
Mind the Gap: Purpose, Pain, and the Difference between Torture and Inhuman Treatment

by Christian M. De Vos*

Condemnation of torture is universal and its prohibition forms not only part of customary international law, but has joined that narrow category of crimes so egregious as to demand universal criminal jurisdiction. Yet despite the considerable progress made towards outlawing torture, there is a frequent and growing tendency to circumvent the law against it by drawing ever finer distinctions between its depravities and the “lesser” acts of what is commonly known as cruel, inhuman, or degrading treatment (CIDT), which is also prohibited but not criminalized as extensively as torture. Perhaps most emblematic of such circumvention has been the Bush administration’s policies toward torture and inhuman treatment in the wake of its putative “War on Terror,” which this article adopts as its case study. In so doing, it examines how the now infamous torture memos produced by the Department of Justice’s Office of Legal Counsel exploited the “gap” between torture and CIDT by focusing almost exclusively on the severity of treatment and the degree of pain suffered as the principal distinction between the two. This approach is legally untenable: it ignores important jurisprudential developments emphasizing the prohibited purposes behind torture as the principal element distinguishing it from other forms of ill-treatment. Even more troubling, however, is the perverted effect this approach has had on debates over torture itself, making it too often the centerpiece of discussion at the cost of “lesser,” but more common abuses, such as CIDT.

THE LEGAL REGIME AGAINST TORTURE AND INHUMAN TREATMENT

Although a number of treaties prohibit torture and CIDT, the basic formula for the prohibition stems from Article 5 of the Universal Declaration of Human Rights, which declares, “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”¹ Other regional human rights treaties — notably, the European Convention on Human Rights,² the American Convention on Human Rights,³ and the African Charter on Human and Peoples’ Rights⁴ — largely reproduce the Declaration’s prohibition although their relative scope of protection varies. Likewise, Article 7 of the International Covenant on Civil and Political Rights (ICCPR) states that, “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”⁵

Notably, the ICCPR does not contain any definition of these concepts and the Human Rights Committee, the treaty body that monitors States Parties’ compliance with the Covenant, “does not consider it necessary to draw sharp distinctions between the various prohibited forms of treatment or punishment.”⁶ Rather, in a 1982 General Comment (later updated in 1992), the Committee

stated that such distinctions “depend on the nature, purpose and severity of the treatment applied.”⁷ Similarly, Nigel Rodley, a former UN Special Rapporteur on Torture, identifies a three-part test applied by regional human rights bodies in defining torture: 1) the relative intensity of the pain or suffering inflicted; 2) the purpose for inflicting it; and 3) the status of the perpetrator, i.e., whether he/she is acting in a public capacity.⁸ Where the threshold between torture and CIDT is concerned, two human rights bodies — the European Court of Human Rights (ECHR) and the United Nations Committee against Torture (Committee) — have addressed in particular detail the first and second pillars: the intensity of pain and the purpose for its infliction.

THE EUROPEAN COMMISSION AND COURT OF HUMAN RIGHTS

The intensity of pain or suffering caused by torture first received attention in a 1969 case brought by Denmark and other states against the Greek military government. There, the (now defunct) European Commission of Human Rights (Commission) was called upon to interpret Article 3 of the European Convention, which provides that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.” The Commission divided Article 3’s overall prohibition into a three-part typology, defining “inhuman treatment” as covering “at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation is unjustifiable.”⁹ Treatment was degrading if it “grossly humiliates [a person] before others or drives him to act against his will or conscience.”¹⁰ Finally, the Commission continued, “torture is often used to describe inhuman treatment, which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment.”¹¹ The Commission accepted that the severity of pain or suffering could distinguish inhuman treatment from other, potentially justifiable treatment, but it was the purpose of the conduct that was of paramount importance in distinguishing between torture and CIDT. Both involved suffering but, whereas “severe” suffering might, in certain instances, be justifiable — for example, shooting a fleeing suspect in the leg if it was the only way to apprehend him — torture could never be justified since it contained an additional purposive element, i.e., “the obtaining of information or confessions, or the infliction of punishment.”

Although the Commission’s decision heavily influenced the 1975 United Nations Declaration against Torture, which similarly adopted the notion of torture as an aggravated form of inhuman treatment,¹² the case of *Ireland v. United Kingdom* challenged the Commission’s purpose-driven test with the approach of the European Court of Human Rights. In that case, which involved five interrogation techniques used on IRA suspects by British security forces,¹³ the Commission considered that the purpose of the techniques was “to obtain information” from the persons subjected to them and unanimously held that the techniques amounted to

* Christian M. De Vos is a J.D. candidate at the American University Washington College of Law and a 2004 graduate (MSc) of the London School of Economics and Political Science. In November 2006 he attended the UN Committee Against Torture’s 37th Session as a participant in WCL’s UN CAT Project.

torture. Again, it considered that “the systematic application of the techniques *for the purpose of inducing a person to give information* shows a clear resemblance to those methods of systematic torture.”¹⁴ The European Court, however, disagreed with the Commission’s analysis and concluded that while the use of the techniques did constitute inhuman treatment, they did not rise to the level of torture. Buttressing its rationale on the UN Declaration’s definition of torture as an “aggravated form” of inhuman treatment, the Court held:

In order to determine whether the five techniques should also be qualified as torture, the Court must have regard to the distinction, embodied in Article 3, between this notion and that of inhuman or degrading treatment. In the Court’s view, *this distinction derives principally from a difference in the intensity of the suffering inflicted*. Although 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.¹⁵

Thus, as the Court then saw it, the distinction between torture and CIDT “derive[d] principally from a difference in the intensity of the suffering inflicted,” a distinction for which torture deserved “special stigma” not merited by other forms of inhuman or degrading treatment.¹⁶

THE UNITED NATIONS CONVENTION AGAINST TORTURE

In response to a UN General Assembly resolution, the Commission on Human Rights (now Council on Human Rights) produced a draft convention against torture intended to supersede the 1975 Declaration. To this end, the Commission set up a Working Group to study the distinction between torture and CIDT, which found that while “the concept of torture could be defined in reasonably precise terms, it was impossible to draft a precise definition” of inhuman treatment.¹⁷ Moreover, because States Parties to the convention would be legally obligated to incorporate its terms and provisions into their national criminal law, “it was hardly possible to attach these obligations to a vague concept like cruel, inhuman or degrading treatment or punishment.”¹⁸

Cognizant of the Working Group’s debates, in December 1984 the General Assembly adopted the UN Convention against Torture’s (CAT) definition. According to CAT Article 1(1):

For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.¹⁹

Whereas the 1975 Declaration adopted the European Commission’s definition of torture as an aggravated form of inhuman treatment, the Convention abandoned this distinction. Instead, Article 16 refers explicitly to “cruel, inhuman and degrading treatment or punishment not amounting to torture,” and requires only that States Parties “undertake to prevent,” rather than

prohibit, such acts committed under their jurisdiction.²⁰ This is a critical distinction since CAT requires that States Parties establish judicial remedies for torture victims, assert criminal jurisdiction over acts of torture and prosecute or extradite its perpetrators, and bar the submission of all statements obtained through torture in legal proceedings.²¹ None of these obligations apply to inhuman treatment.

“Detainee No. 063 was forced to wear a bra. He had a thong placed on his head. He was massaged by a female interrogator who straddled him like a lap dancer. He was told that his mother and sisters were whores.”

SEVERITY REVISITED: TORTURE AND THE ‘WAR ON TERROR’

A new assault on the legal regime prohibiting torture and inhuman treatment began shortly after September 11, 2001, when the “United States and an increasing number of other governments . . . adopted a legal position which, while acknowledging the absolute nature of the prohibition on torture, [put] the absolute nature of the prohibition on CIDT in question.”²² Most emblematic of this attempt was the authoring of a 2002 Department of Justice memorandum (Bybee Memo) by the Office of Legal Council for Alberto Gonzales, then Counsel to President Bush and now U.S. Attorney General. Principally authored by Deputy Assistant Attorney General John Yoo, the Bybee Memo provided a detailed legal analysis of Section 2340 of the United States Criminal Code, which was implemented as part of U.S. obligations to criminalize torture after ratifying CAT in 1992. Section 2340A makes it a criminal offense for any persons outside of the U.S. to commit (or attempt to commit) an act of torture, while § 2340, tracking the language of Article 1 of CAT, defines such an act as one “committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering that is incidental to lawful sanctions) upon another person within his custody or physical control.”²³ Significantly, the statutes do not criminalize inhuman treatment. Rather, it was the U.S. position prior to ratifying CAT that the “vagueness of the phrase [cruel, inhuman, and degrading] could not be construed to bar acts not prohibited by the U.S. Constitution.” As a result, the government declared that it only considered itself bound by the obligation to prevent CIDT “insofar as the term . . . means the cruel, unusual, and inhumane

treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments.”²⁴

While there is much to criticize in the Bybee Memo, especially noteworthy is the extremely high threshold for torture it set forth, defined as:

[I]ntense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body function will likely result.²⁵

Additionally, with respect to psychological torture, the memo opined that:

Severe mental pain requires suffering not just at the moment of infliction but it also requires lasting psychological harm, such as seen in mental disorders like post-traumatic stress disorder... Because the acts inflicting torture are extreme, there is a significant range of acts that might constitute cruel, inhuman, or degrading treatment or punishment but fail to rise to the level of torture.²⁶

Essentially, the Bybee Memo stood for the proposition that the “key statutory phrase in the definition of torture” is whether it causes severe pain or suffering.²⁷

This rationale, in turn, served as the legal basis for the now infamous interrogation techniques applied to suspected terrorists at the Guantanamo Bay facilities and, undoubtedly, in Afghanistan and Iraq as well.²⁸ Indeed, by December 2002, former Defense Secretary Donald Rumsfeld had authorized the use of aggressive interrogation techniques (a menu of nineteen “counter-resistance techniques,” in the administration’s parlance) that tested the very limits of the Bybee Memo, including the use of stress positions for up to four hours, interrogations for up to twenty hours, solitary detention for up to thirty days, forced grooming, removal of all comfort items (including the Koran and toilet paper), hooding, the removal of clothing, forced shaving of facial hair, auditory/environmental manipulation, and “mild non-injurious physical contact.”²⁹

The extent of the abuse perpetuated by these techniques is still unknown, but will certainly continue to be scrutinized with the recent passage of the Military Commissions Act, which provides that statements obtained under such conditions may be admitted at trial.³⁰ Indeed, the findings of the U.S. government itself underscore the primacy the Bybee Memo attached to severity as a means of distinguishing between torture and inhuman treatment. An official investigation into the case of Mohammed al-Qahtani, suspected of being the “20th hijacker” in the September 11th attacks, is illustrative. In response to concerns raised by FBI agents as to the interrogation techniques used on al-Qahtani, military investigators began reviewing his case and found that:

[D]etainee No. 063 was forced to wear a bra. He had a thong placed on his head. He was massaged by a female interrogator who straddled him like a lap dancer. He was told that his mother and sisters were whores. He was told that other detainees knew he was gay. He was forced to dance with a male interrogator. He was strip-searched in front of women. He was led on a leash and forced to perform dog tricks. He was doused with water. He was prevented from praying. He was forced to watch as an interrogator squatted over the Koran.³¹

In July 2005, the Army’s internal investigation determined that Major General Geoffrey Miller — then commander of the detention facilities at Guantanamo (and later Iraq’s Abu Ghraib prison) — had failed to adequately monitor the interrogation of al-

Qahtani but determined that “technically, no torture occurred.”³² Similarly, then Secretary of Defense Donald Rumsfeld stated prior to the Army’s investigation, “My impression is that what has been charged thus far is abuse, which I believe technically is different from torture . . . I don’t know if . . . it is correct to say . . . that torture has taken place, or that there’s been a conviction for torture. And therefore I’m not going to address the torture word.”³³



Courtesy of the U.S. Department of Defense

Detainees at Camp X-Ray, Guantánamo Bay, Cuba.

CHANGING CLASSIFICATIONS IN TORTURE AND INHUMAN TREATMENT

It took two years and the public horror of Abu Ghraib for the Bybee Memo, which only came to light after being leaked to the press, to be formally withdrawn and replaced with a new memorandum prepared by Acting Assistant Attorney General Daniel Levin (Levin Memo).³⁴ The Levin Memo asserts that it “supersedes the August 2002 Memorandum in its entirety”³⁵ and repudiates some of the more extreme aspects of the Bybee Memo’s interpretation of torture. Unfortunately, however, it retains the Bybee Memo’s core distinction between torture and CIDT, i.e., that the decisive criterion for distinguishing between the two is the severity of pain or suffering inflicted on a victim. The memo notes, in part, that “[d]rawing distinctions among gradations of pain (for example, severe, mild, moderate, substantial, extreme, intense, excruciating, or agonizing) is obviously not an easy task” but such distinctions nevertheless form the heart of its analysis.³⁶ Notably, this approach remains significantly out of step with international law and the later jurisprudence of both the European Court and the Committee against Torture.

THE EUROPEAN COURT OF HUMAN RIGHTS POST-IRELAND

Criticism of the decision in *Ireland v. United Kingdom* has been plentiful, and the logic of the decision held sway over the European Court’s reasoning for nearly twenty years, leading to frequent findings of inhuman treatment but never of torture.³⁷ The Bybee Memo in fact relied upon the Court’s decision in *Ireland v.*

United Kingdom, selectively highlighting it as the “leading case . . . explicating the differences between torture and cruel, inhuman, or degrading treatment.”³⁸ This reliance is inapt, however, as the Court has since retreated significantly from its severity-of-suffering approach by holding, in the case of *Selmouni v. France*, that sustained beatings leaving evidence of physical injury (acts it would have previously categorized as only “inhuman”) now constitute torture.³⁹ In its judgment, the Court stated:

[H]aving regard to the fact that the Convention is a “living instrument which must be interpreted in the light of present-day conditions” . . . the Court considers that certain acts which were classified in the past as “inhuman and degrading treatment” as opposed to “torture” could be classified differently in the future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.⁴⁰

In *Keenan v. United Kingdom*, the Court moved even further towards disavowing severity of suffering as the defining factor, noting that:

While it is true that the severity of suffering, physical or mental, attributable to a particular measure has been a significant consideration in many of the cases decided . . . under Article 3, there are circumstances where proof of the actual effect on the person may not be a major factor. For example, in respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3.⁴¹

Thus, while the Court continues to retain its distinction between CIDT and torture, its decisions in *Selmouni* and *Keenan* suggest that the level of pain inflicted is increasingly a less determinate factor, as acts it once considered only “inhuman” could now rise to the level of torture, depending on the context and purpose for which physical force is employed.

THE CONVENTION AGAINST TORTURE: INTENT AND INTERPRETATION

In the view of many commentators, the fact that the final version of CAT abandoned the UN Declaration’s definition of torture as an aggravated form of inhuman treatment, and the defeat of U.S. and United Kingdom proposals to qualify the intensity of torture as “extremely severe pain or suffering,” indicate that the UN “wished to follow the approach taken by the European Commission [in *Ireland v. United Kingdom*] over the approach by the [European] Court.”⁴² In other words, it favored the application of a purposive test in distinguishing between torture and CIDT, rather than one of severity alone. A review of the Convention’s *travaux préparatoires* supports this view.

According to J. Herman Burgers and Hans Danelius, both of whom chaired the Working Group drafting CAT in the 1980s, it was understood by the treaty’s drafters that, for the purposes of Articles 1 and 16, victims of the prohibition of torture and CIDT, “must be understood as consisting of persons who are deprived of their liberty or who are otherwise under the factual power or control of the person responsible for the treatment or punishment.”⁴³ Although the Committee has declined to adopt this view — in a recent case, it made findings of inhuman treatment in the context of non-detained persons⁴⁴ — the fact that Article 1 of CAT

attaches a purposive element to the definition of torture and Article 16 does not lead Burgers and Danelius to conclude that “the purpose of the act is irrelevant in determining whether or not the act should be considered to constitute cruel, inhuman or degrading treatment or punishment.”⁴⁵ Accordingly, if severe suffering — either physical or psychological — is inflicted while one is confined or detained, then it is inhuman. If, however, it is inflicted for achieving a certain purpose identified in Article 1, e.g., for extracting a confession or eliciting information, then it also rises to the level of torture. As the current UN Special Rapporteur on Torture, Manfred Nowak, puts it:

In principle, every form of cruel and inhuman treatment, including torture, requires the infliction of severe pain or suffering . . . Whether cruel or inhuman treatment can also be qualified as torture depends on the fulfillment of the other requirements in Article 1 CAT; mainly whether inhuman treatment was used for any purposes spelled out therein.⁴⁶

Thus, while the severity of pain is certainly a necessary element of torture, it would be contrary to the Convention’s intent to elevate it, as the Bybee and Levin memoranda do, at the expense of a purposive analysis. The CAT’s drafting history instead supports the conclusion, affirmed by the ECHR in *Keenan* as well, that it is the purposive element of torture, the intent that motivates the conduct, which principally distinguishes it from CIDT, and not the severity of treatment itself.

A brief review of the Committee’s individual complaint jurisprudence and its state reporting procedure supports this position. For example, in three cases all involving Serbian citizens of Romani origin the Committee made findings of torture when it found credible the applicants’ allegations that they had been arrested and severely beaten while in police custody. In each case, the Committee determined that the abuse complained of rose to the level of torture because it could be “characterized as severe pain or suffering intentionally inflicted by public officials in the context of the investigation of a crime.”⁴⁷ In other words, it was the purpose of the inflicted suffering, committed to extract a confession from detainees, which informed the Committee’s analysis. In contrast, the case of *Hajirizi Dzemajl et al. v. Yugoslavia* is the only instance in which the Committee has found a violation of Article 16 alone. In that case, Romani applicants submitted a violation of torture when private citizens destroyed their homes with the acquiescence of the Montenegrin police. Despite the suffering that the razings undoubtedly caused, the Committee declined to make an Article 1 determination and concluded only that “the burning and destruction of houses constitute, in the circumstances, acts of cruel, inhuman or degrading treatment or punishment.”⁴⁸ While admittedly inconclusive, the fact that the Committee’s only finding of CIDT to date involved a situation in which the victims were not actually detained underscores the likelihood that the treatment failed to rise to the level of torture not because it was insufficiently “severe,” but because it occurred outside the context of a deprivation of liberty.

The Committee’s commitment to the absolute prohibition on inhuman treatment is further supported by the position it has adopted with respect to Israel, a country of particular significance since another case on which the Bybee Memo relied was *Public Committee against Torture in Israel v. Israel*, decided in 1999 by the Israeli Supreme Court.⁴⁹ While the import of this decision might otherwise be to note that, regardless of the distinction between torture and inhuman treatment, the Court found the “law of interrogation” to exclude both,⁵⁰ the Bybee Memo nevertheless

appropriated the Court's distinction between the two to bolster its reliance on a severity standard. More telling, however, is the Committee's approach to the same interrogation techniques prior to the Supreme Court's decision. In 1997, for instance, during its report to the Committee, the Israeli government maintained that its techniques did not cause severe suffering and therefore did not violate Article 1 of the Convention. The Committee rejected this argument, noting that the techniques were "breaches of Article 16 and also constituted torture as defined in Article 1." In no case did the Committee view suffering as a criterion distinguishing torture from inhuman treatment; rather, the techniques Israeli authorities employed violated both Articles 1 and 16 of CAT⁵¹ "because other criteria, such as intent and purpose of extracting information, were met."⁵²

(MCA) adopts similar severity-based distinctions between torture and CIDT. Under the terms of the Act "severe pain," the hallmark of torture, remains prohibited "for the purposes of obtaining information or a confession, punishment, intimidation [or] coercion,"⁵⁶ but "serious" pain, which is now the province of inhuman treatment, requires no purposive element.⁵⁷ Further, in language ominously reminiscent of the Bybee Memo, the MCA defines "serious pain or suffering" as bodily injury involving at least one of the following: substantial risk of death, extreme physical pain, burns or physical disfigurement of a serious nature, or significant loss or impairment of the function of a bodily member.⁵⁸ In this manner, the severity standard for inhuman treatment is redefined in terms virtually indistinguishable from torture, but any purpose-oriented distinction therein is removed. Pain may now be so

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A DISTORTED DEBATE

Why is all this significant? On one level, it demonstrates the specious basis for many of the legal claims asserted in the Bybee and Levin memoranda, both of which rely on a strict severity standard as the primary criterion distinguishing torture from inhuman treatment. While the Levin Memo repudiates some of the more outrageous claims set forth by Bybee, it nevertheless retains the problematic premise that severity is the primary standard by which acts of torture are to be judged. Certainly, severity is an element to be considered, particularly in view of the subjective nature of suffering, but that is not the sole criterion for distinguishing inhuman treatment from torture. Rather, the weight of human rights jurisprudence supports the view that it is the purposive element of torture that elevates its gravity, not the level of suffering inflicted. Moreover, as Nowak notes, “By focusing only on the criminal prohibition of torture and defining the borderline between torture and CIDT, [the] memoranda create the impression that only torture is absolutely prohibited under U.S. law.”⁵³ This impression is clearly false: simply because inhuman treatment does not rise to the level of an international crime does not mean that it is any less impermissible.

On another level the severity standard is even more problematic as it has the pernicious effect of distorting the debate on torture and inhuman treatment to focus only on the most heinous acts, creating what David Luban has called a “cottage industry [in the] jurisprudence of pain.”⁵⁴ Indeed, while the passage of the 2005 Detainee Treatment Act was promisingly meant to close the “gap” between torture and inhuman treatment in U.S. law by prohibiting both equally,⁵⁵ the Military Commissions Act of 2006

extreme as to involve the loss of a bodily member but, under the MCA, it would not constitute torture even if it was inflicted for coercive purposes.

Ultimately, the intent here is not to argue for the moral rightness (or wrongness) of any of these distinctions. Categorizing levels of ill-treatment and their respective criminality is a work of legal fiction that can confuse as often as it clarifies. For better or worse, these distinctions exist in law; however, if they are to serve any purpose, it should not be to permit states to evade criminal responsibility through artifice and technicality, the normative effect of which exceptionalizes torture when, in fact, it remains distressingly common. Indeed, it is a telling sign of our impoverished discourse on the subject that we are now left to wonder whether “waterboarding” (or, in the more modest characterization of U.S. Vice President Dick Cheney, a “dunk in the water”) is perhaps not as bad as one might think.⁵⁹ Or, as Donald Rumsfeld mused, if he stands for eight to ten hours a day, why should detainees be restricted to four?⁶⁰ As these statements suggest, severity alone risks becoming an increasingly arbitrary standard by which to define torture, one whose threshold is set ever higher by those least at risk of experiencing it.

In order to combat this risk, the notion that severity alone distinguishes (or should principally distinguish) torture and CIDT, or that the criminalization of the former is somehow a license to commit the latter, must be rejected. This is the approach of international human rights law and humanitarian law alike,⁶¹ and it ought to be the position of all governments and States Parties alike, American or otherwise. To focus only on torture, or to confine its discourse to academic debates on the advisability of “torture war-

rants” (illuminating though such discussions may be)⁶² risks repudiating the very “object and purpose” of the Convention against Torture⁶³ and perverts the larger body of international law that prohibits all forms of inhuman treatment, of which torture is but

one part. Further, to draw sharp distinctions between torture and “lesser” horrors is to perpetuate a discourse that cares more about how to avoid imprisonment than the moral ramifications and human costs of what it means to inflict great suffering. *HRB*

ENDNOTES: Mind the Gap: Purpose, Pain, and the Difference between Torture and Inhuman Treatment

1 Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., art. 5, U.N. Doc. A/810 (1948).

2 European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 3, 213 U.N.T.S. 221.

3 American Convention on Human Rights, Nov. 22, 1969, art. 5, 1144 U.N.T.S. 144. *See also* Inter-American Convention to Prevent and Punish Torture, Dec. 9, 1985, 67 O.A.S.T.S. 13 (defining torture, discussing state responsibilities to prevent torture and inhuman treatment).

4 African Charter on Human and Peoples' Rights, June 27, 1981, art. 5, 21 I.L.M. 58.

5 International Covenant on Civil and Political Rights, art. 7, G.A. Res. 2200, at 59, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966).

6 Manfred Nowak, *What Practices Constitute Torture? US and UN Standards*, 28 Hum. Rts. Q. 809, 829 (2006).

7 Human Rights Committee, *General Comment No. 20 on Prohibition of torture, or other cruel, inhuman, or degrading treatment or punishment*, 4, U.N. Doc. HRI/GEN1/Rev.7 (2004).

8 Nigel Rodley, “The Definition(s) of Torture in International Law,” in Michael Freeman, ed., *CURRENT LEGAL PROBLEMS* (Oxford University Press, 2002) at 467-493, *available at* http://www.asil.org/is060630/Rodley_Def_Torture_paper_06_06_30.pdf.

9 *Denmark et al. v. Greece*, 12 YEARBOOK OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 168 (1969).

10 *Id.*

11 *Id.*

12 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1(2), G.A. Res. 3452, at 91, U.N. GAOR, 30th Sess., Supp. No. 34, U.N. Doc. A/10034 (Dec. 9, 1975).

13 The five techniques were described as consisting of: wall-standing (forcing the detainees to remain for periods of some hours in a ‘stress position’); hooding; subjection to noise (holding detainees in a room where there was a continuous loud, hissing noise); sleep deprivation, and; deprivation of food and drink (subjecting detainees to a reduced diet).

14 *Report of the Commission of 25 January 1976*, App. No. 23-1, Eur. Comm. Hum. Rts. Dec. & Rep. (ser. B) 410 (1976) (emphasis added).

15 *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) 5, 66 (1978), ¶ 167 (emphasis added).

16 *Id.*

17 *See* J. Herman Burgers and Hans Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (M. Nijhoff Publishers, 1988) at 149.

18 *Id.*

19 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984).

20 *Id.*, art. 16.

21 *See id.*, arts. 6-8, 14-15.

22 Manfred Nowak, *Challenges to the Absolute Nature of the Prohibition of Torture and Ill-Treatment*, 23 Netherlands Q. Hum. Rts. 674, 676 (2005).

23 18 U.S.C. §§ 2340-2340A (2000).

24 *See* 136 Cong. Rec. S17491 (daily ed. Oct. 27 1990). This interpretation simultaneously invited the conclusion that any non-American citizen residing outside of the territorial United States would not be entitled to the protections afforded by these amendments, which was precisely the position taken by the Bush administration (later rejected by the U.S. Supreme Court) when it began holding detainees from the war in Afghanistan at Guantanamo Bay. *See e.g., Rasul v. Bush*, 542 U.S. 466, 124 S.Ct. 2686, 159 L.Ed.2d 548 (2004), which

recognized that United States federal courts had habeas corpus jurisdiction over legal claims brought by persons detained at Guantanamo Bay.

25 Memorandum from U.S. Dept. of Justice, Counsel to the President, Office of the Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A at 13 (Aug. 1, 2002) [“Bybee Memorandum”], *available at* <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.08.01.pdf>.

26 *Id.* at 46.

27 *Id.* (emphasis added).

28 *See e.g.*, Independent Panel to Review Department of Defense Detention Operations (James R. Schlesinger, Chairman), *The Schlesinger Report: An Investigation of Abu Ghraib* (Cosimo Reports, 2005), which noted that “the augmented techniques [approved by Secretary Rumsfeld] for Guantanamo migrated to Afghanistan and Iraq where they were neither limited nor safeguarded.”

29 *See* Bill Dedman, “Can the ‘20th hijacker’ of Sept. 11 stand trial?” *MSNBC.com* (Oct. 24, 2006), <http://www.msnbc.msn.com/id/15361462/>.

30 *See e.g.*, Neil A. Lewis, “Officials See Qaeda Trials Using New Law in 2007,” *N.Y. Times* (Nov. 3, 2006).

31 *See* Dedman, *supra* note 29, “Can the ‘20th hijacker’ of Sept. 11 stand trial?”

32 David Rising, “Group Sues to Have Rumsfeld Investigated,” *ABC News* (Nov. 14, 2006), <http://www.newsalerts.com/news/article/group-sues-to-have-rumsfeld-investigated.html:top7:854082>.

33 News Transcript: Defense Department Operational Update Briefing (May 4, 2004), <http://www.defenselink.mil/transcripts/2004/tr20040504-secdef1423.html>.

34 Memorandum from Daniel Levin, Acting Assistant Attorney General, U.S. Dept of Justice, to James B. Covey, Deputy Attorney Gen., U.S. Dept of Justice, Regarding Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A (Dec. 30, 2004), *available at* <http://www.usdoj.gov/olc/18usc23402340a2.htm>.

35 *Id.* at 2.

36 *Id.* The Levin Memorandum states, “In the discussion that follows, we will separately consider each of the principal components of this key phrase: (1) the meaning of ‘severe’; (2) the meaning of ‘severe physical pain or suffering’; (3) the meaning of ‘severe mental pain or suffering’; and (4) the meaning of ‘specifically intended.’”

37 *See* Louis-Phillipe F. Rouillard, *Misinterpreting the Prohibition of Torture Under International Law: The Office of Legal Counsel Memorandum*, 21 Am. U. Int'l L. Rev. 9, 30 (2005), which notes that the European Court of Human Rights did not find any acts of torture in cases decided between 1978 and 1996.

38 Bybee Memorandum at 28.

39 *Selmouni v. France*, App. No. 258003/94, 1999-V Eur. Ct. H.R. 155.

40 *Id.* at ¶ 101. *Selmouni* was preceded by two other important cases as well. In 1996, the Commission and Court both determined that, in the case of *Aksoy v. Turkey*, the accused had been tortured, specifically as a result of technique called “Palestinian hanging,” which involves being suspended from one’s arms as they are bound together. The Court also noted that, in the distinction between torture and ill treatment, the former “requires the presence of deliberateness and aggravation.” *See Aksoy v. Turkey*, 1996-VI Eur. Ct. H.R. 2260. *See also Aydin v. Turkey*, 1997-V Eur. Ct. H.R. 1866 (determining that rape in itself is “grave and abhorrent”).

41 *Keenan v. The United Kingdom*, App. No. 27229/95, 2001-V Eur. Ct. H.R. 242, ¶ 112.

42 Manfred Nowak, *What Practices Constitute Torture?*, 28 Hum. Rts. Q. 809, 821. Nigel Rodley also notes that the language of Article 16 represented a compromise between those UNCAT drafters who sought “total elimination of the idea of the intensity of pain or suffering” and those states who wanted to retain the “perceived benefits” of the European Court’s decision in *Ireland*; as such, the “agreed language left the issue open.” *See* Nigel S. Rodley, *The Treatment of Prisoners Under International Law* (Oxford University Press, 1999) at 57.

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43 See Burgers and Danelius, *supra* note 17, at 149-55.

44 See e.g., *Hajrizi Dzemajl et al. v. Yugoslavia*, Communication No. 161/2000, U.N. Doc. CAT/C/29/D/161/2000 (2002), which found an Article 16 violation where a mob destroyed a Roma settlement with the acquiescence of local police.

45 See Burgers and Danelius, *supra* note 17, at 150.

46 See Nowak, *supra* note 42, *What Practices Constitute Torture?* at 822.

47 *Dragan Dimitrijevic v. Serbia and Montenegro*, Communication No. 207/2002, U.N. Doc. CAT/C/33/D/207/2002 (2004) at ¶ 5.3; *Jovica Dimitrov v. Serbia and Montenegro*, Communication No. 171/2000, U.N. Doc. CAT/C/34/D/171/2000 (2005) at ¶ 7.1; *Danilo Dimitrijevic v. Serbia and Montenegro*, Communication No. 172/2000, U.N. Doc. CAT/C/35/D/172/2000 (2005) at ¶ 7.1. See Nowak, *supra* note 42, *What Practices Constitute Torture?* at 822-24.

48 *Hajrizi Dzemajl et al. v. Yugoslavia* at ¶ 9.2. Notably, however, two members of the CAT dissented from the majority's decision, arguing that "even if the victims were not subjected to direct physical aggression," the forced displacement and destruction of property rose to the level of "severe suffering" and constituted torture within the meaning of Article 1. See *id.*, Annex.

49 H.C.J. 5100/94 *Pub. Comm. Against Torture in Isr. v. Israel* [1999], available at <http://eylon1.court.gov.il/eng/verdict/framesetSrch.html>.

50 *Id.* at ¶ 23, which notes that "a reasonable investigation is necessarily one free of torture, free of cruel, inhuman treatment of the subject and free of any degrading handling whatsoever."

51 See Summary record of the 339th Meeting, U.N. Comm. Against Torture, 20th Sess., ¶ 12(a), U.N. Doc. CAT/C/SR.339 (1998).

52 See Nowak, *supra* note 42, *What Practices Constitute Torture?* at 828.

53 *Id.* at 815.

54 David Luban, "The burning question," <http://balkin.blogspot.com/2006/09/burning-question.html> (Sept. 22, 2006).

55 Detainee Treatment Act of 2005 (H.R. 2863, Title X).

56 Military Commissions Act of 2006, Public Law 109-336, 120 Stat. 2600 (Oct. 17, 2006) at § 950v (11)(A) and Sec. 6(b)(1)(B) (amending war crimes offenses under Section 2441, Title 18 of the U.S. Code).

57 *Id.* at § 950v (12)(A) and Sec. 6(b)(1)(B).

58 *Id.* at § 950v (12)(B) and Sec. 6(b)(2)(D).

59 See Press Release, White House Office of the Vice President, Interview of the Vice President by Scott Hennen, WDAY at Radio Day at the White House (Oct. 24, 2006). Cheney later said that he was not referring to "waterboarding" when he agreed with an interviewer's assessment that "dunking terrorism suspects in water" was a "no-brainer." See e.g., Dan Eggen, *Cheney Defends 'Dunk in the Water' Remark*, Wash. Post (Oct. 28, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/10/27/AR2006102700560_pf.html.

60 See "The Interrogation Documents: Debating U.S. Policy and Methods," The National Security Archive (last updated July 13, 2004), <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/>.

61 See e.g., *Prosecutor v. Furundzija*, Case No. IT-96-21, Judgment (Appeals Chamber) (Dec. 10, 1998), ¶ 252. The Chamber held that "[t]o determine whether an individual is a perpetrator . . . of torture . . . it is crucial to ascertain whether the individual who takes part in the torture process also *partakes of the purpose behind torture* (that is, acts with the intention of obtaining information or a confession, of punishing, intimidating, humiliating or coercing the victim or a third person, or of discriminating, on any ground, against the victim or a third person) (emphasis in original)."

62 See e.g., Sanford Levinson, "Precommitment" and "Postcommitment": *The Ban on Torture in the Wake of September 11*, 81 Tex. L. Rev. 2013, 2053 (2002).

63 Vienna Convention on the Law of Treaties, art. 18, U.N. Doc. A/Conf.39/27;1155 UNTS 331; 8 ILM 679 (1969). Article 18 of the Convention obliges a state to refrain from acts which "would defeat the object and purpose of a treaty when . . . it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval."



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