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A Dark Descent into Reality: Making the Case for an Objective Definition of Torture

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A DARK DESCENT INTO REALITY: MAKING THE CASE FOR AN OBJECTIVE DEFINITION OF TORTURE

By Michael W. Lewis*

All the pleasure in life is in general ideas. But all the use of life is in specific solutions, which cannot be reached through generalities any more than a picture can be painted by knowing some rules of method.

Oliver Wendell Holmes, Jr.
Letter to Elmer Gertz, Mar. 1, 1899

Introduction

The definition of torture is broken. Yet in spite of the tremendous interest in the subject since 9/11, little has done to seriously address this problem. This is due, in part, to the preference that most scholars have for generalities that Holmes noted over 100 years ago. Such a preference for thinking and speaking in generalities becomes even more pronounced when the details of a problem are as unpleasant and gruesome as those surrounding the topic of torture. For most authors writing about ticking time bombs, moral dilemmas, torture warrants, waterboarding, criminal prosecutions, necessity defenses, and the moral underpinnings of the rule of law, the "I know it when I see it" approach that Justice Potter Stewart made famous when attempting to define pornography, has generally been sufficient for defining torture. While such vague standards may be sufficient for those speaking in generalities, the recent debate

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concerning possible criminal prosecutions of CIA interrogators or Bush Administration legal advisors has highlighted the inadequacy of the current definition in practice.\(^3\)

However there have been a few scholars deeply involved in the debate that understood Holmes' point and commented on the need for something clearer, and on the difficult task involved in finding it. Sanford Levinson closed a discussion on the torture debate by urging that:

> Those of us who discuss “torture,” “cruel, inhuman, or degrading activities,” and “highly coercive interrogations” must climb down into the muck and confront the “facts on the ground,” rather than merely doing what we do best, which is to proffer (and take refuge in) place-holding abstraction. As we climb down we discover that there is far less of a “common conscience” than we might wish, whatever may be the degree of our ostensible agreement on the abstract statement of the norms in question.\(^4\)

This article will make the descent suggested by Levinson to describe the facts on the ground. By examining the actual conduct of several states in response to terrorist threats this article will demonstrate that the current agreement on the words used to define torture belies a substantive consensus on the conduct they prohibit. The article will also show why choosing a clearer and more objective definition of torture is likely to lead to better protection for the physical integrity of detainees in many countries. It will conclude by proposing a clear and more objective definition of torture that is designed to increase meaningful, rather than notional, state compliance with the broadly accepted international prohibition of torture.

Following the 9/11 attacks there were numerous questions posed about torture. Is torture ever permissible under any circumstance? Are there different degrees of torture? Who has committed torture during the “War on Terror”? What defenses might

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be available to someone accused of committing torture? Much has been written in attempting to answer these questions, focusing on the justifications for torture and going so far as to describe both the circumstances in which it would be permissible, the procedural safeguards against “excessive use” of “torture”, and the form that such “permissible torture” might take.5

More recently there has been significant discussion concerning the potential prosecution of former members of the Bush Administration for the torture of detainees during interrogation. These calls for accountability focus on the need to reestablish American credibility as a nation committed to supporting international law rather than avoiding it. For those demanding such accountability the fact that torture occurred is self-evident.6 Professor Jeremy Waldron’s dismissal of the need for precision in defining the offense is illustrative: “we need to remember that the charge of torture is unlikely to be surprising or unanticipated by someone already engaging in the deliberate infliction of pain on prisoners: ‘I am shocked —shocked!—to find that ‘waterboarding’ . . . is regarded as torture.’”7 While this statement is rhetorically powerful, a “you should have known

5 See e.g. ALAN DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE (2002) at 144 and 156-63 (arguing for the use of “torture warrants” to create some judicial oversight over what he views as the inevitable use of the practice during interrogations); PHILIP B. HEYMANN AND JULIETTE N. KAYYEM, PROTECTING LIBERTY IN AN AGE OF TERROR (2005) at 31-39 (proposing that specific techniques of “highly coercive interrogations” that are short of torture be authorized under limited circumstances involving “emergency exceptions” approved by the President); Miriam Gur-Arye, Can the War Against Terror Justify the Use of Force in Interrogations? in TORTURE: A COLLECTION 183 (Sanford Levinson, ed. 2004) (recharacterizing the Israeli defense of “necessity” as “self-defense” and stating that force should only be permitted in interrogations in the narrowest of “ticking time bomb” scenarios) [hereinafter Gur-Arye]; see also Jeremy Waldron, Torture and Positive Law: Jurisprudence for the White House, 105 COLUM. L. REV. 1681 (2005) (rejecting the use of “ticking time bomb” scenarios in the torture debate as strawmen to allow the contemplation of acts otherwise unthinkable).

6 See e.g. Glenn Greenwald, The Effects of Obama’s Refusal to Investigate Bush Crimes, Jan. 20, 2009 at http://www.salon.com/opinion/greenwald/2009/01/20/turley/ (quoting Jonathan Turley of George Washington University College of Law as stating “[t]hese are war crimes” and comparing George Bush to Augusto Pinochet); Nat Hentoff, Considering the War-Crimes Trial of the Bush Administration, Oct. 1, 2008 at http://www.villagevoice.com/content/printVersion/658475 (quoting Dean Lawrence Velvel of the Massachusetts School of Law as saying “[w]e’ve already seen how the torture president has exercised his “‘inherent unitary-executive constitutional authority’” at a conference organized by Velvel to plan for war-crimes trials of the Bush Administration);

7 Waldron supra note 5 at 1700.
better" standard is probably not a sufficient basis for bringing criminal charges. At a minimum, a defendant so charged might be forgiven a certain degree of incredulity at being criminally charged for waterboarding a detainee if he had performed the exact same act on numerous American service members both before and after the interrogation of the detainee. This begs the question, what exactly is torture and how should its boundaries be legally defined?

**Universal Condemnation, Practical Uncertainties**

Torture is a universally condemned practice. It is a violation of both positive and natural law and yet it is undoubtedly practiced by both states and private individuals with some frequency. There is near universal agreement that torture is not merely wrong, but evil, and there is a generally agreed upon definition for the term that prohibits the intentional infliction of “severe pain or suffering, whether physical or mental.” However there is very little consensus on what that definition actually means. Those scholars that have addressed this question are hopelessly divided. Some have remarked on the fact that “[t]orture does not have a clear legal meaning, in part because there have been no general and systematic attempts to map the border between ‘torture’ and ‘not torture.’” Similarly, the recently released Office of Legal Counsel memoranda

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8 Waterboarding was a standard training technique used by the U.S. military in its SERE (Survival, Evasion, Resistance and Escape) courses that all special forces and combat aviators went through. As a graduate of SERE training in the early 1990’s I can personally confirm that it was used at that time.


10 Along with genocide and piracy, torture is recognized as a prototypical jus cogens violation. It was clearly established as a violation of the law of nations before the CAT was created, see e.g. Filartiga v. Pena-Irala, 630 F.2d 876 (2nd Cir. 1980) and has been consistently viewed as such since, see e.g. Prosecutor v. Furundzija, Case IT-95-17/1 (Appeals Chamber, International Criminal Tribunal for the Former Yugoslavia, 2002), 121 International Law Reports 213 (2002).

11 See Ariel Dorfman, *The Tyranny of Terror: Is Torture Inevitable in Our Century and Beyond? in TORMURE: A COLLECTION* 5 (Sanford Levinson, ed. 2004) (stating that, at last count, there are 132 countries around the world in which torture is contemplated as inevitable). [hereinafter Dorfman]

12 CAT Article 1.

13 Kim Lane Scheppele, *Hypothetical Torture in the “War on Terrorism”*, 1 J. NAT’L SECURITY L. & POL’Y 285, 289 (2005) (remarking that the overlapping prohibitions of “cruel, inhuman or degrading treatment”
on the CIA interrogation techniques qualified their analysis by stating that “[t]he task of interpreting and applying [the prohibition of severe pain and suffering] is complicated by the lack of precision in the statutory terms and the lack of relevant case law.” Others that have chosen to, or in some cases been required to, “map the border between torture and not torture” have produced widely varying answers, be they commentators, legislators or members of the executive branch after 9/11. The resulting definitions range from very narrow interpretations of what constitutes torture that would permit the intentional infliction of substantial pain, to expansive definitions which would practically outlaw interrogations of any kind. Still others argue that any attempt to clearly define torture is counterproductive and should not be attempted because it encourages behavior that necessarily approaches whatever line is drawn. Whatever their positions on the definition of torture, those that have attempted to define it have usually done so as a way of furthering other goals. Whether those goals were protecting individual rights, maintaining moral standards of conduct, or protecting national security, the debate has devolved into a struggle to determine who will be the “master of the language” that is used. Although, as Levinson points out, it may have been acceptable for Humpty-Dumpty to assert that “when I use a word, it means just what I choose it to

14 Memorandum from Office of the Principal Deputy Assistant Att’y Gen. to John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency (May 10, 2005) [hereinafter Bradbury Memo] (on file with the author).
16 Bybee Memo at 6.
17 See What is Torture supra note 15 at 249.
18 See Waldron supra note 5 at 1715.
19 Levinson supra note 4 at 236.
mean”, 20 there is something seriously wrong when commentators, legislators and executives take such an approach toward defining something as important as torture.

What is made apparent by this struggle to even to speak the same language, much less reach consensus, is that the subjectivity inherent in the current definition of torture is a fatal flaw. An examination of the state practices of Germany, Israel and the United Kingdom when faced with terrorist threats, as well as our own reaction to 9/11, demonstrates that even liberal democracies have used the subjectivity inherent in the term “severe pain or suffering" to permit interrogations and detention techniques that have later been criticized as torture. This article proposes a first step toward solving this problem by providing a clear definition of “severe pain or suffering" based upon a morally defensible objective standard that is internally self-policing and difficult to manipulate.

Critical to fashioning this proposal is the acknowledgment of its limitations. Because this proposal recognizes that its impact will be limited to states that are willing to be influenced by human rights treaties, it carefully examines the question of how the definition of torture can be fashioned to increase the compliance of willing states. Such a “modest" goal, that concedes from the outset that there are states that are not influenced by human rights treaties, even though they have officially acceded to those treaties, might seem like an embrace of a legal realist view of international law, and a repudiation of natural law idealism. 21 This is not the case. Rather it is based on the belief, supported by Professor Oona Hathaway’s empirical work on the effectiveness of international law, that “domestic enforcement of international law is essential to compliance.” 22 Domestic enforcement, or perhaps more accurately “self-enforcement,” of international legal obligations is critical for compliance where transnational legal

20 Id.
enforcement mechanisms are weakest.\textsuperscript{23} If this is true, and the available empirical evidence on the effectiveness of international law strongly suggests that it is, then the question “how should torture be legally defined?” is insufficient. Instead the question must become “how can the definition of torture be fashioned to improve the incentives for self-enforcement?”

The answer is to tie the definition of “severe pain and suffering” to pre-existing and well-documented limitations on the stresses that may be imposed on a nation’s own trainees. Simply put, a detaining state may not do unto its detainees that which it does not regularly do to its own trainees.

Part I of this article will examine the use of coercive interrogation in intelligence collection. It will dispel often referenced misconceptions about the intelligence gathering process that often prevent serious debate about where and how lines defining torture should be drawn. Discussions of “ticking time bomb” scenarios generally lead to the conclusion that there are some situations in which we “must do what we have to do” no matter where the lines are drawn. Similarly, the argument that “coercion does not work because it only produces unreliable information” leads to the conclusion that there is no value at all in the use of any coercion, so line-drawing is unnecessary. Part I will also discuss the realities of intelligence collection to show the very narrow area in which the coercion question arises and it will explain why there remain situations in which coercive techniques are still regarded as being effective. Part II will describe the current prohibitions against torture found in international law and specifically the provisions of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or

\textsuperscript{23} See id. (describing the primacy of self-enforcement to support compliance with treaties in which transnational legal enforcement mechanisms are very weak) see also Oona Hathaway, The Promise and Limits of the International Law of Torture, 1 J. NAT’L SECURITY L. & POL’y 199, 205-08 (2005) (discussing the importance of self-enforcement for compliance with the Convention Against Torture). [hereinafter Promise and Limits]
Punishment (CAT).\textsuperscript{24} It will examine interpretations of this prohibition, ranging from the very restrictive to the highly expansive, and it will review court decisions that have addressed what specific acts constitute torture and consider how the related prohibition against the use of cruel, inhuman or degrading treatment impacts how torture is viewed. Part III will examine the detention and interrogation measures taken by a variety of nations in response to terror threats, illustrating why a subjective definition of torture cannot be effective in constraining state behavior within the current system of international law. Part IV will describe the objective definition that is being proposed and will discuss benefits that its adoption will produce. The article will conclude by attempting to answer anticipated criticisms of the proposed definition.

**Part One**

**A. Intelligence Collection Myths**

Both sides of the torture debate typically employ oversimplified and inaccurate characterizations of the role interrogations play in the intelligence gathering process. To properly address the issue of how coercive interrogations should be limited, it is first necessary to make clear the flaws in some commonly repeated lines of argument. In particular, discussions of “ticking time bomb” scenarios and use of the familiar claim that “torture doesn’t work” because it produces bad information, do little to advance the serious consideration of the issue at hand. While both lines of argument contain a kernel of truth, their use displays a complete lack of understanding of how intelligence is actually gathered. But because they are both so deeply ingrained in almost any discussion about coercion or torture, it is useful to dispense with them before further discussing coercive interrogations.

\textsuperscript{24} CAT, Art. 1.
**Ticking time bombs**

The ticking time bomb scenario is seductively appealing in its simplicity. A bomb is planted in a large metropolitan area threatening hundreds, or in the nuclear variant even hundreds of thousands, of innocent lives. The state has custody of an individual who knows where the bomb is, or how it may be disabled, but that individual won't talk. Surely saving the lives of thousands justifies inflicting even the most egregious pain on one person, or even a handful of people. While some have eloquently refused to be seduced by such logic, others, even from a part of the political spectrum not usually sympathetic to things like harsh interrogation or torture including Sen. Charles Schumer and Leon Panetta, have mentioned ticking time bombs in their discussions of when harsher interrogation methods or torture might be used.

Although there are certainly examples of real world “ticking time bomb” scenarios in which coercion or torture resulted in lives being saved, these incidents are extremely rare, no matter what Jack Bauer may imply. The infrequency of such occurrences, and the lack of certainty about the harms or the immediacy involved that exists even in these rare instances, makes the “ticking time bomb” scenario a grossly overused point of discussion.

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26 See Dorfman supra note 11 at 17.
29 See Luban supra note 25 at 1441-42 discussing a foiled plot to assassinate the Pope and the al Qaeda Pacific airliner plot.
Several scholars have quite ably exposed the flaws of considering the “ticking time bomb” hypothetical when debating the use of coercion or torture in interrogations. Their criticism focuses on the unrealistic assumptions that underlie the hypothetical. None of the certainties that exist in the hypothetical are found in the real world. Interrogators will rarely, if ever, know for certain the magnitude of the threat or its imminence. It is also unlikely that the interrogators will know with certainty that the suspect they are interrogating actually has the information necessary to avert the disaster. Nor is it certain that the resort to torture will yield the information desired.

Finally, as Scheppele points out, the hypothetical also avoids the complex difficulties that this article is grappling with by posing the question as an individual moral choice, not the rationale for a bureaucracy creating regulations that allow for torture in certain situations.

These commentators conclude that the ticking time bomb scenario is used as a canard by those that want to justify torture by making even the most reprehensible practices seem rational. Whether or not discussion of such scenarios is done for the purpose of intentionally misrepresenting or oversimplifying the choices involved, it is clear that any serious consideration of coercive interrogation techniques must go well beyond this popular, but unrealistic, scenario.

“Torture does not work”

Another commonly used oversimplification in the torture debate is one that attempts to eliminate the need for any debate at all by negating any possible justification for coercion. This simplification states that “torture does not work” because it elicits unreliable information. Given the general agreement that exists, at least among states

30 See e.g. Scheppele supra note 13 at 293-95 and 305-06; Luban supra note 25 at 1441-43; Shue supra note 25 at 57-58.
31 Id.
32 See Scheppele supra note 13 at 305; Luban supra note 25 at 1445-50.
that are willing to be influenced by the definition of torture, that torture as punishment or torture to extract confessions is always wrong, the only context in which it might be permissible would be in the interrogational setting.\textsuperscript{33} If, in fact, it is unreliable as an interrogational tool then there can be no justification for coercion whatsoever.

Like the ticking time bomb scenario, this line of argument also contains some truth. There is strong evidence that the most effective way to exploit an intelligence source over an extended period of time is usually through rapport-building and patient, non-coercive interrogations.\textsuperscript{34} However, acceptance of the premise that non-coercive interrogations are generally superior in the long-term exploitation of an intelligence source does not negate the claim that coercive methods can produce results in time critical or high value situations.\textsuperscript{35}

The claim that coercion is not a valuable interrogational tool is made by a variety of people for a variety of reasons. Not surprisingly, some commentators that are most critical of the ticking time bomb scenario, and those generally opposed to any form of coercion, embrace the “torture doesn’t work” oversimplification as further support for their position that there exists no possible justification for coercion.\textsuperscript{36}

\textsuperscript{33} See Shue \textit{supra} note 25 at 53.
\textsuperscript{36} See e.g. Scheppele \textit{supra} note 13 at 335-37; Attorney General Eric Holder quoted as saying “People will say almost anything to avoid torture” when explaining his position that torture does not work \textit{in Ari Shapiro, Holder Calls Waterboarding Torture}, NPR All Things Considered, Jan. 15, 2009, http://www.npr.org/templates/story/story.php?storyId=99404524 (accessed Jul. 12, 2009); Sen. Jay Rockefeller quoted as saying “On the other hand, I do know that coercive interrogations can lead detainees to provide false information in order to make the interrogation stop.” in John A. Wahlquist, \textit{Enhancing Interrogation: Ethics and a New Agenda for Intelligence Interviewing}, presented at the 4th Annual Conference of the International Intelligence Ethics Association, Feb. 20, 2009 at the Johns Hopkins University (copy on file with author) at 8. [hereinafter Wahlquist]
that coercion yields unreliable results is also employed tactically by the military as a training tool that reinforces compliance with the Geneva Conventions by its interrogators.\footnote{Chris Mackey and Greg Miller, The Interrogators: Inside the Secret War Against Al Qaeda 31 (2004).}

Although like the “ticking time bomb” scenario, the “torture doesn’t work” line of argument has a large number of adherents from across the political and policy making spectrum, it does not stand up well to reality. There are many examples of torture, or at least highly-coercive interrogation techniques, foiling terrorist plots and saving the lives of civilians or soldiers. Some of these examples are well documented, such as the torture used by Filipino police in disrupting a 1995 al Qaeda plot to simultaneously blow up eleven U.S. airliners over the Pacific.\footnote{See Luban supra note 25 at 1441-42.} Others, like Israel’s claims that its security service had foiled ninety planned terrorist attacks, including suicide bombings, car bombings, kidnappings, and murders based upon information gained through the use of coercive interrogations,\footnote{See U.N. Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Second Periodic Reports of States Parties Due in 1996, Add., Isr., para. 24, at 7 U.N. Doc. CAT/C/33/Add.2/Rev.1 (Feb. 17, 1997).} or the claims, made by former CIA operations officer John Kiriakou and others, that waterboarding Abu Zubaydah and Khalid Sheikh Mohammad yielded information that led to major intelligence breakthroughs that disrupted “a number of attacks, maybe dozens of attacks”\footnote{See Transcript of interview with John Kiriakou by correspondent Brian Ross, “CIA—Abu Zubayda,” ABC News, n.d., 17, 39, http://abcnews.go.com/images/Blotter/brianross_kiriakou_transcript1_blotter071210.pdf, found at http://abcnews.go.com/Blotter/Story?id=3978231&page=2 (accessed March 11, 2009) (also on file with author).} are impossible to fully assess until these interrogations are declassified. That said it is clear that coercive interrogation techniques are effective at quickly eliciting information, a portion of which has real intelligence value.
B. Actual Intelligence Collection

Intelligence collection is typically a long, tedious process that involves the gathering of countless fragments of information and gradually piecing them together to form an overall picture. These fragments can be scraps of paper found in the pocket of a captured enemy, a consistent phrase used by a number of prisoners, or an inconsistent remark made by one. They may be files found on the hard drive of a captured laptop, an intercepted cell phone call, or the nervous glance of a prisoner in response to a pointed question.\textsuperscript{41} There is good information, bad information and a great deal of non-information that is gathered from the tens of thousands of interrogation sessions that take place during a conflict. There are names and places that act as safe houses or weapons stores that can be physically verified. There are descriptions of internal communications procedures, decision making processes and command structures that are cross-referenced against similar descriptions provided by other prisoners. And there are opinions and observations about individuals’ personalities and motivations that provide valuable insight, but are practically impossible to independently verify.\textsuperscript{42} The veracity of this last type of information is judged by the demeanor of a prisoner when giving the information. Almost all prisoners tell the truth at least part of the time, and almost all prisoners lie, at least part of the time. While research on detecting deception seems to indicate that there is little data supporting any reliable non-verbal indications of deception, it also concedes that most of the studies are conducted in a laboratory setting using very short interviews.\textsuperscript{43} By interviewing the same prisoner

\textsuperscript{41} See Chris Mackey and Greg Miller, The Interrogators: Inside the Secret War Against Al Qaeda 71-451 (2004) [hereinafter Mackey and Miller]; some of the understanding of intelligence collection contained in this section is also based upon 7 years of personal experience in the U.S. Navy and having a father that spent 35 years as an intelligence analyst for the National Security Agency.

\textsuperscript{42} Id.

\textsuperscript{43} See Gary Hazlett, Psy.D., “Research on Detection of Deception: What We Know vs. What We Think We Know,” in Intelligence Science Board, Educing Information: Interrogation: Science and Art,
on numerous separate occasions for hours at a time, and carefully noting when and how
the subject behaves when he is giving information that has been verified as true and
when he gives information that has been verified as false, some degree of confidence
can be established in the ability to detect deception in some prisoners.\textsuperscript{44}

Like any other aspect of warfare, intelligence collection is characterized by
continual innovation and adaptation of tactics and techniques. Once one side
understands how their people will be interrogated, they are able to prepare them to resist
that sort of interrogation. When the interrogators learn which resistance techniques their
opponents are using, they will modify their interrogational approach. The ebb and flow
of technique and counter-technique is constant and readily apparent to those that are
involved in the process. One interrogator in Afghanistan remarked that “[i]t was strange
to see a prisoner trying [resistance] techniques that we hadn’t encountered in months.
We thought perhaps he had been on the run and isolated from the fleeing Arab scene in
Pakistan’s cities, where more sophisticated resistance techniques were being devised
and spread by word of mouth,”\textsuperscript{45}

The fundamental goal of any interrogator is to keep the prisoner off balance,
confused, disoriented and, at times, afraid. This fear need not be of physical harm. It
may be fear of betrayal by ones comrades, or fear of prolonged separation from family,
or fear that a prior interrogation session provided valuable information to the enemy or
simply fear of the unknown.\textsuperscript{46} While interrogators try to prolong this fear, confusion and

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\textsuperscript{44} See Mackey and Miller supra note 41 at 71-451.
\textsuperscript{45} Id. at 310.
\textsuperscript{46} See Id. at 479-483 (listing the various techniques employed by Army interrogators, found in the Army
Field Manual (FM 34-52).}
disorientation, it is a difficult task. As Chris Mackey, an Army interrogator in Afghanistan, said, “[f]ear is often an interrogator’s best ally, but it doesn’t have a long shelf life.”

The American experience in Afghanistan illustrates why this is so, and why interrogators find employing some form of coercion useful. In Afghanistan, one of the reasons that fear did not have a long shelf life was that the al Qaeda prisoners had been told what to expect when they were captured. A captured al Qaeda training manual gave the following instructions on resisting interrogation:

Hold out on providing any information for at least twenty-four hours, it said, to give ‘brothers’ enough time to adjust their plans. The Americans ‘will not harm you physically,’ the manual said, but ‘they must be tempted into doing so. And if they do strike a brother, you must complain to the authorities immediately.’ It added that the baiting of Americans should be sufficient to result in an attack that leaves ‘evidence.’ You could end the career of an interrogator, maybe even prompt an international outcry, if you could show the Red Cross a bruise or a scar.

Once the prisoners had been held for a couple of days and they learned that this description of their captivity was accurate, that they would be well fed, and that there were not adverse physical consequences for lying or refusing to answer questions, any fear of the unknown rapidly vanished.

The interrogations in Afghanistan were limited to the techniques found in the Army Field Manual and as the cat and mouse game between the al Qaeda prisoners and interrogators continued there was a sense that these limitations restricted the effectiveness of the interrogations. “Our experience in Afghanistan showed that the harsher methods we used – though they never contravened the Conventions, let alone crossed over into torture – the better the information we got and the sooner we got it.”

It should be remembered that Mackey’s assurance that interrogations “never crossed over into torture” was based upon his subjective understanding of the definition.

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47 Id. at 8.
48 Id. at 179.
49 See id. at 181.
50 Id. at 477.
of torture. Even if Mackey’s group never crossed such a line, there is a widespread belief that others at Guantanamo and Abu Ghraib did.\textsuperscript{51} As we turn to the variety of definitions of torture both employed and proposed, it becomes clear that there are those who claim that some of the techniques that Mackey employed were torture, while others go so far as to justify the conduct at Abu Ghraib. Arriving at a definition that closes this gap by dealing with the specifics of how torture should be defined will be critical to the future of intelligence gathering.

**Part Two**

**A. The International Prohibition of Torture**

There can be no question that international law prohibits torture.\textsuperscript{52} It is well established that customary international law prohibits torture and views its use as a *jus cogens* violation. In his opinion in *Filartiga v. Pena-Irala*, Judge Kaufman canvasses numerous conventions and commentators and finds that they all come to the same conclusion, that the law of nations prohibits official torture.\textsuperscript{53} Not only is this prohibition clearly established in customary international law, but it is also a positive obligation on all the signatories of several widely accepted international treaties and conventions. Most notably each of the four Geneva Conventions of 1949, the only international treaties to ever achieve universal acceptance, prohibit torture.\textsuperscript{54} Common Article 3 of these Conventions (so named because each of the four conventions contains the identical article) prohibits “[v]iolence to life and person, in particular murder of all kinds, mutilation,

\textsuperscript{51} See Mark Danner, “Tales From Torture’s Dark World”, N.Y. Times, Mar. 14, 2009 online at http://www.nytimes.com/2009/03/15/opinion/15danner.html?_r=3 (detailing the leaked reports from the International Committee of the Red Cross on the mistreatment of the “high value” detainees at Guantanamo).

\textsuperscript{52} See Filartiga v. Pena-Irala and Prosecutor v. Furundzija, supra note 10.

\textsuperscript{53} See Filartiga at 883-84.

cruel treatment and torture."⁵⁵ Likewise Additional Protocol II of 1977, which supplements Common Article 3, reiterates the prohibition on torture and includes a list of other prohibited actions such as rape, pillage, slavery, taking hostages and collective punishments.⁵⁶

Although the Geneva Conventions and their Additional Protocols only apply in times of armed conflict, human rights conventions, both aspirational and binding, also clearly prohibit torture in all circumstances. The Universal Declaration of Human Rights, a non-binding U.N. General Assembly Resolution passed in 1948, provided that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."⁵⁷ The International Covenant on Civil and Political Rights (ICCPR) used the same language in its binding prohibition of torture in 1966.⁵⁸ The identical language is also found in Article 3 of the European Convention on Human Rights and nearly identical language, merely transposing the words "punishment" and "treatment", is found in the American Convention on Human Rights.⁵⁹ Although these and other conventions all clearly prohibit the practice, none of them attempt to further define either torture or inhuman or degrading treatment.

For a more definitive explanation of the term, we must turn to the CAT. Article 1 of the CAT defines torture as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person 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

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⁵⁵ Geneva Conventions I-IV, Art. 3(a).
⁵⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, Art. 4.
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.⁶⁰

There is widespread acceptance of this definition, indicated by the fact that there are 146 state parties to the Convention.⁶¹ However this consensus on the wording of the Convention misleadingly implies agreement on the actual scope of the prohibition which is not borne out in practice.

**B. Torture and Cruel, Inhuman and Degrading Treatment (CID)**

One factor that blurs the practical definition of torture is its pairing with “cruel, inhuman or degrading treatment or punishment” (CID).⁶² Many of the Conventions that prohibit torture also prohibit CID.⁶³ However a split has developed over whether these conventions recognize any legal distinction between the two forms of treatment. On the one hand, the ICCPR, the European Convention on Human Rights and the American Convention on Human Rights all prohibit both torture and CID, and also state that no derogation may be made from either of these provisions in time of emergency.⁶⁴ For these conventions both types of conduct are equally impermissible. In contrast the CAT separates its prohibition against torture, found in Article 1, from its prohibition of “acts of cruel, inhuman or degrading treatment or punishment” found in Article 16.⁶⁵ It goes on to specify that torture and CID are not coextensive by stating that CID is defined as those acts “which do not amount to torture as defined in article 1.”⁶⁶ Article 16 further differentiates CID from torture by selectively applying some articles of the convention to

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⁶⁰ CAT Art. 1  
⁶² See Scheppele *supra* note 13 at 289; see also Levinson *supra* note 4 at 238-240.  
⁶⁴ See ICCPR Art. 4(2); European Convention on Human Rights Art. 15(2); American Convention on Human Rights Art. 27(2).  
⁶⁵ CAT Art. 16.  
⁶⁶ *Id.*
the prevention of CID while leaving others applicable only to allegations of torture.\footnote{CAT Art. 10-13 are addressed to preventing both CID and torture while all articles of the CAT apply to situations involving torture.}

More importantly Article 2(2) of the CAT provides that the prohibition on torture is non-derogable, even in time of war or state emergency, while similar status is not afforded the prohibition against CID.\footnote{CAT Art. 2(2). See also Levinson \textit{supra} note 4 at 239-40.}

The CAT is the most recent of these Conventions, and it more specifically addresses questions of torture and CID than do the broader ICCPR and human rights conventions. These general principles of statutory interpretation would seem to favor deference to the distinction that CAT establishes between torture and CID. This distinction is further supported by the fact that a number of European Court of Human Rights cases dealing with claims of torture and CID, including the seminal case of the \textit{Ireland v. United Kingdom}, distinguished between torture and CID in their rulings.\footnote{See \textit{Republic of Ireland v. United Kingdom}, 2 Eur. Ct. H.R. 25 (1978); \textit{see also} Aydin v. Turkey, 25 E.H.R.R. 251, 277 (stating that “it appears to be the intention that the Convention with its distinction between ‘torture’ and ‘inhuman and degrading treatment’ should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering.”)}

However, since 9/11 specific efforts have been made, at least by the Council of Europe, to confirm the absolute and non-derogable prohibition of both torture and inhuman or degrading treatment.\footnote{See \textit{Committee of Ministers of the Council of Europe, Guidelines on Human Rights and the Fight Against Terrorism} 8, 12 (July 11, 2002), \textit{available at} http://www.coe.int/T/E/Human_rights/h-inf(2002)8en.pdf, \textit{accessed} (Mar. 13, 2009) (stating that the “use of torture or of inhuman or degrading treatment or punishment is absolutely prohibited” and that “[s]tates may never . . . derogate . . . from the prohibition against torture or inhuman or degrading treatment or punishment”).} There have also been medical studies that have indicated that the distinction between torture and CID is not particularly meaningful when the long term outcome of the victims is considered.\footnote{See Metin Basoglu, MD, PhD, Maria Livanou, PhD, Cvetana Crnobaric, MD, \textit{Torture vs. Other Cruel, Inhuman and Degrading Treatment: Is the Distinction Real or Apparent?}, 64 Archives of General Psychiatry 277 (Mar. 2007). [hereinafter Mental Torture]}

Arguments can be made on either side of the debate as to whether the definition of torture has been made irrelevant by the expansion of the absolute prohibition to the
much broader category of CID. This impasse is noted mainly to prevent it from being used to undermine the purpose of this article. While I am persuaded by Levinson’s arguments that there is value in continuing to differentiate between torture and CID, others will not be. This article will not try to persuade in either direction on that question. To the extent that torture is considered to be legally distinct from CID, this article seeks only to define the boundaries of torture. To the extent that CID is viewed as the legal equivalent of torture in all respects, this article’s proposal will define the boundaries of the broader category of CID.

C. Court Decisions

The European Court of Human Rights has been by far the most active judicial body in deciding cases related to claims of torture in the context of coercive interrogations. Given the vague definition it is interpreting, it is not surprising that the jurisprudence is somewhat unclear as to where exactly the lines are to be drawn.

In the leading case of Ireland v. United Kingdom, decided by the Court in 1978, the government of the Republic of Ireland complained, inter alia, that the techniques used by the authorities of the United Kingdom to interrogate suspected members of the IRA violated Article 3 of the European Convention of Human Rights. These complaints involved approximately 228 cases of alleged abuse. Of these the European Commission on Human Rights examined 16 “illustrative” cases in detail and considered medical reports and written documents relating to an additional 41. The five techniques at issue were wall standing, hooding, subjection to noise, sleep deprivation

\[72 \text{ See Levinson supra note } 4 \text{ at } 238.\]
\[73 \text{ See e.g. Scheppele supra note } 13 \text{ at } 289-91.\]
\[74 \text{ See Nigel S. Rodley, The Definition(s) of Torture in International Law, } 55 \text{ Current Legal Problems } 467 (2002) \text{ for an excellent summary of the evolution of ECHR jurisprudence in this area.}\]
\[76 \text{ See Ireland opinion at } \S \text{ 1.}\]
\[77 \text{ See id. at } \S \text{ 93.}\]
and deprivation of food and drink. The detainees were interrogated over a period of several days, but were seldom held longer than one week.

The Commission heard these cases in 1972 and concluded unanimously that “the combined use of the five techniques in the cases before it constituted a practice of inhuman treatment and of torture in breach of Article 3.” After the Commission’s final report was filed with the Council of Europe in 1976, the Republic of Ireland made application to the European Court of Human Rights, as the superior body, asking that it “confirm the opinion of the Commission that breaches of the Convention have occurred.”

In response to this application the Court considered the distinction between torture and inhuman or degrading treatment. Because this opinion was decided before the ratification of the CAT, the Court turned to a definition provided by UN General Assembly Resolution 3452 which described torture as “an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.” It concluded that “[a]lthough the five techniques, as applied in combination, undoubtedly amounted to inhuman and degrading treatment . . . they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood.”

Since Ireland v. United Kingdom the Court has stated that the level of severity required for a showing of torture, as opposed to inhuman and degrading treatment has

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78 See id. at ¶ 96. Wall-standing was described as a “stress position” in which the detainee is forced to stand spread-eagled against a wall with their feet back away from the wall, causing all of the detainee’s weight to be borne by the fingers and toes. Hooding is the practice of keeping a detainee’s head and face covered by an opaque hood whenever they are not being interrogated. Subjection to noise involved keeping the detainee in room in which there was a continuous loud hissing noise. Sleep deprivation is self-explanatory, although no specific timeframe was discussed. Deprivation of food and drink was described as keeping the detainees on a “reduced diet” during their stay at the interrogation centers (which lasted for several days but seldom exceeded one week).

79 See id. at ¶¶ 96-114.

80 Id. at 145-147.

81 Id. at ¶ 2.

82 Id. at ¶ 167.

83 Id.
decreased.\textsuperscript{84} In cases such as \textit{Selmouni v. France}\textsuperscript{85} the court has found that severe beatings that leave sequelae can rise to the level of torture, when such injuries were formerly viewed as evidence of inhuman and degrading treatment.\textsuperscript{86} It is not clear, however, whether this development changes the \textit{Ireland} court’s holding that the five techniques constituted inhuman and degrading treatment but not torture.

Another oft-cited case examining the use of coercive interrogations is \textit{Public Committee Against Torture in Israel v. Israel}, handed down by the Israeli Supreme Court in 1999.\textsuperscript{87} The Israeli Supreme Court considered allegations that coercive techniques used by Israeli security forces that were similar to those examined in \textit{Ireland v. United Kingdom}, violated international law. The techniques under review in \textit{Committee Against Torture} included hooding, shaking, stress positions and sleep deprivation.\textsuperscript{88} The Israeli Supreme Court concluded that these techniques were illegal, although it did not address whether they constituted torture rather than cruel, inhuman and degrading treatment which is also prohibited.\textsuperscript{89} The Court’s general approach was to allow any physical restrictions on the prisoners that are inherently necessary in a custodial interrogation. Therefore some interruption in the prisoner’s normal sleep routine was expected and permissible, as long as he was not deprived of sleep for a prolonged period for the purpose of “breaking him”.\textsuperscript{90}

The Israeli Supreme Court went on to analyze the question of whether the contours of the “necessity” defense could be established \textit{ex ante} to determine what sort of exigent circumstances might allow the use of otherwise prohibited coercive

\textsuperscript{84} \textit{See} Rodley \textit{supra} note 13 at 477-480
\textsuperscript{86} \textit{See} Rodley \textit{supra} note 13 at 477-480.
\textsuperscript{87} \textit{See} Public Committee Against Torture in \textit{Israel v. Israel}, 38 I.L.M. 1471 (1999). [hereinafter Israel opinion]
\textsuperscript{88} \textit{See} id. at 1473-74 (like the Ireland opinion, there was no specific duration discussed with respect to sleep deprivation).
\textsuperscript{89} \textit{See} id. at 1482-85.
\textsuperscript{90} \textit{See} id. at 1484.
techniques. The Court declined to provide such guidance stating that “[n]ecessity is certainly not a basis for establishing a broad detailed code of behavior such as how one should go about conducting intelligence interrogations in security matters, when one may or may not use force, how much force may be used and the like.” Although this opinion does little to clarify our understanding of the difference between torture and cruel, inhuman or degrading treatment, by strictly limiting conduct to just that which is inherent in custodial questioning, it comes close to prohibiting any form of coercive interrogation. Of course this prohibition remains subject to the necessity defense that allows for coercive techniques under certain ill-defined circumstances that constitute sufficient exigency. It is under these circumstances where the line between torture, which is subject to a non-derogable prohibition and cruel, inhuman and degrading treatment, which is not, becomes important.

Overall these decisions provide a general idea of the line between permissible conduct and cruel, inhuman or degrading treatment. They are less clear on the distinction, if any legal distinction still remains, between cruel, inhuman and degrading treatment and torture. The opinions are also necessarily limited to their facts. So while they may firmly establish that, for example, shaking is impermissible, they provide little guidance for how to address the latest piece of human ingenuity in the field of inflicting pain upon one’s fellow man.

D. Expansive definitions of torture

Some commentators have argued for an expansive reading of the definition of torture established by the CAT. This argument often begins by examining the perverse

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91 See id. at 1486-87.
92 Id. at 1486.
dynamic of interrogational torture, in which the victim is asked to provide information to end the torture,\textsuperscript{94} and his continued failure to do so, places the responsibility for continued torture on the victim’s “consent” to continue. Because the interrogator is the only one who can decide whether the withdrawal of consent (the information provided) is sufficient, the dynamic of torture is defined as the utter and complete domination of one individual by another. “The suspect’s endurance is based partly on his self-confidence and self-respect; the aim of the interrogator is to destroy these components of his character, as well as his consciousness of himself, his ‘I’.”\textsuperscript{95} This destruction of the suspect’s identity and worldview has less to do with the severity of the pain inflicted, than it does with the torturer’s ability to escalate the pain or coercion being used.\textsuperscript{96} This leads one commentator, Professor John Parry, to conclude that torture need not involve severe pain. He finds that a practice is torture even though it “lasts relatively briefly and causes less than severe pain, if it does so against a background of total control and potential escalation that asserts the state’s dominance over the victim.”\textsuperscript{97} Although Parry concedes that his proposed definition broadens the one found in the Convention, it could be argued that the definition can be linguistically reconciled with the CAT by characterizing the conduct as the intentional infliction of severe suffering which CAT prohibits.

While this proposed definition, whether viewed as an interpretation of CAT or a proposed expansion of its coverage, is intellectually appealing, it is practically problematic. By focusing on escalation and the assertion of dominance or control over the victim, the definition could be used to describe practically any custodial interrogation as torture. The detention of any individual against his or her will is an exercise of “the

\textsuperscript{94} See Shue \textit{supra} note 25 at 53 (discussing the difference between interrogational torture, that some may contend is justifiable under certain circumstances, and terroristic torture employed purely as punishment).

\textsuperscript{95} Kremnitzer, \textit{supra} note 93 at 250.

\textsuperscript{96} See Parry \textit{supra} note 93 at 153-54.

\textsuperscript{97} \textit{Id.}
state’s dominance over the victim.” And, as discussed in part I supra, interrogations usually involve some form of “escalation” or negotiation over the provision or withdrawal of privileges, creature comforts or “luxuries” such as a favorite food. When the past use of allegations of torture by terrorist groups is considered (see the discussion of RAF complaints of “isolation torture” in part III, infra) there is a reason to pause before creating an “overinclusive” definition of torture that undermines the seriousness of the charge being leveled.98

E. Restrictive definitions of torture

While overly-expansive definitions of torture may risk undermining the seriousness of torture allegations, overly-restrictive definitions result in unacceptable harm being visited upon detainees. The acceptance of very narrowly drawn definitions of torture permits a wide range of conduct that most observers would facially consider to be torture. The most infamous “restrictive” definition of torture is almost certainly the “Bybee Memo” written by John Yoo and Assistant Attorney General Jay Bybee to White House Counsel Alberto Gonzales on August 1, 2002. Its second paragraph contains the often-quoted sentence stating that: “[p]hysical 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.”99 Because there was widespread disagreement with this definition of “severe pain”, it does little to further our understanding of how torture should be defined. But the story of how this definition was arrived at speaks volumes.

The definition was drafted by John Yoo in answer to the Bush Administration’s questions about the limits on coercive interrogation, questions prompted by the capture

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98 See Levinson supra note 4 at 238.
99 Bybee Memo supra note 15.
of Abu Zubaydah, al Qaeda’s chief of operations, in March 2002. Until Zubaydah’s capture, questions about the boundaries of acceptable interrogation practices were thought of as an academic exercise. But when it became apparent that Zubaydah was successfully resisting the standard interrogation techniques being employed, Yoo was tasked with describing where exactly the line should be drawn. He was asked to draw this line when his answer was urgently needed to extract information from a man that undoubtedly possessed a vast knowledge of al Qaeda operations, which targeted US troops in Afghanistan and civilians throughout the world.

Yoo considered the language of 18 U.S.C. § 2340 and §2340A, the statutes passed by Congress in response to the United States’ ratification of the Convention Against Torture. They prohibited the infliction of “severe physical or mental pain”, but what did that mean in practice? The Justice Department had never prosecuted anyone for violating this statute, so there were not any U.S. court opinions to guide the definition. The European Court of Human Rights opinion in Ireland v. United Kingdom, discussed infra, held that a combination of several techniques such as hooding, stress positions, noise and sleep deprivation amounted to cruel, inhuman and degrading treatment, but not torture. So Yoo turned to language found in other U.S. statutes which defined “severe pain” in the context of emergency health care. It was from these statutes that the terms “severe organ failure or death” were extracted. The memo did go on to describe other practices that clearly constituted torture, including the use of electric shocks, rape, extracting teeth, mock executions, beatings with metal

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101 Id.
103 See Yoo supra note 100.
105 Id.
pipes, etc., but the damage done to effective self-enforcement by the one sentence in the summary, equating torture with the pain associated with organ failure or death, is incalculable.

Although portions of this memo were later rescinded,\(^{106}\) the fact that it was adopted at all illustrates why meaningful self-enforcement of the international prohibition against torture is unlikely to be successful. Contrary to some claims, Yoo is probably not a “monster”, and his response to this situation is certainly not unique. As Part III, \textit{infra}, will illustrate, when someone is tasked with legally defining the boundaries of torture in a time critical situation, where the lives of many civilians may depend upon the answer provided, whether the author is German, British, Israeli or American, the \textit{Bybee Memo}, or something that looks very much like it, is likely to be the result. While this may be intensely disappointing, it should not be surprising.

F. The Price of Indeterminacy

The widely varying interpretations of the Convention’s actual scope make it clear that any practical consensus on the current definition of torture is illusory. As a result, the broad agreement on the words used to define torture may actually do more harm than good. While international law can claim to have successfully implemented a convention that has received overwhelming support, such a claim of success is hollow. Because transnational legal enforcement mechanisms in this area are relatively weak, self-enforcement is critical to upholding the international prohibition against torture.\(^{107}\) Yet the subjectivity of the definition that lies at the heart of the convention makes meaningful self-enforcement extremely unlikely. This is because the prohibition against inflicting “severe pain or suffering” does little to establish behavioral boundaries. It


\(^{107}\) See Hathaway \textit{supra} note 22 at 520.
leaves the practical meaning of the term to the eye of the beholder. When the time comes for a national government that is willing to be constrained by international law to determine whether it is resorting to torture, the circumstances that have brought it to that point will almost certainly make a good faith interpretation impossible.

Part Three

A. Common Reactions to Terror Threats

This part of the article examines the reaction of several states to terrorist threats. When states are placed under pressure by terrorist groups, they invariably respond by enacting legislation designed to counter the threat. This legislation typically includes prosecution-friendly changes in judicial process and procedure, and harsher detention and interrogation policies. Like the United States’ reaction to the 2001 attacks discussed above, the responses of Germany, the United Kingdom and Israel to terrorist threats all included measures that were criticized by human rights organizations as torture or inhuman and degrading treatment, that allegedly violated the human rights conventions to which each state was a signatory. The purpose of examining the responses of these states to terror threats is not to determine whether the allegations of torture were well founded, nor is it to attempt to outline some form of state practice justifying such behavior. Rather, it is to further illustrate the fatal flaw in the current definition of torture when it is implemented within the present system of international law.

Because compliance with the prohibition on the use of torture in the present system largely relies on self-enforcement, the subjectivity and malleability of the

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108 It should be noted that even consistent state practice could not justify such measures. The fact that all of these states (and many others not examined carefully in this section such as Colombia and Sri Lanka) responded to terrorist threats with similar measures does not diminish the individual culpability of each state for doing so. Each state had a positive treaty obligation not to engage in torture or inhuman and degrading treatment and even a clearly established customary state practice of other nations does not excuse a violation of positive obligations. Further, the prohibition against torture is a firmly established jus cogens norm which, by definition, cannot be avoided by treaty, let alone by a claim of custom.

109 See Promise and Limits supra note 23 at 206-07.
current standard undermines the effectiveness of the prohibition, even in states that are serious about abiding by their treaty obligations. By effectively leaving the interpretation of “severe pain and suffering” to the eye of the beholder, the current system hopes that states will interpret this definition in good faith. The fact that the question of how torture is defined usually comes to the fore under circumstances that make a good faith interpretation almost impossible for a government charged with protecting its citizens, means that the current system’s “hope” has proven time and again to be a forlorn one.

B. Specific Examples

Germany

During the 1970’s the Red Army Faction (RAF), also known as the Baader-Meinhof gang, conducted numerous terrorist attacks against West German targets. During a series sporadic bombings and bank robberies between 1970 and 1974 the RAF killed at least 8 police officers, judges, industrialists and U.S. Army personnel and wounded dozens of others. After most of the founding members were arrested, the group staged a dramatic takeover of the West German embassy in Sweden in 1975. When their demands for their colleagues release were not met, the RAF executed two diplomats before the accidental detonation of an RAF bomb designed to destroy the building, ended the siege. The German government’s refusal to negotiate with the RAF in Stockholm, and the RAF’s public execution of German diplomats during the siege hardened both sides approach to the continuing struggle.110

As the two-year trial of the RAF leadership came to a close in 1977, the “second-generation” RAF stepped up their attacks, killing a federal prosecutor, his driver and bodyguard in April. After the trial concluded with the conviction and sentencing of the original RAF members, the group responded with a series of attacks that became known

as the “German Autumn”. At the end of July Jurgen Ponto, the chairman of the Dresdener Bank, was shot and killed in his home by three RAF members. After a failed rocket attack on the Federal Prosecutor’s Office in Karlsruhe in August, the RAF kidnapped Hanns-Martin Schleyer, the President of the Confederation of German Employers’ Associations and the Federation of German Industries on September 5. In this attack they killed the three police officers assigned to protect Schleyer as well as his driver.\footnote{Id.}

When the RAF demanded that its imprisoned leaders be flown to foreign nations of their choosing, the German government stalled and prolonged the negotiated details of the flights for over a month. In mid-October a Lufthansa jet of German tourists was hijacked by Palestinian terrorists affiliated with the RAF. The hijackers also demanded the release of the RAF leadership and over the next five days ordered the jet flown from Rome to Cyprus, Bahrain, Dubai, Yemen and ultimately Somalia.\footnote{Terror and Triumph in Mogadishu, Time Magazine, Oct. 31, 1977, at http://www.time.com/time/magazine/article/0,9171,945802-1,00.html.} The terrorists executed the plane’s captain in Yemen before ordering the co-pilot to fly on to Mogadishu where they threatened to blow up the plane if the RAF prisoners were not freed. Meanwhile, German GSG-9 commandos, an anti-terrorist unit created after the massacre of the Israel athletes at the 1972 Olympics in Munich, that had been shadowing the plane’s movements around the Persian Gulf landed at the Mogadishu airport. Shortly before the hijackers latest deadline expired, the commandos successfully stormed the plane, killing three hijackers and wounding the fourth. One commando, one crew member and four passengers sustained minor injuries.\footnote{Id.}

That night in Germany the imprisoned RAF leadership allegedly learned of the demise of the hijackers from a radio that had been smuggled in to them by their lawyers.
Four of the RAF leaders attempted suicide that night. Three of them died within a day while the fourth’s stab wounds to her chest narrowly missed her heart. When word of the suicides broke the next day, the RAF members holding Schleyer killed him and left his body in the trunk of a car to be found a few days later. The suicides and Schleyer’s killing ended the “German Autumn” and effectively ended the RAF, although some of the “second generation” members conducted sporadic acts of terror over the next several years.  

The German government took several legislative measures in response to the RAF threat. Because there were strong indications that lawyers for the Baader-Meinhof defendants were collaborating with the defendants and actively aiding the terrorist struggle, laws were passed that provided for the exclusion of defense counsel. These laws allowed the authorities to prohibit the hiring of private defense counsel and to appoint defense counsel for the specified defendants. Although a striking procedural step, this restriction did not result in claims of torture or mistreatment.

What did result in such claims was the Kontaktsperrre or “isolation law”. This law was introduced by the government after Schleyer was kidnapped. It was approved and implemented in just a few days, a record time for legislation in Germany. It took effect on September 30, 1977, and allowed for the government to order the complete isolation of prisoners for up to thirty days if the government had a “reasonable suspicion” that a terrorist group was endangering the “physical integrity, life, or liberty of a

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116 See id.
118 See id.
person‖. 119 Lawyers for the RAF challenged this “isolation torture”, as did Amnesty International a couple of years later. 120 Neither of these challenges dissuaded the German government from continuing the practice of isolating RAF prisoners, even though the prisoners’ health seriously deteriorated. 121

Following the suicides of the three RAF prisoners, the family members of Ensslin, Baader and Raspe petitioned the European Commission of Human Rights for a ruling that, inter alia, the social isolation authorized by the Kontaktsperre violated Article 3 of the European Convention on Human Rights. 122 While the Human Rights Commission ultimately rejected these claims, it recognized that isolation may constitute inhuman treatment violative of Article 3. 123 “Complete sensory isolation coupled with complete social isolation can no doubt ultimately destroy the personality; thus it constitutes a form of inhuman treatment which cannot be justified by the requirements of security, the prohibition on torture and inhuman treatment contained in Article 3 being absolute in character.” 124

Compared with the struggles against other terror organizations described below, Germany’s fight against the RAF appears almost trivial. In terms of both the lives lost and the human rights’ abuses allegedly perpetrated by the government in response, these events do not measure up to the struggles against the IRA, PLO/Hamas or al Qaeda. There were no claims of physical violence against the RAF prisoners, and the conditions of their confinement generally included access to recreation, television, radio

120 See Heinz supra note 117 at 166.
121 See id.
123 See id. at 109.
124 Id.
and books. Yet even in these circumstances, with less than 30 people killed over six years, the government took unprecedented legislative action to curtail the rights of prisoners. And for their part, even when the conditions of their confinement were relatively benign, restrictions on television or social interaction with other RAF members were challenged as torture or inhuman treatment.

**United Kingdom**

The historical struggle between Britain and Ireland goes back hundreds of years and was marked by numerous incidents, rebellions and spikes in violence. After a period of relative calm following the end of World War II, what became known as “The Troubles” started in the late 1960’s. Violence rapidly escalated in 1971. In 1971-72, 647 people were killed by sectarian violence in Northern Ireland. In July 1972 alone, 95 people were killed there were over 200 explosions and over 2,800 shooting incidents. All this occurred in a geographical area smaller than Connecticut.

The British response to the violence was swift, and changes were made in both criminal procedure and interrogation methodology. In the realm of criminal procedure “Diplock courts” were created to deal with the special challenges of prosecuting suspected terrorists. These courts took their name from the commission report (Diplock Report) that recommended the changes. The report began by recommending that the trial of “those crimes which are commonly committed at the present time by members of terrorist organizations”, which it termed “scheduled offenses” should take place before courts employing modified criminal procedures.

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125 See id. at 93-96.
127 See Ireland opinion at ¶ 55.
128 See Vercher supra note 115 at 120-121.
130 Id. at ¶ 6.
These modified procedures included the elimination of juries and the possible admission of confessions obtained through coercion. The rationale for eliminating juries was two-fold. There were concerns about both juror intimidation and jury nullification. The primary reason for suspending the rules excluding confessions obtained through coercion was simply the practical problem of obtaining convictions without them. The Diplock Report recommended that “[a]ny inculpatory admission made by the accused may be given in evidence unless it is proved on a balance of probabilities that it was obtained by subjecting the accused to torture or to inhuman or degrading treatment”, thereby placing the burden of proof on the defendant to prove that he had been subjected to torture or inhuman treatment. These recommendations were implemented by Parliament in Section 6 of the Northern Ireland (Emergency Provisions) Act of 1973 (NIEPA). These changes remained in effect until the 1987 NIEPA which lowered the burden on the defendant, requiring only prima facie evidence of torture or inhuman treatment to exclude a confession.

In reaction to the sparse and outdated intelligence information that they possessed on the IRA in early 1971, senior British intelligence officials met with members of the Royal Ulster Constabulary (RUC)’s special branch in April of that year. During that meeting it was determined that this intelligence gap could be closed through a massive series of arrests and the use of the five interrogation techniques (wall-standing, hooding, etc.) discussed in part IIC supra. Shortly after the July spike in violence, this program of arrests and interrogations was implemented, resulting almost

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131 See id. at ¶¶ 17-37.
132 See id. at ¶¶ 73-92.
133 See Vercher supra note 115 at 125-32.
134 See id. at 141-42.
135 Diplock Report at ¶¶ 88-90.
137 See Vercher supra note 115 at 142-43.
138 See id. at 65-66.
139 See id.
immediately in a stream of complaints of mistreatment.\(^{140}\) In response to the complaints a Committee of Enquiry headed by Sir Edmund Compton was established to look into the complaints.\(^{141}\) The Compton Report concluded that ill-treatment had taken place during the interrogations, but ascribed this to the inadequate application of the techniques, rather than to any impropriety in the use of such techniques.\(^{142}\) This initial failure of self-enforcement was sharply criticized,\(^{143}\) and several months later, after the violence had somewhat subsided, the government announced that the use of these techniques would be discontinued.\(^{144}\)

**Israel**

This same pattern of violence triggering a harsh governmental reaction, followed by an internal investigation supporting the harsh reaction, and concluding with an eventual retreat from the use of harsh techniques was also seen in Israel. Israel's decades long struggle with terrorism is a matter of common knowledge. From spectacular attacks such as the killing of 11 Israeli athletes at the 1972 Olympic Games in Munich, to the thousands that have been killed in the ebb and flow of violence since the end of the Six-Day War in 1967, the Israeli government has been under near constant pressure to protect its citizens against such violence. In the 1980's Israel was involved in a domestically unpopular occupation of Lebanon, and questions about the conduct of its security services came to the forefront in 1987.

The issue of Israeli General Security Services' (GSS) use of coercive interrogations against suspected terrorists was called into question in 1987 after two

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\(^{140}\) See id. at 66-67.


\(^{142}\) See Vercher supra note 115 at 67.


\(^{144}\) See Vercher *supra* note 115 at 67.
incidents raised serious concerns about the severity of the treatment being used on Palestinian prisoners. The first event, the “300 bus affair”, occurred on April 12, 1984 when bus number 300 with 41 passengers on board was hijacked by four Palestinian terrorists.\(^\text{145}\) The bus was forced to drive to the Gaza Strip where a standoff ensued. The Palestinians demanded the release of 500 PLO members being held in Israeli jails. The Israelis refused to meet the demands and stormed the bus early the following morning. Two hijackers and one soldier were killed and seven passengers were wounded in the assault.\(^\text{146}\) The public was told that the other two hijackers were mortally wounded during the assault and had died on their way to the hospital. A photograph showing the remaining two hijackers walking off the bus, injured but alive, had been banned by the Israeli Military Censor.\(^\text{147}\) It was later discovered that the GSS members had been ordered to kill the other hijackers by Avraham Shalom, the head of the GSS, once they left the scene. A subsequent investigation resulted in the resignation, but not the prosecution, of Shalom.\(^\text{148}\)

The second event, the Izzat Nafsu case, involved the perjury by GSS members at the treason trial of an Israeli soldier.\(^\text{149}\) Nafsu had been convicted of treason in 1982 although he had claimed that his confession had been extracted under torture and a “trial within a trial” (the Israeli term for a suppression hearing) had been held to determine whether the confession was admissible.\(^\text{150}\) GSS members testified during the “trial within a trial” that the confession had been voluntary and that no coercion had been used. However, when GSS obstruction of investigations into the 300 bus affair in 1984

\(^\text{146}\) See id.
\(^\text{147}\) See id.
\(^\text{148}\) See id.
\(^\text{150}\) See id. at ¶¶ 2.2-2.3.
cast further doubt on the veracity of GSS witnesses, an internal investigation into the Nafsu case made it apparent that not only did GSS members perjure themselves in that case, but that there was an established practice of perjury within the GSS that involved denying torture or coercion in any suppression hearings.\textsuperscript{151}

The Landau Commission was established in response to this crisis of confidence concerning the GSS and its interrogation methods. It acknowledged the various international conventions that prohibit torture and cruel and inhuman treatment and specifically referenced the five techniques discussed in \textit{Ireland v. United Kingdom}\.\textsuperscript{152} While it labeled the pervasive perjury by the GSS as a “dismal and regrettable” picture it took satisfaction in the fact that the practice had been “totally abolished.”\textsuperscript{153} More controversially it also concluded that:

The effective interrogation of terrorist subjects is impossible without the use of means of pressure, in order to overcome an obdurate will not to disclose information . . . . Interrogation of this kind is permissible under the law, as we interpreted it above, and we think that a confession thus obtained is admissible in a criminal trial.\textsuperscript{154}

It went on to say that in cases where psychological pressure was ineffective in obtaining information, “the exertion of a moderate physical pressure cannot be avoided.”\textsuperscript{155} The Landau Report also included a classified appendix in which it issued guidelines for the permissible pressure techniques which it assured readers were less severe than the five techniques described in \textit{Ireland v. United Kingdom}.\textsuperscript{156}

Not surprisingly these conclusions were met with extensive criticism.\textsuperscript{157} Some of it mirrored the criticism of ticking time bombs discussed in Part IA, \textit{supra}. It was argued that the certainties claimed to permit the GSS to conduct such interrogations on the

\begin{footnotesize}
\begin{enumerate}
\item[151] See \textit{id.} at ¶ 2.3-2.9 and 2.37-2.53.
\item[152] See \textit{id.} at ¶ 3.21.
\item[153] \textit{Id.} at ¶ 2.53.
\item[154] \textit{Id.} at ¶ 4.6.
\item[155] \textit{Id.} at ¶ 4.7.
\item[156] See \textit{id.} at ¶ 4.13.
\item[157] See e.g. Gur-Arye \textit{supra} note 5 at 184-86; Kremnitzer \textit{supra} note 93 at 250-55.
\end{enumerate}
\end{footnotesize}
basis of “necessity” were illusory, and that the balance of the harms was therefore not being correctly assessed.\textsuperscript{158} Amnesty International was even harsher in its assessment of the Landau Commission Report. It stated that:

> Israeli security services have routinely tortured Palestinian political suspects . . . and from 1987 the use of torture was effectively legal. The effective legalization was possible because the Israeli government and the judiciary, along with the majority of Israeli society, accepted that the methods . . . used by the (GSS) were a legitimate means of combating ‘terrorism.’\textsuperscript{159}

As described in Part IIC, \textit{supra}, the Israeli Supreme Court retreated from the position taken by the Landau Report in 1999. But as with Germany and the United Kingdom before it, the Israel government responded to the pressure of protecting its civilian population from terrorist violence by defining torture very narrowly, and sanctioning (at least for several years) the use of techniques that many outsiders would define as torture.

\textbf{C. Implications of State Practice}

The pressures faced by Germany when reacting to the violence of the RAF in the 1970’s, by the United Kingdom when responding to IRA violence in the 1970’s, by the Landau Commission in Israel when dealing with the Palestinian terrorists and by the United States after the 2001 terror attacks, all resulted in the use of interrogation or detention techniques that have been criticized by human rights organizations and have often be characterized as torture. In each of these cases government officials made claims that their conduct did not violate international human rights laws. This was because national security concerns and innocent civilian lives were thought to be in the balance. Whether the exceptional measures taken by these governments amounted to torture may remain a matter of debate, but there can be little question that the subjective definition of torture or inhuman and degrading treatment applied by these nations under

\textsuperscript{158} See Kremnitzer \textit{supra} note 93 at 243-45.
\textsuperscript{159} Amos N. Guiora, \textit{GLOBAL PERSPECTIVES ON COUNTERTERRORISM}, 290 (2007).
pressure was not the same definition that would have prevailed under less trying and dangerous circumstances. This is why the subjective element in defining torture must be eliminated, because the definition of torture should have been the same on September 12, 2001 as it was on September 10, 2001. Under the present system such consistency is not possible.

Part Four

A. Effective Rulemaking

When the corrosive effect of subjectivity described in Parts II and III is considered in the context of the present international legal system, it becomes apparent that the current definition has little prospect for success in preventing torture. If the present definition of torture is indeed broken, what can be done to fix it? Or more accurately, how may the definition of torture be refined in order to improve the incentives for self-enforcement? Conceptually, effective rulemaking is a fairly simple and straightforward process - the desired outcome must be agreed upon by the parties involved, and incentives must then be created to align the self-interest of the parties with that outcome. This rather unremarkable proposition may seem obvious, but by all appearances it is one that is frequently forgotten by rule makers of all stripes.

While this conceptualization of rulemaking is easily articulated, it can be very difficult to implement, particularly in the international law context. Taking nothing away from the continuing and valuable efforts to create and expand the reach of the International Criminal Court, as well as regional judicial bodies such as the European Court of Human Rights it is clear that international law still lacks a meaningful enforcement mechanism, particularly in the realm of human rights protection. The available empirical evidence relating to the effectiveness of the Convention Against
Torture supports this assessment.\textsuperscript{160} This means that, in the near term at least, the effectiveness of defining torture will be found in its ability to encourage nations to exercise self-restraint at a time when it is most difficult to do so. Therefore the typical criminal law approach, which aligns self-interest with the desired outcome by promising punishment if the actor to be influenced fails to deliver that outcome, is inapplicable to the current situation. Absent an enforcement mechanism that delivers the promised punishment, an actor’s self-interest is never properly re-aligned. Therefore other means must be found for aligning the self-interest of an interrogating state in extracting information to protect its civilian population, with the exercise of desirable self-restraint.

\textbf{B. The Proposed Standard}\textsuperscript{161}

The solution is to define “the infliction of severe pain or suffering”, which represents the absolute limit on coercive interrogation techniques, by referencing pre-existing and self-interested limitations on conduct. “The infliction of severe pain or suffering” would be defined as the application of any physical stressors to detainees that are not applied to the detaining nation’s own trainees in a non-punitive setting. The nation’s self-interest in preserving the health and well-being of its own trainees will encourage the maintenance (or even the further narrowing) of the list of currently permissible stressors, even in time of war. This is particularly true when it is considered that in order for a detaining state to be compliant with the proposed standard it would have to subject hundreds or even thousands of its own trainees to any stressor that it wanted to use on a handful of detainees.

\textsuperscript{160} See Promise and Limits, note 23 \textit{supra} at 205 (stating that the Convention Against Torture “is remarkably weak in enforcement”).

\textsuperscript{161} It is important to clarify that the proposed standard addresses the use of coercion in an intelligence gathering context, \textit{not} a law enforcement context. The standard advanced and the line-drawing that is done is not for the purpose of determining whether evidence obtained from an interrogation should be admissible in court, but rather to clearly describe what absolute limits international law should place on coercive interrogations.
All nations subject their trainees to stressors in order to better prepare them for the rigors of warfare. They also have well established standards limiting the type and duration of the stressors that can be applied to their trainees, in order to protect them. When these standards were written it was never contemplated that they would limit the scope of interrogations that the state might perform, the only competing considerations in balance were the effectiveness of the training and the safety of the trainees. Any changes in these standards that allow for the use of harsher interrogation methods against detainees will be meaningfully checked by the interrogating state’s belief that the harsher measures do not cause any lasting physical or emotional harm for their own trainees. The state’s self-interest in protecting its own people, its military and civilian trainees, far more of whom will be subjected to these techniques than the handful of detainees that will be interrogated using such techniques, will provide a meaningful deterrent to changes in these standards that are likely to lead to permanent harm.\footnote{162 Robert D. Kaplan, \textit{Fear Hath No Shelf-Life: Our Torture Dilemma}, The Atlantic Online, Jan. 22, 2009, at http://www.theatlantic.com/doc/200901u/kaplan-torture?ca=6aWiVAwGXmMBcPJTGM04%2Fml825ySnZQjftFju77pTFI%3D (hard copy on file with author) (stating that far more American servicemen have been subjected to waterboarding than have prisoners at Guantanamo Bay); \textit{see also} Bradbury Memo, \textit{supra} note 14 at 15.}

Basing the treatment of detainees upon the treatment afforded to ones own forces during wartime is not a new concept in international law. Geneva Convention (III) Relative to the Treatment of POW’s requires that prisoners must be “quartered under conditions as favorable as those for the forces of the Detaining Power who are billeted in the same area.”\footnote{163 Geneva Convention III, Article 25.} This convention also limits the imposition of disciplinary or judicial penalties against POW’s to those that may be imposed against members of the Detaining Power’s armed forces of equivalent rank for the same acts.\footnote{164 \textit{Id.} at Articles 87 and 88.} It also requires that POW’s receive the same judicial process, appellate rights and the same conditions of pre-trial and post-conviction confinement afforded to members of the Detaining
Power’s armed forces.\textsuperscript{165} The sufficiency of equivalent treatment has also been applied to non-international armed conflicts such as the conflict between the U.S. and al Qaeda. Justice Kennedy indicated that a showing of equivalence between the judicial treatment of detainees at Guantanamo and that afforded U.S. service personnel under the UCMJ would be sufficient to satisfy Common Article 3’s requirements for “regularly constituted courts.”\textsuperscript{166}

Adopting this standard would provide much needed clarity to the definition of torture. It would also prevent the inevitable contraction of the definition of “severe pain and suffering” that numerous states have employed when faced with a terrorist threat. Perhaps most importantly, it will give the term “severe pain and suffering” sufficient definiteness to allow for criminal prosecutions that might well be avoided under the current system. No longer would arguments that qualified legal authorities provided a restrictive definition of torture upon which the actors relied, be countenanced.

\textbf{C. Implementation}

\textit{How the Proposal Addresses the Problem}

The principal problem with the current definition of torture has two elements, each of which must be addressed. The subjectivity found in the CAT’s use of the term “severe pain and suffering” combines with the fact that the primary adherence mechanism for the prohibition against torture is self-enforcement. This eviscerates the prohibition against torture when a state is under pressure from terrorist violence. As discussed in Part III \textit{supra}, even states that are solidly supportive of the prohibition against torture have defined away torture by reading the definition of “severe pain and suffering” more narrowly during a crisis.

\begin{itemize}
  \item \textsuperscript{165} \textit{Id.} at Articles 95, 102-03, 106 and 108.
  \item \textsuperscript{166} See Hamdan v. Rumsfeld, 126 S.Ct. 2749, 2804 (2006), Kennedy, J. \textit{concurring}.
\end{itemize}
This article’s proposal attaching a clearer and more objective standard to the term “severe pain and suffering” addresses both of these elements. By clarifying the line between torture and “not torture” it removes much of the subjectivity found in the current definition which will, in turn, influence self-enforcement. States will no longer be able to point to a Landau Commission Report or a Compton Commission Report or a Bybee or Bradbury Memo that “legally determines” that the coercive methods being used do not inflict severe pain or suffering to avoid prosecuting those that may have crossed the line. Instead they will have to demonstrate that their training methods and interrogation methods were the same, or concede that they are unwilling to discharge their self-enforcement responsibilities under the CAT.

**Practical Application and Bright Line Rules**

In practice the initial test for whether a specific form of coercion was permissible would be fairly straightforward. Any stressor or form of physical treatment that a nation uses in a non-punitive manner on its own trainees would presumptively not be considered torture when used on a detainee. This would be treated as a rebuttable presumption, but one that strongly favors a detaining state that acts within these limits. Conversely, all coercive methods that deviate from the stressors that a nation subjects its own trainees to, would be rebuttably presumed to constitute “severe pain and suffering” unless the detaining state could provide compelling evidence overcoming this presumption.

While this objective standard based upon the detaining state’s treatment of its own trainees will provide a great deal of protection for detainees, such a definition, by itself, is insufficient. Standing alone, such a standard remains subject to manipulation by the detaining power, and loopholes could be found to undermine the purpose of the standard, just as verbal loopholes have been found in the past. To fully and properly protect detainees this proposed standard must be supplemented with a short list of
bright line rules to close potential loopholes by forbidding certain conduct that, however unlikely, might be practiced by a state on its own trainees. These bright line prohibitions include medical experimentation, exposure to chemical/biological agents, murder, rape, mock executions and mutilation.

Medical experimentation on prisoners of war is prohibited by the Geneva Conventions and any violations of this prohibition are labeled a “grave breach” of those conventions. Because some states, including the United States, have engaged in medical experimentation on their own trainees in the past, it is necessary for the proposed objective definition of torture to include an explicit prohibition against any experimentation on detainees. This provision would mirror Geneva (III)’s prohibition on medical experimentation and could be further amplified by the Commentary to Article 130 of that Convention which describes medical experimentation as

experiments [that] are injurious to body or health and as such are dealt with in most penal codes. The memory of the criminal practices of which certain prisoners were Victim led to these acts being included in the list of grave breaches. The prohibition does not, however, deny a doctor the possibility of using new methods of treatment justified by medical reasons and based only on concern to improve the state of health of the patient. It must be possible to use new medicaments offered by science, provided that they are administered only for therapeutic purposes.

Another instance in which the protections that a state provides to its own trainees may prove insufficient for detainees is in the area of chemical and biological warfare training. Many nations train their armed forces in the use of biological/chemical protective gear by exposing them to chemical or biological agents. In a few cases there is evidence that this training exposure, while wearing proper protective gear, is to lethal

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168 See CIA v. Sims, 471 U.S. 159 (1985) providing an extensive discussion of the MK-ULTRA program which included experimentation with LSD on military trainees.
agents.\textsuperscript{170} Even if a detaining power finds trainee casualties in biological or chemical weapons simulations to be an acceptable price for properly training its forces, it may not use that judgment to imperil detainees. Therefore, the proposed standard would include a bright line rule stating that any intentional exposure of detainees to any form of chemical or biological agent, except for the use of non-lethal agents as a last resort for the purposes of controlling an uprising within a detention facility, constitutes torture and is a violation of CAT.

Murder of detainees is already explicitly prohibited by Common Article 3 of the Geneva Conventions\textsuperscript{171} and Article 75 of Additional Protocol I.\textsuperscript{172} These prohibitions, coupled with the proposed standard, might seem to make it unnecessary for the definition of torture to include a bright line rule against murder. While it is certainly unlikely that any government would intentionally kill its own trainees, the history of wartime conduct of many nations, and particularly recent events in the Colombian civil war, should give anyone pause before asserting that it never happens.\textsuperscript{173} It has been reliably reported that the Colombian Army lured young, unmarried, unemployed men away from home and murdered them so that their bodies could be used to increase the “body count” in their ongoing civil war with the FARC.\textsuperscript{174} Such events require that the murder of detainees be included as a bright line prohibition within the definition of torture.


\textsuperscript{171} See Third Geneva Convention Article 3

\textsuperscript{172} See Additional Protocol I, Art. 75(2)(a)(i).


\textsuperscript{174} Id.
Rape perpetrated for the purpose of punishment or intimidation has been held to be torture by the European Court of Human Rights.\textsuperscript{175} However unlikely it is that a state would use rape as a “training tool”, a bright line rule against rape would be included in the proposed definition.

Like rape, mock executions have also been found to constitute torture, and like rape this practice would also be explicitly prohibited.\textsuperscript{176} This is particularly true because there can be no claim of equivalency between a “mock execution” conducted in training, which will obviously not result in death, and the mental stress associated with the mock execution of a detainee.\textsuperscript{177}

The last bright line prohibition would be against mutilation. Like murder, it is already explicitly prohibited by Common Article 3 of the Geneva Conventions and Article 75 of Additional Protocol I.\textsuperscript{178} However there are a variety of rites of passage that involve tattooing, branding or the removal of fingers.\textsuperscript{179} While these examples are found outside of the military, if fraternities or criminal organizations impose such requirements on their members, then it is certainly foreseeable that military sub-groups might also voluntarily engage in such practices. Even if such practices are common within the training structure of the detaining power, however, the proposed standard would prohibit any mutilation or coercion that resulted in permanent disfigurement.

\begin{footnotes}
\item[175] See e.g. Aydin v. Turkey, 25 E.H.R.R. 251, supra note 68.
\item[176] See e.g. Sevtap Veznedaroglu v Turkey, app. 32357/96, opinion issued Apr. 11, 2000.
\item[177] See discussion of mental stress in Part IV E infra.
\item[178] See notes 170 and 171 supra.
\item[179] See DAVID KAPLAN AND ALEC DUBRO, YAKUZA: JAPAN’S CRIMINAL UNDERWORLD (2003) at 14 (describing the Japanese practice of yubitsume or “finger-shortening” used by the Yakuza as both a punishment and a voluntary ritual of atonement); Ashley L. Battle, For Some Black Fraternities, Body Branding is a Symbol of Devotion, Columbia News Service, Mar. 27, 2007 available at http://jscms.jrn.columbia.edu/cns/2007-03-27/battle-branding (describing fraternity initiations that include branding Greek letters onto the arms or legs of the individual).
\end{footnotes}
D. Additional Benefits

**Internal Checks on Behavior**

The proposed definition does more than provide much needed clarity to the torture question. It will also greatly improve internal checks on behavior or what might be termed *ex ante* self-enforcement. Currently most soldiers, in western militaries at least, are aware that torture is illegal. But they are no more likely to have a clear and unshakeable understanding of what constitutes “severe pain and suffering” than anyone else. So when they are ordered to utilize coercive interrogation techniques they generally assume that those techniques have been properly approved and that they do not constitute torture. When Sergeant Javal Davis, sentenced to six months in jail for his role in the Abu Ghraib abuses, was asked why he did not inform the chain of command of the abuses, he said “[b]ecause I assumed that if they were doing things out of the ordinary or outside the guidelines, someone would have said something.”  

Even if the soldiers are uneasy about these techniques, the hierarchical structure of the military makes it very difficult to question their superiors about the legality and morality of their orders. “Sir, isn’t what you are telling me to do torture?” is, in most circumstances, just too difficult a question to ask because it directly challenges both the judgment and the morality of the superior officer. On the other hand, if the standard for interrogation techniques is simply “we will only do to others what we do to our own people” then the question becomes much easier to ask. “Sir, do we really do this to our own people?” The answer to that question is either a simple yes or no and the question is not one that directly attacks the judgment or morality of the superior. As a result, it is a question that is likely to be asked much more frequently, thereby bringing to light violations like those that occurred at Abu Ghraib much sooner, or preventing them from occurring in the first place.

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**Bridging the “Expectation Gap”**

Another benefit of the proposed standard is that it will bridge the gap that currently exists between aspiration and reality in the interpretation and enforcement of international law. Two statements illustrate this gap quite clearly. The first was made by Dean John Hutson, a retired Navy Admiral, in his testimony before the Senate Judiciary Committee when it was considering the nomination of Attorney General Mukasey.

One might think, ‘What a clever lawyer. He defined ‘torture’ so narrowly and the defenses to torture so broadly that we can never be found guilty. He has done a great service to the Nation.’ One would be dead wrong. We have seen the consequences of that sort of twisted legal analysis and we must never repeat it.  

While Hutson may be right in decrying the “clever lawyer”, his hollow exhortation of “never again” is all too familiar in international law. Hutson complains that the Rule of Law was not followed, and yet at the very heart of the matter is the fact that the definition of torture was vague enough that a “clever lawyer” could entirely eviscerate it. His proposed solution is to put the right people in place to get the Rule of Law “back on the tracks.”

But who would those people be? How can we find people that will not see something as acceptable when under great stress only to later realize that it was, in fact, monstrous? As California Attorney General, Earl Warren presided over the internment of hundreds of thousands of Japanese-Americans, a decision he later regretted terribly. Likewise, in the current debate concerning the use of waterboarding, legislators who later moved to prohibit waterboarding in 2007, were briefed on the

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182 Id.
practice in 2002, and at that time none of them objected to the practice.\textsuperscript{185} The Washington Post’s discussion of this change of heart was telling. It found the earlier acquiescence to the use of waterboarding to be understandable because “[i]n fairness, the environment was different then because we were closer to Sep. 11 and people were still in a panic”.\textsuperscript{186}

Mentioning Warren and the Congressional change of heart on waterboarding is not done to criticize these actions, but rather to illustrate that even individuals’ who might be expected to oppose the use of excessive measures, failed to do so under pressure. People panic when their nation is attacked. That will always happen. And the people who are responsible for the protection of their country will respond to that panic, and may even panic themselves. Hutson hopes our leaders will be better than that in the future and that hope is widely shared. But history tells us that people from all kinds of backgrounds are generally not “better” when they are under pressure, and if the broad subjectivity in the definition of torture is allowed to persist, there will always be a “clever lawyer” on hand to inoculate those that are not “better” from future prosecution.

The second statement that illustrates the gap between aspiration and reality was made by Michael Posner, President of Human Rights First, in response to the proposed standard advanced by this article. “No U.S. official should engage in any conduct with respect to the treatment of detainees that we would not expect for an American who is captured by our adversaries.”\textsuperscript{187} While Posner made this statement in opposing the standard as too permissive of coercion, his statement as written would actually allow for far more coercive means than the standard proposed by this article. This is because of the difference between the words “expect” and “hope”. His statement meant to say that

\textsuperscript{186} Id.
\textsuperscript{187} See Michael Posner and Michael W. Lewis, Advice to the Next Administration Regarding Coercive Interrogation, ABA NATIONAL SECURITY LAW REPORT, Sep/Oct 2008, at 18.
our treatment of detainees ought to be the same as the treatment we “hope for an American captured by our adversaries.” The treatment that American servicemen receive in SERE school, which is where most of the techniques at issue in the current debate about Guantanamo originated, is precisely what we expect Americans to face when captured, and historically it has always been a mere shadow of what actually awaits them.

This should not be taken to imply that the proposed standard is based upon linear reciprocity. It does not allow a detaining state to mistreat detainees just because their own soldiers are mistreated by the other side, nor does it allow for the treatment that detainees receive to vary based upon the treatment that the detaining state’s own soldiers receive. The proposed standard would not have excused many of the abuses that occurred at Abu Ghraib and Guantanamo even though al Qaeda quite dramatically beheaded a number of civilians that it captured. What the proposed standard does do is provide a clear and realistic guideline that does not rely on some hoped for good faith interpretation of “severe pain or suffering”, but rather mitigates the damage that can be done by a bad faith interpretation.

E. Common Objections

Mental Stress

The most common objection to the proposed standard that was raised by the panelists at the Oxford Roundtable, and by a number of other scholars that have reviewed this proposal, has been that the equivalent physical treatment of trainees and

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188 SERE (Survival, Evasion, Resistance and Escape) School is run by the U.S. military for special forces and combat aviators (those personnel at high risk of capture) to provide them with a small taste of what the rigors of captivity will be like. My own experience at SERE School contributed greatly to my development and advocacy of the standard proposed in this article. Numerous articles and testimony before the Senate Armed Services Committee has confirmed that some of the techniques used as SERE school were reverse-engineered to be used during interrogations at Guantanamo Bay. See Jane Mayer, The Experiment, The New Yorker, Jul. 11, 2005; see also Testimony of William J. Haynes (former Department of Defense General Counsel) before the Senate Armed Services Committee, Jun. 17, 2008 (hard copy on file with author).
detainees does not mean that the overall experience is the same. This is absolutely true. The mental anxiety of being in the hands of your enemy cannot be replicated in a training environment, nor can the fear of escalation that Parry and others discuss in arriving at their expansive definitions of torture. This criticism is bolstered by the fact that there is also at least some evidence that the long-term psychological impact of physical torture does not differ greatly from the long-term impact of psychological stressors.

If these objections are valid, then what value does the proposed standard really have? First and foremost it secures the physical integrity of the prisoners. The amount of sleep deprivation, noise, exposure to temperature changes or the types of rough treatment will be identical in both kind and duration for both groups. Because the physical impact of these techniques on all people is variable, the captives must also receive the same medical monitoring that trainees’ do, to ensure their physical safety.

But what about the mental aspects of captivity and interrogation? The standard does little to account for the mental scars that long-term captivity and interrogation can cause. That is due to the fact that International Humanitarian Law allows for indefinite captivity and interrogation, particularly in the context of non-international armed conflicts. The only limitations placed on the detention and interrogation of detainees in a non-international armed conflict, are those found in Article 4 of Additional Protocol II. These include prohibitions against murder, mutilation, torture, cruel, inhuman and

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189 See discussion in Part II D supra.
190 See Mental Torture supra note 71 at 283 (the value of this study in the present context is somewhat limited because it included stressors such as sleep deprivation, sham executions, death threats, rape threats and watching the torture of others as psychological rather than physical stressors. These techniques are considered torture and forbidden, or in the case of sleep deprivation clearly limited, by the standard proposed by this article. Therefore the implied equivalency between physical torture and psychological stressors described by the Mental Torture study does not correlate with the mental vs. physical divide that exists in the standard proposed by this article.
191 See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, Art. 4.
degrading treatment, rape and enforced prostitution.\textsuperscript{192} There can be no question that
the detaining power is allowed to ask questions of its detainees. And few would argue
with the use of non-coercive interrogation techniques such as trickery or deception in
order to extract valuable information from enemy detainees. When it is considered that
among the most psychologically damaging things that can happen to a detainee is the
realization that he has provided information to the enemy, or that his comrades believe
that he has done so,\textsuperscript{193} it is difficult to conceptualize the limitation that can be placed on
the imposition of mental stress. It is a hard truth that captors in wartime cannot be the
 guarantors of a detainee’s mental health, and are in fact permitted to take actions that
are likely to cause psychological harm. The goal of the proposed standard is to at least
make the captors the guarantors, or close to it, of the prisoner’s physical health.

\textit{A Race to the Bottom}

Another common objection to the proposed standard is that it will lead to
changes in training standards that are designed to allow interrogators to “push the
envelope”. Once interrogation standards are linked with training standards, so the
argument goes, states will implement harsher training standards in order to justify
harsher interrogations in the future. While this is theoretically possible, it is practically
very unlikely.

Any new stressors would be applied to many times more trainees than detainees,
so these new stressors would not be considered potentially harmful by the state applying
them. The only exception to this would be in states that truly do not care about the well
being of their own people. While such states do exist, they are not likely to be ones that
are willing to be influenced by international law. It may be possible to imagine North

\textsuperscript{192} See id. Art. 4(2).
\textsuperscript{193} Many Vietnam POW’s have said that their lowest moments during captivity were not after being
physically tortured, but after giving up information. Sources include the author’s personal discussions with
former Vietnam POW Doug Hegdahl, and a lecture given by former POW Dick Stratton in the early
1990’s; see also Jeremiah Denton, Jr., \textit{When Hell was in Session}, 44-83 (1982).
Korea creating a special unit of its own soldiers that are horribly mistreated to justify its equally horrible mistreatment of prisoners. But this presupposes that North Korea would require such a justification to commit torture in the first place.

If the central premise of this article is considered, that changing the definition of torture will only change the behavior of states that are willing to be bound by international law, then this criticism fails. Any state willing to go to such lengths to justify torture is unlikely to be one that was willing to be bound by international law in the first place.

**The Proposal Undermines Reciprocity**

Reciprocity is a cornerstone International Humanitarian Law (IHL), and it has been argued that the standard proposed by this article undermines that reciprocity. This is because the proposed standard allows for differing baselines for the treatment of detainees based upon the internal regulations of each party to the conflict. Where two warring nations A and B treat their own trainees substantially differently, with State A treating its trainees much more harshly than State B, the standard would likewise allow them to treat their detainees substantially differently. As a result, it is possible that both parties could be operating in full compliance with the proposed definition of torture advanced by this article and yet the detainees of State A may be interrogated with far harsher techniques than the detainees of State B. Put another way, under the proposed standard State B might be found guilty of having committed torture for treating its detainees in exactly the same way that State A was treating its detainees, even though the standard would find State A to be fully compliant.

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While in this context the inequality of outcomes appears problematic, it is in keeping with the current trend in IHL regarding what is termed “negative reciprocity.” Negative reciprocity “refers to state suspensions of legal obligations in response to breaches.” It would allow State B as described above, to cease fulfilling its legal obligations to State A in reaction to State A’s failure to meet its parallel obligations to State B. As IHL and human rights’ law converge in areas like the CAT, there is a trend towards limiting State B’s ability to suspend its obligations merely because State A has breached its obligations to State B. This is because the obligations of State B to treat its detainees in a certain manner are viewed as being owed State B’s detainees rather than to State A. So while this may result in the inequality of outcomes discussed above, the alternative, which would allow State B to treat its detainees worse in reaction to State A’s conduct greatly undermines the protections that the CAT should provide, and would generally result in those protections being limited to the handful of bright line prohibitions discussed supra in Part IVC.

There is another, far more practical reason for tying the standard for detainee treatment to the internal regulations of the detaining state, rather than attempting to achieve reciprocal treatment between states. That is the absence of a reliable flow of information during a conflict. When two states are in conflict with one another, they are not likely to willingly share, or openly reveal to each other what treatment standards are being maintained. While neutral third parties such as the ICRC can observe compliance with established standards of treatment, their neutrality and access are based upon the

196 See Watts supra note 194 at 386-417. “Negative reciprocity” is a form of “observational reciprocity” that is similar to what Derek Jinks terms “second-order reciprocity”. See Derek Jinks, The Applicability of the Geneva Conventions to the “Global War on Terrorism”, 46 VA. J. INT’L L. 165, 193-95 (2005).
197 Watts supra note 194 at 376.
198 See Watts at 386-417 (discussing the trend towards limiting negative reciprocity); see also Jinks at 193-95 (claiming that the Geneva Conventions do not contain a requirement for “second-order reciprocity” that would allow for the suspension of obligations).
199 This article will not attempt to unravel the complicated issue of individual personality in international law. It is fair to say, however, that the concept of state obligations to the individual, rather than merely to other states, is one that has received ever-increasing amounts of support over the past half century.
fact that they cannot share this information with outside sources. While it would be possible for the ICRC to confirm that State A is adhering to its own internal standards, it would be impossible for it to attempt to harmonize standards between the various parties to a conflict while maintaining the confidentiality that allows it access in the first place.

**What about Waterboarding?**

In many ways the discussion of waterboarding is a perfect microcosm of the entire torture debate. It illustrates the subjectivity and indeterminacy that undermines the current definition of torture while also demonstrating how the proposed standard advanced by this article could evolve in practice.

The past four U.S. Attorneys General currently have very different opinions about whether waterboarding constitutes torture. Within the past year, John Ashcroft and Alberto Gonzales have maintained that waterboarding, as conducted by the CIA in 2002 did not constitute torture, while Michael Mukasey consistently refused to state definitively whether waterboarding was torture, and the current Attorney General, Eric Holder definitively stated that waterboarding was and is torture. Such wide disagreements between legal professionals would not exist if torture were more clearly defined.

The waterboarding example is also valuable in demonstrating why the current standard will successfully adapt to changes in customary international law. If the waterboarding of Abu Zubaydah and Khalid Sheikh Mohammad was done in the manner

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described by both John Kiriakou and the Bradbury memo,\textsuperscript{202} that there was a doctor present and that it lasted for less than a minute, then according to the proposed standard the limited use of the technique in 2002 would not have been torture because of its routine use on American service members at that time.\textsuperscript{203} However it would no longer be permitted today. When America completed the valuable public debate about the costs and benefits of interrogation techniques, it concluded that waterboarding was not acceptable. The practice was discontinued on trainees and therefore, according to the proposed standard, would be considered torture if it were used today for interrogations.

A final aspect of waterboarding that seems to confirm its place on the borderline between “torture” and “not torture”, thereby making it a useful technique to examine when considering where and how to place that line, is that it is largely immune to the mental stress objection, discussed \textit{supra}, and that it has attracted a number of volunteers that have undergone the technique. The technique is immune from the mental stress objection, that things are different for trainees than for detainees, because the fear caused by waterboarding is generated by the body’s involuntary reaction to the sensation of drowning. The body does not care if it is your best friend or most hated enemy that is drowning you, it just reacts with a gag reflex and panic.\textsuperscript{204} In addition to all the American service members that experienced the technique, a number of writers and intelligence analysts also volunteered to undergo waterboarding and they did not report

\textsuperscript{202} See Kiriakou’s statement, \textit{supra} note 40; see also Bradbury Memo, \textit{supra} note 14.

\textsuperscript{203} However, the Bradbury Memo indicates that these individuals were waterboarded repeatedly, in excess of 50 times each. Because no American serviceman was subjected such repeated exposure to the technique, the proposed standard would have prohibited the repeated waterboarding of Zubaydah and Mohammad in 2002.

\textsuperscript{204} See e.g. Kiriakou’s statement about CIA operatives performing it on each other, \textit{supra} note 40; see also Christopher Hitchens, \textit{Believe Me, It’s Torture}, Vanity Fair, Aug. 2008 available at http://www.vanityfair.com/politics/features/2008/08/hitchens200808; Kaj Larsen, \textit{A Lesson for Mukasey: Why I Had Myself Water-Boarded}, Huffington Post, Oct. 31, 2007 (former special forces officer that had been waterboarded during SERE school volunteered to be waterboarded again for film crews in reaction to Mukasey’s refusal to state that waterboarding was torture during his confirmation hearings). This is also based on the self-reporting of numerous U.S. Navy colleagues of mine that went through SERE school.
taking any comfort from the fact that they were being subjected to waterboarding by "friends".205 While most of the writers that have undergone waterboarding have subsequently declared it to be torture, there is a seemingly fundamental contradiction between the ideas of volunteerism and torture.206 It is this belief that volunteerism and torture are incompatible concepts that, in part, undergirds the standard proposed by this article.

Conclusion

Few have accepted Levinson's invitation to descend into the muck and confront the realities of warfare, terrorism and interrogation, because it is difficult to seriously address this subject without feeling uneasy about the realities being discussed. It is far easier to sit back and say "John Yoo is a monster", "the Landau Commission legalized torture", "the Diplock Courts were a travesty" and "we should be better", but then avoid answering the difficult questions of exactly how that is to be accomplished.207 Accepting that these criticisms are valid and that we should have been better does not change things for the future. The only path to "being better" is to understand the human realities associated with warfare, terrorism and interrogation. Those realities tell us people are not "better" when they are under siege. If the rule of law has been repeatedly subverted by men, be they American, British, German or Israeli, then changing the men is not likely

205 See id.
206 Although this article is a reaction in opposition to the “I know it when I see it” definition for torture, there is something viscerally at odds between the ideas of volunteerism and torture. I am not aware of anyone volunteering to have their genitals hooked up to a car battery, their torsos burned with blow torches, their arms pulled from their sockets, or their fingernails ripped out to make a point about those practices that continue to be used in some countries. While the mere fact that someone is willing to volunteer to undergo a coercive technique does not, by itself, mean that the technique is not torture, it is a strong indication that the label “torture” is being misapplied to the technique.
207 See Yoo supra note 100 (Jonathan Freiman, an attorney for Jose Padilla, after delivering withering criticism of John Yoo was asked what standards should apply. He refused to answer on three separate occasions); in a recent debate at Rutgers-Camden School of Law on this topic my opponent, who clearly disagreed with the proposed standard, was asked by the audience what techniques he would find acceptable. Like Freiman, he evaded the question several times without providing any specifics.
to provide a lasting solution to the problem. What must be changed is the law, or at least how it is interpreted.

By proposing a specific solution, rather than dealing in the generalities typically associated with this topic, this article seeks to close the gap between the idealized hope and the true realities of what happens when a nation is attacked and its civilians are killed. It attempts to do this by proposing a standard that might at least represent a starting place for a more serious discussion of how changing a definition might help to change the way that torture’s prohibition is self-enforced, both ex ante and ex post. Within the confines of the current international legal system, self-enforcement is the only effective tool for making the prohibition against torture a meaningful reality. It is hoped that this proposed definition that first and foremost seeks to defend the physical integrity of detainees provides a useful first step towards improving that self-enforcement.