advocate changes in domestic jurisdiction of States, support the protection of the most vulnerable of society, and seek truth and accountability after periods of gross and massive violations of human rights. The Academy addresses those needs by providing human rights training in its annual Summer Program and Inter-American Human Rights Moot Court Competition, curriculum development through its international partnerships, technical assistance to human rights institutions and practitioners, and scholarly research with its multiple publications and other practical resources.

This year the articles published include the best submissions in English and Spanish for the 2005 Human Rights Award of the Academy on Human Rights and Humanitarian Law. The topic of the award was "*The Prohibition of Torture Under International Law.*" We would like to recognize the winners of the Award, Louis-Philippe Rouillard and Xavier Andrés Flores Aguirre, as well as authors Elizabeth Vasiliades and David Fernández Puyana and our fellow Honor Jury Members who reviewed the submissions and selected the winners, namely: Charlotte Ku, Nigel Rodley, Susana SáCouto, Tanya Terrell-Collier, Theo Van Boven, and Leo Zwaak (for English submissions); and Roberto Cuellar, Ariel Dulitzky, Sergio García Ramírez, Claudio Grossman, Fernando Mariño, Flávia Piovesan, and Gabriela Rodríguez (for Spanish submissions).

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Finally, we want to thank Mariana Canelon, Christopher Clinton, Ernesto Gonzalez, Vanessa James, Veronica Jimenez, Patricia Larios, Luisa Lopez, Alejandra Siles, and Leonel Vásquez who edited the Spanish articles for the book. We also want to thank the staff and editors of the *International Law Review* who worked on the English language articles.

MISINTERPRETING THE PROHIBITION OF TORTURE UNDER INTERNATIONAL LAW: THE OFFICE OF LEGAL COUNSEL MEMORANDUM

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INTRODUCTION

When human rights clash with the necessities of State security, it becomes difficult to view torture from a dispassionate perspective. Even known civil libertarians strengthen their opinions, and the limits of the permissible become more flexible. Such is the case with torture under international law, and nothing illustrates this contradiction as clearly as *Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A* ("Standards of Conduct Memorandum"),[1] a memorandum composed by the U.S. Department of Justice's Office of Legal Counsel. Through the prism of Sections 2340[2] and 2340A[3] of Title 18 of the United States Code, the memorandum drafters seek to define and interpret what constitutes torture. The Standards of Conduct Memorandum is a response to a request for an opinion by the Central Intelligence

1. *See* Memorandum from U.S. Department of Justice, Office of Legal Counsel, Office of the Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A, at 1 (Aug. 1, 2002) [hereinafter Standards of Conduct Memorandum], *available at* http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf (concluding that, in the context of conduct of interrogation outside the United States, acts inflicting or intending to inflict severe mental or physical pain or suffering must be "of an extreme nature" to rise to the level of torture within the meaning of the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment).

2. 18 U.S.C. 2340 (2000) (defining "torture," as well as the various scenarios constituting "severe mental pain or suffering").

3. 18 U.S.C. 2340A (2000) (putting forth the punishment for acts of torture and explaining when the United States has jurisdiction to punish such acts), *amended by* United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, § 811(g) (adding that anyone conspiring to commit torture shall be subject to the same penalties as one committing or attempting to commit torture).

Agency on the legal norms applicable to methods of interrogation involving suspected terrorists.[4]

In response to this request, the Office of Legal Counsel offered the opinion that there are circumstances when self-defense and necessity permit the use of force to defend another person and that if "a government defendant were to harm an enemy combatant during an interrogation in a manner that might arguably violate Section 2340A, he would be doing so in order to prevent further attacks on the United States by the Al Qaeda terrorist network."[5] The permissibility of such conduct is based upon the advice of the Office of Legal Counsel that the threshold of what constitutes torture is much higher than mere cruel, inhuman, or degrading treatment, which are collectively referred to as "ill treatment."[6]

In view of the ongoing war on terrorism, the occupation of Iraq, and the continuing peacemaking presence in Afghanistan, there is paramount value in examining the reach of the prohibition of torture under international law. For that reason, this article will examine the notions of what constitutes torture under international law and whereby derogation from the prohibition on torture might be justified.

Part I explains the applicable treaty and customary law defining torture in international law, providing the background for Part II, which establishes the legal reasoning used in the Standards of Conduct Memorandum. Part III deconstructs this reasoning based on the substance of *Ireland v. United Kingdom* and *Public Committee Against Torture in Israel v. Israel*. Part IV examines the modern definition of what constitutes torture, setting the stage for the analysis in Part V of whether the prohibition of torture is absolute in international law.

4. *See* Toni Locy & Thomas Frank, *Gonzales 'Troubled and Offended' by Abuse*, USA TODAY, Jan. 7, 2005, at 2A (reporting that Gonzales later said that he could not recall whether the CIA asked him for guidance on the interrogation tactics). The Standards of Conduct Memorandum was sent to Gonzales by Assistant Attorney General Jay Bybee. *Id.*

5. Standards of Conduct Memorandum, *supra* note 1, at 46.

6. *Id.* at 1 (concluding that some cruel, inhuman, or degrading treatment may not constitute torture when the produced pain and suffering does not meet the requisite intensity).

Based on historic and recent case law, as interpreted in light of applicable treaty law, I conclude that the threshold of what constitutes torture under international law is much lower than what has been submitted by the Office of Legal Counsel and that, even under the proposed standards, ill treatment is no more permissible under international law than torture itself.

I. THE LEGAL STATUS OF TORTURE UNDER TREATY LAW AND CUSTOMARY INTERNATIONAL LAW

There cannot be any doubt that torture is prohibited under international law. That much is clear from both international humanitarian law and international human rights law perspectives. As a notion of international humanitarian law, the customary norms regarding torture evolved in the latter part of the nineteenth and the early twentieth century[7] and have been widely accepted, both in *opinio juris* and in practice by States before being codified in the four Geneva Conventions of 1949[8] and again in later additional

7. *See* Convention Relative to the Treatment of Prisoners of War art. 2, July 27, 1929, 118 L.N.T.S. 343, 356, 47 Stat. 2021, 2031 ("Prisoners of war are in the power of the hostile Power, but not of the individuals or corps who have captured them. They must at all times be humanely treated and protected, particularly against acts of violence, insults and public curiosity."); Convention II Respecting the Laws and Customs of War on Land art. 4, July 29, 1899, 187 Consol. T.S. 429, 436, 32 Stat. 1803, 1812 ("Prisoners of war are in the power of the hostile Government, but not in that of the individuals or corps who captured them. They must be humanely treated."); Additional Articles Relating to the Condition of the Wounded in War art. 11, Oct. 20, 1868, 138 Consol. T.S. 189, 193 ("Wounded or sick sailors and soldiers, when embarked, to whatever nation they may belong, shall be protected and taken care of by their captors.") (translation by author); Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Aug. 22, 1864, 129 Consol. T.S. 361; *see also* Institute of International Law, The Laws of War on Land, art. 63 (Sept. 9, 1880), *available at* http://www.icrc.org/ihl.nsf/385ec082b509e76c41256739003e636d/6a5d425d29d9d6dbc125641e0032ec97?OpenDocument ("They must be humanely treated."). The International Institute did not attempt to propose an international treaty, but merely offered "to the governments a 'Manual' suitable as the basis for national legislation in each State, and in accord with both the progress of juridical science and the needs of civilized armies." *Id.* preface.

8. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Convention for the Wounded]; Geneva Convention for the

protocols to the Geneva Conventions.[9] At the core of this body of law is Article 3—common to the four Geneva Conventions of 1949—which presents a core of rights that are applicable as much to international armed conflicts as to non-international armed conflicts. This core contains at its heart the prohibition against torture, regardless of the status of the persons concerned, whether they are combatants or non-combatants, including illegal combatants such as spies and *saboteurs*.[10] This notion is so well entrenched in the *corpus*

Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Convention for the Wounded at Sea]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Prisoner of War Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Convention to Protect Civilians].

9. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609.

10. Specifically, Article 3 in each convention states:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: 1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

Convention for the Wounded, *supra* note 8, 6 U.S.T. at 3116, 3118, 75 U.N.T.S. at 32, 34; Convention for the Wounded at Sea, *supra* note 8, 6 U.S.T. at 3220, 3222, 75 U.N.T.S. at 86, 88; Prisoner of War Convention, *supra* note 8, 6 U.S.T. at 3318, 3320, 75 U.N.T.S. at 136, 138; Convention to Protect Civilians, *supra* note 8, 6 U.S.T. at 3518, 3520, 75 U.N.T.S. at 288, 290. Directly addressing "spies and *saboteurs*," the Convention to Protect Civilians states:

juris of international law that its status is known and acknowledged as *erga omnes* obligations for States, clearly defined as one owed by a State to all members of the international community, and deemed as having acquired the status of *jus cogens*.[11] During international armed conflicts, all prisoners of war, enemy aliens, spies, *saboteurs*, illegal combatants, and indeed enemy combatants, are included in this notion.[12]

However, the application of this prohibition of torture in times of peace or periods of tension and internal tribulation, including states of emergency, fall within the realm of international human rights law. It is therefore necessary to define torture and its reach under international instruments applicable to all such situations.

The document known as the "International Bill of Human Rights"[13] contains the basic elements of the definition and scope of

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> Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention. In each case, such persons shall nevertheless be treated with humanity, and in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be.

Convention to Protect Civilians, *supra* note 8, art. 5, 6 U.S.T. at 3522, 75 U.N.T.S. at 292.

11. *See* Robert K. Goldman, *Trivializing Torture: The Office of Legal Counsel's 2002 Opinion Letter and International Law Against Torture*, 12 AM. U. HUM. RTS. BRIEF 1 (2004) (observing that every State owes to all other countries the obligations to prohibit torture, and this prohibition is "a peremptory norm embodying a fundamental standard that no state can contravene").

12. *See* Louis-Philippe F. Rouillard, *The Combatant Status of the Guantanamo Detainees*, E. EUR. HUM. RTS. L.J., Sept. 2004, at 1, 10, *available at* http://www.fwpublishing.net/Files/EEHRLJV1N2.pdf (recounting the basic principle of humanitarian law that "nobody should remain outside the law," and noting how Article 5 of the Convention to Protect Civilians makes clear that all civilians, regardless of participation in hostile activities to the occupying regime, are entitled to the protections of this Convention).

13. The International Bill of Human Rights is generally understood to include the Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948) [hereinafter Universal Declaration], International Covenant on Civil and Political Rights, G.A. Res. 2200,

the application of torture, starting with Article 5 of the Universal Declaration of Human Rights ("Universal Declaration").[14] While the legal force of a U.N. General Assembly resolution remains arguable,[15] the principles enumerated in the Universal Declaration provide the foundation of subsequent international[16] and regional[17]

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at 52, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR], International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200, at 49, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICESCR], Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200, at 59, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966), and the Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, G.A. Res. 128, at 206, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49 (Dec. 15, 1989). *See, e.g.*, United Nations, Office of the High Commissioner for Human Rights, Fact Sheet No. 2 (Rev. 1), The International Bill of Human Rights, *available at* http://www.unhchr.ch/html/menu6/2/fs2.htm. *See generally* U.N. Econ. & Soc. Council [ECOSOC], Comm. on Hum. Rts., *Status of the International Covenants on Human Rights: Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, Annex, U.N. Doc. E/CN.4/1985/4 (Sept. 28, 1984).

14. Universal Declaration, *supra* note 13, art. 5 ("No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment.").

15. Summarizing the recognized status of the Universal Declaration, the Restatement (Third) of Foreign Relations Law of the United States asserts:

> The binding character of the Universal Declaration of Human Rights continues to be debated, . . . but the Declaration has become the accepted general articulation of recognized rights. With some variations, the same rights are recognized by the two principal covenants, the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights.

RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 701, reporters note 6 (1987).

16. *See* ICCPR, *supra* note 13, art. 7 ("No one shall be subjected to torture or to 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, G.A. Res. 3452, at 91, U.N. GAOR, 30th Sess., Supp. No. 34, U.N. Doc. A/10034 (Dec. 9, 1975) [hereinafter Declaration Against Torture] (requiring States to criminalize acts of torture, as well as "participation in, complicity in, incitement to or an attempt to commit torture"); Recommendations of the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, E.S.C. Res. 663C, at 11, ECOSOC, 24th Sess., Supp. No. 1, U.N. Doc. E/3048 (July 31, 1957) (approving the *Standard Minimum Rules for the Treatment of Prisoners*, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders in

1955, which set forth a general framework addressing prisoner conditions and matters concerning treatment, such as clothing and bedding, food, medical services, and freedom of religious practice), *amended by* E.S.C. Res. 2076, at 35, ECOSOC, 62d Sess., Supp. No. 1, U.N. Doc. E/5988 (May 13, 1977); Code of Conduct for Law Enforcement Officials, G.A. Res. 169, at 186, art. 5, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46 (Dec. 17, 1979) ("No law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment."); Principles of Medical Ethics Relevant to the Role of Health Personnel, Particularly Physicians, in the Protection of Prisoners and Detainees Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 194, at 211, Annex, U.N. GAOR, 37th Sess., Supp. No. 51, U.N. Doc. A/37/51 (Dec. 18, 1982); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 46, at 197, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (Dec. 10, 1984) [hereinafter Convention Against Torture]; Convention on the Rights of the Child, G.A. Res. 25, at 171, art. 37, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49 (Nov. 20, 1989) ("States Parties shall ensure that: (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment."); Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, G.A. Res. 173, at 298, U.N. GAOR, 43d Sess., Supp. No. 49, U.N. Doc. A/43/49 (Dec. 9, 1988); Basic Principles for the Treatment of Prisoners, G.A. Res. 111, at 200, U.N. GAOR, 45th Sess., Supp. No. 49A, U.N. Doc. A/45/49 (Dec. 14, 1990); Declaration on the Elimination of Violence Against Women, G.A. Res. 104, at 217, U.N. GAOR, 48th Sess. Supp. No. 49, U.N. Doc. A/48/49 (Dec. 20, 1993); Draft Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, H.R.C. Res. 33, at 151, U.N. ESCOR, Comm'n on Hum. Rts., 58th Sess., Supp. No. 3, U.N. Doc. E/CN.4/2002/200 (Apr. 22, 2002).

17. *See* American Declaration of the Rights and Duties of Man, O.A.S. Official Rec., OEA/Ser. L./V./II.23, doc. 21, rev. 6 (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82, doc. 6, rev.1, at 18, art. 1 (1992) ("Every human being has the right to life, liberty and the security of his person."); American Convention on Human Rights, Nov. 22, 1969, art. 5, 1144 U.N.T.S. 144 (setting forth the right to humane treatment and the specific treatment prohibited as a result of that right) [hereinafter American Convention]; Inter-American Convention to Prevent and Punish Torture, Dec. 9, 1985, 67 O.A.S.T.S. 13 (defining torture, discussing State responsibilities to prevent torture, and reviewing certain circumstances, such as war, that do not justify acts of torture); Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, Europ. T.S. No. 5 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment.") [hereinafter European Convention]; Charter of Fundamental Rights of the European Union, art. 4, 2000 O.J. (C 364) 1 (same); Draft Charter of Fundamental Rights of the European Union, art. 4, July 28, 2000, Charter 4422/00, Covenant 45 (same); African Charter on Human and Peoples' Rights, art. 5, *adopted* June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 rev. 5, *reprinted in* 21 I.L.M. 58 (1982) [hereinafter African Charter] ("All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.").

instruments prohibiting torture, many retaking the original disposition verbatim.[18] From their reading, it clearly appears that the prohibition of torture is far-reaching, covered as much in the regional as in the universal human rights systems.

The prohibition of torture under treaty law extends to customary law as a norm of *jus cogens*, both in matters related to international humanitarian law and international human rights law.[19] This peremptory legal norm is deemed fundamental enough to preclude State contravention.[20]

The expansive body of prohibitive treaty law and customary international law would seem to preclude any debate on torture and render hopeless those arguments favoring the use of stronger measures of interrogation. Yet, the argument is made that measures of much vigor are not to be deemed torture. The explanation is rather simple: while torture is universally prohibited, the definition of what constitutes torture remains very controversial, as "each perpetrator seeks to define its own behavior so as not to violate the ban."[21]

This is explained, in part, by the entitlement given in the universal and regional instruments applicable to the prohibition of torture, but also to the definition of torture itself and its interpretation by different courts and jurisdictions over time. The basis of this

18. *See* NIGEL RODLEY, THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW 71 (2d ed. 1999) (observing that all human rights treaties containing provisions prohibiting torture reproduce the basic formula of Article 5 of the Universal Declaration).

19. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 102, 702 (recognizing torture and other cruel, inhuman, or degrading treatment or punishment as part of customary law).

20. *See, e.g.*, Catherine M. Grosso, Note, *International Law in the Domestic Arena: The Case of Torture in Israel*, 86 IOWA L. REV. 305, 308 (2000) (using the absence of authorization for torture in all State's domestic laws to further support the notion that torture is universally prohibited).

21. Jeffrey F. Addicott, *Into the Star Chamber: Does the United States Engage in the Use of Torture or Similar Illegal Practices in the War on Terror?*, 92 KY. L.J. 849, 856 (2003/2004) (quoting RODLEY, *supra* note 18, at 74).

difference of interpretation rests in the initial adoption, in 1975, of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Declaration Against Torture"), which, under Article 1, defines torture as:

> 1. . . . [A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.
>
> 2. Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.[22]

Due to its non-binding nature, this declaration proved largely ineffective and prompted the redaction of a convention to have an effective mechanism by which to prohibit torture.[23] When the codification of this General Assembly declaration came to pass in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Convention Against Torture"), it adopted instead the following definition of torture:

> 1. . . . [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 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

22. Declaration Against Torture, *supra* note 16, art. 1.

23. *See generally* Evelyn Mary Aswad, Note, *Torture by Means of Rape*, 84 GEO. L.J. 1913, 1921-22 (1996) (discussing how the Declaration Against Torture, though ineffective, contributed to the development of the legal distinction between torture and ill treatment).

> or suffering arising only from, inherent in or incidental to lawful sanctions.
>
> 2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.[24]

While the intentional infliction of severe pain or suffering is a prerequisite under both conventions, the Convention Against Torture departs from the wording of the Declaration Against Torture in two key areas. The intentional conduct under the Convention Against Torture extends to "one of a broad range of illicit political purposes," whereas the Declaration Against Torture was limited to "one of several illicit political purposes."[25] Moreover, the Declaration Against Torture required that such illicit conduct occur "by or at the instigation of government officials," while the same element under the Convention Against Torture is met by governmental consent or acquiescence.[26]

These revisions widened the definition of torture by applying it to a larger scope of actions. Indeed, the notion of discrimination found in the Convention Against Torture expanded the definition of torture to encompass requisite acts committed for discrimination "of any kind." Surely this expansion includes hate crimes as much as repression through terror by the use of torture "*pour encourager les autres*," a reputedly effective and much schooled method of holding onto power by 'Presidents for Life' everywhere.[27] Furthermore, the Convention Against Torture's inclusion of cases where consent or acquiescence is given by persons acting in an official capacity even

24. Convention Against Torture, *supra* note 16, art. 1.

25. Aswad, *supra* note 23, at 1922-23.

26. Declaration Against Torture, *supra* note 16, art. 1; Convention Against Torture, *supra* note 16, art. 1; *see also* Aswad, *supra* note 23, at 1922-23 (arguing that the Declaration Against Torture's non-binding nature added to its ineffectiveness).

27. See Convention Against Torture, *supra* note 16, art. 1, where it is expressively written that coercion in order to intimidate the victim or a third person is prohibited, despite being the *modus operandi* of dictators.

applies to undercover operatives.[28] Yet, the excision of the second paragraph—defining torture as an aggravated and deliberate form of ill treatment—muddled the ground, permitting the argument that since the difference is not expressly made in the Convention Against Torture, the parameters of torture and ill treatment remain open to interpretation.[29] This freedom is what enables proponents of a permissive definition to claim that the threshold of conduct constituting torture is very high indeed; methods that might be labeled ill treatment do not necessarily amount to torture.

Interestingly, few have focused on this difference in definitions, even though the Preamble of the Convention Against Torture refers in its first consideration to the previous declaration, clearly intending to make it an interpretative instrument of the convention itself, in conjunction with Article 55 of the U.N. Charter, Article 7 of the International Covenant on Civil and Political Rights ("ICCPR"), and Article 5 of the Universal Declaration.[30] While this interpretative qualification of the Declaration Against Torture might appear dangerously potent in feeding the argument that some vigorous methods qualifying as ill treatment could in fact be deemed torture, this fear is misplaced. Rather, the opposite should be eyed suspiciously. Not having a precise definition of torture allows proponents of a more forceful approach to interrogation to argue that their tactics do not qualify as torture and therefore are not actionable under national laws or international law.

This proposition does not fully account for the notions in the Convention Against Torture. Proponents justify their circumvention of international norms and national legislation by arguing that since ill treatment is not torture, they can do it without fear of

28. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987) (indicating that the prohibition against torture applies to all those acting under the color of State law).

29. *See* Addicott, *supra* note 21, at 859 (noting that the Convention Against Torture defines torture with clarity while exhibiting less care in defining ill treatment).

30. Convention Against Torture, *supra* note 16, pmbl.; U.N. Charter art. 55; ICCPR, *supra* note 16, art. 7; Universal Declaration, *supra* note 13, art. 5.

prosecution.[31] But under international law, their argument is based on an incorrect interpretation of the applicable norms, as Article 16 of the Convention Against Torture states:

> 1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.
>
> 2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.[32]

Under this definition, the instruction of law enforcement, military, and public officials against ill treatment;[33] the review of interrogation methods in order to prevent ill treatment;[34] the prompt and impartial investigations of complaints of ill treatment;[35] and the right of prisoners to complain and have their cases examined in earnest without fear of retribution[36] are all codified to include prevention and resolution of ill treatment as obligations of States. One may use the

31. *See* Grosso, *supra* note 20, at 309 (asserting that authorities who make a distinction between torture and ill treatment often point to the language of the Convention Against Torture and the Universal Declaration, which indicate that the two practices are in fact distinct, though neither intended the distinction to ever be used as a justification for certain practices).

32. Convention Against Torture, *supra* note 16, art. 16.

33. *See id.* art. 10 (requiring training for any person "who may be involved in the custody, interrogation or treatment of any person subjected to any form of arrest").

34. *See id.* art. 11 (making the review requirement applicable to all "interrogation rules, instructions, methods and practices").

35. *See id.* art. 12 (limiting the scope to those situations in which "there is reasonable ground to believe that an act of torture has been committed").

36. *See id.* art. 13 (requiring that the investigation be carried out promptly).

wording of the Declaration Against Torture to interpret the meaning of torture in the Convention Against Torture as an aggravated and deliberate form of ill treatment. However, the use of ill treatment is no more condoned under international law than torture.[37] Just as a square is also a rectangle, torture is also ill treatment. Both are illegal and prohibited under international law.

Some might argue that under customary law, ill treatment has not attained the status of *jus cogens* and could therefore be resorted to in some circumstances. It is true that the status of *jus cogens* can be argued against for ill treatment.[38] However, it hardly matters when treaty law explicitly dictates applicable legal norms and outlines the duties of States that are parties to the treaty.[39] The Convention Against Torture does not provide for an obligation to prosecute perpetrators of ill treatment, but it does provide for prevention in general, as applicable throughout the convention.[40] Failing to take adequate measures to prevent ill treatment is therefore akin to abdicating international obligations.

Still, some States argue that since there is no obligation to prosecute for the commission of ill treatment, it remains an acceptable method for extracting useful information from suspects without fear of lawsuits. This reasoning circumvents the prohibition of torture, protects perpetrators from prosecution, and effectively

37. *See, e.g.*, Grosso, *supra* note 20, at 309 ("Both [the Convention Against Torture and the Universal Declaration] strictly forbid both torture *and* ill treatment.") (emphasis added).

38. *See* Goldman, *supra* note 11, at 1 (acknowledging that while torture is undoubtedly recognized as having attained the status of a *jus cogens* violation, the status of ill treatment remains unclear).

39. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 331 (1987) (stating that unless a limited set of circumstances apply, a State party is obligated to conform its behavior to the instrument to which it is a party).

40. The Convention Against Torture's general requirements of prevention are particularly prevalent in Articles 10-13. Convention Against Torture, *supra* note 16, arts. 10-13. *But cf.* Addicott, *supra* note 21, at 861 (commenting that Article 16 of the Convention Against Torture does not require the criminalization of ill treatment, nor does it require victims to be compensated, though the convention requires both for torture).

defeats the purpose of the Convention Against Torture[41] by ceding the moral high ground in favor of a pragmatic approach to interrogation.[42]

II. THE OFFICE OF LEGAL COUNCIL NARROWS THE DEFINITION OF TORTURE IN ORDER TO EXPAND ITS USE

The Office of Legal Counsel based its interpretation of a very high threshold for torture on the two foremost cases concerning the matter: *Ireland v. United Kingdom*[43] and *Public Committee Against Torture in Israel v. Israel*.[44] Both these cases appear on the surface to support the contention that measures short of torture could be acceptable in some situations and that the threshold of what constitutes torture is so high that the security services of States party to the Convention Against Torture can apply a wide range of measures without having to fear breaching their international obligations. A closer examination of the facts and contextual basis surrounding these cases makes the contentions argued by the Office of Legal Counsel highly questionable.

41. The rationale holds about as much weight as one who exclaims that "we had to burn the village in order to save it," or that "in order to defeat your enemy, you must become like him."

42. *See, e.g.*, Goldman, *supra* note 11, at 3-4 (commenting that the U.S. justification for harsher treatment during interrogation as a means of preventing future damage to the United States by terrorists is self-defeating when considering the likely ramifications of future treatment of captured U.S. soldiers).

43. 25 Eur. Ct. H.R. (ser. A) at 3 (1978).

44. HCJ 5100/94 Pub. Comm. Against Torture in Isr. v. Israel [1999], *available at* http://elyon1.court.gov.il/eng/verdict/framesetSrch.html (search "Parties" for "Public Committee Against Torture in Israel," then click on case name). This case is the consolidation of numerous lawsuits, demanding that Israel to stop using questionable methods of interrogations. These cases are: HCJ 4054/95 Ass'n for Civil Rights in Isr. v. Prime Minister of Israel [1999]; HCJ 6536/95 Abu Zaiyda v. General Security Services [1999]; HCJ 5188/96 Al Kaaqua v. General Security Services [1999]; HCJ 7563/97 Ghaneimat Ganimat v. Minister of Defense [1999]; HCJ 7628/97 Qur'an v. Minister of Defense [1999]; HCJ 1043/99 Batat v. General Security Services [1999]. *Id.*

A. *IRELAND V. UNITED KINGDOM*

Ireland v. United Kingdom supports the contention that torture is not the same as inhuman or degrading treatment, which is ill treatment as understood under the Convention Against Torture. By a vote of thirteen to four, the court decided that the practices known as "the five techniques,"[45]—the heart of the applicants' claim for breach of Article 3 of Europe's Convention for the Protections of Human Rights and Fundamental Freedoms ("European Convention")[46]—"did not constitute . . . torture [as understood under the treaty]."[47] However, it also found by a vote of sixteen to one that the techniques under discussion were "inhuman and degrading treatment."[48] On these findings, the court found unanimously that it "cannot direct the respondent State to institute criminal or disciplinary proceedings against those members of the security forces who have committed the breaches of Article 3 found by the Court and against those who condoned or tolerated such breaches."[49]

It is important to note that the European Commission's investigation did not find that the five techniques had caused any physical injuries, although weight loss and acute psychiatric symptoms stemming from the interrogation were recorded as medical evidence and included in post-interrogation findings.[50] Claims of

45. The five techniques consist of:

(a) *wall standing*: forcing the detainees to remain for periods of some hours in a 'stress position' . . . ; (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; (e) *deprivation of food and drink*: subjecting the detainees to a reduced diet during their stay at the centre and pending interrogations.

Ireland, 25 Eur. Ct. H.R. (ser. A) at 41.

46. European Convention, *supra* note 17, art. 3.

47. *Ireland*, 25 Eur. Ct. H.R. (ser. A) at 94.

48. *Id.*

49. *Id.* at 95.

50. *Id.* at 44 (noting that while the Commission was convinced of psychiatric aftereffects from the interrogation, the precise degree of the effects was uncertain).

beatings were therefore rejected because they were not substantiated.[51]

One could hastily conclude that the court, in its decision, agreed that the combination of the "five techniques" is what made the conduct "inhuman and degrading," while the use of a particular technique does not, by itself, reach the level of prohibited treatment.[52] One could just as hastily reason from the absence of bodily injuries that inflicted physical pain failing to leave permanent marks or impair organs would not constitute torture.[53] A final inference from the decision is that the definition of torture has an extremely high threshold.[54] From these inferences, the conclusion reached is that since the court examined a case of "severe" and/or "substantial" beatings not deemed torture under the "severity and intensity" test, isolated incidents of physical beatings do not constitute torture.[55] This is certainly what the Office of Legal Counsel infers from the court's decision.

All these conclusions are erroneous, anachronistic, and misleading. They are erroneous because they selectively draw on a very limited number of quotes from the case at hand. They are anachronistic because they rely on a case pre-dating the entrance into force of the Convention Against Torture and instead apply the definition used in the Declaration Against Torture. The conclusions are misleading because they rest upon a non-applicable definition of international law that has been supplanted by another through the most restrictive case available, distorting the state of international legal norms at this time.

51. *Id.*

52. *See* Standards of Conduct Memorandum, *supra* note 1, at 29 ("The European Court of Human Rights concluded that these techniques used in combination, and applied for hours at a time, were inhuman and degrading but did not amount to torture.").

53. *See id.* at 1 ("Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.").

54. *See id.* at 29 (noting that intense physical and mental suffering may only rise to the level of inhuman treatment and emphasizing how torture requires sufficient intensity of the administered cruel and inhuman treatment).

55. *Id.*

The Office of Legal Counsel also fails to mention that on February 8, 1977, the same day the case was heard, the Attorney General of the United Kingdom declared that Her Majesty's Government would not under any circumstances reintroduce the "five techniques" as an aid to interrogation,[56] clearly repudiating the legality of these practices, regardless of whether they are used individually or in some combination.

The Office of Legal Counsel dismisses "massive," "substantial," and "severe" beatings as falling short of torture because the court in *Ireland v. United Kingdom* did not recognize them as such. However, the court's decision was based on the simple definition of the European Convention, which states solely that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment."[57] The court interpreted this definition with reference to the Declaration Against Torture's definition, which is far different from the contemporary and applicable definition contained in the Convention Against Torture.[58]

The definition is certainly different from the wide-reaching elements examined above, in particular as to the enlargement of the notion that severe physical or psychological pain and suffering be inflicted intentionally for a broad range of political purposes.[59] In the case of *Ireland v. United Kingdom*, the political conflict between the Loyalists and the Republicans had been known for decades and the support of the Royal Ulster Constabulary to the "moderate" Loyalists

56. *See Ireland*, 25 Eur. Ct. H.R. (ser. A) at 43 ("'The Government of the United Kingdom have considered the question of the use of the 'five techniques' with very great care and with particular regard to Article 3 of the Convention. They now give this unqualified undertaking, that the 'five techniques' will not in any circumstances be reintroduced as an aid to interrogation.'"). *But cf.* Brandie Gasper, *Examining the Use of Evidence Obtained Under Torture: The Case of the British Detainees May Test the Resolve of the European Convention in the Era of Terrorism*, 21 AM. U. INT'L L. REV. (forthcoming Dec. 2005) (analyzing British complicity in using evidence obtained through third parties where the means used to obtain the evidence may have included torturous acts).

57. European Convention, *supra* note 17, art. 3.

58. *See* discussion *supra* Part I (contrasting the two definitions of torture).

59. *See supra* notes 20-26 and surrounding text.

had never been hidden from the public.[60] Then again, the court's reasoning that the acts attributed to the security forces were not torture, but inhuman and degrading treatment, did not refer to the beatings, but to the "five techniques" under discussion in the case.[61] The Office of Legal Counsel, therefore, misattributes the reasoning of the court to an unrelated conclusory statement.

Moreover, the Office of Legal Counsel once more shows its selective reading by omitting the fact that these "massive," "substantial," and "severe" beatings were the object of denials by fourteen members of the security forces accused of witnessing or perpetrating them (if not believed by the Commission) and that the Commission believed that certain assertions of the claimants were "exaggerated, invented or improbable."[62] The conclusion from this is that the beatings might have occurred or not, but that if they did, they certainly were not of the intensity alleged by the claimants.

One of the claimants in the case did sustain an injury—a perforated eardrum—during his detention, which supports the contention that the court views some physical maltreatment as failing to achieve the status of torture. This contention is based on the distinction drawn by the European Convention between torture and cruel, inhuman or degrading treatment and punishment, based on a distinction between cruelty and intensity thereof.[63]

Of all the injuries detailed in the case, only the aforementioned ear injury concerns an impaired body organ, yet the court concluded that this did not amount to torture. On this point, the Office of Legal Counsel would certainly seem to have made its case, if one did not take into account that since the Convention Against Torture, the

60. *See generally* Claire Palley, *The Evolution, Disintegration and Possible Reconstruction of the Northern Ireland Constitution*, 1 ANGLO-AM. L. REV. 368 (1972) (providing a discussion of the historical and political background relevant to *Ireland v. United Kingdom*).

61. *Ireland*, 25 Eur. Ct. H.R. (ser. A) at 94.

62. *Id.* at 46.

63. *Id.* at 68.

applicable definition has been expanded and case law has also evolved the legal definition of torture.[64]

B. *PUBLIC COMMITTEE AGAINST TORTURE IN ISRAEL V. ISRAEL*

Foreseeing the argument of an expanded definition of torture since *Ireland*, the Standards of Conduct Memorandum attempts to base its finding on the more recent case of *Public Committee Against Torture in Israel v. Israel*.[65] Based on the five methods presented in that case,[66] the Office of Legal Counsel notes that "while the Israeli Supreme Court concluded that these acts amounted to cruel and inhuman treatment, the court did not expressly find that they amounted to torture."[67]

64. *See* discussion *infra* Part IV (tracking the evolution of the definition of torture and applicable case law); *see also* Campbell v. United Kingdom, 48 Eur. Ct. H.R. (ser. A) at 12 (1982) (defining torture separately from inhuman treatment).

65. HCJ 5100/94 Pub. Comm. Against Torture in Isr. v. Israel [1999], *available at* http://elyon1.court.gov.il/eng/verdict/framesetSrch.html (search "Parties" for "Public Committee Against Torture in Israel," then click on case name).

66. *Id.* ¶¶ 10-13 (describing the Israeli police's methods for interrogating suspects).

> [A] suspect investigated under the "Shabach" position has his hands tied behind his back. He is seated on a small and low chair, whose seat is tilted forward, towards the ground. One hand is tied behind the suspect, and placed inside the gap between the chair's seat and back support. His second hand is tied behind the chair, against its back support. The suspect's head is covered by a sack that falls down to his shoulders. Loud music is played in the room. According to briefs submitted, suspects are detained in this position for a long period of time, awaiting interrogation.

Id. ¶ 10. "[The 'Frog Crouch'] refers to consecutive, periodical crouches on the tips of one's toes lasting for five minute intervals." *Id.* ¶ 11. Several petitioners "contended that [the practice of excessively tight handcuffs] results in serious injury to the suspect's hands, arms and feet, due to the length of the interrogations." *Id.* ¶ 12.

> Petitioners [also] complained of being deprived of sleep as a result of being tied in the "Shabach" position, while subject to the playing of loud music, or being subject to intense, non-stop interrogations without sufficient rest breaks. They claim that the purpose of depriving them of sleep is to cause them to break from exhaustion.

Id. ¶ 13.

67. Standards of Conduct Memorandum, *supra* note 1, at 30.

There is merit to the Office of Legal Counsel's assertion, but it is only part of a larger story that requires reading the case in its entirety. In fact, the Supreme Court of Israel, sitting as the High Court of Justice, failed to actually find that these acts amounted to cruel and inhuman treatment. Only once did the court refer to the findings of the European Court of Justice in *Ireland v. United Kingdom*,[68] when it referred to the use of a "similar—though not identical method" as "inhuman and degrading treatment."[69] However, nowhere did it define the techniques used by the General Security Services ("GSS") of Israel as either torture or inhuman and degrading treatment, because it dealt solely and restrictively with the question of whether the Government of Israel or the Head of the GSS had the authority "to establish directives regarding the use of physical means during the interrogation of suspects suspected of hostile terrorist activities, beyond the general rules which can be inferred from the very concept of an interrogation itself."[70] Moreover, the Office of Legal Counsel fails to mention that the GSS had declared that the use of physical violence and the method known as the "Shabach" had either been stopped or was not used during interrogation for the investigations under discussion prior to the case being heard.[71] GSS officials did not, however, declare that these methods would not be used again, unlike the officials in the case of *Ireland v. United Kingdom*.

As such, the court did not even address the question of whether the methods used were torture or not. Had it done so, the Supreme Court of Israel would not have had to consider the European Convention, but rather the Convention Against Torture.[72] The Court certainly

68. 25 Eur. Ct. H.R. (ser. A) at 3.

69. *Pub. Comm. Against Torture in Isr.*, ¶ 30 (recognizing the similarities between the English tactics and those of the GSS in order to reinforce the necessity of prohibiting such methods despite any failure of them to qualify as torture).

70. *Id.* ¶ 38.

71. *See id.* ¶¶ 6-7 (noting that the Court issued an *order nisi* in both situations to hear the complaints of each detainee, but finding that the offensive procedures had stopped prior to the hearing).

72. *Compare* European Convention, *supra* note 17, art. 3 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment."), *with* Convention Against Torture, *supra* note 16, art. 1 (providing a more specific definition of prohibited conduct).

would have considered the notions and methods used by the European Court of Human Rights. However, its examination would not have been limited to *Ireland v. United Kingdom* due to the proliferation of case law addressing the topic of torture versus ill treatment in the more than twenty-year time span between that decision and *Public Committee Against Torture in Israel.*

The court would most probably have referred to the case law and advisory opinions of the Inter-American Court of Human Rights, which has actively defined and refined its approach to the issue of torture. The difference, of course, is that the Inter-American Court of Human Rights is based upon the American Convention on Human Rights, and this treaty contains both a negative and positive edict in Article 5.[73] The first sentence of Article 5(2) establishes the negative right by declaring that "no one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment,"[74] while the second sentence of the same section states that "persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person," setting forth the positive right.[75]

III. 1978-1996: JUDICIAL RETICENCE AND THE "SPECIAL STIGMA" OF TORTURE LIMITS DEVELOPMENT OF CASE LAW POST-*IRELAND*

The effect of the *Ireland v. United Kingdom* decision has certainly proved enduring, as the European Court of Human Rights did not find any acts of torture in cases decided between 1978 and 1996. Although it has decided cases on inhuman or degrading treatment—mostly relating to degrading treatment—no determination of an act of torture took place during that time under the guidance of the Council of Europe's own European Convention at Article 3, despite the fact that the court considered many claims from numerous countries. Samples of these cases demonstrate that the court was most unwilling to attach what it calls the "special stigma to deliberate inhuman treatments causing very serious and cruel

73. American Convention, *supra* note 17, art. 5.

74. *Id.* art. 5(2).

75. *Id.*

suffering."[76] However, this reticence on the part of the court existed prior to the case of *Ireland*, as the European Commission of Human Rights has always limited access to the court to those claims which had exhausted all recourses under the national legislation.[77] During that time, the court concentrated on the legacy of *Ireland* in conjunction with offenses relating to corporal punishment in schools, detention, or police actions.[78]

In the matter of corporal punishment, it was never alleged that the punishments imposed amounted to torture. The only questions at hand were whether caning the buttocks with three strokes,[79] hitting the hands with a leather strap called a "tawse,"[80] hitting the buttocks through gym shorts with a rubber-soled gym shoe,[81] and caning the buttocks four times through the trousers,[82] fell within the purview of "degrading" treatments. In the first three cases, the court concluded that corporal punishment in school was an assault on the dignity and physical integrity of an individual, especially considering the young age of the students who were subjected to the disciplinary measures,

76. Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) at 66-67 (1978) (articulating that the distinction between "torture" and "inhuman or degrading treatment" relates to the differences in the intensity of the suffering inflicted upon the person).

77. *See* European Convention, *supra* note 17, art. 26 ("The Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law, and within a period of six months from the date on which the final decision was taken.") This restrictive approach remains sensible due to the presumably high volume of cases that would be directed at the court if this restriction were liberalized.

78. *See infra* notes 79-93 and accompanying text (providing a review of cases addressing such offenses during this time).

79. *See* Tyrer v. United Kingdom, 26 Eur. Ct. H.R. (ser. A) at 7 (1978) ("The birching raised, but not cut, the applicant's skin and he was sore for about a week and a half afterward.").

80. *See* Campbell v. United Kingdom, 48 Eur. Ct. H.R. (ser. A) at 12 (1982) (noting that while corporal punishment does not itself amount to torture, threatening a person with torture might in some cases amount to "inhuman treatment").

81. *See* Costello-Roberts v. United Kingdom, 247 Eur. Ct. H.R. (ser. A) 50, 52 (1993).

82. *See* Y. v. United Kingdom, 247 Eur. Ct. H.R. (ser. A) 5, 7 (1992).

but that the force used had been moderate and that the feelings of humiliation were not enough to constitute degrading treatment.[83]

However, the court disagreed in *Y. v. United Kingdom*,[84] where the family doctor examined the pupil disciplined on the day of the punishment and reported that the pupil had "four wheals across both buttocks, each wheal approximately [fifteen centimeters] in length and swelling of both buttocks."[85] Since both the police and the lower courts refused to pursue the matter, the European Commission investigated and referred the case to the European court, which found that the "significant physical injury and humiliation" amounted to degrading treatment or punishment in contravention of Article 3 of the European Convention.[86]

In terms of detention, the debate centered on the conditions of detention and on the issue of solitary confinement. This method, widely used as a preventive tool and a punishment in European prisons, was not long in coming before the court. In a case involving a solitary confinement of seventeen months, the court found that the confinement did not qualify as inhuman treatment because the detainees could listen to the radio, watch television, exercise one hour per day, obtain books from the prison library, have personal contact with the guards and access to controlled family visits.[87] Also, it is important to note that the detainees had access to legal counsel

83. *See, e.g.*, *Campbell*, 48 Eur. Ct. H.R. (ser A) at 13 (explaining that it would be a distortion of the ordinary use of the term to find that corporal punishment could constitute "degrading" conduct).

84. 247 Eur. Ct. H.R. (ser. A) at 5.

85. *Id.* at 7.

86. *Id.* at 14. Originally, complaints were both in the name of the mother and of Y., but the Commission deemed the complaint of the mother inadmissible while that of Y. was referred to the court. *Id.* at 8. The case was never decided upon as the Government of the United Kingdom reached an out of court settlement with the plaintiff, without admission of wrongdoing, and therefore the case was "struck out of the list." *Id.* at 9.

87. *See* R. v. Denmark, App. No. 10263/83, 41 Eur. Comm'n H.R. Dec. & Rep. 149, 152-54 (1985) (finding that even when a period of solitary confinement was for an "undesirable amount of time," it could still be permissible under Article 3 if the conditions of the confinement did not rise to the level of severity creating an Article 3 violation).

and to medical care at all times on request.[88] Availability of, and access to, medical care has been established as a central factor in determining whether detainees have suffered ill treatment.[89]

Of all the factors considered, only incidents involving police action seem to have raised a real question of torture in Europe from 1978 to 1996, though none were judged to have attained this aggravated and deliberate form of inhuman treatment. Ever reticent to accuse a high contracting party of torture in a manner that would profit a political opponent, the Commission did not designate as torture cases where physical violence had been alleged.[90] In the rare instances when it did find that physical violence had escalated to such an extent that it violated Article 3 of the European Convention, the court failed to specifically characterize the action as torture.

Such was the approach of the court in *Tomasi v. France*,[91] a case that involved a French national of Corsica who was interrogated with physical violence at a French police station. The court stated that while the injuries of Mr. Tomasi were slight, the examination of the medical document provided to the court offered enough proof to determine that a violation of Article 3 had occurred.[92] Similar determinations of violations on prima facie evidence of degrading treatment had also been rendered in cases of police arrests and detentions.[93]

88. *See id.* at 153-54.

89. *See, e.g.*, R., S., A. & C. v. Portugal, App. Nos. 9911/82, 9945/82 (joined), 36 Eur. Comm'n H.R. Dec. & Rep. 200, 205, 207-08 (1984) (reviewing the circumstances surrounding the maltreatment of prisoners who went on a hunger strike, and evaluating the government's response to the prisoners' actions).

90. *See* Donnelly v. United Kingdom, App. No. 5577-5583/72, 4 Eur. Comm'n H.R. Dec. & Rep. 4 (1975).

91. 241 Eur. Ct. H.R. (ser. A) 7 (1992).

92. *Id.* at 42 (articulating that even though the prisoner's injuries were slight, the blows caused feelings of fear, anguish, and inferiority amounting to inhuman and degrading treatment).

93. *See, e.g.*, Ribitsch v. Austria, 336 Eur. Ct. H.R. (ser. A) 6 (1995); Raninen v. Finland, 1997-VIII Eur. Ct. H.R. 2804.

IV. RECONSIDERATION AND EXPANSION OF THE DEFINITION OF TORTURE

The breakthrough on the question of what constitutes torture finally came in *Aksoy v. Turkey*.[94] In that case, the Commission determined that the accused had been tortured, and the court itself upheld this assessment.[95] The applicant claimed that he had been ill treated in many different ways,[96] and that as a result of the "Palestinian hanging,"[97] he suffered subsequent paralysis of both arms for a period of about two weeks.[98] The court did not mince words in stating that the treatment qualified as torture.[99] It further specified that this decision was based on the distinction between torture and ill treatment, where the former requires the presence of deliberateness and aggravation.[100]

A subsequent determination of torture was made in *Aydin v. Turkey*,[101] where the court determined that rape by an official of the

94. 1996-VI Eur. Ct. H.R. 2260.

95. *Id.* at 2277-78 (explaining that when an individual enters police custody in good health, but leaves with injuries, the detaining government has the burden of providing a plausible explanation showing that there has been no violation of Article 3 of the European Convention).

96. *Id.* at 2278 (recounting abuse that included Palestinian hangings, electric shocks, beatings, slapping and verbal abuse).

97. *Id.* (explaining that a "Palestinian hanging" involved being suspended from his arms, which were bound together behind his back).

98. *Id.*

99. *Id.* at 2279 ("The Court considers that this treatment was of such a serious and cruel nature that it can only be described as torture. In view of the gravity of this conclusion, it is not necessary for the Court to examine the applicant's complaints of other forms of ill treatment.").

100. *Id.* at 2278-79.

101. 1997-V Eur. Ct. H.R. 1866, 1873-74, 1891 (describing the applicant as a seventeen-year-old girl who was arrested and driven away from her village and brought to the gendarmerie headquarters ten kilometers away where she then "was raped by a person whose identity has still to be determined").

> [She] was also subjected to a series of particularly terrifying and humiliating experiences while in custody at the hands of the security forces at Derik gendarmerie headquarters having regard to her sex and youth and the circumstances under which she was held. She was detained over a period of three days during which she must have been bewildered and disoriented by being kept blindfolded, and in a constant state of physical pain and mental anguish brought on by the beatings administered to her during questioning and by the apprehension of what would happen to her next. She was also paraded naked in humiliating circumstances thus adding to her overall sense of vulnerability and on one occasion she was pummeled with high-pressure water while being spun around in a tyre.

Id. at 1891.

State was in itself grave and abhorrent, and that rape left deep psychological scars on the victim.[102] The court went so far as to announce that it would have reached the same conclusion on either physical or psychological grounds of the applicant's claim.[103] These two cases represent an important departure from *Ireland*, which was further reinforced by yet another decision—the case of *Selmouni v. France*.[104]

Relying on the precedent set in *Aksoy* and *Aydin*, the court in *Selmouni* again determined that the alleged ill treatment under examination in the case was indeed proven and that it amounted to torture.[105] Here, the facts of the case involved blows to the body, sexual humiliation, and threats of bodily harm with a blowtorch and a syringe.[106] The court did not limit itself to characterizing the alleged acts as torture. Instead, it took the additional step of declaring that the severity test articulated in *Ireland* was to be interpreted within the meaning of Article 1 of the Convention Against Torture, and not solely on the basis of the European Convention.[107]

102. *Id.* (highlighting how an individual's position as a State officials increases the ease of exploiting victims and explaining that the psychological effects of such victimization are particularly damaging and long-lived). The victim "also experienced the acute physical pain of forced penetration, which must have left her feeling debased and violated both physically and emotionally." *Id.*

103. *Id.* at 1892.

104. App. No. 25803/94, 1999-V Eur. Ct. H.R. 155.

105. *Id.* at 184.

106. *Id.* at 183 (explaining that the examining doctor found that "marks of violence . . . covered almost all of [Mr. Selmouni's] body"). Furthermore, Mr. Selmouni was "dragged by his hair," tripped repeatedly by officers as he ran down a corridor, and an officer urinated on him. *Id.*

107. *Id.* at 182 ("[I]t remains to be established in the instant case whether the 'pain or suffering' inflicted on Mr. Selmouni can be defined as 'severe' within the meaning of Article 1 of the United Nations Convention. The Court considers that this 'severity' is, like the 'minimum severity' required for the application of Article 3, in the nature of things, relative; it depends on all the circumstances of the

The court further stated that the European Convention was a "living instrument," and that certain acts classified previously as inhuman or degrading could be classified differently in the future. In effect, the court said that the *Ireland* severity test must be adapted to reflect contemporary understanding and evolution of the law.[108]

This judgment of the European Court of Human Rights certainly flies in the face of the argument presented by the Office of Legal Counsel, which relies solely on a quarter-century-old opinion favorable to its argument, but fails to mention the evolution of the law in the last decade. While it cannot be said that the evolution of torture as a defined standard prohibits the argument of the Office of Legal Counsel under U.S. law, neither can it be said that the status of torture has remained static in international law since *Ireland*. Today's threshold of what constitutes torture is certainly much lower than the parameters suggested in the Standards of Conduct Memorandum. This evolving threshold continues to be interpreted on the merits and circumstances of each and every case.[109] As a result, interpretations of whether actions and conduct constitute torture must adapt to the times. The ceiling of tolerated actions has been lowered substantially since the first determination of *Ireland*.

V. TORTURE IS NOT THE ANSWER: ARGUMENTS AGAINST JUSTIFIED DEROGATION

This review of the determination of torture invariably leads to a fundamental question: Are there any occasions when the prohibition of torture is not absolute? Are there any occasions when one should deem an emergency so important, or a situation so dire, that usual decency and values must be pitted against the inner beast, forcing one to adopt measures that he or she usually would find repulsive and abhorrent to use? The answer is no, none whatsoever.

case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.").

108. *Id.* at 183 (citing Tyrer v. United Kingdom, 26 Eur. Ct. H.R. (ser. A) at 15-16 (1978); Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) at 40 (1989); Loizidou v. Turkey, 310 Eur. Ct. H.R. (ser. A) at 26-27 (1995)).

109. *See supra* note 108 and accompanying text.

A. NECESSITY DOES NOT OUTWEIGH HUMAN RIGHTS PROTECTIONS

Some propose that derogations might be possible when a nation is under imminent threat, and self-defense could be invoked to justify acts of physical and psychological violence to obtain information and therefore save lives. This is, in essence, the proposition brought forth by the GSS of Israel in *Public Committee Against Torture in Israel*, and it was adopted by the Office of Legal Counsel in its Standards of Conduct Memorandum. This theory must fail. While the rights proclaimed in the Universal Declaration may be considered non-binding, parties may not derogate from those contained in Article 7 of the ICCPR regarding torture and cruel, inhuman, or degrading treatment, ensuring that even in case of tensions, troubles, emergencies, or war, there can be no use of torture.[110] The restrictions contained in the regional instruments, with the exception of the African Convention, are just as stringent.[111] Even if these regional instruments were not equally stringent, the Convention Against Torture reinforces the absoluteness of the prohibition in all circumstances, expressly stipulating that "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."[112] In other words, there is no situation that justifies torture.

110. *See* ICCPR, *supra* note 16, art. 4(2) ("No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.").

111. *See, e.g.*, American Convention, *supra* note 17, art. 30 ("The restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established."); European Convention, *supra* note 17, art. 15. ("(1) 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. (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.").

112. Convention Against Torture, *supra* note 16, art. 2(2).

As a result, there cannot be any doubt that the prohibition of torture is absolutely applicable in times of both war and peace, as well as during national emergencies. This, however, may not necessarily mean that measures of physical or psychological violence short of torture are not acceptable during such periods. Much has been made of the citation by the Supreme Court of Israel to Dr. Dershowitz's proposal that certain measures, such as the use of a syringe to break the skin under the fingernails, might inflict pain but still fall short of torture.[113]

What has been overlooked is the fact that the court, while grudgingly granting the possibility of a necessity defense in "ticking bombs" situations—instances where specific information could save lives—this defense would have to be proven after the fact if a security official were to be indicted. The court reminds the parties that the issue in *Public Committee Against Torture in Israel* is whether the Government of Israel or the Head of the GSS of Israel had the authority to determine guidelines for such situations, a question it answered in the negative.[114] Furthermore, the court specifies that the necessity defense may prevent one from escaping prosecution and liability, but does not add any other normative value. In plain terms, it is not because the agent committing ill treatment or torture escapes prosecution that the acts committed do not infringe on human rights. Therefore, the necessity defense does not permit anyone to justify torture in international law.[115]

B. LACK OF IMMINENT THREAT PRECLUDES SELF-DEFENSE JUSTIFICATION

Much in the same manner, proponents of the possibility of derogating from the prohibition of torture have argued that self-defense could permit such derogations. This corrupts the notions of self-defense as understood in international law, which can only occur after an attack or, in the case of anticipatory self-defense, in a set of

113. *See* HCJ 5100/94 Pub. Comm. Against Torture in Isr. v. Israel [1999], ¶ 34, *available at* http://elyon1.court.gov.il/eng/verdict/framesetSrch.html (search "Parties" for "Public Committee Against Torture in Israel," then click on case name) (assuming a necessity defense might allow such measures).

114. *Id.* ¶ 36.

115. *Id.*

circumstances that has yet to be demonstrated as existing within a legal norm applicable and recognized in international law.[116] The notion of self-defense does not permit one to take actions unless an attack has occurred, or is so imminent that it cannot be denied, and alternative methods are not available. This is not the case during an interrogation, where many methods are available and time is available to extract the information. Contrary to the necessity defense, self-defense would create a normative value prior to the fact, since it is the basis for justifying the actions to be committed. However, no case has yet reported on the permissible conditions for anticipatory self-defense in line with its stringent requirements.

C. THE MORAL PRICE OF TORTURE IS TOO HIGH FOR MODERN SOCIETY TO PAY

Some proponents of justified torture, especially those willing to pursue policies that conflict with international law, will point out that the Standards of Conduct Memorandum has been superseded by a new memorandum published in 2004, entitled *Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A* ("Standards of Conduct Memorandum II").[117] The clear objective of Standards of Conduct Memorandum II is to appease the popular uproar created by the first memorandum. This goal was attained, in part, by diminishing the extreme statements one can find in the Standards of Conduct Memorandum.

However, the new memorandum still reverts to the argument that torture is an act of greater gravity than ill treatment. It simply restates the point that torture is an aggravated form of ill treatment and reiterates the very high threshold for acts to qualify as torture. While very effective in removing the debate from the public eye, Standards of Conduct Memorandum II does not address the changed

116. *See* Louis-Philippe F. Rouillard, *The* Caroline *Case: Anticipatory Self-Defense in Contemporary International Law*, *in* HISTORY OF INTERNATIONAL LAW 129, 129-47 (Peter Kovacs ed., 2004), *reprinted in* 1 MISKOLC J. INT'L L. 104-20 (2004), *available at* http://www.uni-miskolc.hu/~wwwdrint/20042rouillard.htm.

117. Memorandum from U.S. Department of Justice, Office of Legal Counsel, Office of the Assistant Attorney General, for James B. Comey, Deputy Attorney General, Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A (Dec. 30, 2004), *available at* http://news.findlaw.com/hdocs/docs/terrorism/dojtorture123004mem.pdf.

conceptualization of the threshold of torture and, worse, fails to mention that ill treatment and torture are both prohibited under international law.

Those who support the use of torture—or even the use of physical or psychological pressure that falls just short of torture—in order to guarantee the security of the State, reason that persons who aim to destroy civil society and democratic values do so because their sense of value is warped and they lack respect for others' human rights. They presume that the perpetrators' "evilness" is purely circumstantial and is so ingrained as to be incurable. As a result, proponents of torture argue, these persons abdicate the respect owed to their own human rights. But this argument fails to consider that each action denying the humanity of the other denies, in fact, one's own entitlement to human rights. Their logic would thus unravel the very civil society they purport to protect and undermine the very democratic values they swear to uphold.

The very source of this misguided argument—the Supreme Court of Israel—understands that it is only by applying our ideals that we preserve them, and that double standards destroy the very things we most want to preserve. We need only refer to the closing words in *Public Committee Against Torture in Israel* to learn how the court that is most experienced in confronting terrorism views the delicate balance between security and liberty:

> This is the destiny of a democracy—it does not see all means as acceptable, and the ways of its enemies are not always open before it. A democracy must sometimes fight with one hand tied behind its back. Even so, a democracy has the upper hand. The rule of law and the liberty of an individual constitute important components in its understanding of security. At the end of the day, they strengthen its spirit and this strength allows it to overcome its difficulties.[118]

CONCLUSION

The prohibition against torture has been made absolute in universal and regional instruments. It is further prohibited in all circumstances by both treaty law and customary law. Because it has

118. *Pub. Comm. Against Torture in Isr.*, HCJ 5100/94, ¶ 40.

acquired the status of *jus cogens*, the only way to circumvent or deny this legal norm is to claim that the physical or psychological treatment fails to meet the severity test outlined in *Ireland v. United Kingdom*. However, as *Aksoy v. Turkey*, *Aydin v. Turkey*, and *Selmouni v. France* have demonstrated, the interpretation of what amounts to torture must be made in accordance with the times, and the courts in our contemporary era have lowered the threshold from what would have been considered "ill treatment" twenty-five years ago to qualify as "torture" today. The selective reading of treaties and case law by the Office of Legal Counsel will not change these facts.