

DEFINING TORTURE IN INTERNATIONAL LAW: A CRITIQUE OF THE CONCEPT EMPLOYED BY THE EUROPEAN COURT OF HUMAN RIGHTS

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INTRODUCTION

The purpose of this article is to critique the concept of torture employed by the European Court of Human Rights. Part I highlights the absolute character of the prohibition against torture and explicates the definition provided by the United Nations Convention against Torture. Part II deconstructs the concept of torture employed by the European Court of Human Rights, concentrating on the standard setting case of *Ireland v. United Kingdom*.¹ Asserting that the Court's notion of torture is too narrow, Part III proposes an approach similar to the one employed by the United Nations Human Rights Committee. Ultimately, Part IV emphasizes the need for a less definitive, broader view of the concept of torture, and draws attention to the restrictive nature of the notion currently employed by the Court.

I. THE PROHIBITION OF TORTURE AND ITS CONCEPTUALIZATION IN INTERNATIONAL LAW

Article 5 of the United Nations Universal Declaration of Human Rights ("UDHR") states that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."² Since the adoption of the UDHR on December 10, 1948, this provision has been reproduced in several other international human rights instruments. For example, Article 5(3) of the American Convention on Human Rights replicates the formula with the

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1. *Ireland v. United Kingdom*, App. No. 5310/71, 2 Eur. H.R. Rep. 25 (1980).

2. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., Part I, at 71, U.N. Doc A/810 (1948) [hereinafter UDHR].

appendage that “[a]ll persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.”³ In addition, Article 7 of the International Covenant on Civil and Political Rights (“ICCPR”) includes the provision of the UDHR, specifying that “[i]n particular, no one shall be subjected without his free consent to medical or scientific experimentation.”⁴ Finally, The Convention on the Rights of the Child,⁵ and the European Convention on Human Rights⁶ also reproduce, with minor changes, the wording of Article 5 of the UDHR.⁷ With all international instruments containing a provision prohibiting torture, enforcement against it is absolute. Thus, under no circumstances can a state party legitimately derogate from the obligations incurred by this provision.⁸

The prohibition of torture contained in the above-mentioned instruments represents a codification of a norm of *jus cogens* or customary international law. The proscribing of torture as a peremptory norm of international law is illustrated by the judgment of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Furundzija* case:

It should be noted that the prohibition of torture laid down in human rights treaties enshrines an absolute right, which can never be derogated from, not even in time of emergency This is linked to the fact . . . that the prohibition on torture is a peremptory norm or *jus cogens*. . . . This prohibition is so extensive that States are even barred by international law from expelling, returning or extraditing a person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture.⁹

3. American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 (entered into force July 18, 1978).

4. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, art. 7, 999 U.N.T.S. 171, G.A. res. 2200A, 21 U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) (entered into force March 23, 1976) [hereinafter ICCPR].

5. Convention on the Rights of the Child, *adopted without vote* Nov. 20, 1989, 28 I.L.M. 1448, 1470, G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. No. 49, at 167, U.N. Doc. A/Res./44/25 (entered into force Sept. 2, 1990).

6. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, 224 (entered into force Sept. 3, 1953) [hereinafter European Convention on Human Rights].

7. The European Convention on Human Rights reproduces the U.N. Declaration formula in its Article 3 but omits the word “cruel.” *Id.* art. 3. The Convention on the Rights of the Child contains the provision with the term “child” substituted for “one.” Convention on the Rights of the Child, *supra* note 5, art. 37. Article 39 of this convention also uses the terms contained in the United Nation’s provision: “States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of . . . torture or any other form of cruel, inhuman or degrading treatment or punishment.” *Id.* art. 39.

8. *See, e.g.*, European Convention on Human Rights, *supra* note 6, art. 15; ICCPR, *supra* note 4, art. 4.

9. Prosecutor v. Furundzija, ICTY Case No. IT-95-17/1, Trial Chamber Judgment, ¶ 144 (1998) (italics added) (citations omitted). All ICTY cases are available from the ICTY’s website at <http://www.icty.org>.

Stating, “there exists today universal revulsion against torture” the ICTY asserted that this “has led to a cluster of treaty and customary rules on torture acquiring a particularly high status in the international, normative system.”¹⁰ The European Court of Human Rights adopted a similar position:

Within the Convention system it has long been recognised that the right under [Article] 3 not to be subjected to torture or to inhuman or degrading treatment or punishment enshrines one of the fundamental values of democratic society. It is an absolute right, permitting of no exception in any circumstances.¹¹

As a principle of *jus cogens*, the prohibition of torture is among the strongest norms of international law. The ICTY emphasized this point:

Because of the importance of the values it protects, this principle has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even “ordinary” customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special or even general customary rules not endowed with the same normative force.¹²

To clarify the concept of torture, it is useful to examine the definition provided by Article 1 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“UNCAT”):

For the purposes of this Convention, the term “torture” means any 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 reason 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.¹³

10. *Id.* ¶ 147.

11. *Al-Adsani v. United Kingdom*, App. No. 35763/97, 34 Eur. H.R. Rep. 11, ¶ 29 (2001) (citation omitted).

12. *Prosecutor v. Furundzija*, ICTY Case No. IT-95-17/1, Trial Chamber Judgment, ¶ 153 (1998) (citation omitted).

13. *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Dec. 10, 1984, 23 I.L.M. 1027, as modified, 24 I.L.M. 535, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984). The definition of torture provided by Article 2 of the Inter-American Convention for the Prevention of Torture, although broader in scope, is modeled on Article 1 of UNCAT:

For the purposes of this Convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose.

This is the first definition of torture to be expressed in a convention. The wording derives from a similar provision in the U.N. Declaration against Torture.¹⁴ The definition is used by the International Criminal Tribunal for Rwanda and the ICTY and has been referred to on a number of occasions in the jurisprudence of the European Court of Human Rights.¹⁵

It is possible to discern four cardinal features of the above definition that characterise constitutively the meaning of torture in international human rights law.¹⁶ The first, and perhaps most distinguishing feature, concerns the severity of the treatment or punishment inflicted.¹⁷ Generally, in international human rights law, for an act to constitute torture it must cause a certain degree of mental or physical pain or suffering.¹⁸ This is reflected in the jurisprudence of the ICTY,¹⁹ the European Court of Human Rights²⁰ and the Human Rights Committee.²¹ The severity of pain or suffering is thus commonly understood as a “distinguishing characteristic of torture that sets it apart from similar offences.”²²

Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.

The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article.

Inter-American Convention for the Prevention of Torture, Dec. 9, 1985, art. 2, 25 I.L.M. 519, O.A.S. Treaty Series No. 67 (entered into force Feb. 28, 1987).

14. Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, G.A. Res. 3452, U.N. GOAR, 30th Sess., Supp. No. 34, at 91, U.N. Doc. A/10034 (1975).

15. See, for example, its use by the Court in *Al-Adsani v. United Kingdom*, App. No. 35763/97, 34 Eur. H.R. Rep. 11, ¶ 29 (2001).

16. See AMNESTY INT’L, *TORTURE IN THE EIGHTIES* 13-14 (London: Amnesty Int’l Publications, 1984).

17. *Id.*

18. One notable exception to this criterion is the Inter-American Convention for the Prevention of Torture. The criterion of severity is omitted from the definition contained in Article 2 of this Convention and the concept is widened to include acts that do not necessarily result in pain or suffering: “Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.” Inter-American Convention for the Prevention of Torture, *supra* note 13, art. 2.

19. See *Prosecutor v. Delalic et al.*, ICTY Case No. IT-96-21-T, Trial Chamber Judgment, ¶ 468 (1998) (commonly known as the “Celebici case” because it arises out of events which occurred at a detention facility in the village of Celebici).

20. See discussion *infra* Part II.

21. See *United Nations Human Rights Committee General Comment 20*, U.N. CCPR 44th Sess., 1138th mtg. ¶ 5 (1992) reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. GAOR, U.N. Doc. HRI/GEN/1/rev.5 (2001) [hereinafter *General Comment 20*].

22. *Prosecutor v. Kvocka, et al.*, ICTY Case No. IT-98-30/1, Trial Chamber Judgment, ¶ 142 (2001).

The level of intensity required by the definition is unclear.²³ Consequently, it is problematic to distinguish the threshold of sufficient severity without referring to the victim's point of view. According to Chris Ingelse,

[i]n view of the way in which the provision is formulated, only the victim himself can bear witness to the pain and its intensity. The effect that the action has on the victim is also determinative for the question as to whether torture has occurred. The intention of the person inflicting the pain is, at least for the subjective perception of its intensity, irrelevant . . . [T]his offers few clues on which to base an objective conclusion.²⁴

Although the term "severe" is vague and open to interpretation,²⁵ to include a specific threshold of pain or suffering in the definition would arguably result in an excessive limitation on its application.²⁶ The experience of the victim is of primary consideration in determining acts that constitute torture. Exclusive use of objective criteria in assessing such ill-treatment overlooks the fact that pain and suffering are fundamentally subjective, thus, the victim's perspective needs to be taken into account.²⁷

The second feature of torture is that, either by act or omission, it is inflicted intentionally.²⁸ If the ill-treatment results from incidental neglect, such as forgetting to feed prisoners, then it does not constitute torture. It may be possible for such acts to be characterised as cruel, inhuman or degrading treatment. However, if an act is to be characterised as torture, a necessary ingredient is the perpetrator's deliberate intention to inflict pain or suffering.

The third feature is the purpose of the treatment or punishment;²⁹ it must be inflicted in view of achieving a specific objective, such as obtaining information. The term "for such purposes as" indicates that the purposes mentioned within the Convention's definition are not exhaustive.³⁰ Although Burgers and Danelius, who participated in the drafting of the Convention, state that the phrase "for such purpose as" qualifies acts as being similar or

23. The *travaux préparatoires* of UNCAT does not shed light on this issue. See J. HERMAN BURGERS & HANS DANIELIUS, *THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT* 117-18 (1988).

24. CHRIS INGELSE, *THE U.N. COMMITTEE AGAINST TORTURE: AN ASSESSMENT* 209 (2001).

25. See discussion of *Ireland v. United Kingdom* *infra* pp. 39-42.

26. According to one commentator, to say generally "how severe or aggravated inhuman treatment has to be for it to amount to torture is virtually impossible." NIGEL RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* 98 (2d ed. 1999).

27. This point will be returned to again with the discussion of the *Ireland v. United Kingdom* case where it will be argued that the threshold of suffering was set at an excessively high level by the Court. See discussion *infra* pp. 39-42.

28. AMNESTY INT'L, *supra* note 16, at 13-14.

29. *Id.*

30. See INGELSE, *supra* note 24, at 209.

connected to those mentioned in the Convention,³¹ this is not how it is now interpreted.³² Indeed, the ICTY stated in its judgment in the *Celebici* case, the examples given “do not constitute an exhaustive list, and should be regarded as merely representative.”³³

The fourth feature of torture concerns its official character.³⁴ Under the definition, torture is only recognized if it is committed “at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”³⁵ Although the Convention is directed primarily against actions of state officials, the wording of the definition is broad enough to effectively include some actions by private individuals.³⁶ Nevertheless, the requirement of a state actor’s involvement imposes a serious restriction on the application of the definition. It was considered recently by the ICTY to be “inconsistent with the application of individual criminal responsibility for international crimes found in international humanitarian law and international criminal law.”³⁷

The four above-mentioned features articulate cardinal aspects of how torture is generally conceived in international law.³⁸ Attention will now be turned to how the concept is employed by the European Court of Human

31. According to Burgers and Danelius, for ill treatment to qualify as torture its purpose must have “some—even remote—connection with the interests or policies of the State and its organs.” BURGERS & DANELIUS, *supra* note 23, at 119.

32. See, e.g., Prosecutor v. Kvočka, et al., ICTY Case No. IT-98-30/1, Trial Chamber Judgment, ¶ 119 (2001).

33. Prosecutor v. Delalic et al., ICTY Case No. IT-96-21-T, Trial Chamber Judgment, ¶ 470 (1998).

34. See INGELSE, *supra* note 24, at 210 (citation omitted).

35. *Id.*

36. According to Ingelse,

[t]he wording of the requisite relationship with the government is so broad in the Convention (notably the term acquiescence) that there are many ways to ensure that a wide range of actions committed by private persons are covered by the operation of the Convention, if the state in some way or other permits such activities to continue.

Id.

37. Prosecutor v. Kvočka, et al., ICTY Case No. IT-98-30/1, Trial Chamber Judgment, ¶ 139 (2001). It ought to be noted also that the definition of torture provided by Article 7(2)(e) of the Rome Statute of the International Criminal Court does not include the requirement of state actor: “‘Torture’ means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.” Rome Statute of the International Criminal Court, July 17, 1998, art. 7(2)(e), 37 I.L.M. 999, 1005, U.N. Doc. A/CONF.183/9 (1998); Prosecutor v. Kvočka, et al., ICTY Case No. IT-98-30/1, Trial Chamber Judgment, ¶ 139 n. 296 (2001).

38. Although there is considerable overlap with both international humanitarian law and international criminal law, it ought to be noted that the prerequisites of torture in these fields are not identical to those contained in the Convention against Torture. For example, the ICTY (since the *Kunarac* Judgment), does not require under international humanitarian law the involvement of an official for an act to constitute torture.

Rights. In doing so, problems arising from the Court's interpretation of the severity of treatment or punishment required for torture will be highlighted.

II. TORTURE AS DEFINED BY THE EUROPEAN COURT OF HUMAN RIGHTS

Article 3 of the European Convention on Human Rights states, "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."³⁹ According to the European Court of Human Rights,

[i]n determining whether a particular form of ill-treatment should be qualified as torture, consideration must be given to the distinction, embodied in [Article] 3, between this notion and that of inhuman or degrading treatment. As noted in previous cases, it appears that it was the intention that the Convention should, by means of this distinction, attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering [citation omitted]. In addition to the severity of the treatment, there is a purposive element, as recognised in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which came into force on 26 June 1987, which defines torture in terms of the intentional infliction of severe pain or suffering with the aim, inter alia, of obtaining information, inflicting punishment or intimidating.⁴⁰

The Court first employed this concept of torture in the case of *Ireland v. United Kingdom*.⁴¹ This case is of particular significance to the present discussion for two reasons. First, it introduced the notion that a minimum level of severity is required for acts of ill-treatment to constitute torture. Prior to the judgment in *Ireland v. United Kingdom*, the European Commission on Human Rights defined the meaning of Article 3's terms in the *Greek* case:

The notion of inhuman treatment covers at least such treatment as deliberately causes suffering, mental or physical, which, in the particular situation is unjustifiable.

The word "torture" is often used to describe inhuman treatment, which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment. Treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others, or drives him to an act against his will or conscience.⁴²

Although torture is considered in the *Greek* case to be an "aggravated form of inhuman treatment," the Court did not make explicit that a threshold of pain or suffering is required for an act to constitute torture. Second, *Ireland v. United Kingdom* is significant because the Court differentiated more

39. European Convention on Human Rights, *supra* note 6, art. 3.

40. *Atkas v. Turkey*, App. No. 24351/94, ¶ 313 (2003) available at <http://www.echr.coe.int> (citation omitted).

41. *Ireland v. United Kingdom*, App. No. 5310/71, 2 Eur. H.R. Rep. 25, ¶ 167 (1980).

42. Richard Desgagne, *Integrating Environmental Values into the European Convention on Human Rights*, 89 AM. J. INT'L L. 263, 270 n.51 (quoting *The Greek Case*, 1969 Y.B. Eur. Conv. on H.R. 186 (Eur. Comm'n on H.R.)).

distinctly the meaning of each of the terms contained in Article 3 of the European Convention on Human Rights. The Court has utilized this approach, placing emphasis on severity of suffering in the concept of torture, on a number of different occasions, including in *Çiçek v. Turkey*,⁴³ *Aydin v. Turkey*,⁴⁴ *Selmouni v. France*,⁴⁵ *H.L.R. v. France*,⁴⁶ *Aksoy v. Turkey*,⁴⁷ the *Guzzardi* case,⁴⁸ the *Campbell and Cosans* case⁴⁹ and *Atkas v. Turkey*.⁵⁰

The Irish government submitted an application to the European Commission on Human Rights on December 16, 1971, alleging a number of violations of the European Convention on Human Rights by the United Kingdom.⁵¹ The present analysis confines itself to those aspects of the Court's judgment concerned with violations of Article 3.

Article 3 states: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."⁵² Its violation in *Ireland v. United Kingdom* concerned the torture of prisoners by British security forces for the purpose of extracting information. The security forces' practice of "interrogation in depth" involved the use of the following five techniques:

(a) wall-standing: forcing the detainees to remain for periods of some hours in a "stress position," described by those who underwent it as being "spreadeagled against the wall, with their fingers put high above the head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers";

(b) hooding: putting a black or navy coloured bag over the detainees' heads and, at least initially, keeping it there all the time except during interrogation;

(c) subjection to noise: pending their interrogations, holding the detainees in a room where there was a continuous loud and hissing noise;

(d) deprivation of sleep: pending their interrogations, depriving the detainees of sleep;

43. *Çiçek v. Turkey*, App. No. 25704/94, 37 Eur. H.R. Rep. 20, ¶ 154, 172 (2003).

44. *Aydin v. Turkey*, App. No. 23178/94, 25 Eur. H.R. Rep. 251, ¶ 82 (1998).

45. *Selmouni v. France*, App. No. 25803/94, 29 Eur. H.R. Rep. 403, ¶ 88 (1999).

46. *H.L.R. v. France*, App. No. 24573/94, 26 Eur. H.R. Rep. 29, ¶ 35 (1997).

47. *Aksoy v. Turkey*, App. No. 21987/93, 23 Eur. H.R. Rep. 553, ¶ 63 (1997).

48. *Guzzardi v. Italy*, App. No. 7367/76, 3 Eur. H.R. Rep. 333, ¶ 107 (1981).

49. *Campbell and another v. United Kingdom*, App. No. 7511/76, 4 Eur. H.R. Rep. 293, ¶ 27 (1982).

50. *Atkas v. Turkey*, App. No. 24351/94, ¶ 313 (2003) available at <http://www.echr.coe.int>.

51. *Ireland v. United Kingdom*, App. No. 5310/71, 2 Eur. H.R. Rep. 25, ¶ 148 (1980). The Irish Government alleged violations of Articles 1, 3, 5, 6 and 14 in its original application to the European Commission on Human Rights. *Id.*

52. European Convention on Human Rights, *supra* note 6, art. 3.

(e) deprivation of food and drink: subjecting the detainees to a reduced diet during their stay at the centre and pending interrogations.⁵³

The opinion of the Court was that the application of the above five techniques for the purpose of interrogation, although inhuman and degrading, did not amount to torture.⁵⁴ The Court decided that the suffering inflicted through the use of the techniques was not of sufficient severity to constitute torture.⁵⁵ The Court used the terms contained in Article 3 as a way of distinguishing the ill-treatment suffered by the prisoners from the “special stigma” attached to the actual practice of torture:

In order to determine whether the five techniques should also be qualified as torture, the Court must have regard to the distinction, embodied in Article 3, between this notion and that of inhuman or degrading treatment. In the Court’s view, this distinction derives principally from a difference in the intensity of the suffering inflicted.

The Court considers in fact that, whilst there exists on the one hand violence which is to be condemned both on moral grounds and also in most cases under the domestic law of the Contracting States but which does not fall within Article 3 of the Convention, it appears on the other hand that it was the intention that the Convention, with its distinction between “torture” and “inhuman or degrading treatment,” should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering.⁵⁶

The Court thus distinguished torture by its level of intensity and characterized torture as “deliberate inhuman treatment causing very serious and cruel suffering.” Article 1(2) of Resolution 3452 (XXX), adopted unanimously by the General Assembly of the United Nations on December 9, 1975, clarifies this point: “Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.”⁵⁷ The Court concludes this point with the following statement:

Although the five techniques, as applied in combination, undoubtedly amounted to inhuman and degrading treatment, although their object was the extraction of confessions, the naming of others and/or information and although they were used systematically, they did not occasion suffering of

53. Ireland v. United Kingdom, App. No. 5310/71, 2 Eur. H.R. Rep. 25, ¶ 96 (1980). See also SIR EDMUND COMPTON, REPORT OF THE ENQUIRY INTO ALLEGATIONS AGAINST THE SECURITY FORCES OF PHYSICAL BRUTALITY IN NORTHERN IRELAND ARISING OUT OF EVENTS ON THE 9TH AUGUST 1971 ch. VII (Her Majesty’s Stationary Office 1971) available at <http://www.cain.ulst.ac.uk/hmsocompton.htm>. For narrative accounts of the practice, written by the detainees, see FATHER DENIS FAUL & FATHER RAYMOND MURRAY, THE HOODED MEN: BRITISH TORTURE IN IRELAND AUGUST, OCTOBER 1971 4-78 (1974).

54. Ireland v. United Kingdom, App. No. 5310/71, 2 Eur. H.R. Rep. 25, ¶ 167 (1980).

55. “[T]he severity of the suffering that [the five techniques] were capable of causing did not attain the particular level inherent in the notion of torture as understood by the Court.” *Id.* ¶ 174.

56. *Id.* ¶ 167.

57. Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 14, at 91.

the particular intensity and cruelty implied by the word torture as so understood.⁵⁸

This position of the Court has been widely criticized for the narrowness of its application of Article 3.⁵⁹ In distinguishing the treatment of prisoners as “inhuman and degrading treatment” but not torture because of its intensity, the Court set aside the unanimous decision of the European Commission on Human Rights that Article 3 is violated by the application of the five techniques as form of torture. According to the Commission,

the systematic application of the techniques for the purposes of inducing a person to give information shows a clear resemblance to those methods of systematic torture which have been known over the ages. . . . [T]he Commission sees in them a modern system of torture falling into the same category as those systems which have been applied in previous times as a means of obtaining information and confessions.⁶⁰

The Commission’s definition of torture, as an “aggravated form of inhuman treatment,”⁶¹ does not differ substantively from that which the Court refers to in Article 1(2) of General Assembly Resolution 3452 (XXX).⁶² How then did the Court come to a conclusion so different from that of the Commission? This is a difficult question to answer. The Court’s explanation says substantively little more than the treatment was not severe enough, nor was the suffering sufficiently intense for it to be characterized as torture.⁶³ Given that the Commission’s decision on Article 3 was unanimous, and the fact that it was not contested by either party,⁶⁴ this simple rationalization of the Court’s position appears peculiar. Indeed, the Court possessed no information that the Commission did not have at its disposal during its deliberation

58. Ireland v. United Kingdom, App. No. 5310/71, 2 Eur. H.R. Rep. 25, ¶ 167 (1980).

59. See, e.g., Michael O’Boyle, *Torture and Emergency Powers Under the European Convention on Human Rights: Ireland v. United Kingdom*, 71 AM. J. INT’L L. 674, 684-88 (1977); R.J. Spjut, Note, *Torture Under the European Convention on Human Rights*, 73 AM. J. INT’L L. 267, 270 (1979); RODLEY, *supra* note 26, at 90-95; AMNESTY INT’L, *supra* note 16, at 13-17.

60. Ireland v. United Kingdom, App. No. 5310/71, Eur. Comm’n H.R. Dec. & Rep. 402 (1976) [hereinafter Report].

61. *Id.* at 377.

62. Ireland v. United Kingdom, App. No. 5310/71, 2 Eur. H.R. Rep. 25 (1980) (separate opinion of Judge Evrigenis). Article 1(2) states that “[t]orture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.” Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 14, art. 1(2).

63. Nigel Rodley rightly describes the justification offered by the Court as “unsatisfactory reasoning from an authoritative judicial body.” RODLEY, *supra* note 26, at 92.

64. Ireland v. United Kingdom, App. No. 5310/71, 2 Eur. H.R. Rep. 25 (1980) (dissenting opinion of Judge Zekia) (“I entertain a lot of doubt whether the Court is justified in setting aside a unanimous conclusion of the Commission in respect of torture which has not been contested by the representatives of the two High Contracting States who took part in the proceedings before the Court.”).

and although it had the power to directly re-examine evidence and to call witnesses, it did not do so.

According to the Court's reasoning, it is possible to predicate all but one of the four prerequisites of torture to the five techniques. First, the *purpose* of the five techniques, as stated by the Court, "was the extraction of confessions, the naming of others and/or information."⁶⁵ 'Second, that the techniques were used "systematically" to achieve the purpose of extracting information, demonstrates the perpetrators' intention to deliberately cause pain and suffering. Third, the Court recognized the *official* character of the members of the security forces in Northern Ireland that carried out the acts.⁶⁶ Thus, it is the absence of sufficiently severe pain or suffering in the application of the five techniques that prevents this method of interrogation, in the opinion of the Court, from being categorized as torture.

Given the lack of explanation offered by the Court for its position, it could be argued that the Court did not fully engage with the findings of the Commission. It is worth noting the fact that the Respondent had invited the Court to adhere to these findings.⁶⁷ It is also worth considering that amounts ranging from £10,000 to £25,000 sterling had been awarded to each of the fourteen prisoners who were subjected to the five techniques.⁶⁸ Arguing that the use of the five techniques as a method of interrogation did in fact constitute torture, Judge Zekia stated in a separate opinion that "the amounts awarded constitute a strong indication of the degree of severity and the intensity and length of the suffering caused to the recipients."⁶⁹

The concept of torture contained in the *Ireland v. United Kingdom* judgment is one that requires extreme intensity of pain or suffering. It is significant in this regard that a subjective test, assessing the ill-treatment from the point of view of the victim, was not applied by the Court, which chose not to call witnesses.⁷⁰ This further underlines the arbitrary basis for the Court's decision. By not engaging with the victims' point of view, the Court overlooked a fundamental aspect of how to assess the severity of ill-treatment.⁷¹ It also merits attention that by defining torture primarily in terms of its physical intensity the practice of torture is narrowly conceived by the Court so that it does not include acts that are not exceptionally brutal. In reaction to the Court's decision, Amnesty International stated "[o]ur organisa-

65. *Ireland v. United Kingdom*, App. No. 5310/71, 2 Eur. H.R. Rep. 25, ¶ 167 (1980).

66. "[T]he five techniques were taught orally by the English Intelligence Centre to members of the RUC at a seminar held in April 1971. There was accordingly a practice." *Id.* ¶ 166.

67. *Ireland v. United Kingdom*, App. No. 5310/71, 2 Eur. H.R. Rep. 25 (1980) (separate opinion of Judge Zekia).

68. According to the Commission, "no self-respecting Government faced with similar allegations against its security forces would pay money to persons . . . unless [they] were convinced of the guilt of the security forces." Report, *supra* note 60, at 370.

69. *Ireland v. United Kingdom*, App. No. 5310/71, 2 Eur. H.R. Rep. 25 (1980) (separate opinion of Judge Zekia).

70. The importance of a subjective test is emphasized by Judge Zekia. *Id.*

71. See discussion *supra* Part II.

tion must continue to combat torture anywhere in the world and that task makes it impossible for us to follow the restrictive standard set by the Court.”⁷² An implication of the Court’s judgment is that the concept of torture can only be conceived in terms of particularly barbaric behavior.⁷³

According to the Special Rapporteur on Torture, the five techniques used during interrogation “can only be described as torture, which is not surprising given their advanced purpose, namely, to elicit information, implicitly by breaking the will of the detainees to resist yielding up the desired information.”⁷⁴

A factor that commentators use to explain the Court’s reasoning is its concern with the outcome of its decision.⁷⁵ If the Court decided the five techniques constituted torture, the “special stigma” attached to such a violation could further anger the Catholic community in Northern Ireland, resulting in the heightening of hostilities against the security forces. According to one commentator, “recognizing that a finding of torture would have been attended by public antipathy toward the perpetrators, the Court allowed its concern with the consequences of its decision to determine its definition of torture.”⁷⁶

A principle that helps to illuminate how the Court’s reasoning differs so much from that of the Commission is that of the margin of appreciation. In cases where a state derogates from the Convention, a margin of appreciation is granted on the understanding that the Respondent is in a better position

72. RODLEY, *supra* note 26, at 93 (quoting News Release, Amnesty International, AI Index NWS 02/04/78 (Jan. 19, 1978)).

73. See *Ireland v. United Kingdom*, App. No. 5310/71, 2 Eur. H.R. Rep. 25 (1980) (dissenting opinion of Judge Evrigenis):

The Court’s interpretation in this case seems also to be directed to a conception of torture based on methods of inflicting suffering which have already been overtaken by the ingenuity of modern techniques of oppression. Torture no longer presupposes violence, a notion to which the judgment refers expressly and generically. Torture can be practised—and indeed is practised—by using subtle techniques developed in multidisciplinary laboratories which claim to be scientific. By means of new forms of suffering that have little in common with the physical pain caused by conventional torture it aims to bring about, even if only temporarily, the disintegration of an individual’s personality, the shattering of his mental and psychological [sic] equilibrium and the crushing of his will. I should very much regret it if the definition of torture which emerges from the judgment could not cover these various forms of technologically sophisticated torture. Such an interpretation would overlook the current situation and the historical prospects in which the European Convention on Human Rights should be implemented.

Id.

74. *Report of the Special Rapporteur, Mr. Nigel S. Rodley, Submitted Pursuant to Commission on Human Rights Resolution 1995/37 B*, U.N. ESCOR, 53d Sess., Provisional Agenda Item 8(a) ¶ 121, U.N. Doc. E/CN.4/1997/7 (1997).

75. See Spjut, *supra* note 59, at 270-71.

76. *Id.*

than the Court to judge the situation in a state of emergency.⁷⁷ In the case of *Ireland v. United Kingdom*, the Respondent state had officially derogated from its obligations under the European Convention using Article 15.⁷⁸ Although derogation does not extend to Article 3,⁷⁹ it is useful to consider the Court's use of the margin of appreciation when attempting to grasp the terms of its reasoning.⁸⁰

The European Commission on Human Rights defined the margin of appreciation as "a certain measure of discretion in assessing the extent strictly required by the exigencies of the situation."⁸¹ In the context of the *Ireland v. United Kingdom* case, the Court made it quite clear that it was giving a wide margin of appreciation to the Respondent state:

It falls in the first place to each Contracting State, with its responsibility for "the life of [its] nation," to determine whether that life is threatened by a "public emergency" and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, *the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it.* In this matter Article 15(1) leaves those authorities a *wide margin of appreciation.*⁸²

77. See generally Oren Gross & Fionnuala Ní Aoláin, *From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights*, 23 HUM. RTS. Q. 625 (2001).

78. See *Ireland v. United Kingdom*, App. No. 5310/71, 2 Eur. H.R. Rep. 25 (1980). Article 15(1) of the European Convention states:

In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

European Convention on Human Rights, *supra* note 6, art. 15(1).

79. European Convention on Human Rights, *supra* note 6, art. 15(2) ("No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.").

80. See *Ireland v. United Kingdom*, App. No. 5310/71, 2 Eur. H.R. Rep. 25, ¶ 214 (1980).

It is certainly not the Court's function to substitute for the British Government's assessment any other assessment of what might be the most prudent or most expedient policy to combat terrorism. . . .

Adopting, as it must, this approach, the Court accepts that the limits of the margin of appreciation left to the Contracting States by Article 15 para. 1 were not overstepped by the United Kingdom[.]

Id.

81. *Greece v. United Kingdom* 2 Y.B. Eur. Conv. on H.R. 174-76 (1960) (Commission report).

82. *Ireland v. United Kingdom*, App. No. 5310/71, 2 Eur. H.R. Rep. 25, ¶ 207 (1980) (emphasis added). For an overview of how the doctrine of margin of appreciation has been applied by the Court see generally Eva Brems, *The Margin of Appreciation Doctrine in the*

According to Judge O'Donoghue, "the Court has strained beyond breaking point their conception of the margin of appreciation in Respondent's favour."⁸³ He further emphasized the principle's abuse by asserting "the invocation of [the margin of appreciation] in favour of the Respondent Government has been treated by the Court . . . as a blanket exculpation for many actions taken which cannot be reconciled with observance of the obligations imposed by the Convention."⁸⁴ These strong words are expressed in the context of criticizing the Court's decision on Article 3.

III. REDEFINING THE CONCEPT OF TORTURE

The previous section argued that the concept of torture applied by the European Court of Human Rights in the *Ireland v. United Kingdom* case is excessively narrow. In this section the need for a broader, less definitive interpretation of torture is emphasized.

In redefining the concept of torture to include such methods of interrogation as the five techniques, an inquiry into the intended meaning of Article 3 is useful for the purpose of clarifying its scope. The concept of torture used by the Court in *Ireland v. United Kingdom* appears to be inconsistent with the *travaux préparatoires* of the European Convention on Human Rights.⁸⁵ The drafters of the Convention intended the terms used in Article 3 to widen the scope of its application rather than narrow it.⁸⁶ The delegate from the United Kingdom, Mr. Cocks, put forward an amendment including the prohibition of "imprisonment with such an excess of light, darkness, noise or silence, as to cause mental suffering."⁸⁷ This amendment was withdrawn only after it was agreed that the wording of the Article 3, similar to that of

Case-Law of the European Court of Human Rights, 56 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 240.

83. *Ireland v. United Kingdom*, App. No. 5310/71, 2 Eur. H.R. Rep. 25 (1980) (separate opinion of Judge O'Donoghue).

84. *Id.* O'Donoghue also remarks:

It must be stated again that, while the evidence of the applicant Government was quite properly subjected to rigorous cross-examination, the same attitude was not displayed to all the witnesses for the respondent Government. Here was a lamentable lack in the manner adopted in carrying out a searching and even-handed investigation.

Id. He further stated, "I find nothing even approaching disapproval by the Court at the non-cooperative attitude of the respondent Government." *Id.*

85. See *Ireland v. United Kingdom*, App. No. 5310/71, 2 Eur. H.R. Rep. 25 (1980) (separate opinion of Judge Evrigenis). For the debate that occurred in drafting Article 3 of the European Convention see 1 COLLECTED EDITION OF THE TRAVAUX PRÉPARATOIRES 116-117 (1985).

86. *Ireland v. United Kingdom*, App. No. 5310/71, 2 Eur. H.R. Rep. 25 (1980) (separate opinion of Judge Evrigenis).

87. Louise Doswald-Beck, *What Does the Prohibition of "Torture or Inhuman or Degrading Treatment or Punishment" Mean? The Interpretation of the European Commission and Court of Human Rights*, 25 NETHERLANDS INT'L L. REV. 24, 33 (1978) (quoting 1 COLLECTED EDITION OF THE TRAVAUX PRÉPARATOIRES 116-17 (1985)).

Article 5 of the UDHR,⁸⁸ would implicitly cover the prohibition of such ill-treatment.⁸⁹ It is thus arguable that the Court did not fully engage with the intended meaning of Article 3 and, consequently, narrowed its scope to exclude acts that the drafters of the Convention would have included under the concept of torture.⁹⁰ The narrowness of the Court's interpretation of the term is emphasized by Judge Evrigenis, who stated that

[t]he notion of torture which emerges from the judgment is in fact too limited. By adding to the notion of torture the notions of inhuman and degrading treatment, those who drew up the Convention wished, following Article 5 of the Universal Declaration of Human Rights, to extend the prohibition in Article 3 of the Convention—in principle directed against torture . . . to other categories of acts causing intolerable suffering to individuals or affecting their dignity rather than to exclude from the traditional notion of torture certain apparently less serious forms of torture and to place them in the category of inhuman treatment which carries less of a "stigma"—to use the word appearing in the judgment.⁹¹

The concept of torture needs to be broadened to include not only the meaning intended by the drafters of the Convention, but also to cover a range of techniques that are continually being developed.⁹² The notion should be broadly conceived so that its interpretation may develop in order to make more effective the prohibition of new, subtle methods of torture.

For R.J. Spjut, the concept of torture propounded by the Court in the case of *Ireland v. United Kingdom* appears to be one "limited to extreme barbarity."⁹³ Holding a similar position, Barry Klayman remarks that "[i]t would appear that only the most brutal and atrocious behaviour . . . could amount to torture under the court's definition."⁹⁴ The five techniques were applied with the intention of either breaking or eliminating the will of a prisoner to withhold information. The fact that they do not correspond to more conventional notions of torture ought to be considered incidental. However, according to Judge Fitzmaurice the term should only refer to a distinctly higher order of suffering which is different not only in degree but also in kind to that experienced as a result of the five techniques: "If the five techniques are to be regarded as involving torture, how does one characterize e.g. having one's finger-nails torn out, being slowly impaled on a stake through

88. UDHR, *supra* note 2, art. 5.

89. See Doswald-Beck, *supra* note 87 at 33.

90. See Barry Klayman, *The Definition of Torture in International Law*, 51 TEMP. L.Q. 449, 511-12; Doswald-Beck, *supra* note 87, at 32-33.

91. *Ireland v. United Kingdom*, App. No. 5310/71, 2 Eur. H.R. Rep. 25 (1980) (separate opinion of Judge Evrigenis).

92. See EDWARD PETERS, TORTURE 169-71 (1996) (describing modern torture techniques).

93. Spjut, *supra* note 59, at 271.

94. Klayman, *supra* note 90, at 498.

the rectum, or roasted over an electric grid?"⁹⁵ This extremely restrictive use of the term limits the prohibition of torture contained in Article 3 to stereotypical practices and does not take into account the use of new technology.⁹⁶

In narrowing the scope of Article 3 the Court has excluded from the concept of torture more subtle methods of interrogation.⁹⁷ Accordingly, techniques devised by scientists that do not involve physical ill-treatment but are nonetheless used to extract information no longer qualify as torture. Psychological and pharmacological methods used by perpetrators are thus not recognized as torture. The source of the problem here is the stipulation of a minimum level of intensity of pain or suffering. The terms contained in Article 3 were not intended to acquire the specific meanings they have received from the Court. By distinguishing the different limbs of the formula the Court has adopted an approach that essentially weakens its application and stifles the future evolution of the provision. According to Amnesty International,

[t]wo points emerge from the contradictory rulings [of the Court and the Commission] in the Northern Ireland Case. First, the treatment in law of torture, whether by definition or in jurisprudence, must keep pace with modern technology, which is capable of inducing severe psychological suffering without resort to any overt physical brutality. Second, it is not necessary to delineate precisely the border between torture and other forms of ill-treatment in order to condemn a particular act. The prohibition in international law of cruel, inhuman or degrading treatment or punishment is as unequivocal as that of torture.⁹⁸

As previously mentioned, the demarcation in the meaning of terms contained in Article 3 has the effect of narrowing the scope of its application. A remedy to this may be achieved by adopting an approach similar to that of the United Nations Human Rights Committee ("Human Rights Committee") in its application of Article 7 of the ICCPR.⁹⁹

95. *Ireland v. United Kingdom*, App. No. 5310/71, 2 Eur. H.R. Rep. 25 (1980) (separate opinion of Judge Fitzmaurice).

96. Judge O'Donoghue makes that point that "[o]ne is not bound to regard torture as only present in a mediaeval dungeon where the appliances of rack and thumbscrew or similar devices were employed." *Ireland v. United Kingdom*, App. No. 5310/71, 2 Eur. H.R. Rep. 25 (1980) (separate opinion of Judge O'Donoghue).

97. According to one commentator,

[t]orture is become increasing scientific. Alongside physical brutality and mutilations, the use of sophisticated mechanised equipment is becoming more and more common. A particular cause for concern is the growth of psychological and pharmacological methods of torture. While once doctors present at an interrogation were generally there to prevent the victims death, today medical science plays an active role in improving the torture's techniques.

Herbert Radtke, *Torture as an Illegal Means of Control, in THE DEATH PENALTY AND TORTURE* 3, 4-5 (Franz Bockle & Jacques Pohier eds., Miranda Chayton trans. 1978).

98. AMNESTY INT'L, *supra* note 16, at 15.

99. See *General Comment 20, supra* note 21, ¶ 5.

The practice of the Human Rights Committee has been to apply the Article as a whole without differentiating the meaning of the terms it contains.¹⁰⁰ Actions that violate the article are thus not categorized distinctively as “torture” or “inhuman” or “degrading” treatment. Accordingly, the decisions of the Human Rights Committee generally refer only to violations of Article 7 and not to its constitutive parts. Article 4 of General Comment 20 describes this approach:

The Covenant does not contain any definition of the concepts covered by article 7, nor does the Committee consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied.¹⁰¹

This more flexible approach would widen the scope of Article 3 of the European Convention on Human Rights, enabling the Court to proscribe less conventional methods of torture. Its prohibition would thus be strengthened without the restriction of the “special stigma” specified by the judgment of the *Ireland v. United Kingdom* case.

CONCLUSION

By first explicating the meaning of torture as generally understood in international law, and then by examining its application in the case of *Ireland v. United Kingdom*, this paper has advanced an argument against the approach currently employed by the European Court of Human Rights.

It is the position of this paper that the concept applied by the Court in the case of *Ireland v. United Kingdom* is too restrictive and not capable of including more subtle methods of torture. It is also held that the Court’s delineation of the meaning of the terms contained in Article 3 is not consistent with the *travaux préparatoires* of the Convention and results in the scope of the article being narrowed. In conclusion, a more flexible approach based on a broader, less definitive concept of torture is recommended for the effective enforcement of its prohibition. Without broadening the scope of the concept of torture to include methods of interrogation such as the five techniques, the approach employed by the European Court of Human Rights implicitly weakens the legal protection available to victims. The concept of torture needs to be redefined in terms that ensure its prohibition is effective, taking

100. See RODLEY, *supra* note 26, at 96-98.

101. General Comment 20, *supra* note 21. This General Comment replaces General Comment 7 which contained a similar provision: “As appears from the terms of this article, the scope of protection required goes far beyond torture as normally understood. It may not be necessary to draw sharp distinctions between the various prohibited forms of treatment or punishment.” *United Nations Human Rights Committee General Comment 7*, U.N. CCPR, 16th Sess. (1982) reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. GAOR, U.N. Doc. HRI/GEN/1 (1992).

into account developments in the technology employed for torture. If this does not occur then the concept, as applied by the Court, will continue to exclude an ever-increasing number of cases.