violence, who often do not fit asylum categories." Id.
Bush Administration maintained that allowing Haitians to enter the United States in this manner could “potentially trigger a mass asylum from Haiti to the United States.’ The Administration further . . . warn[ed] that terrorists may pose as Haitian asylum seekers.”24 This fear of a massive influx of Haitian asylum seekers is one rationale for the strictly enforced Haitian immigration policy.25

B. Haiti’s Deplorable Prison Conditions

Since 2000, Haiti has engaged in a policy of mandatory detention for Haitian citizens who are deported from the United States after serving criminal sentences for crimes committed in the United States.26 The Haitian prison conditions are abysmal because of lack of sanitation facilities, extreme overcrowding, little to no food or water, and no medical treatment.27 State Department Country Reports indicate that Haitian “prisons


26. For a further discussion of the history and practices of Haiti’s mandatory detention policy, see supra note 2 and accompanying text.


[P]risoners must sleep sitting or standing up . . . temperatures can reach as high as 105 degrees Fahrenheit . . . . Many of the cells lack basic furniture . . . and are full of vermin, including roaches, rats, mice, and lizards. Prisoners are occasionally permitted out of their cells for a duration of about five minutes every two to three days. Because cells lack basic sanitation facilities, prisoners are provide 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 . . . . [M]alnutrition and starvation is a continuous problem. Nor is medical treatment provided to prisoners, who suffer from a host of diseases . . . .


Cells average 0.77m² of space per inmate . . . . The UN Development Programme (UNDP) minimum recommendation is 4.5m². The International Committee of the Red Cross (ICRC) states that even in the worst circumstances, each detainee should have at least two square meters, a standard not met in any Haitian prison . . . . 90 percent of detainees have fungicidal infections, chronic skin itching or scabies . . . . Prisons are vulnerable to massive uprisings, corruption of guards and invasions from the outside, but also to violence among inmates . . . . [N]othing concrete has been done to tackle the crisis in detention facilities comprehensively.

INT’L CRISIS GROUP, supra, at 5.
are overcrowded, poorly maintained, unsanitary, and rodent infested," and that "[p]risoners suffer from malnutrition, inadequate health care, and a lack of basic hygiene." The Third Circuit has stated that these inhumane conditions are reminiscent of the "slave ships" that brought Africans to the United States during the slave trade. The most common forms of abuse by Haitian jailers involve "[b]eatings with fists, sticks, and belts." Further, the Third Circuit noted that there are reports of Haitian prisoners being "torture[d] by electric shock, as well as instances in which inmates were burned with cigarettes, choked, or were severely boxed on the ears, causing ear damage."

C. *The History of the United Nations Convention Against Torture*

Article 1 of the CAT defines torture as:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reasons based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

The CAT thus codifies the fundamental principle of international law that torture should be prevented at all costs. President Reagan signed the CAT on April 18, 1988 with the explicit reservation that "[t]he Govern-


29. See Lavira v. Att'y Gen., 478 F.3d 158, 170 (3d Cir. 2007) ("There is no dispute that medical care is wholly inadequate if not completely absent in the [prison] facility. There is no dispute that the conditions are rife with disease and comparable to a 'slave ship.'").


31. Auguste, 395 F.3d at 129 (citing State Department country reports).

32. CAT, supra note 5, at art. 1(1) (emphasis added). Article 3 of the CAT states 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 for being subjected to torture." Id. at art. 3(1).

33. See Renee C. Redman, *Defining "Torture": The Collateral Effect on Immigration Law of the Attorney General's Narrow Interpretation of "Specifically Intended" when Applied to United States Interrogators*, 62 N.Y.U. ANN. SURV. AM. L. 465, 470-71 (2006) ("CAT codifies the pre-existing jus cogens of international law that torture is to be absolutely prevented. It is forbidden in almost every country in the world and had already been forbidden by prior human rights treaties.").
ment of the United States of America reserves the right to communicate, upon ratification, such reservations, interpretive understandings, or declarations as are deemed necessary."\(^{34}\)

In January of 1990, President George H.W. Bush submitted revised conditions, stating with respect to Article 1 of the CAT, the "United States understands that, in order to constitute torture, an act must be *specifically intended* to inflict severe physical or mental pain or suffering."\(^{35}\) On October 27, 1990, the Senate adopted a resolution of advice and consent subject to this understanding.\(^{36}\) Because this resolution specified that the CAT was not self-executing, Congress proceeded to pass the Foreign Affairs Reform and Restructuring Act (FARRA) to implement the United States' obligations under the CAT.\(^{37}\) FARRA gave the Department of Justice (DOJ)—of which the former INS was a division—the authority to promulgate CAT regulations.\(^{38}\) The DOJ adopted language identical to the

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\(^{34}\) *Auguste,* 395 F.3d at 130 (citing Ogbudimkpa v. Ashcroft, 342 F.3d 207, 211 (3d Cir. 2003)). Approximately one month after signing the Convention, President Reagan "transmitted the CAT to the Senate for its advice and consent with seventeen proposed conditions." *Id.* at 131 (citing Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, S. Exec. Rep. 101-30, at 2, 7 (1990)).

\(^{35}\) *See id.* (citing S. Exec. Rep. 101-30, at 9, 36) (emphasis added)). President George H.W. Bush revised and reduced President Reagan's list of proposed conditions largely in response to congressional and public concern regarding several of the proposed conditions previously submitted by President Reagan in May of 1988. *See id.* (noting modification of proposed conditions). Bush's understanding "tracked a similar understanding initially submitted by President Reagan in 1988, which stated that the United States 'understands that, in order to constitute torture, an act must be a deliberate and calculated act of an extremely cruel and inhuman nature, *specifically intended* to inflict excruciating and agonizing physical or mental pain or suffering.'" *Id.* at 131 (citing S. Exec. Rep. 101-30, at 15) (emphasis added).

\(^{36}\) *See id.* at 132 (noting legislative history of CAT ratification).

\(^{37}\) *See id.* at 132 n.7 ("Treaties that are not self-executing do not create judicially-enforceable rights unless they are first given effect by implementing legislation."). Several other circuits have determined that the CAT is not self-executing. *See e.g.,* Reyes-Sanchez v. Att'y Gen., 369 F.3d 1239, 1240 n.1 (11th Cir. 2004); Saint Fort v. Ashcroft, 329 F.3d 191, 202 (1st Cir. 2003); Wang v. Ashcroft, 320 F.3d 130, 140 (2d Cir. 2003); Castellano-Chacon v. INS, 341 F.3d 533, 551 (6th Cir. 2003); *see also* Isaac A. Linnartz, *The Siren Song of Interrogational Torture: Evaluating the U.S. Implementation of the U.N. Convention Against Torture,* 57 Duke L.J. 1485, 1495 (2008) ("The Senate's reservations and understandings for the [CAT] included a provision stating that 'the United States declares that the provisions of Articles 1 through 16 of the Convention are not self-executing,' meaning that the obligations imposed by those articles had to be legislatively implemented to have the force of law." (citing 136 Cong. Rec. 25, 36198 (1990))).

\(^{38}\) *See Auguste,* 395 F.3d at 133 (citing 8 C.F.R. §§ 208.16(c), .17, .18(a) (2004)) (noting legislative authority that gives Department of Justice authority to promulgate rules regarding CAT); *see also* Pierre v. Gonzales, 502 F.3d 109, 119-20 (2d Cir. 2007) ("It is plain that in FARRA, Congress commanded the immigration agencies to promulgate regulations that give full effect to all of the Senate's reservations and understandings.").
CAT Article 1 definition of torture, along with six additional provisions.\(^39\) One provision denotes that “[i]n order to constitute torture, an act must be \textit{specifically intended} to inflict severe physical or mental pain or suffering.”\(^40\)

III. \textsc{Interpreting the Meaning of Specific Intent in the Immigration Context}

\textbf{A. The BIA’s Interpretation of Specific Intent Under the CAT}

In 2002, in the landmark case of \textit{In re JE}-, the BIA, sitting en banc, held that for an act to constitute torture under the CAT, it must satisfy a five-part test: “(1) an act causing severe physical or mental pain or suffering; (2) \textit{intentionally inflicted}; (3) for a proscribed purpose; (4) by or at the instigation of or with the consent or acquiescence of a public official who has custody or physical control of the victim; and (5) not arising from lawful sanctions.”\(^41\) To further clarify this second element, the BIA stated that the “act must be \textit{specifically intended} to inflict severe physical or mental pain or suffering.”\(^42\) The BIA thus defined “specific intent” by its common criminal law definition as “the intent to accomplish the precise criminal act that one is later charged with.”\(^43\)

After defining specific intent, the BIA next considered whether Haiti’s policy of indefinite detention, inhuman prison conditions, and reported incidences of police mistreatment constituted torture.\(^44\) The BIA first held that Haiti’s indefinite detention policy, standing alone, did not constitute torture because of the lack of evidence that Haitian authorities were “detaining criminal deportees with the \textit{specific intent} to inflict severe

\begin{itemize}
\item \textit{See Auguste}, 395 F.3d at 133 (noting adoption of identical language).
\item \textit{Id.} at 133 (citing 8 C.F.R. § 208.18(a)(5)) (emphasis added). “[8 C.F.R.] Section 208.18(a) sets out the definitions to be used in applying the United States’ obligations under the CAT and states: ‘The definitions in this subsection incorporate the definition of torture contained in Article 1 of the [Convention], subject to the reservations, understandings, declarations, and provisos contained in the Convention.’” \textit{Id.} (citing 8 C.F.R. § 208.18(a)). “An act that results in unanticipated or unintended severity of pain and suffering is not torture.” \textit{Id.} (quoting 8 C.F.R. § 208.18(a)(5)).
\item \textit{Id.} at 135 (identifying five-part test set forth in \textit{In re JE}-) (emphasis added); \textit{see also In re JE}-, 23 I. & N. Dec. 291, 297 (B.I.A. 2002) (setting forth test).
\item \textit{Id.} at 300 (defining specific intent requirement under CAT).
\item \textit{Id.} at 301 (quoting \textsc{BLACK’S LAW DICTIONARY} 813-14 (7th ed. 1999)) (defining specific intent requirement under CAT); \textit{see also Bernstein, supra note 23} (“In 2002, the Bush administration sharply narrowed the definition of torture, as part of its aggressive approach to terrorism. In allowing use of harsher interrogation techniques, it said that torture required a ‘specific intent’ to inflict severe pain, not merely the infliction of severe pain.”). “By late 2001, the Board of Immigration Appeals . . . had ruled in several . . . cases that indefinite detention in Haiti was torture under the law, halting the deportations. But in 2002, narrower definitions took hold . . . .” Bernstein, \textit{supra} note 23.
\item \textit{See Auguste}, 395 F.3d at 135 (discussing three main contentions of torture as set forth by petitioner in \textit{In re JE}-).\end{itemize}
physical or mental pain or suffering." Second, the BIA found no evidence that Haiti’s inhuman prison conditions constituted torture because Haiti was not “intentionally and deliberately creating and maintaining such prison conditions in order to inflict torture.” Lastly, the BIA noted that the claimant had failed to establish that isolated instances of mistreatment were pervasive enough to establish a high probability of torture.

B. The Third Circuit’s Prior Inconsistent Interpretations of Specific Intent Under the CAT

Since the BIA decided In re J-E in 2002, it has served as the touchstone for subsequent cases concerning the “intentionally inflicted” provision of Article 1 of the CAT—making it extremely difficult for Haitian prisoners facing indefinite detention upon deportation to assert a successful CAT claim. Although early Third Circuit decisions did not interpret “intentionally inflicted” as imposing a specific intent requirement, subsequent cases deferred to the BIA’s interpretation that a showing of specific intent is required—albeit differing over the precise meaning of “specific intent.” In its most recent precedential opinion on the subject, Pierre v. Attorney General, the Third Circuit attempted to reconcile three of its earlier and inconsistent CAT decisions.

45. See In re J-E, 23 I. & N. Dec. at 300 (determining that indefinite detention by Haitian authorities is by itself insufficient to meet specific intent requirement of CAT) (emphasis added). The court stated that indefinite detention appears to be a “lawful enforcement sanction designed by the Haitian Ministry of Justice to protect the populace from criminal acts committed by Haitians who are forced to return to the country after having been convicted of crimes abroad.” Id.

46. See id. at 301 (finding inhuman prison conditions did not constitute torture under CAT because deplorable conditions were not deliberately created); see also Auguste, 395 F.3d at 136 (“[T]he BIA concluded that the prison conditions were not the result of any specific intent to inflict severe physical or mental pain or suffering, but rather were the result of budgetary and management problems as well as the country’s severe economic difficulties.”) (quotation omitted).

47. See In re J-E, 23 I. & N. Dec. at 304 (“Respondent has failed to establish that these severe instances of mistreatment are so pervasive as to establish a probability that a person detained in a Haitian prison will be subject to torture, as opposed to other acts of cruel, inhuman, or degrading punishment or treatment.”).


49. For a discussion of the Third Circuit’s earlier decisions interpreting the “intentionally inflicted” element of a claim of torture under the CAT, see infra notes 48-77 and accompanying text.

In *Zubeda v. Ashcroft*, the Third Circuit remanded the case of a Congolese woman who had been subjected to gang rape, sexual abuse, and forced servitude in her native country. In determining whether the severe pain and suffering associated with rape constituted torture under the CAT, the Third Circuit stated that the "intentionally inflicted" language did not implicate a "specific intent" requirement. The court noted that the CAT's intent requirement would be satisfied if suffering was a "foreseeable consequence" of an actor's conduct, and thus did not require the actor to actually intend the result. Contrary to the BIA's holding in *In re J-E*, the Third Circuit reasoned that imposing a specific intent requirement would make CAT relief unavailable to qualified persons that the treaty intended to protect.

Following its decision in *Zubeda*, the Third Circuit in *Auguste v. Ridge* reexamined the CAT's "intentionally inflicted" requirement and determined that its prior analysis in *Zubeda* was merely dicta and that specific intent is required. The petitioner in *Auguste* was a citizen of Haiti who was convicted of a controlled substance violation and sentenced to ten

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51. 333 F.3d 463 (3d Cir. 2003).
52. See id. at 467 (stating facts of case). In *Zubeda*, the petitioner was detained in December of 2000 for attempting to enter the United States without proper documentation. See id. at 465 (same). The Immigration Judge held that Zubeda qualified for CAT relief, noting that "[v]irtually every government detains its citizens for some period of time after that citizen is deported or forcibly removed from another country. . . . At least it is highly doubtful that [Zubeda] would be treated any more leniently than her fellow citizens under similar detention status." Id. at 470. The BIA reversed, and Zubeda appealed to the Third Circuit. See id. at 471 (stating procedural posture of case).
53. See id. at 473 ("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 severe pain or suffering that is the unintended consequence of an intentional act."); cf. Pierre v. Gonzales, 502 F.3d 109, 117-18 (2d Cir. 2007) (noting holding in *Zubeda* is contrary to Second Circuit's interpretation of specific intent under CAT).
54. See *Zubeda*, 333 F.3d at 473-74 ("The intent requirement . . . distinguishes between suffering that is the accidental result of an intended act, and suffering that is purposefully inflicted or the foreseeable consequence of deliberate conduct. . . . [T]he Convention does not require that the persecutor actually intend to cause the threatened result.").
55. See id. at 474 ("[R]equiring an alien to establish the specific intent of his/her persecutors could impose insurmountable obstacles to affording the very protections the community of nations sought to guarantee under the Convention Against Torture.").
56. 395 F.3d 123 (3d Cir. 2005).
57. See id. at 148 ("We recognize that [the specific intent] portion of *Zubeda* is in tension with our holding in this case, [but] the appropriate standard to be applied in the domestic context is the specific intent standard. However, we believe that the [specific intent] passage of *Zubeda* . . . is dicta."). "[I]t does not appear that the meaning of the specific intent standard was challenged in [*Zubeda*] . . . . Thus, we decline to follow that portion of the *Zubeda* opinion that is dicta." Id.
months imprisonment. Auguste argued that he would face torture as a result of the intolerable prison conditions he would be forced to endure under Haiti’s mandatory imprisonment policy.

In denying Auguste’s claim under the CAT, the Third Circuit placed great weight on legislative history, noting that “where the President and the Senate express a shared consensus on the meaning of a treaty as part of the ratification process, that meaning is to govern in the domestic context.” The court also gave deference to the BIA’s interpretation of “intentionally inflicted” in In re J-E as a specific intent requirement, thus eliminating the “foreseeable consequence” theory espoused in Zubeda. Accordingly, the court found that Auguste’s three bases for his CAT claim—indefinite detention, intolerable prison conditions, and physical abuse—did not meet the definition of torture because they were indistinguishable from the unsuccessful claims asserted by the petitioner in In re J-

58. See id. at 128 (stating facts of case). The Immigration Judge denied Auguste’s request for deferral of removal, finding that his claim was indistinguishable from that of the petitioner in In re J-E. See id. at 136 (stating procedural posture of case). Auguste appealed to the BIA, and the BIA affirmed without opinion. See id. (same). Auguste requested a stay of removal on grounds that he had been denied relief under CAT. See id. at 137 (same).

59. See id. at 128 (stating facts of case).

60. See id. at 129 (same).

61. Id. at 143 (noting legislative history in support of BIA’s interpretation of CAT intent requirement). “Based on the ratification record, there is no doubt that the applicable standard to be applied for CAT claims in the domestic context is the specific intent standard . . . .” Id. at 143-44; see also Thomas P. O’Connor, Auguste v. Ridge: Functional Inapplicability of the United Nations Convention Against Torture in the United States, 14 TUL. J. INT’L & COMP. L. 237, 246 (2005) (“Even where the courts have referred to an individual’s claim under the CAT, they have applied the standards set forth in the FARRA regulations. The Third Circuit’s holding in this respect is therefore rather uncontroversial.”).

62. See Auguste, 395 F.3d at 145-46 (“[F]or an act to constitute torture, there must be a showing that the actor had the intent to commit the act as well as the intent to achieve the consequences of the act, . . . although . . . pain and suffering may have been a foreseeable consequence, the specific intent standard would not be satisfied.”). The court also noted that the BIA’s specific intent standard implicated two principles of Chevron deference: 1) That the BIA’s interpretation and application of immigration law are subject to deference; and 2) the court owes deference to the BIA’s interpretation when the CAT involves issues of immigration law that could implicate questions of foreign relations. See id. at 144-45 (stating Third Circuit’s two main reasons for granting deference to BIA’s interpretation of specific intent standard in In re J-E). “The specific intent standard is a term of art that is well-known in American jurisprudence. . . . [I]n order for an individual to have acted with specific intent, he must expressly intend to achieve the forbidden act.” Id. at 145; see also INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999) (“[J]udicial deference to the Executive Branch is especially appropriate in the immigration context where officials exercise especially sensitive political functions that implicate questions of foreign relations.”) (citation omitted). For a further explanation of the “foreseeable consequences” theory set forth in Zubeda, see supra notes 53-55 and accompanying text.
E. The court did note, however, that it was not adopting a blanket rule that prison conditions could never rise to the level of torture. 64

In Lavira v. Attorney General, 65 further inconsistencies arose in the Third Circuit’s CAT jurisprudence. 66 In February of 2007, the Third Circuit decided the CAT claim of another Haitian citizen, Maurice Lavira, an HIV-positive amputee with political ties to Haiti’s exiled former President. 67 The Department of Homeland Security took Lavira into custody in July of 2003 because of his prior 1998 conviction for attempted criminal

63. See Auguste, 395 F.3d at 151-54 (explaining Third Circuit’s reliance on In re J-E in determining that Auguste’s claim was unsuccessful). Regarding Auguste’s claim that indefinite detention constitutes torture, the court noted that “even if we were to find that the [Haitian] detention policy was not a lawful sanction, we would conclude that the Haitian authorities lack the requisite intent for a finding of torture.” Id. at 152-53. Next, the court determined that Auguste’s claim that the Haitian prison conditions constituted torture was unsatisfactory by relying on the BIA’s findings in In re J-E, as well as a lack of evidence that the Haitian authorities had the requisite specific intent to inflict severe pain on the detainees. See id. at 153 (“The mere fact that the Haitian authorities have knowledge that severe pain and suffering may result by placing detainees in these conditions does not support a finding that the Haitian authorities intend to inflict severe pain and suffering.”). Finally, the court noted that isolated incidents of physical abuse in prisons do not rise to the level of torture unless the petitioner alleges past torture or can “show that he faces an increased likelihood of torture.” See id. at 154 (reasoning that facts were no worse in instant case than facts presented in In re J-E).

64. See id. (acknowledging that deplorable prison conditions alone could, in theory, constitute torture). The court noted that it was “not adopting a per se rule that brutal and deplorable prison conditions can never constitute torture. . . . [I]f there is evidence that authorities are placing an individual in such conditions with the intent to inflict severe pain and suffering . . . such an act may rise to the level of torture . . . .” Id.

65. 478 F.3d 158 (3d Cir. 2007), overruled by Pierre v. Att’y Gen., 528 F.3d 180 (3d Cir. 2008).

66. See Pierre v. Gonzales, 502 F.3d 109, 122 n.10 (2d Cir. 2007) (“Lavira’s . . . proposition [that ‘willful blindness’ could satisfy specific intent] seems to us inconsistent with the Third Circuit’s holding in Auguste. . . . How can willful blindness towards a fact be legally significant if actual knowledge is not?”); see also Thelemaque v. Ashcroft, 363 F. Supp. 2d 198, 212 (D. Conn. 2005) (“The [Supreme] Court recognizes that a heated debate has developed in courts and beyond regarding whether CAT requires a showing of ‘specific intent’ to inflict severe pain and suffering or only a showing of ‘general intent.’”).

67. See Lavira, 478 F.3d at 159 (stating case facts). Born in Haiti, Lavira lost his leg in a car accident. See id. at 160 (same). Following the death of his father, then-sixteen-year-old Lavira took refuge at a church where the former Haitian President, Jean-Bertrand Aristide, preached. See id. Lavira stayed at the church for two years, and openly supported Aristide in 1990—the year Aristide was elected President. See id. Lavira left Haiti for the United States after Aristide was ousted in a military coup. See id. Lavira was detained by the former INS for over a year, and eventually released. See id. Upon his release, Lavira believed he had been granted permanent asylum. See id. He did not seek new immigration status after his release from INS detention. See id. By 1996, Lavira suffered from depression, was homeless, and was also addicted to drugs. See id.
sale of a controlled substance. In November 2003, the Immigration Judge (IJ) ordered that Lavira be removed to Haiti as a result of the drug conviction. Lavira successfully appealed, and the BIA remanded the case to the IJ. The IJ then denied Lavira’s claims, concluding that he was not eligible to remain in the United States “because he had leveled only a generalized attack on the conditions of the Haitian facility.”

The Third Circuit heard the case and distinguished it from Auguste, noting that unlike the petitioner in Auguste, Lavira would likely be singled out by Haitian prison guards for being HIV-positive. The court went on to say that because Lavira was an HIV-positive amputee, the lack of medical care in Haiti’s prisons meant that he would suffer severe pain. As such, the court held that Lavira had successfully alleged the type of claim left open by Auguste.

The court then turned to the law as it pertained to proof of specific intent, and explained that it could not “rule out the generally accepted principle that intent can be proven through evidence of willful blindness.” While the court in Auguste noted that mere recklessness would

68. See id. at 160 (providing facts of case). Lavira was charged as a result of accepting ten dollars from an undercover officer to obtain crack cocaine for the officer. See id.

69. See id. (stating facts of case).

70. See id. (stating procedural posture of case). “Unable to write or speak English, Lavira appealed pro se to the BIA. The BIA sustained the appeal and remanded the case to the IJ, finding that Lavira’s opportunity to make claims for withholding of removal under the INA and the CAT had been improperly limited by the IJ.” Id.

71. Id. at 160 (reasoning that “generalized” attack on Haitian prison conditions did not rise to level of torture required under CAT) (emphasis added).

72. See id. at 170 (distinguishing case from Auguste). Specifically, the court stated:

It cannot be questioned that the undisputed facts Lavira presented in support of his claim are not merely an attack on the “general state of affairs.” Lavira’s CAT claim details how guards will threaten this HIV-positive prison, and addresses the specific act of placing someone with his medical condition in a disease-infested facility.

Id.

73. See id. (“Severe pain [was] not a possible consequence that may result ... it is the only plausible consequence.”). “There is no dispute that medical care is wholly inadequate if not completely absent in the facility. There is no dispute that the conditions are rife with disease comparable to a slave ship.” Id. The expert report stated that Lavira would have little or no chance of obtaining food and water, given his physical condition and the aggressive behavior required of detainees in order to obtain nourishment. Lavira ... would not receive any meaningful medical treatment because the Haitian system does not have antiretroviral drugs for HIV patients.

Id. at 170-71.

74. See id. (stating that Lavira fits into caveat left open by Third Circuit after Auguste). “Auguste demands no more than has been shown [by Lavira].” Id. at 171.

75. Id. (stating that specific intent requirement can be met by showing of willful blindness). The court also found that “intent is necessarily an inferential endeavor ... In the CAT setting, those inferences are based on reports on the
not meet the petitioner's burden of showing specific intent, "criminal law jurisprudence . . . bolsters the view that a finding of specific intent could be based on deliberate ignorance or willful blindness."\textsuperscript{76} Therefore, the court found that Lavira had met the specific intent requirement by presenting an individualized attack on his removal to Haiti that was specific to his medical conditions.\textsuperscript{77}

IV. The Third Circuit Joins All Other Circuit Courts in the Prevailing Interpretation of Specific Intent

A. The Third Circuit Attempts to Reconcile Its Prior Decisions in Pierre v.
   Attorney General

On June 9, 2008, the Third Circuit sat en banc to determine the level of intent required for a finding of torture under the CAT.\textsuperscript{78} In Pierre, the petitioner, Paul Pierre, was a Haitian citizen who had lived in the United States since 1986.\textsuperscript{79} On October 14, 1992, Pierre broke into his ex-girlfriend's home and repeatedly stabbed her with a meat cleaver.\textsuperscript{80} When a neighbor heard the attack and came to investigate, Pierre drank a container of battery acid in an attempt to commit suicide.\textsuperscript{81} As a result of his suicide attempt, Pierre suffered from a medical condition called esophageal dysphasia, which limited him to a liquid diet administered through a feeding tube that must be replaced monthly.\textsuperscript{82} Pierre was convicted of various crimes stemming from the attack on his ex-girlfriend, and he served a ten-year prison sentence.\textsuperscript{83} After his release, the former INS moved to have Pierre deported based upon his conviction of an aggravated felony.\textsuperscript{84}

\begin{itemize}
\item current activity in the proposed country of removal and predictions about what result will befall an individual after removal." Id.
\item \textsuperscript{76} Id. (noting that deliberate ignorance and willful blindness can satisfy specific intent requirement without contradicting Auguste).
\item \textsuperscript{77} See id. ("Lavira presented an individualized attack on his removal to Haiti, an attack that was obviously specific to his case in light of the doctor's report on his medical condition and the expert report describing how removal would cause Lavira to lose 30 pounds in a short time.").
\item \textsuperscript{78} See Pierre v. Att'y Gen., 528 F.3d 180, 182 (3d Cir. 2008) (en banc) (stating issue before court).
\item \textsuperscript{79} See id. at 183 (stating facts of case). The United States granted Pierre permanent legal resident status on December 1, 1990. See id.
\item \textsuperscript{80} See id. (summarizing facts of case).
\item \textsuperscript{81} See id. (same).
\item \textsuperscript{82} See id. (explaining that Pierre's medical condition would make him especially subject to torture if he were sent to prison in Haiti).
\item \textsuperscript{83} See id. (noting conviction that resulted in Pierre's incarceration).
\item \textsuperscript{84} See id. (stating procedural posture of case). The criminal charges filed against Pierre rendered Pierre removable under United States immigration law. See id. (summarizing relevant immigration law). The former Immigration and Naturalization Service filed the Notice to Appear charging Pierre with being deportable under INA § 237(a)(2)(A)(iii). See id. (same).
\end{itemize}
Relying on the BIA’s opinion in In re J-E, the Third Circuit overruled its prior decision in Lavira and ruled out the possibility that willful blindness could satisfy the specific intent standard. The court restated its holding in Auguste that “the actor [must have] the intent to commit the act as well as the intent to achieve the consequences of the act” and that “knowledge that pain and suffering will be the certain outcome of conduct” will not be enough for a finding of specific intent, despite any suggestion to the contrary found in Lavira. Thus, Pierre was unable to obtain relief under the CAT because he could not show that the Haitian prison officials had the purpose of inflicting severe pain or suffering by placing him in prison.

The court relied on the distinction between general and specific intent as defined in United States v. Bailey, where the Supreme Court held that “‘purpose’ corresponds loosely with the common-law concept of specific intent, while ‘knowledge’ corresponds loosely with the concept of general intent.” In light of the Court’s guidance in Bailey, Lavira’s discussion of willful blindness would only satisfy the general intent requirement of “knowledge”—thereby falling short of satisfying the CAT’s specific intent requirement.

85. See id. at 188 (overruling Lavira).
86. Id. at 189 (citing Auguste v. Ridge, 395 F.3d 123, 145-46 (3d Cir. 2005)). “Specific intent requires not simply the general intent to accomplish an act with no particular end in mind, but the additional deliberate and conscious purpose of accomplishing a specific and prohibited result.” Id. “Mere knowledge that a result is substantially certain to follow from one’s actions is not sufficient to form the specific intent to torture.” Id. “[T]o the extent that Lavira suggests that mere knowledge is sufficient for a showing of specific intent, we overrule that suggestion.” Id.

87. See id. at 190 (“Pierre has failed to qualify for relief under the CAT because he has failed to show that Haitian officials will have the purpose of inflicting severe pain or suffering by placing him in detention upon his removal from the United States.”). “The lack of medical care and likely pain that Pierre will experience is an unfortunate but unintended consequence of the poor conditions in the Haitian prisons [and] . . . not the type of proscribed purpose contemplated by CAT.” Id. at 189.
88. 444 U.S. 394 (1908).
89. Pierre, 528 F.3d at 190 (citing Bailey, 444 U.S. at 405) (noting accepted formulation of distinction between specific and general intent as applied in criminal law jurisprudence); cf. Babbitt v. Sweet Home Chapter of Cmtyns. for a Great Oregon, 515 U.S. 687, 697 n.9 (1995) (noting that Congress’s amendment to criminal statute outlawing certain activities related to endangered species, in which “willfully” was replaced by “knowingly,” was done “to make criminal violations of the act a general rather than a specific intent crime”); Callahan v. A.E.V., 182 F.3d 237, 261 n.15 (3d Cir. 1999) (stating that “although harm to the plaintiffs may have been a probable ultimate consequence of the defendants’ actions, we do not think they specifically intended to cause such harm”); United States v. Blair, 54 F.3d 659, 642 (10th Cir. 1995) (holding that “a specific intent crime is one in which the defendant acts not only with knowledge of what he is doing, but does so with the objective of completing some unlawful act”).
90. See Pierre, 528 F.3d at 190 (“Willful blindness can be used to establish knowledge but it does not satisfy the specific intent requirement of the CAT.”).
B. All Other Circuit Courts to Consider the Issue Follow the BIA’s Interpretation of Specific Intent in In re J-E-

Prior to Pierre v. Attorney General, the Second Circuit directly referred to the Third Circuit’s opinions in Zubeda and Lavira as “wrinkles” in the generally accepted interpretation of “intentionally inflicted” as imposing a specific intent requirement, as established in In re J-E.\(^{91}\) In Pierre v. Gonzales,\(^ {92}\) the Second Circuit held that despite the difficulties that could arise in applying a criminal specific intent standard to individual immigration cases, the word “specifically,” as used in the ratification understanding, was designed to implement a specific intent requirement under the CAT.\(^ {93}\) Thus, the petitioner’s CAT claim was denied because, despite suffering from type-two diabetes and hypertension, he was unable to produce evidence that the Haitian government or its agents had the requisite specific intent to cause the severe suffering that inevitably results from the country’s squalid prison conditions.\(^ {94}\) Other circuits that considered the question of specific intent under the CAT have relied on In re J-E and reached the same conclusion as the Second and Third Circuits.\(^ {95}\)

\(^{91}\) See Pierre v. Gonzales, 502 F.3d 109, 117 (2d Cir. 2007) (“No federal circuit court considering the case of a Haitian criminal deportee has declined to follow In re J-E, though there are wrinkles in the Third Circuit.”). The Second Circuit noted that while willful blindness and deliberate indifference “may bear on knowledge to the extent they establish conscious avoidance, [they cannot] without more demonstrate specific intent, which requires that the actor intend the actual consequences of his conduct (as distinguished from the act that causes these consequences).” Id. at 118.

\(^{92}\) 502 F.3d 109 (2d Cir. 2007).

\(^{93}\) See id. at 118 (“[T]he phrase ‘specifically intended’ incorporates a criminal specific intent standard, notwithstanding the difficulties that might arise in applying that standard to evidence of country conditions in order to predict the likelihood of future events in individual cases.”). The petitioner in Pierre was convicted of criminal possession of a firearm in 1997 and grand larceny in 1999. See id. at 111 (stating facts of case). He was sentenced to eighteen to thirty-six months’ incarceration for the latter offense, but INS considered both crimes aggravated felonies, which made him removable. See id. (same).

\(^{94}\) See id. at 121 (“Prison is always an ordeal. Barbaric prison conditions might constitute torture if they cause severe pain or suffering and if circumstances indicate that the intent of the authorities in causing the severity of pain and suffering . . . is to illicitly discriminate, punish, coerce confessions, intimidate, or the like.”).

\(^{95}\) See Villegas v. Mukasey, 523 F.3d 984, 989 (9th Cir. 2008) (“[W]e hold that to establish a likelihood of torture for purposes for the CAT, a petitioner must show that severe pain or suffering was specifically intended—that is, that the actor intend the actual consequences of his conduct, as distinguished from the act that causes these consequences.”); Majd v. Gonzales, 446 F.3d 590, 597 (5th Cir. 2006) (rejecting CAT claim because “[m]ost of the suffering [the petitioner] described was inflicted without any specific intent”).

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V. Arguments in Favor of an Expanded Reading of Specific Intent

A. International Courts' Broader Readings of "Torture"

The Second Circuit noted in Pierre v. Gonzales that international law does not assist in the analysis of international treaties like the CAT because the "United States is not subordinate to customary international law or necessarily subordinate to treaty-based international law and, in fact, may conflict with both."96 One scholar has labeled this default policy of imposing reservations on international agreements as "American exceptionalism."97 In a sense, the United States "tries to have it both ways" by enjoying the "appearance of compliance" while at the same time maintaining "the illusion of unfettered sovereignty."98 One of the most problematic examples of American exceptionalism occurs "when the United States proposes that a different rule should apply to itself than applies to the rest of the world."99 In so doing, the United States goes beyond modification and actually undermines the rule's legitimacy.100 Many scholars believe that the only way the United States can commit to a policy of human rights is to fully adopt international human rights laws without the reservations, understandings, and declarations currently in place for treaties like the CAT.101

96. Pierre, 502 F.3d at 119 (citing United States v. Yousef, 327 F.3d 56, 91 (2d Cir. 2003)). "An act of Congress will govern in domestic courts in derogation of previous treaties and customary international law." Id.

97. See Harold Hongju Koh, On American Exceptionalism, 55 Stan. L. Rev. 1479, 1482-83 (2003) (discussing American exceptionalism). American exceptionalism can be partly defined as "ways in which the United States actually exempts itself from certain international law rules and agreements, even ones that it may have played a critical role in framing, through such techniques as ... ratification with reservations, understandings, declarations [and] the non-self-executing treaty doctrine." Id. "[T]he United States has adopted the perverse practice of human rights compliance without ratification." Id. at 1484.

98. Koh, supra note 97, at 1485 ("[T]he United States] support[s] and follow[s] the rules of the international realm most of the time, but always out of a sense of political prudence rather than legal obligation."). The United States "complies, but does not obey, because to obey visibly would mean surrendering his freedom and admitting to constraints, while appearing 'free' better serves [its] self-image than the more sedate label of being law-abiding." Id.

99. Id. at 1489 (noting United States' policy of applying variations of rules that it expects other countries will apply exactly as written).

100. See id. at 1487 ("[T]he United States can end up undermining the legitimacy of the rules themselves, not just modifying them to suit American's purposes."). "[T]he perception that the United States applies one standard to the world and another to itself sharply weakens America's claim to lead globally through moral authority. This diminishes U.S. power to persuade through principle." Id.

Looking to international case law, it is evident that European Nations are more willing to factor humanitarian considerations into their examination of whether prison conditions constitute torture. The European Court of Human Rights found that, although prison conditions in his country of citizenship would not normally constitute torture, removal "would expose him to a real risk that he would die in distressing circumstances, which would amount to inhuman treatment," thus constituting torture.

Similarly, in R. v. Immigration Appeal Tribunal, the petitioner suffered from leprosy and AIDS, and the court found that deporting him back to Uganda would put the United Kingdom in violation of the European Convention’s definition of torture solely due to the petitioner’s particular medical situation. The International Criminal Tribunal for the

102. See Brief for Dalegrand as Amici Curiae Supporting Respondent, supra note 2, at 17 (“[There are] broad humanitarian purposes [in] 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.” Id. “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.” Id. at 20.


104. See id. (stating facts of case).

105. See id. (same).

106. See id. (explaining that petitioner’s individual medical circumstances meant he would die in prison despite fact that prison conditions themselves would not otherwise amount to torture).

Withdrawal of the care, support and treatment D was currently receiving in the UK would have serious consequences for him, and, whilst the conditions in St Kitts did not themselves breach the standards demanded by Art. 3, D’s removal there would expose him to a real risk that he would die in distressing circumstances, which would amount to inhuman treatment contrary to Art. 3. Although released alien prisoners did not normally have the right to remain so as to continue to receive medical or welfare services, D’s case was exceptional and involved compelling humanitarian factors.


108. See id. (“[I]t was arguable that [the petitioner’s] case was one of the extreme cases in which the removal of a person to a third country in which he would not be subjected to treatment infringing Art. 3 would nevertheless put the United Kingdom in breach of Art. 3.”). “There was clear evidence that, if returned to Uganda, [the petitioner] would not only suffer more and die more rapidly from
Former Yugoslavia (ICTY), in *Prosecutor v. Kunarac*, 109 closely tracked the Third Circuit’s “willful blindness” or “deliberate indifference” reasoning in *Lavira* and *Zubeda*. 110 *Kunarac* concerned a charge of torture, in which the defense argued that the accused lacked “specific intent” because he only committed rape to achieve his own sexual gratification, not to “torture” his victim. 111 The ICTY disallowed the defense and 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.” 112 The Tribunal noted that regardless of the attacker’s subjective purpose, pain or suffering was a “logical consequence of his conduct,” and his deliberate indifference constituted specific intent to cause pain and suffering. 113

Finally, in *Lizardo Cabrera v. Dominican Republic*, 114 the Inter-American Commission on Human Rights “did not demand proof that the prison officials actually desired to cause the pain and suffering” of a prisoner with health problems. 115 The fact that the prison officials chose to allow the prisoner’s health to deteriorate in solitary confinement, as opposed to specifically desiring such a result, did not prevent their conduct from being condemned as “torture.” 116 Clearly, then, there is ample support in international law for dispensing the BIA’s requirement that the government or government actor “specifically intend” to inflict the pain and suffering that inevitably comes about by the nature of the appalling conditions of a developing country’s prison system. 117

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HIV and AIDS, but would do so in circumstances of degradation brought about by the combination of that condition and leprosy.” *Id.*

109. Case No. IT-96-23-T (ICTY Appeals Chamber June 12, 2002).


111. *See* *Kunarac*, Case No. IT-96-23-T, ¶ 158 (noting Kunarac’s defense).

112. *See id.* ¶ 153 (noting Tribunal’s finding that specific intent does not require that perpetrator intend pain and suffering).

113. *See id.* (holding that deliberate indifference was sufficient to satisfy specific intent requirement for finding of torture).


115. Brief for Dalegrand as Amici Curiae Supporting Respondent, *supra* note 2, at 19 (noting Commission did not require that prison guards have desire to harm prisoner to find torture had been committed).

116. *See id.* (“All that mattered was that the jailers had remitted the prisoner to solitary confinement knowing that his health problems would likely be exacerbated there.”).

117. *See id.* (“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. The Varying Criminal Law Definitions of Specific Intent

The meaning of "specific intent" in the context of the criminal law does not have one consistent meaning.\textsuperscript{118} By requiring that Haitian prison guards have a sadistic purpose to inflict torture in order to find that they acted with "specific intent" is contrary to criminal law jurisprudence.\textsuperscript{119} Criminal caselaw and treatises have found that specific intent requires "no more than intent to do the prohibited act with knowledge or desire that it will cause a certain result."\textsuperscript{120} The concurrence in Pierre v. Attorney General noted that relying on an "errant sentence" in Bailey to "establish that 'specific intent' must mean 'purpose'" would lead to absurd conclusions.\textsuperscript{121}

\begin{itemize}
  \item \textsuperscript{118} See Memorandum from Daniel Levin, Acting Assistant Att’y Gen., to James B. Comey, Deputy Att’y Gen., at 16 (Dec. 30, 2004), available at http://www.usdoj.gov/olc/18usc23402340a2.htm [hereinafter Levin Memorandum] ("It is well recognized that the term 'specific intent' is ambiguous and that courts do not use it consistently."). "Some suggest that only a conscious desire to produce the proscribed result constitutes specific intent; others suggest that even reasonable foreseeability suffices." \textit{Id.}; see also JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 10.06 (6th ed. 1995) ("The terms 'specific intent' and 'general intent' are the bane of criminal law students and lawyers. . . . The concepts are so 'notoriously difficult . . . to define and apply . . . [that] a number of text writers recommend that they be abandoned altogether.'") (footnote omitted).
  \item \textsuperscript{119} See Pierre v. Att’y Gen., 528 F.3d 180, 191 (3d Cir. 2008) (Rendell, J., concurring) ("[The majority has] "obscured the meaning of specific intent and its proper contours as developed in the criminal law jurisprudence."). "The majority conflates [specific intent with illicit purpose] by deciding that specific intent to inflict severe pain and suffering only exists if the actor’s purpose is to inflict pain." \textit{Id.} "The majority equates 'intentionally inflicted' under CAT, which requires specific intent, to 'pain for pain’s sake.’" \textit{Id.}
  \item \textsuperscript{120} \textit{Id.} at 192 (citing Tison v. Arizona, 481 U.S. 137, 150 (1987)) (noting that “knowledge” or “desire” both meet specific intent requirement for purposes of criminal law, contrary to requirement of “purpose” as found by majority); see also Carter v. United States, 530 U.S. 255 (2000) (explaining that general intent, as opposed to specific intent, requires “that the defendant possessed knowledge [only] with respect to the actus reus of the crime”); United States v. Neiswender, 590 F.2d 1269, 1273 (4th Cir. 1979) (holding proof of specific intent requires only that defendant simply have “knowledge or notice” that his act “would have likely resulted in” proscribed outcome). As one commentator notes:

\begin{quote}
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.
\end{quote}

Wayne R. LaFave, SUBSTANTIVE CRIMINAL LAW § 5.2(a) (2d ed. 2003) (emphasis added).
  \item \textsuperscript{121} See Pierre, 528 F.3d at 192 (Rendell, J., concurring) (noting absurd results if specific intent is always defined as “purpose” under criminal law). The concurrence noted that if specific intent was defined to mean “purpose” it would “mean that, since 1980, all prosecutions for specific intent crimes either proved the defendant’s purpose as to consequences (and did not rely on knowledge of the certainty

\end{itemize}
A broader interpretation of specific intent is also evidenced by the jury instructions in Third Circuit criminal trials, which define intent to mean "that [the defendant] knew that (he) (she) . . . would be practically certain to cause that result." In addition, caselaw interpreting the Eighth Amendment has historically "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." Finally, the Third Circuit's adoption of the BIA's interpretation of specific intent contradicts the Attorney General's express renunciation of the more restrictive definition in 2004. Section 2540 of the U.S. Criminal Code, enacted to carry out the United States' obligations under the CAT, defines torture as "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering." In August of 2002, the Office of Legal Counsel of the Department of Justice, headed by Jay Bybee, issued an opinion defining "specifically intended" as requiring that one "must expressly intend to achieve the forbidden act . . . [The Statute] requires that a defendant act with specific intent to inflict severe pain . . . [and that it] must be the defendant's precise objective." Yet, in 2004, the Attorney General, in a subsequent memorandum, renounced this more narrow interpretation of "specifically intended," and noted that a defendant's motive is not relevant to determining whether he or she had the requisite specific intent. In

of consequences) or resulted in acquittals based on Bailey. Furthermore, the concurrence relied on the fact that the Court in Bailey noted "purpose" only "corresponds loosely with the common-law concept of specific intent." Id. (citing Third Circuit Jury Instructions § 5.03 (Sept. 2006)) (noting knowledge of particular result meets criminal law definition of intent in context of criminal trials). "Bailey purported only to summarize the state of the law, not to overrule precedent interpreting the common law term. Indeed, the term 'loosely' used by the Bailey Court indicates that specific intent, in fact, has meanings other than purpose." Id. at 192-93.

122. Id. (citing Third Circuit Jury Instructions § 5.03 (Sept. 2006)) (noting knowledge of particular result meets criminal law definition of intent in context of criminal trials). "Bailey purported only to summarize the state of the law, not to overrule precedent interpreting the common law term. Indeed, the term 'loosely' used by the Bailey Court indicates that specific intent, in fact, has meanings other than purpose." Id. at 192-93.


124. For a further discussion of the Bybee and Levin memoranda, see infra notes 125-27 and accompanying text.

125. 18 U.S.C. § 2340(1) (2000) (emphasis added); see also H.R. Rep. No. 103-482, at 229 (1994) (Conf. Rep.) (noting Congress enacted Sections 2340-2340A to carry out United States' obligations under the CAT); Levin Memorandum, supra note 118, at 4 ("The CAT . . . requires the United States, as a state party, to ensure that acts of torture, along with attempts and complicity to commit such acts, are crimes under U.S. law.").


127. See Levin Memorandum, supra note 118, at 16-17 (renouncing Bybee Memorandum's more narrow interpretation of specific intent). The Levin Memorandum provides:

In the [Bybee] Memorandum, this Office concluded that the specific intent element of the statute required that infliction of severe pain or suf-
light of this subsequent renunciation, the federal courts should not give deference to the BIA's restrictive interpretation of specific intent.  

VI. THE NEGATIVE IMPLICATIONS OF CONTINUED RELIANCE ON IN RE J-E-

As the Third Circuit noted in Zubeda, "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." The federal courts' continued deference to the BIA's interpretation of specific intent in In re J-E- affects not only Haitian criminal deportees, but all cases where torture is implicated.  

The Third Circuit's adoption of the BIA's restrictive definition of specific intent essentially requires a CAT claimant to prove the impossible: the prospective intent of their torturer. As an extreme example, under the BIA's interpretation of specific intent, even widespread systematic rape by soldiers would not rise to the level of torture unless a rapist specifically intended that his victims would suffer.

Serious

128. See Redman, supra note 33, at 468 ("[F]ederal courts are making a tragic mistake in continuing to defer to the Board's narrow interpretation of 'torture' even after the White House has renounced the same interpretation as applied to the United States personnel."). "While federal courts generally accord Chevron deference to the Board's reasonable interpretations of ambiguous immigration statutes, they traditionally decline to defer to interpretations of provisions that do not implicate the Board's particular expertise in immigration law." Id.

129. Zubeda v. Achcroft, 333 F.3d 463, 474 (3d Cir. 2003); see also In re J-E-, 23 I. & N. Dec. 291, 310-11 (B.I.A. 2002) (Rosenberg, J., dissenting) ("[T]his [more narrow] approach . . . I fear can only lead to a derogation and not a meaningful implementation of our obligations under the [CAT].").

130. See Redman, supra note 33, at 494 (noting widespread implications of BIA's narrow specific intent interpretation).

131. See In re J-E-, 23 I. & N. Dec. at 316 (Rosenberg, J., dissenting) ("Nowhere does the regulation state that the respondent must prove that the prospective torture he may face will result from the torturer's specific intent to torture him. Indeed, it would be difficult, if not impossible, to prove specific intent in a prospective context.").

For example, a person seeking to prevent his extradition to another country based on a danger of being subjected to torture must prove the criminal intent of the foreign authorities to cause him severe pain and suffering. Otherwise, regardless of how much pain and suffering he fears, the treatment would not constitute "torture."

Redman, supra note 33, at 494-95.

132. See Brief for Dalegrand as Amicus Curiae Supporting Respondent, supra note 2, at 16 (noting devastating consequences of BIA's narrow reading of "specific intent"). Specifically:

Under the Board's strict definition of "specific intent," even widespread, systematic use of rape by soldiers as a means of terrorizing civilians might
Despite Congress's understandable distaste for protecting criminals, the CAT requires the United States to stand by its obligations, and to protect all persons from torture.\textsuperscript{133}

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\textsuperscript{133} See \textit{In re E-}, 23 I. & N. Dec. at 311 (Rosenberg, J., dissenting) (noting dissent's reminder that Congress vowed to protect all persons from torture and not simply those without criminal convictions). The dissent pointedly states:

It is no secret that Congress was not pleased with being obligated to extend protection to persons, including those with criminal convictions, who are barred from eligibility for asylum and withholding of removal. But the very terms of the Convention that the Senate ratified require us to protect such individuals from the probability of torture, no matter how undesirable they may be and notwithstanding the prior criminal offenses. \textit{Id.} (internal citations omitted).