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Revisiting the Pledge by the U.K. Regarding the “Five Techniques”

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REVISITING THE U.K. PLEDGE ON THE "FIVE TECHNIQUES"

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I. INTRODUCTION

In 1977, the United Kingdom pledged to the European Court of Human Rights (ECtHR) that it would discontinue the "Five Techniques" for interrogations used in Northern Ireland that amounted to human rights violations.[1] However in the years since 1977, the United Kingdom has apparently continued the use of those Five Techniques, perhaps until the present day.[2] As recently as 2018,

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1. *See* Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) at 36 (1978) (quoting the United Kingdom Attorney General's declaration to discontinue use of the Five Techniques).

2. *See generally* Nicholas Mercer, *The Truth About British Army Abuses in Iraq Must Come Out*, THE GUARDIAN, Oct. 3, 2016, https://www.theguardian.com/commentisfree/2016/oct/03/british-army-abuses-iraq-compensation (reporting in 2016 on the Baha Mousa – stemming from the

multiple investigations and public inquiries have uncovered the use of the Five Techniques by U.K. forces in Iraq and Afghanistan.[3] This article questions whether, in addition to violating the human rights of the victims by performing those techniques on them, the United Kingdom is directly responsible to the ECtHR for violating its pledge.

Pledges made before international courts and tribunals, in the solemnity of proceedings, can be legally binding, creating new legal obligations to comply with the content of the pledge.[4] The U.K. Attorney General gave the pledge before the ECtHR during the case of *Ireland v. UK*.[5] The pledge was preceded by another statement by the Prime Minister before Parliament on the same topic, ending use of the Five Techniques. Jurisprudence before the ECtHR and other international courts and tribunals, such as the International Court of Justice (ICJ), shows that making such a statement is usually treated as creating a new legal obligation.[6] In addition, the International Law Commission (ILC) has developed guidelines on how to determine whether a unilateral statement is legally binding or merely a political remark.[7] Following both the jurisprudence of the courts and the ILC guidelines, the pledge by the United Kingdom must be regarded as binding.[8]

Notwithstanding this obligation, evidence is emerging that the use of the Five Techniques has continued since 1977. Several notable

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military action in Afghanistan and Iraq – inquiry which heard that the Five Techniques were still in use).

3. *See* Mercer, *supra* note 2 (discussing the use of the Five Techniques during the military action in Iraq and Afghanistan despite their use constituting a violation of the Geneva Convention).

4. *See* Int'l Law Comm'n, Rep. on the Work of its Fifty-Eighth Session, U.N. Doc. A/61/10, at 374 [hereinafter Guiding Principles] (referring to a 2006 I.C.J. judgment allowing that "persons representing a State in specific fields may be authorized by that State to bind it by their statements in respect of matters falling within their purview").

5. Ireland v. United Kingdom, 25 Eur. Ct. H.R. at 36 (quoting the Attorney General as pledging that "the 'five techniques' will not in any circumstances be reintroduced as an aid to interrogation").

6. *See* Guiding Principles, *supra* note 4, at 374 (noting that a representative of a State may make statements binding his State in matters that fall under his purview).

7. *See generally* Guiding Principles, *supra* note 4, at 370-76 (laying out the various guidelines pertaining to the legally binding nature of unilateral statements).

8. *See id.* (explaining the ICJ's statement regarding when statements made by State representatives are legally binding).

cases, such as *Baha Mousa* and *Al-Skeini*, and the related inquiries to discover the facts, have uncovered a bulk of examples where U.K. intelligence, police, or armed forces have either committed, conspired, or knowingly avoided preventing the use of the Five Techniques.[9] In April of 2019, the United Kingdom submitted itself for periodic review before the Committee against Torture, and further information may yet come out.[10]

This article will examine whether the United Kingdom undertook an obligation not only to refuse to torture, but also to specifically ban the use of the Five Techniques. It will briefly summarize some of the major findings from a number of inquiries on point, and it will conclude that the United Kingdom appears to have violated its pledge. In the final section, this article will consider how the violation can be asserted and the pledge enforced.

II. THE U.K. PLEDGE TO THE EUROPEAN COURT OF HUMAN RIGHTS

The U.K.'s pledge has its origins in the conflict in Northern Ireland and the subsequent case Ireland brought against the United Kingdom before the ECtHR. [11] From the time of Irish independence from the United Kingdom, and the U.K.'s retention of sovereignty over several countries in the north of the island, the Northern Ireland region has always been tumultuous. [12] Due to the divided communities and the violence there, the United Kingdom exercised a vigorous and

9. *See The Baha Mousa Case*, REDRESS, (2018) https://redress.org/casework/the-baha-mousa-case/ (referencing the Baha Mousa inquiry which condemned "corporate failure" at the Ministry of Defense for its use of banned torture techniques); *see also* Al-Skeini v. United Kingdom, 2011 Eur. Ct. H.R. 70-71 (explaining that during the time in question the Royal Military Police, including its Special Investigation Branch, was not operationally independent from the military chain of command).

10. *See, e.g.*, Committee Against Torture, Committee Against Torture Reviews the Report of the United Kingdom, OHCHR (May 8, 2019), https://www.ohchr.org/EN/NewsEvents /Pages/DisplayNews.aspx?NewsID=24578&LangID=E (showing some of the findings of the Committee against Torture after its consideration of the sixth periodic report of the United Kingdom).

11. Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) at 5-6 (1978).

12. *Id.* (providing background on the crisis in Northern Ireland).

militarized police presence.[13] For some time, Northern Ireland was partly self-governing; however, in March of 1972, the United Kingdom resumed direct rule over the region.[14] In addition, beginning in August of 1971 and continuing until December of 1975,[15] the police forces enjoyed a wide scope of extrajudicial powers of arrest and detention.[16] It was during this time that the Five Techniques were used.[17]

The Five Techniques include several interrogation methods designed to induce compliance and cooperation from detainees.[18] The techniques include: (1) wall-standing (i.e. forcing individuals to hold stress positions for extended periods of time), (2) hooding (i.e. placing a dark bag over individual's heads and faces), (3) continuous noise, (4) sleep deprivation, and (5) deprivation of food and drink.[19] The United Kingdom admitted that the Five Techniques had been specifically authorized at a "high level" in government[20] and given as instructions to the police forces in Northern Ireland, the Royal Ulster Constabulary.[21]

In December of 1971, Ireland reported the use of the Five Techniques to the European Commission of Human Rights, arguing violations of the European Convention on Human Rights (ECHR).[22] The Commission considered the matter and issued its report in February of 1976.[23] In the report, the Commission found that there was strong evidence in favor of the many allegations of mistreatment,[24] concluding that multiple provisions of the ECHR had been violated, including Article 3, the protection from torture or

13. *Id.*
14. *Id.* at 6 (explaining the political history of Ireland).
15. *Id.* at 5-6.
16. *See id.* (alleging the use of extrajudicial powers during the crisis in Northern Ireland).
17. *See id.* at 33-34 (discussing the various allegations and complaints stemming from the incidents between 1971-74).
18. *See id.* at 34 (explaining the Five Techniques).
19. *Id.*
20. *Id.* at 35.
21. *Id.*
22. *Id.* at 1.
23. *Id.*
24. *See id.* at 33-50 (laying out the facts and findings of the report).

inhuman or degrading treatment or punishment.[25] The Commission determined that the matter could proceed to the ECtHR.[26]

While this matter was pending before the Commission, in March of 1972, the British Government made the decision to end use of the Five Techniques.[27] The Prime Minister, then Edward Heath, made a statement before the House of Commons on this point and took questions. First, the Prime Minister stated that:

> The Government, having reviewed the whole matter with great care and with particular reference to any future operations, have decided that the [Five] techniques which the Committee examined will not be used in future as an aid to interrogation.[28]

He was asked:

> Does the Government's decision to discontinue intensive interrogation of this kind apply only in Northern Ireland or to all future circumstances anywhere?[29]

To which the Prime Minister replied:

> I must make it plain that interrogation in depth will continue, but that these techniques will not be used. It is important that interrogation should continue. The statement that I have made covers all future circumstances. If a Government did decide—on whatever grounds I would not like to foresee—that additional techniques were required for interrogation, then I think that, on the advice which is given in both the majority and the minority reports, and subject to any cases before the courts at the moment, they would probably have to come to the House and ask for the powers to do it.[30]

Later, he reaffirmed the same statement by adding:

> I repeat that interrogation in depth will continue when it is deemed right,

25. *Id.* at 50-52 (reporting on the Commission's conclusions).
26. *Id.* at 1.
27. 832 Parl Deb HC (5th ser.) (1972) col. 744 (UK) [hereinafter Parker Committee's Report] (quoting the Prime Minister declaring that the Government "decided that the techniques which the Committee examined will not be used in future as an aid to interrogation").
28. *Id.* at 744.
29. *Id.* at 746.
30. *Id*.

> but these techniques will not be used for this purpose. We must distinguish between these two things. I would repeat what I said to my hon. Friend the Member for Oxford (Mr. Woodhouse), that if any Government did come to the decision, after the most careful thought, that it was necessary to use some or all of these techniques, it would be necessary to come to the House first before doing so.[31]

In March of 1976, Ireland took the next step to continue its complaint against the United Kingdom before the ECtHR.[32] In that case, the only question before the Court was whether the United Kingdom had committed any violations of the ECHR, not whether any other actors had committed violence or terrorist acts.[33] Ireland's case was largely a victory, although the United Kingdom was able to remedy the case partly by issuing a solemn declaration. Ireland asked the court to find that the Five Techniques amounted to inhuman and degrading treatment and also torture.[34] Ireland also asked that the court issue an order to the United Kingdom to stop using the Five Techniques, whether for interrogation or any other purpose, and that it punish under criminal law any individuals who employed the Five Techniques.[35] The Court found that the Five Techniques did violate Article 3 of the ECHR, only in so far as they amounted to inhuman and degrading treatment, but the Court refrained from concluding that the techniques amounted to torture.[36] This conclusion was largely

31. *Id.* at 748.

32. Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) at 1 (1978).

33. *Id.* at 2 (laying out the question before the court).

34. *Id.* at 58 ("[T]he five techniques . . . constituted a practice not only of inhuman and degrading treatment but also of torture. The applicant Government asks for confirmation of this opinion which is not contested before the Court by the respondent Government.").

35. *Id.* at 64.

36. *Id.* at 59 ("The Court concludes that recourse to the five techniques amounted to a practice of inhuman and degrading treatment, which practice was in breach of Article 3."); *see also* Selmouni v. France, 1999-V Eur. Ct. H.R. 29, 31-32 ("However, having 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 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."); Ireland v. United Kingdom, rev'd, 2018 Eur. Ct. H.R. 44

based on the gravity of the treatment. [37] In addition, Ireland withdrew its request for an order regarding the Five Techniques when the United Kingdom made a solemn declaration before the court.[38]

The solemn declaration was a statement by the U.K.'s agent to the Court during Court session.[39] It pledged that the United Kingdom would no longer employ the Five Techniques.[40] Specifically, the U.K. Attorney General speaking before the Court on February 8, 1977 said:

> The Government of the United Kingdom have considered the question of the use of the five techniques with very great care and with particular regard to Article 3 (art. 3) of the Convention. They now give this unqualified undertaking, that the "five techniques" will not in any circumstances be reintroduced as an aid to interrogation.[41]

While the declaration was sufficient enough to convince Ireland to withdraw its request for an order, the Court still had to determine

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(remarking on the evolution of case law in regards to classifying acts of torture); A v. Sec'y St. Home Dep't [2005] UKHL 71, [2006] 2 AC 221 (HL) ¶ 53 (appeal taken from Eng.) ("It may well be that the conduct complained of in Ireland v. the United Kingdom . . . would now be held to fall within the definition in Article 1 of the Torture Convention."); Re McGuigan [2017] NIQB 96, [252-54] (N. Ir.) (" . . . it seems likely to the [High Court of Justice in Northern Ireland] that if the events here at issue were to be replicated today the outcome would probably be that the ECtHR would accept the description of torture in respect of these events as accurate . . . These points support a conclusion that the sort of activity with which this case is concerned has a larger dimension than an ordinary criminal offence and would amount to the negation of the very foundations of the Convention.").

37. *See* Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) at 59 (1978) (indicating that the Court found that the Five Techniques amounted to inhuman and degrading treatment).

38. *Id.* at 64 ("In a letter dated 5 January 1977, the applicant Government requested the Court to order that the respondent Government refrain from reintroducing the five techniques, as a method of interrogation or otherwise; proceed as appropriate, under the criminal law of the United Kingdom and the relevant disciplinary code, against those members of the security forces who have committed acts in breach of Article 3 (art. 3) referred to in the Commission's findings and conclusions, and against those who condoned or tolerated them. At the hearings, the applicant Government withdrew the first request following the solemn undertaking given on behalf of the United Kingdom Government on 8 February 1977 . . . ; on the other hand, the second request was maintained.").

39. *Id.* at 36 (quoting the Attorney General's declaration).

40. *Id.*

41. *Id.* at 36, 54.

whether the case had any object.[42] The Court observed that it can dismiss a case if it is informed of a "notice of discontinuance, friendly settlement, arrangement" or "other fact of a kind to provide a solution of the matter."[43] The Court did not expressly find that the pledge amounted to one of these situations.[44] In any event, the Court believed that it was its responsibility to pronounce on the law,[45] and it proceeded to render a judgment finding that the United Kingdom had violated Article 3 of the ECHR.[46]

III. WHETHER A PLEDGE CREATES NEW LEGAL OBLIGATIONS

This declaration by the United Kingdom is legally binding on it. Under the jurisprudence of the ECtHR, and that of other tribunals, such as the International Court of Justice (ICJ), formal declarations made in Court to the Court itself are binding on the party making the declaration.[47] Generally, assurances made by a state to another state to act or refrain from acting are not considered binding, or at least that is the argument that is generally submitted.[48] However, when a state makes a pledge to a court, the pledge has different consequences.[49] In

42. *Id.* at 54 (outlining the Court's responsibility in this area).

43. *Id.*

44. *Id.* at 54-55.

45. *Id.*

46. *Id.* at 58-59 ("The five techniques . . . accordingly fell into the category of inhuman treatment within the meaning of Article 3 (art. 3). The techniques were also degrading . . . 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 (art. 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, although their object was the extraction of confessions, the naming of others and/or information and although they were used systematically, they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood.").

47. *See* Guiding Principles, *supra* note 4, at 374 (referencing the 2006 I.C.J. judgment that allowed for State representatives to make binding declarations).

48. William Thomas Worster, *Between a Treaty and Not: A Case Study of the Legal Value of Diplomatic Assurances in Expulsion Cases*, 21 MINN. J. INT'L L. 253, 253 (2012) (arguing that some assurances can be considered legally binding).

49. *See* Guiding Principles, *supra* note 4, at 374 (discussing binding declarations

fact, in reading the words that the United Kingdom chose, the addressee and context of the statement, it would seem that the United Kingdom deliberately intended for this statement to have binding effect.[50]

There is strong precedent for states to make binding pledges to international organizations. Switzerland, though not a U.N. member, promised the United Nations that it would be treated as any other international organization in Switzerland (the "Petitpierre" promise).[51] The Swiss Federal Council held that this was a binding statement.[52] Also, South Africa gave a binding undertaking to the United Nations to continue the mandate system in South West Africa.[53] The ICJ similarly held that declaration by South Africa was a binding undertaking.[54] Binding statements have been given to the U.N.

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as ruled on by the I.C.J. in 2006).

50. *See* Ireland v. United Kingdom, 25 Eur. Ct. H.R. at 36, 54 (quoting the United Kingdom Attorney General's declaration that the Five Techniques will no longer be used as an interrogation tactic).

51. *See* Lucius Caflisch, *La pratique suisse en matière de droit international public 1982*, 39 SCHWEIZERISCHES JAHRBUCH FÜR INTERNATIONALS RECHT 177-268 (1983) ("[T]he Swiss authorities are prepared to grant the United Nations and its staff members treatment at least as favorable as the treatment granted any other international organization on Swiss territory"); Ion Gorita & Wolfgang Münch, (Human Resources Management Joint Inspection Unit), *Review of the Headquarters Agreements Concluded by the Organizations of the United Nations System: Human Resources Issues Affecting Staff*, U.N. Doc. A/59/526 (Oct. 25, 2004) ("the principle of most favored treatment of international organizations . . . following, for example, the current practice of the Swiss Federal Government").

52. *See* CONSEIL FÉDÉRAL À L'ASSEMBLÉE FÉDÉRALE CONCERNANT LE STATUT JURIDIQUE EN SUISSE DE L'ORGANISATION DES NATIONS UNIES, D'INSTITUTIONS SPÉCIALISÉES DES NATIONS UNIES ET D'AUTRES ORGANISATIONS INTERNATIONALS [FEDERAL COUNCIL TO THE FEDERAL ASSEMBLY CONCERNING THE LEGAL STATUS IN SWITZERLAND OF THE UNITED NATIONS, SPECIALIZED AGENCIES OF THE UNITED NATIONS AND OTHER INTERNATIONAL ORGANIZATIONS], July 28, 1955, FF II 389, 393 (1955).

53. *See* Int'l Status of South West Africa, Advisory Opinion, 1950 I.C.J. Rep. 128, 135-36 (July 11) (detailing how South Africa's representatives to the League of Nations and United Nations throughout 1946 made statements signaling their intention to uphold the League of Nations mandate system in South West Africa).

54. *See id.* at 146 (explaining the Court's findings on the binding nature of South Africa's declaration).

Security Council,[55] General Assembly,[56] and the Organization of American States.[57] Thus, statements to international organizations can be legally binding, although it is sometimes controversial how to distinguish between binding pledges and non-binding political statements of intent.

However, making a pledge to an international court or tribunal has a slightly different nature to it that makes them more likely to be binding. The proceedings are necessarily more formal, and the statements are appreciated with more gravity.[58] Both the ICJ and the Permanent Court of International Justice before it have found that pledges made to the Court created legal obligations. Examples of such obligations include the undertakings given in the *Mavrommatis* Case,[59] *Certain German Interests* case,[60] *Free Zones* case,[61] *Obligation to Prosecute or Extradite* case,[62] *Peru v. Chile Maritime Dispute*, [63] and *Certain Documents* case.[64] These cases can be distinguished from the

55. *See, e.g.*, *Selected legal opinions of the Secretariat of the United Nations and related intergovernmental organizations*, 1977 U.N. Jurid. Y.B. 193, §§ 3–4 (providing an example of such a binding statement).

56. *See, e.g.*, U.N. GAOR, 10th Spec. Sess., 26th plen. mtg., at § 12, U.N. Doc. A/S-10/4/PV.26 (June 28, 1978) (reporting the United Kingdom's binding declaration not to use nuclear weapons against States that are parties to the Treaty on the Non-Proliferation of Nuclear Weapons); U.N. GAOR, 10th Spec. Sess., 5th plen. mtg., at §§ 84-85, U.N. Doc. A/S-10/PV.5 (May 26, 1978) (reporting the Soviet Union's declaration to not "use nuclear weapons against those States which renounce the production and acquisition of such weapons").

57. *See, e.g.*, Cases Concerning Military and Paramilitary Activities in & Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, § 261 (June 27) (regarding free elections in Nicaragua).

58. *See generally* Guiding Principles, *supra* note 4, at 374 (allowing, under the 2006 I.C.J. judgment, for binding declarations to be made in front of courts).

59. Mavrommatis Jerusalem Concession (Greece v. Gr. Brit.), Judgment, 1925 P.C.I.J. (ser. A) No. 5, at 37 (Mar. 26).

60. Case concerning certain German interests in Polish Upper Silesia (Germ. v. Pol.), 1926 P.C.I.J. (ser. A) No. 6, at 13 (May 25).

61. Free Zones of Upper Savoy & District of Gex (Fr. v. Switz.), 1932 P.C.I.J. (ser. A/B) No. 46, at 170 (June 7).

62. Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sene.), Req. for the Indic. of Prov. Meas., Order, 2009 I.C.J. Rep. 139, §§ 38, 68 (May 28).

63. Maritime Dispute (Peru v. Chile), 2014 I.C.J. Rep. 4, §§ 131, 136, 178 (Jan. 27).

64. Questions Relating to the Seizure & Detention of Certain Documents & Data (Timor-Leste v Aust'lia), Request for Indication of Provisional Measures, Order,

Nuclear Tests cases,[65] *North Sea Continental Shelf* cases,[66] the *Temple of Preah Vihear* case,[67] and the *Libya/Chad Territorial Dispute* case,[68] where the declaration was given by one state to the other state outside of the court proceedings and not to the Court itself.[69] In those cases, the Court had to apply a model of obligation more akin to estoppel.[70] In fact, in some of these cases, the Court found that because the promises were binding, a competing request for provisional measures could be dismissed.[71] Other arbitral tribunals,[72] conciliation commissions,[73] claims commissions,[74] and similar bodies[75] have also

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2014 I.C.J. Rep. 147 § 36 (Mar. 3); *id.* §§ 36-38 (observing that Australia also made a similar pledge before the Timor Sea Treaty Arbitral Tribunal).

65. Nuclear Tests Cases (Aust'lia v. Fr), Judgment, 1974 I.C.J. Rep. 253, 267-268, § 45 (Dec. 20); Nuclear Tests Cases (N. Zealand v. Fr.), Judgment, 1974 I.C.J. Rep. 253, 473, § 48 (Dec. 20).

66. North Sea Continental Shelf Cases (Fed. Rep. of Ger./Den.), Judgment, 1969 I.C.J. Rep. 3, 25, §§ 27–30 (Feb. 20).

67. Temple of Preah Vihear (Camb. v Thai.), Preliminary Objections, Judgment, 1961 I.C.J. Rep. 17, 31 (May 26).

68. Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, 1994 I.C.J. 6 (Feb. 3).

69. *See id.* ¶ 77 (discussing the agreements made between two countries outside of court).

70. *See* Temple of Preah Vihear, 1961 I.C.J. at 31-32 (discussing the obligations owed). *But see* Mavrommatis Jerusalem Concession (Greece v. Gr. Brit.), Judgment, 1925 P.C.I.J. (ser. A) No. 5, at 37 (Mar. 26) (not requiring detrimental reliance).

71. *See* Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sene.), Req. for the Indic. of Prov. Meas., Order, 2009 I.C.J. Rep. 139, ¶ 33 (May 28) (showing that Belgium indicated that a declaration made before the Court by an Agent of Senegal would be sufficient); *see generally* William Thomas Worster, *Unilateral Diplomatic Assurances as an Alternative to Provisional Measures*, 15 L. & PRAC. INT'L. CTS. & TRIBS. 445, 448 (2016) (arguing that the I.C.J views "state-to-state assurances as questions of law with the potential to dispose of the matter").

72. *See* Filleting Within the Gulf of St. Lawrence Between Canada and France, XIX R.I.A.A. 225, 265 (July 17, 1986) (finding pledges made before the Tribunal to be binding).

73. *See* France/Italy Dec. No. 39 (Nymphe Case), XIII R.I.A.A. 136, 137 (Commission de Conciliation, Mar. 30, 1950) (finding that verbal assurances made by the Italian government were re-issued officially in a communication made to the Secretariat of the Commission).

74. Mixed Claims Commission (Italy-Venezuela), Time Extended for Submitting Claims, Order, X R.I.A.A. 477, 485 (Feb. 13 & May 7, 1903) (referring to the situations under which claims shall be submitted).

75. *See generally* Statement by the Eritrea-Ethiopia Boundary Commission with Annex (List of Boundary Points and Coordinates), XXVI R.I.A.A. 771 (Nov. 27, 2006) (discussing the legally binding nature of pledges made during the border

concluded that pledges to the court or tribunal are binding.[76]

In fact, the United Kingdom appears to already accept the binding nature of the pledge. At the time the Attorney General made the statement before the Court, the United Kingdom described the pledge as an "unqualified undertaking," [77] and the Court in turn characterized it as a "solemn and unqualified undertaking."[78] Undertakings are generally understood to create binding legal obligations, for example the Austrian unilateral declarations of neutrality,[79] the "Lancaster House Undertakings" in the *Chagos Marine Protected Area Arbitration*,[80] and the E.U. declaration to Venezuela on fisheries.[81] In its position paper in the *South China Sea Arbitration*, China submitted that "the term 'undertake' . . . is also frequently used in international agreements to commit the parties to their obligations."[82] The ICJ has agreed with these views and stated:

[T]he ordinary meaning of the word "undertake" is to give a formal promise, to bind or engage oneself, to give a pledge or promise, to

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demarcation process); *see also* Ashby v. Trinidad & Tobago, Comm. No. 580/1994, Views, UN Doc. CCPR/C/74/D/580/1994, ¶ 10.8 (Hum. Rts. Comm., Apr. 19, 2002) (finding that the individual was permitted to rely on the assurances issued by Trinidad and Tobago to the Privy Council because noncompliance constituted a violation of the principle of good faith compliance with international obligations).

76. *But see* Panel Report, *United States - Sections 301-310 of the Trade Act of 1974*, WTO Doc. WT/DS152/R, ¶ 7.125 (adopted Dec. 22, 1999) (concluding that a pledge made to the panel was not a binding "undertaking;" however, this conclusion was based on the facts, not on the legal impossibility for a pledge to be binding).

77. Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) at 54 (1978).

78. *Id.* at 53-54.

79. *See* Alfred P. Rubin, *The International Legal Effects of Unilateral Declarations*, 71 AM. J. INT'L L. 1, 5 (1977) (arguing that the declarations made by Austria were incorporated into multilateral undertakings, thus giving them legal force).

80. *See* Chagos Marine Protected Area Arbitration (Mauritius v. U.K.), PCA Case Repository ¶ 547 (Perm. Ct. Arb. 2015) (outlining the findings of the Tribunal).

81. *See* Joined Cases C-103/12 & 165/12, Eur. Parliament & Eur. Comm'n v. Council Eur. Union, 2014 EUR-Lex CELEX LEXIS ¶¶ 23, 65 (Nov. 26, 2014) (characterizing a unilateral declaration as an "undertaking" in commenting that "[s]uch an undertaking, given by means of an agreement or other arrangement . . . ").

82. *Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines*, THE SOUTH CHINA SEA ISSUE, ¶ 38 (Dec. 7, 2014), https://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1368895.htm.

agree, to accept an obligation. It is a word regularly used in treaties setting out the obligations of the Contracting Parties. . . . it is not merely hortatory or purposive.[83]

Therefore, an undertaking should be viewed as a binding legal commitment.

In addition to this jurisprudence, the declaration by the United Kingdom also satisfies the requirements in doctrine. The general approach in international law is not to simply give effect to an instrument just by reference to its designation, such as "undertaking."[84] For this reason, we need to test the U.K. declaration beyond its designation. The ILC studied unilateral statements to determine which ones would create legal obligations. It concluded that a unilateral statement can create legal obligations in certain situations.[85]

To test the binding effect of unilateral statements, the elements include an oral or written statement by a person with authority to bind the state that manifests a will to be bound.[86] First, the fact that the U.K. declaration was made orally is of no consequence for its legal effect.[87]

Second, the declaration needs to be made by a person with authority

83. Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 111, ¶ 162 (Feb. 26).

84. Vienna Convention on the Law of Treaties (With Annex), Art. 2(1)(a), May 23, 1969, 1155 U.N.T.S. 331 (providing a definition of "treaty").

85. *See Report of the Commission to the General Assembly on the Work of its Fifty-Eighth Session*, [2006] 2 Y.B. Int'l L. Comm'n 163-64, U.N. Doc. A/CN.4/SER.A/2006/Add.l (listing out the situations in which a unilateral statement creates a binding legal obligation).

86. *See id.* at 163-64 (providing examples of both oral and written declarations); *see, e.g.*, Mavrommatis Jerusalem Concession (Greece v. Gr. Brit.), Judgment, 1925 P.C.I.J. (ser. A) No. 5, at 34 (Mar. 26); Temple of Preah Vihear (Camb. v Thai.), Preliminary Objections, Judgment, 1961 I.C.J. Rep. 17 at 31-32 (May 26); Nuclear Tests Cases (Aust'lia v. Fr), Judgment, 1974 I.C.J. Rep. 253, 267-268 (Dec. 20); Nuclear Tests Cases (N. Zealand v. Fr.), Judgment, 1974 I.C.J. Rep. 253, 473 (Dec. 20); Application of Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v. Yugoslavia), Preliminary Objections, Judgment, 1996 I.C.J. 595, 612-14 (July 11).

87. *See Report of the Commission to the General Assembly on the Work of its Fifty-Eight Session*, *supra* note 85, at 163-64 (showing that binding declarations can be made orally).

to bind the state.[88] The U.K. Attorney General is not one of the three officers of state with inherent authority to bind the state (the Head of State, Head of Government, and Foreign Minister[89]), and he was not serving as agent in the case but as counsel.[90] Nonetheless, that officer can hold the authority to bind the state. The ICJ recognized, and the ILC affirmed, that certain other officials holding "technical ministerial portfolios," who are acting within their "field of competence," may hold such authority.[91] In the *Ireland v. UK* case, the Attorney General was clearly empowered to argue on behalf of the United Kingdom and in so doing, bind the state. Certainly, the Attorney General was repeating the words of the Prime Minister spoken in Parliament years earlier, but that venue and statement is unclear whether it bound the state legally, so the fact that the declaration by the Attorney General was repeating words by the Head of Government does not mean that the Head of Government was binding the state before the ECtHR.[92] However, the Attorney General holds a specialized portfolio and was acting within those competences in litigating a case before the ECtHR.[93] The consequence of the case would also, in its resolution, bind the United Kingdom under international law, and the Attorney General clearly claimed to be making the statement on behalf the U.K.

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88. *See Report of the General Assembly on the Work of its Fifty-Eighth Session*, *supra* note 85, at 163 (asserting that a "unilateral declaration binds the State internationally only if it is made by an authority vested with the power to do so."); *see, e.g.*, Aust'lia v. Fr., 1974 I.C.J. Rep. at 267-268; N. Zealand v. Fr., 1974 I.C.J. Rep. at 473 ; Bosnia & Herzegovina v. Yugoslavia, 1996 I.C.J. at 612-14; Arrest Warrant of 11 Apr. 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. 2, 21-22 (Feb. 14); Armed Activities on the Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, 2006 I.C.J. 6, 27 (Feb. 3).

89. *See Report of the Commission to the General Assembly on the Work of its Fifty-Eighth Session*, *supra* note 85, at 163 ("By virtue of their functions, heads of State, heads of Government and ministers for foreign affairs are competent to formulate such declarations.").

90. Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) at 4-5 (1978) (noting the Attorney General's role in the case).

91. *Report of the Commission to the General Assembly on the Work of its Fifty-Eighth Session*, *supra* note 85, at 163 ("Other persons representing the State in specified areas may be authorized to bind it, through their declarations, in areas falling within their competence.").

92. *See* Ireland v. United Kingdom, 25 Eur. Ct. H.R. at 53-54 (noting the circumstances of the Attorney General's declaration before the Court).

93. *See id.* (noting the Attorney General's role).

Government.[94] Thus, the Attorney General in this case did have authority to bind the state.[95]

The final element is that the statement needs to express an intention to be bound by law.[96] For this element, it appears that the intention was present. The Attorney General expressly stated that the U.K. Government had considered the use of Five Techniques "with very great care" and specifically considered its compatibility with the ECHR.[97] The Attorney General then gave the declaration as an "unqualified undertaking," which was clearly intended to change the dynamics in the litigation.[98] He did not need to make this statement as it was not necessary for the case to proceed. The statement was made to induce Ireland to withdraw its request for an order.[99] Certainly, it was intended to create a legal obligation.[100]

In addition to the elements, the ILC suggested that there are several evidentiary factors to help determine whether a declaration was binding. Those factors include the content and context of the declaration, as well as reactions to the declaration.[101] Both of the first two factors have already been discussed, but the reactions to the declaration are also persuasive.[102] Some important possibilities for other states' reactions include whether other states acknowledge the declaration, object to it, or assert that it is not legally binding.[103]

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94. *Id.*

95. *Id.*

96. *See Report of the Commission to the General Assembly on the Work of its Fifty-Eighth Session*, *supra* note 85, at 162 ("Declarations publicly made and manifesting the will to be bound may have the effect of creating legal obligations."); *see, e.g.*, Nuclear Tests Cases (Aust'lia v. Fr), Judgment, 1974 I.C.J. Rep. 253, 267-268 (Dec. 20); Nuclear Tests Cases (N. Zealand v. Fr.), Judgment, 1974 I.C.J. Rep. 253, 473 (Dec. 20); Frontier Dispute (Burk. Faso v. Rep. of Mali), 1986 I.C.J. 554, 573 (Dec. 22).

97. Ireland v. United Kingdom, 25 Eur. Ct. H.R. at 53-54.

98. *Id.*

99. *Id.*

100. *Id.*

101. *See Report of the Commission to the General Assembly on the Work of its Fifty-Eighth Session*, *supra* note 85, at 162-63 (providing examples of these factors).

102. *Id.* at 162-63 (commenting that whether the "States take cognizance of commitments undertaken . . . or, on the contrary, object to or challenge the binding nature of the 'commitments' at issue" is important in determining whether a declaration is binding).

103. *Id.* at 163.

Following the U.K.'s declaration, Ireland reacted by withdrawing one of its requests, specifically the request for an order prohibiting the United Kingdom from using the Five Techniques.[104] The Court accepted this request. All of the actors acknowledged the declaration, and none objected.[105] The withdrawal of the request suggests that Ireland and the Court, as well as the United Kingdom, understood that the declaration would have the same effect as a court order.[106] In sum, the declaration satisfies the guidelines of the ILC and appears to be a binding unilateral statement.[107]

Following in line with international practice, the ECtHR has also accepted these kinds of assurances as being legally binding.[108] In *Yordanova v. Bulgaria*,[109] the Court denied a request for provisional measures after it had received binding assurances from the state.[110] To this practice, we must add the lengthy, consistent history of the ECtHR in accepting unilateral declarations by the state purporting to settle claims against it[111] because the statements were the functional equivalent of a (binding) court judgment.

Considering the U.K.'s declaration and legal practice on such declarations, we find that the United Kingdom is legally obligated to do what it says it would do. The declaration in *Ireland v. UK* is very specific and precise about the U.K.'s intention to be bound.[112] Just as with the other cases where such declarations have been held to create legal obligations, the United Kingdom pledged formally, without

104. *See* Ireland v. United Kingdom, rev'd, 2018 Eur. Ct. H.R. 2-3 (noting the request for revision by Ireland).

105. *Id.* at 78-79.

106. *Id.* at 2-3, 7.

107. *See id.*; *see also Report of the Commission to the General Assembly on the Work of its Fifty-Eighth Session*, *supra* note 85, at 162 (outlining the ILC guidelines).

108. *See generally* Yordanova v. Bulgaria, 2012-IV Eur. Ct. H.R. 1 (providing an example of when the European Court of Human Rights has accepted these assurances).

109. *Id.* at 1.

110. *See id.* (providing a timeline of the case); *see also* Yordanova v. Bulgaria, 2010-V Eur. Ct. H.R. 1, 3.

111. *See, e.g.*, European Convention on Human Rights, arts. 39, 46, Nov. 4, 1950, 213 U.N.T.S. 221; Eur. Ct. H.R., Rules of Court, Rule 43, ¶ 3 (Apr. 1, 2011); Akman v. Turkey, 2001-I Eur. Ct. H.R. 1, 6; S.J. v. Belgium, 2015 Eur. Ct. H.R. 1, 10.

112. *See* Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) at 53-54 (1978) (referring to the undertaking as "unqualified").

qualification, directly to the Court that the Five Techniques will not be used. [113]

The United Kingdom has, from time to time, flirted with the idea of abrogating the ECHR and leaving the jurisdiction of the ECtHR.[114] This possible course of action is a separate consideration but would not have any impact on the U.K.'s obligation created by its promise in *Ireland v. UK*.[115] This promise, though made to the Court directly, is not founded on the ECHR, nor does it depend on another instrument between the United Kingdom and the ECtHR for its validity.[116] A state not party to the ECHR could have just as easily made such a promise. It is certainly possible for a state that is not a member of an international organization to enter into a treaty with that organization, as demonstrated by the Headquarters Agreements between OPEC and Austria[117] and between the United Nations and Switzerland.[118] It is also the case that a state does not escape its obligations simply by terminating diplomatic relations with another international legal person,[119] and the ECtHR would continue to exist without the United Kingdom as a member. After all, the pledge by Switzerland to the

113. *Id.* at 36, 54.

114. *See Theresa May: UK Should Quit European Convention on Human Rights*, BBC NEWS (Apr. 25, 2016), https://www.bbc.com/news/uk-politics-eu-referendum-36128318 (reporting on Theresa May's past comments suggesting that the United Kingdom should quit the European Convention on Human Rights).

115. *See id.* (discussing the possibility of the United Kingdom leaving the European Convention on Human Rights); Ireland v. United Kingdom, 25 Eur. Ct. H.R. at 36, 54 (outlining the obligation made by the declaration).

116. *See* Ireland v. United Kingdom, 25 Eur. Ct. H.R. at 36, 54 (noting that the undertaking was made directly to the Court).

117. Agreement Between the Republic of Austria and the Organization of the Petroleum Exporting Countries Regarding the Headquarters of the Organization of the Petroleum Exporting Countries, Austria-OPEC, Feb. 18, 1974, 2098 U.N.T.S. 416.

118. Interim Arrangement on Privileges and Immunities of the United Nations, June 11 & July 1, 1946, UN-Switz., 1 UNTS 163 [hereinafter Interim Arrangement on Privileges and Immunities].

119. *See* ANTHONY AUST, MODERN TREATY LAW AND PRACTICE, 270-71 (3d ed. 2013) (noting that "[t]he severance of diplomatic or consular relations between parties to a treaty does not affect the legal relation established between them by the treaty"); *see generally* Treaty of Friendship, Commerce, and Navigation, China-U.S., Nov. 30, 1948, 63 Stat. 1299 (showing that despite revocation of recognition of the state, the treaty remains valid and operational, though only applicable to the Republic of China on the Island of Taiwan).

United Nations, the "Petit promise," was considered a binding promise.[120] And, the proposal to leave the ECtHR makes no mention of whether the United Kingdom would leave the Council of Europe.[121] Thus, the United Kingdom would continue to be bound by its promise even if it left the ECHR and ECtHR.

The next question is what does this pledge require the United Kingdom to do specifically? International law imposes responsibility on a state regardless of whether the state was under an obligation to act in a certain manner or to realize a particular outcome.[122] Even though we can analytically distinguish between obligations of conduct and result, the ILC notes that many cases do not exclusively follow only one of those characterizations.[123] The ILC cited to the ECtHR case of *Colozza v. Italy*[124] to show that although the Court found the obligation under Article 6 of the ECtHR to impose an obligation of result, it also examined whether Italy could have acted differently to find a way to make the right effective.[125] Therefore, the obligation imposed will not take an exclusive conduct/result approach.

The pledge by the Attorney General provides that the "[F]ive [T]echniques" would not be used as an aid to interrogation under any circumstances.[126] In addition, the Prime Minister had previously stated this pledge was not limited to Northern Ireland and would apply to all

120. *See* Interim Arrangement on Privileges and Immunities, *supra* note 118.

121. *Draft Articles on Responsibility of States for Internationally Wrongful Acts, With Commentaries*, [2001] 2 YB Int'l L. Comm'n 54, art. 12 [hereinafter ILC, Draft Articles on State Responsibility] (containing no mention of plans to leave the Council of Europe).

122. *See id.* (noting the international responsibilities in situations of breach of an international obligation).

123. *See id.* ("That distinction may assist in ascertaining when a breach has occurred. But it is not exclusive, and it does not seem to bear specific or direct consequences as far as the present articles are concerned."); *see also* The Gabcikovo-Nagymaros Project (Hungary/Slovakia), 1997 I.C.J. 7, 76-77 (Sep. 25) (remarking on obligations accepted by parties to the Treaty to the construction of a System of Locks); The Islamic Republic of Iran v. U.S., Award No. 602-A15(IV)/A24-FT, 32 Iran-U.S. Cl. Trib. Rep. 115 (1996).

124. Colozza v. Italy, 89 Eur. Ct. H.R. (ser. A) at 11 (1985).

125. *See* ILC, Draft Articles on State Responsibility, *supra* note 121, art. 12; *id.* (noting that it is not the Court's task to determine how the result is achieved); *see also* De Cubber v. Belgium (Article 50), 124 Eur. Ct. H.R. (ser. B) at 9 (1987).

126. Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) at 36 (1978).

circumstances, potentially not limited to interrogation.[127] However, it is not clear that the Prime Minister's statement was meant to be part of the legally binding pledge, so we will only consider the Attorney General's statement, which appears to be limited to interrogation, though not limited to only Northern Ireland. The Attorney General specifically referred to the Five Techniques in quotes.[128] The interrogation techniques that constitute the Five Techniques are well known and confirmed by the ECtHR and U.K. Government as being: (1) wall-standing, (2) hooding, (3) continuous noise, (4) sleep deprivation, and (5) deprivation of food and drink.[129] An obligation of result would suggest that no person shall suffer the Five Techniques as a cause of U.K. action in an interrogation context.[130] An obligation of conduct would prohibit the United Kingdom from taking any actions intended to cause the Five Techniques in an interrogation context and oblige it to take actions to prevent the Five Techniques from occurring as a result of its actions.[131] A hybrid reading would result in an obligation on the United Kingdom to take all steps to prevent its officials and agents from employing wall-standing, hooding, continuous noise, sleep deprivation, or food/drink deprivation anywhere as an aid to interrogation and bear responsibility should any of those techniques be employed.[132]

IV. EVIDENCE OF CONTINUED USE OF THE FIVE TECHNIQUES

In the years since the *Ireland v. UK* case, a number of troubling reports have come to light that the United Kingdom may still be using the Five Techniques.[133] For the limited purpose of this article, we will

127. *See* Parker Committee's Report, *supra* note 27, col. 746 (quoting the Prime Minister as saying that "[t]he statement I have made covers all future circumstances.").

128. Ireland v. United Kingdom, 25 Eur. Ct. H.R. at 36.

129. *Id.* at 34-35.

130. *See id.* at 34-35, 54 (describing what the Five Techniques are and attributing to them that name).

131. *See id.*

132. *Id.* (listing out what constitutes the Five Techniques).

133. *See* Samantha Newbery, *Five Controversial Interrogation Techniques Still Not Judged As Torture in Missed Opportunity for Human Rights*, THE CONVERSATION (Mar. 22, 2018), theconversation.com/five-controversial-

assume attribution can be established in all of these cases.[134] All of the acts in the various reports to follow identify acts of U.K. police or military officials who were acting in their official role, and in any event, even if they were acting outside of their actual authority, attribution would still stand.[135]

One of the more significant reports includes *Baha Mousa*[136] and related cases. Baha Mousa and others were detained by the United Kingdom in Iraq and subsequently mistreated.[137] In 2011, an inquiry lead by Sir William Gage issued its Report of the Baha Mousa Inquiry.[138] That inquiry concluded that, despite the purported ban on the Five Techniques, the practice continued[139] and guidance issued to interrogators did not clearly prohibit them. [140] Baha Mousa and others brought a case against the United Kingdom before the ECtHR.[141] The Court found the claims to be admissible and meritorious, although the claims were only for a violation of Article 2, the procedural obligation to carry out an adequate and effective investigation into deaths, and

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interrogation-techniques-still-not-judged-as-torture-in-missed-opportunity-for-human-rights-93708 (discussing evidence of previously classified U.K. government records that show that the effects and use of the Five Techniques may have been misrepresented to the Court).

134. *See* ILC, Draft Articles on State Responsibility, *supra* note 121, art. 2(a) (noting that attribution is a necessary element of an internationally wrongful act of a State).

135. ILC, Draft Articles on State Responsibility, *supra* note 121, art. 7 (commenting that the act of one imbued with the power to exercise elements of governmental authority is considered an act of the State).

136. *See generally* BAHA MOUSA PUBLIC INQUIRY REPORT, 2011-5, HC 1452-I (UK) (inquiring into the allegations of inhumane treatment and torture of Iraqi prisoners by the British army).

137. *See generally id.* (detailing allegations of torture including lack of food and water, heat exhaustion, and sleep deprivation).

138. *See id.*

139. *See* BAHA MOUSA PUBLIC INQUIRY REPORT, 2011-5, HC 1452-II, ¶¶ 4.1, 4.9 (UK) (noting the use of the Five Techniques in Northern Ireland and subsequent inquiries).

140. *See* BAHA MOUSA PUBLIC INQUIRY REPORT, *supra* note 136, ¶¶ 5.141-5.151 ("JWP [Joint Warfare Publication] 1-10 was the joint level doctrine on prisoner of war handling. It specifically did not address interrogation in detail . . . it did not specifically include the prohibition on the five techniques").

141. *See* Al-Skeini v. United Kingdom, 2011 Eur. Ct. H.R. 1, 1-2 (bringing the case in the European Court of Hunan Rights under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms).

not Article 3.

Various other investigations included the House of Lords and House of Commons Joint Committee on Human Rights,[142] the Gibson Inquiry,[143] and the work of the Iraq Historic Allegations Team, among others.[144] The Joint Committee on Human Rights investigated allegations that U.K. intelligence officers may have been complicit in torture in multiple cases since 2006.[145] The Gibson Inquiry began with the objective of investigating the United Kingdom's involvement in unlawful detention, rendition, and torture. It was chaired by Sir Peter Gibson, a former appeal judge, as Intelligence Services Commissioner.[146] That inquiry was terminated in 2012 before its work was complete, although Gibson was able to file an interim report.[147] While he noted that he was unable to reach definitive findings of fact in an interim report, he observed that he could summarize important themes and issues that came to light that meant further investigation.[148] Based on the documents that he reviewed, there was strong evidence that intelligence officers were aware of the use of the Five Techniques.[149] In 2013, the United Kingdom created Iraq Historic Allegations Team (IHAT) to investigate allegations of torture.[150]

142. JOINT COMMITTEE ON HUMAN RIGHTS, NINETEENTH REPORT, 2005-6, HL 185/HC 701 (UK).

143. Cabinet Office, *The Report of the Detainee Inquiry*, 19 Dec. 2013, *available at* https://www.gov.uk/government/publications/report-of-the-detainee-inquiry.

144. Sir David Calvert-Smith, *Review of the Iraq Historic Allegations Team*, 15 Sep. 2016, *available at* https://www.gov.uk/government/publications/review-of-iraq-historic-allegations-team.

145. *See* JOINT COMMITTEE ON HUMAN RIGHTS, ALLEGATIONS OF UK COMPLICITY IN TORTURE, 2009-4, HL 152/HC 230, at Ev 30 (UK) (detailing the Committee's reporting efforts to balance counter-terrorism policy and human rights).

146. *See* Sam Jones, *Torture inquiry judge does not have conflict of interest, government says*, THE GUARDIAN (Jul. 29, 2010), https://www.theguardian.com/law/2010/jul/29/gibson-judge-torture-intelligence.

147. *See* Gibson Inquiry, *supra* note 143, at 1 (observing that the inquiry was being terminated prematurely).

148. *See id.* at 1-2 (explaining the public inquiry could not reach any final conclusions in addition to the closed inquiry which only included details that relate to national security).

149. *See id.* at 23 (reporting that the inquiry found intelligence officers used techniques such as use of hoods, stress positions, sleep deprivation, physical assault, and substandard facilities).

150. *See* Comm. against Torture, Sixth Periodic Rep. of the United Kingdom of

IHAT investigated many allegations and in the end concluded that they had no merit. [151] IHAT was dissolved in 2017 and transferred all outstanding matters to the Service Police. [152] The Committee against Torture criticized the United Kingdom for closing the IHAT and other Iraq and Afghanistan investigations without any prosecutions. [153]

More recently, in 2018, the Intelligence and Security Committee (ISC) of the U.K. Parliament released two reports on mistreatment and rendition of detainees. [154] This Committee is charged with oversight of

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Great Britain and Northern Ireland, ¶ 222, UN Doc. CAT/C/GBR/6 (Jan. 29, 2018) [hereinafter UK Sixth Periodic Report].

151. *See* Comm. against Torture, Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland, ¶ 32 UN Doc. CAT/C/GBR/CO/6 (June 7, 2019) [hereinafter Concluding Observations on UK Sixth Periodic Report] ("The Committee observes with concern that while the Iraq Historic Allegations Team has received around 3,400 allegations of unlawful killings, torture and ill-treatment committed by the United Kingdom armed forces in Iraq between 2003 and 2009, no prosecutions for war crimes or torture have resulted from the Team's investigations. Moreover, before its work ceased in June 2017, the Team's remaining investigations were transferred to the Service Police . . . the Committee is concerned about reports indicating that cases transferred for investigation under this framework might have been closed 'based on an arbitrary and conceptually underinclusive ranking of their severity'"); *see id.*, ¶¶ 221-25 (reporting on allegations of torture, denying the allegations, making reference to the work of IHAT, and suggesting that counsel for victims making allegations was acting in violation of norms of professional conduct); *see also* REDRESS, THE UK'S IMPLEMENTATION OF THE UN CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT: CIVIL SOCIETY ALTERNATIVE REPORT 73 (2019) (explaining that some cases were dropped because there was not enough evidence or did not rise to the level of severe inhuman treatment).

152. *See* Concluding Observations on UK Sixth Periodic Report, *supra* note 151, ¶ 32 (explaining the process in which IHAT stopped their work and transferred complaints); *see also* UK Sixth Periodic Report, *supra* note 150, ¶ 222 (explaining the Secret Police's acceptance of IHAT's cases).

153. Concluding Observations on UK Sixth Periodic Report, *supra* note 151, ¶¶ 32-34 (stating the Committee's regret that the United Kingdom does not have a permanent, independent inquiry to investigate allegations of torture).

154. *See* INTELLIGENCE & SECURITY COMMITTEE, DETAINEE MISTREATMENT AND RENDITION: 2001-2010, 2018-5, HC 1113 (UK) [hereinafter INTELLIGENCE & SECURITY COMMITTEE: 2001-2010] (detailing the findings of the I.S.C.'s inquiry into the intelligence community's treatment of detainees); INTELLIGENCE & SECURITY COMMITTEE, DETAINEE MISTREATMENT AND RENDITION: CURRENT ISSUES, 2018-5, HC 1114 (UK) (assessing the policies and guidance in place regarding rendition); *see also* Concluding Observations on UK Sixth Periodic Report, *supra* note 151, ¶ 34 (indicating C.A.T.'s concern with I.S.C.'s findings and

the U.K. intelligence services and was investigating allegations of abuses between 2001 and 2010, specifically the cooperation of U.K. intelligence with U.S. intelligence on mistreatment and torture of detainees and exchange of information on detainees.[155] Despite the views of the Committee that it was hampered in its investigations by the government,[156] the Committee was able to reach some conclusions. Primarily, it found that U.K. intelligence and defense officers were aware of, cooperated with, and covered up mistreatment of some detainees.[157] The Committee against Torture specifically noted that the conclusions of the ISC warrant investigation and prosecution.[158]

Aside from the ECtHR, concerns about ongoing torture have also been expressed before international bodies.[159] In May of 2012, the United Kingdom filed with the Committee against Torture its fifth periodic report on compliance with the Torture Convention. [160] The Report, supplemented by submissions from civil society,[161] indicated that the United Kingdom may be failing to effectively investigate allegations of complicity in, and direct commission, of torture

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then eventual premature closure due to lack of evidence).

155. *See* INTELLIGENCE & SECURITY COMMITTEE: 2001-2010, *supra* note 154, at iii, 1, 4 (explaining the role of the intelligence community post-9/11).

156. *See id.* at 1 (explaining that the Government prevented investigation due to access denial and certain conditions on talking to witnesses).

157. *See id.* at 1-5 (finding that there was awareness by multiple actors of mistreatment and that the Agencies were turning a blind eye to this treatment); Concluding Observations on UK Sixth Periodic Report, *supra* note 151, ¶ 34 (indicating C.A.T.'s concern with I.S.C.'s findings and then eventual premature closure due to lack of evidence).

158. *See* Concluding Observations on UK Sixth Periodic Report, *supra* note 151, ¶ 34 ("In addition to the disturbing findings contained in the reports indicating that the State party may have been complicit in cases of torture and ill-treatment, the Committee notes with concern that the inquiry was prematurely closed due to lack of access to key evidence, as the Government refused to provide access to witnesses from the State party's intelligence agencies.").

159. *See* Press Release, General Assembly, Twenty-Six Years after UN Treaty Aimed at Absolute Prohibition of Torture Adopted 'We Have Not yet Achieved That Goal,' Third Committee Told, U.N. Press Release GA/SHC/3983 (Oct. 10, 2010) (showing that the United Nations and other committees were concerned about detainee treatment and victims of torture).

160. Comm. against Torture, Fifth Periodic Rep. of the United Kingdom of Great Britain and Northern Ireland, UN Doc. CAT/C/GBR/5 (May 21, 2012).

161. *See id.* at 7-8; *see, e.g.*, Amnesty Int'l, *United Kingdom: Briefing to UN Committee Against Torture*, AI Index EUR 45/002/2013 (May 2013).

overseas[162] as well as expulsions to situations of torture. [163] In its concluding observations, the Committee found troubling information that the United Kingdom might be responsible for acts of torture and recommended pursuit of inquiries into those allegations.[164] Apparently the United Kingdom gave the Committee assurances that it would do so,[165] though the Committee does not regard the United Kingdom as having fulfilled those assurances.[166] The U.K.'s sixth periodic report was filed as of November 2017, and was discussed with concern at the most recent session of the Committee against Torture in April of 2019.[167] In addition, the Office of the Prosecutor of the International Criminal Court is investigating two situations involving the United

162. *See* Comm. against Torture, Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland, ¶¶ 15-17, UN Doc. CAT/C/GBR/CO/5 (June 24, 2013) [hereinafter Concluding Observations on UK Fifth Periodic Report] (expressing concern about the growing number of allegations of overseas torture and lack of accountability in the Baha Mousa Inquiry).

163. *See id.*, ¶¶ 18-20 (indicating that misuse of diplomatic assurances and detainee transfers and deportations to Afghanistan and Sri Lanka likely constituted a violation of the Convention Against Torture's Art. 3 non-refoulement principle).

164. *See id*., ¶ 15.

165. *See id.* (giving the Committee assurances that the United Kingdom "intends to 'hold an independent, judge-led inquiry' and to publish as much as possible of the interim report of the Detainee Inquiry conducted by Sir Peter Gibson").

166. *See* Concluding Observations on UK Sixth Periodic Report, *supra* note 151, ¶ 34 ("The Committee further regrets the State party's failure to establish an independent, judge-led inquiry into allegations of torture overseas, including by means of complicity, as a result of the State party's military interventions in Afghanistan and Iraq, despite previous assurances to the Committee.")

167. *See id*., ¶ 34; *see also* Comm. against Torture, Annotated Provisional Agenda of the Sixty-Sixth Session, U.N. Doc CAT/C/66/1, at 10 (2019) (citing the Committee's receiving of the sixth report).

Kingdom and both Iraq[168] and Afghanistan.[169] Should either investigation result in identifying uses of the Five Techniques, and should those be held to constitute war crimes, then the individuals would be responsible, not the United Kingdom. However, any finding of criminal responsibility does not preclude the Committee against Torture finding that the United Kingdom violated the Torture Convention.

The objective of this section in this article is not to definitively establish whether the United Kingdom, by and through its agents, has continued to use the Five Techniques, although on first glance it appears that that is the most likely conclusion. The objective of this section is merely to identify that the United Kingdom may have continued to use the Five Techniques, possibly to the present day, despite its pledge not to.

V. CLAIMING A VIOLATION OF THE PLEDGE

There are several options for how to address such a violation of an obligation owed to the Court. One option is to assimilate the pledge to an order of the Court and seek enforcement. As has been argued above, a pledge to a court can be considered the functional equivalent to a provisional measures order. Initially, while it was clear that the Court's judgments are binding,[170] the ECtHR was unsure whether its

168. *See* Int'l Crim. Ct. Office of the Prosecutor, *Report on Preliminary Examination Activities 2018* 49-52 (Dec. 5, 2018) (investigating the United Kingdom's involvement in treatment of detainees during their military operations in Iraq); European Center for Constitutional and Human Rights (ECCHR) and Public Interest Lawyers (PIL), *Communication to the Office of the Prosecutor of the International Criminal Court: The Responsibility of Officials of the United Kingdom for War Crimes Involving Systematic Detainee Abuse in Iraq from 2003-2008*, at 6 (Jan. 10, 2014) (requesting the Prosecutor to investigate U.K. military torture and killing of detainees); Concluding Observations on UK Fifth Periodic Report, *supra* note 162, ¶ 16 (indicating there have been no prosecutions for torture and complicity in torture of British officers for actions during 2003-2009).

169. *See* International Criminal Court, *Preliminary examination: Afghanistan*, *available at* https://www.icc-cpi.int/afghanistan (last visited Apr. 8, 2019) (writing that the Prosecutor of the ICC requested authorization for investigation into war crimes in Afghanistan); *see also* Concluding Observations on UK Fifth Periodic Report, *supra* note 162, ¶ 15.

170. *See* European Convention on Human Rights, *supra* note 111, art. 46(1) ("The High Contracting Parties undertake to abide by the final judgment of the Court in

provisional measures orders were binding. It simply considered violations a matter of serious concern.[171] However, following the case of *Mamatkulov & Askarov v. Turkey*, the Court now considers its orders binding, and non-compliance will constitute violations of Article 34 (right to a judicial remedy) of the ECHR.[172] This determination that provisional measures are binding appears to be consistent among courts, also being followed by the ICJ,[173] though not adopted by non-judicial treaty oversight bodies such as the Human Rights Committee[174] and Committee Against Torture.[175] Thus, an

any case to which they are parties."); *see, e.g.* Mammadov v. Azerbaijan, 2014 Eur. Ct. H.R. 35 (holding that the applicant is entitled to non-pecuniary damages); Emre v. Switzerland (No. 2), 2011-II Eur. Ct. H.R. 3 (holding the court's judgment as final and binding under Article 46 § 1).

171. *See* Cruz Varas v. Sweden, 201 Eur. Ct. H.R. 34 (1991) ("It cannot be otherwise since the Convention provides for a real and effective protection of human rights for all persons present in the member States; their governments cannot be permitted to expose such persons to serious violations of human rights in other countries").

172. *See* Rules of Court, *supra* note 111, at Rule 39 (. . . at the request of a party or of any other person concerned, or of their own motion, indicate to the parties any interim measure which they consider should be adopted in the interests of the parties or of the proper conduct of the proceedings"); *see, e.g.*, Mamatkulov v. Turkey, 2005-I Eur. Ct. H.R. 29 (reaffirming the right of individual application for the enforcement of human rights and freedoms); Olaechea Cahuas v. Spain, 2006-X Eur. Ct. H.R. 5-10 (holding that the Government failed to comply with Rule 39 and thus not allowing Article 34 of the Convention to apply); Gebremedhin [Gaberamadhien] v. France, 2007-II Eur. Ct. H.R. 32 (saying that Article 13 of the Convention allows for remedy under the substance of the Convention rights and freedoms).

173. *See* LaGrand Case (Ger. v. U.S.), Judgment, 2001 I.C.J. Rep. 466, 506, ¶ 109 (June 27) (holding that order on provisional matters under Article 41 are binding); Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.), Provisional Measure, Order, 2011 I.C.J. Rep. 6, 26, ¶ 84 (Mar. 8) (reaffirming the binding effect of Article 41 from LaGrand).

174. *See* Human Rights Comm., Commc'n No. 1086/2002 of the Seventy-Seventh Session, ¶ 7.2, U.N. Doc. CCPR/77/D/1086/2002 (2002) ("Flouting of the Rule, especially by irreversible measures such as the execution of the alleged victim or his/her deportation from the country, undermines the protection of Covenant rights through the Optional Protocol.").

175. *See* Comm'n Against Torture, Commc'n. No. 428/2010 of the Forty-Seventh Session, ¶ 13.1, U.N. Doc. No. CAT/C/47/D/428/2010 (2011) ("The Committee notes that the adoption of interim measures pursuant to rule 114 of its rules of procedure (former rule 108), in accordance with article 22 of the Convention, is vital to the role entrusted to the Committee under that article. Failure to respect that provision, in particular through such irreparable action as extraditing an alleged victim, undermines the protection of the rights enshrined in the Convention."); *see,*

action could be brought against the United Kingdom under Article 34 of the ECHR.

A second means of enforcement is for Ireland to request the Court to reconsider the original judgment in *Ireland v. UK*; though, this approach would be less likely to succeed. The ECHR does not expressly provide for the possibility of reopening a case and actually affirms the finality of judgments. [176] Nonetheless, the Rules of the Court provide that a party to a case may request reopening:

In the event of the discovery of a fact which might by its nature have a decisive influence and which, when a judgment was delivered, was unknown to the Court and could not reasonably have been known to that party, request the Court, within a period of six months after that party acquired knowledge of the fact, to revise that judgment.[177]

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e.g., Comm'n Against Torture, Commc'n No. 430/2010 of the Fiftieth Session, ¶ 9.1, U.N. Doc. No. CAT/C/50/D/430/2010 (2013) (holding that the request for interim measures does not fail to meet obligations under Article 22 of the Convention).

176. *See* European Convention on Human Rights, *supra* note 111, art. 44 (codifying that the judgment of the Grand Chambers is final); Harkins v. United Kingdom, 2017 Eur. Ct. H.R. 13-14 (explaining the importance of the rule because there would not be stability with parties knowing their judgments are not final); Ireland v. United Kingdom, rev'd, 2018 Eur. Ct. H.R. 32 (reaffirming the finality of judgment and the possibility of revision as an exception).

177. *Rules of Court*, *supra* note 111, at Rule 80(1); *see, e.g.*, Ireland v. United Kingdom, 2018 Eur. Ct. H.R. at 24 (holding that the Government submitted the request for revision under the guidelines of Rule 80 § 1); Tanişma v. Turkey, 2017 Eur. Ct. H.R. 2, http://hudoc.echr.coe.int/eng?i=001-175161 (applying Rule 80 §1 to the facts of the case); De Luca v. Italy, 2014 Eur. Ct. H.R. 4-5, http://hudoc.echr.coe.int/eng?i=001-145337 (holding that the Government could have reasonably known the facts before the final judgment); Pennino v. Italy, 2014 Eur. Ct. H.R. 4-5, http://hudoc.echr.coe.int/eng?i=001-145338 (holding that the Government could have reasonably known the facts before the final judgment); Naumoski v. Former Yugoslav Republic of Macedonia, 2013 Eur. Ct. H.R. 2-3, http://hudoc.echr.coe.int/eng?i=001-138588 ("Court considers that the length of the impugned proceedings, as revised, was excessive and failed to meet the 'reasonable-time' requirement."); Eremiášová v. Czech Republic, 2013 Eur. Ct. H.R. 2-3, http://hudoc.echr.coe.int/eng?i=001-120965 (stating the Government asked for a revision of the judgment after an applicant died); Grossi v. Italy, 2012 Eur. Ct. H.R. 4-5, http://hudoc.echr.coe.int/eng?i=001-114086 (holding that if the Government obtained a copy of the documents, they were clearly aware of them and could not revise the judgment); Cernescu v. Romania, 2010 Eur. Ct. H.R. 3, http://hudoc.echr.coe.int/eng?i=001-101933 (holding the Government could not have reasonably known the existence of the facts); Adamczuk v. Poland, 2010 Eur.

Thus, there are three elements: (1) a fact that would have a decisive influence, (2) that fact was unknown at the time of the judgment, and (3) that fact could not reasonably have been known to the party. [178] In fact, Ireland has already previously requested the Court to re-open and revise the original judgment.[179] In that application, Ireland argued that

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Ct. H.R. 10-11, http://hudoc.echr.coe.int/eng?i=001-99409 (holding that the Government did not receive applicant's pleadings and the judgment should be revised); Bugajny v. Poland, 2009 Eur. Ct. H.R. 6-7, http://hudoc.echr.coe.int/eng?i=001-96242 (holding the Government's request for revision should be refused because of their ability to obtain contracts relevant to the case); Hertzog v. Romania, 2009 Eur. Ct. H.R. 4-5, http://hudoc.echr.coe.int/eng?i=001-92173 (holding that the Government could not have reasonably known the facts because the applicants failed to disclose of the property sale); Fonyódi v. Hungary, 2009 Eur. Ct. H.R. 2, http://hudoc.echr.coe.int/eng?i=001-92081 (holding that the judgment should be revised under Rule 80); Sabri Taş v. Turkey, 2006 Eur. Ct. H.R. 2-3, http://hudoc.echr.coe.int/eng?i=001-75166 (holding that the judgment should be revised because of applicant's submissions that have a decisive influence on the outcome); Baumann v. Austria, 2005 Eur. Ct. H.R. 3-4, http://hudoc.echr.coe.int/eng?i=001-69319 (holding that the Government's request for revision of the monetary damages amount does not fall within the meaning of Rule 81); Stoicescu v. Romania, 2004 Eur. Ct. H.R. 8, http://hudoc.echr.coe.int/eng?i=001-66658 (holding that the Government's inability to access certain registers meant they could not have reasonably known the facts); McGinley v. United Kingdom, 2000 Eur. Ct. H.R. 12, http://hudoc.echr.coe.int/eng?i=001-58452 (stating that judgments are final under Article 44 and revisions of judgments are exceptions viewed under strict scrutiny); Gustafsson v. Sweden, 1998-V Eur. Ct. H.R. 11 (stating that judgments are final under Article 44 and revisions of judgments are exceptions viewed under strict scrutiny); Pardo v. France, 1996-III Eur. Ct. H.R. 9-10 (stating that judgments are final under Article 44 and revisions of judgments are exceptions viewed under strict scrutiny and must have a decisive influence).

178. Rules of Court, *supra* note 111, at Rule 80(1); *see, e.g.*, Ireland v. United Kingdom, 2018 Eur. Ct. H.R. at 24; Tanişma v. Turkey, 2017 Eur. Ct. H.R. at 2; De Luca v. Italy, 2014 Eur. Ct. H.R. at 4-5; Pennino v. Italy, 2014 Eur. Ct. H.R. 4-5; Naumoski v. Former Yugoslav Republic of Macedonia 2013 Eur. Ct. H.R. at 2-3; Eremiášová v. Czech Republic, 2013 Eur. Ct. H.R. at 2-3; Grossi v. Italy, 2012 Eur. Ct. H.R. at 4-5; Cernescu v. Italy, 2010 Eur. Ct. H.R. at 3; Adamczuk v. Poland, 2010 Eur. Ct. H.R. at 10-11; Bugajny v. Poland, 2009 Eur. Ct. H.R. at 6-7; Hertzog v. Romania, 2009 Eur. Ct. H.R. at 4-5; Fonyódi v. Hungary, 2009 Eur. Ct. H.R. at 2; Sabri Taş v. Turkey, 2006 Eur. Ct. H.R. at 2-3; Baumann v. Austria, 2005 Eur. Ct. H.R. at 3-4; Stoicescu v. Romania, 2004 Eur. Ct. H.R. at 8; McGinley v. United Kingdom, 2000 Eur. Ct. H.R. at 12; Gustafsson v. Sweden, 1998-V Eur. Ct. H.R. at 11; Pardo v. France, 1996-III Eur. Ct. H.R. at 9-10.

179. *See* Ireland v. United Kingdom, 2018 Eur. Ct. H.R. at 1 (requesting revision under Rule 80 of the Rules of the Court).

the Five Techniques, which were only held to constitute inhuman and degrading treatment, should be correctly understood to also constitute torture within the meaning of the ECHR.[180] Ireland justified re-opening the case because its argument was based on newly discovered documents demonstrating that the U.K. Government had withheld information from the Court that would have supported a finding of torture.[181] Specifically, the United Kingdom had information on the true extent of the physical effects of the Five Techniques and that their use was authorized by the U.K. Government at the highest level.[182] The Court concluded that the new documents did not include new facts "that were 'unknown' to the Court when the original judgment was delivered"[183] and would "have had a decisive influence on the original judgment."[184] However, the case of subsequent acts in Afghanistan and/or Iraq would not qualify as new facts that undermine the validity of the original judgment in Ireland v. UK. In the case of a violation of the U.K.'s pledge, the existence of torture following the pledge is a new fact that could not have been known and would be decisive, but it occurred after the judgment and as such, does not appear to be covered by this provision.[185]

Yet another possibility would be to examine the U.K.'s actions as relevant for non-compliance with the original judgment rather than a basis to reopen the judgment. The Court could take the view that its

180. *See id.* at 2-3 (arguing the use of Five Techniques constituted torture and not just inhuman treatment).

181. *See id.* at 15 (explaining that the U.K. government obtained new documents from a television network that they then withheld from the Commission at the time of judgment).

182. *See id.* at 16-24 (asserting that the new documents contained information from medical officials regarding the extent of detainee treatment and also high officials' knowledge of the treatment).

183. *See id.* at 42 (holding the facts were unknown to the Court at the time of judgment); Rules of Court, *supra* note 111, at Rule 80(1).

184. Ireland v. United Kingdom, 2018 Eur. Ct. H.R. at 46-47 (concluding the alleged new facts might have had a decisive influence on the original judgment due to the possible change of severity of suffering).

185. *See id.* at 34 (" . . . namely whether the new fact 'could not reasonably have been known' to the party seeking revision when the judgment was delivered. This requirement relates to situations in which the new fact forming the basis for the revision request could already have been known to the party before the delivery of the original judgment, not, as in the present case, long after the conclusion of the original proceedings.").

judgment in *Ireland v. UK* was not being followed and seek a judgment against the state on that point.[186] When states do not comply with judgments of the Court, the matter is referred to the Council of Europe's Committee of Ministers for supervision and execution. [187] If necessary, the Committee may refer a matter back to the Court for a definitive finding of non-compliance[188] and necessarily, the Court may consider facts that are created or are discovered after the judgment.[189] This route is not likely to be successful because the *dispositif* of the case does not include the pledge with a rejection of Ireland's request for an order, so that obligation is not part of the judgment. [190] While the Court may indicate specific measures in a judgment that might satisfy compliance, the ultimate choice of measures was still left to the states.[191] Thus, in terms of the *Ireland v. UK* judgment, the pledge was

186. *See* Mammadov v. Azerbaijan (Proc. under Art. 46 §4), 2019 Eur. Ct. H.R. 53 (holding that Azerbaijan violated Article 46 § 1 by not abiding by the original judgment); *see also* Mammadov v. Azerbaijan*,* 2014 Eur. Ct. H.R. 36-37 (holding that there were multiple violations under the Convention and applicant was owed damages).

187. *See* European Convention on Human Rights, *supra* note 111, art. 46(2) ("The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."); *see, e.g.*, Mammadov v. Azerbaijan, 2019 Eur. Ct. H.R. at 22, 31 (applying Article 46 of the Convention giving the Committee of Ministers authority to execute the judgment of the case).

188. *See* European Convention on Human Rights, *supra* note 111, art. 46(3)-(5) (explaining the process in which final judgments may be referred back to the Court to rule on failure of the execution of judgment); *see, e.g.*, Mammadov v. Azerbaijan, 2019 Eur. Ct. H.R. at 40-53 (holding that Azerbaijan failed to fulfill their obligation under Article 46 § 1 as referred by the Committee of Ministers).

189. *See* Mammadov v. Azerbaijan, 2019 Eur. Ct. H.R. at 45 (holding that Azerbaijan did fail its obligation); Al-Saadoon v. United Kingdom, 2010 Eur. Ct. H.R. 57-58, 64 (stating that new information to come subsequently from the judgment does not preclude examination).

190. *See* Mammadov v. Azerbaijan, 2019 Eur. Ct. H.R at 38-39 (articulating that it is the state's decision on the means and methods to implement a final judgment of the Court, and thus the means and methods are not bound to the obligation); Öcalan v. Turkey, 2005-IV Eur. Ct. H.R. 60 (reaffirming the idea that a state has the choice to implement its own remedial measures); Brumărescu v. Romania, 2001-I Eur. Ct. H.R. 5 (stating that Contracting states are allowed to choose the means in which they comply with a judgment); Scozzari v. Italy, 2000-VIII Eur. Ct. H.R. 50 (explaining the State is free to choose the means by which it implements an obligation); *cf.* Mammadov v. Azerbaijan, 2019 Eur. Ct. H.R. at 53 (finding non-compliance with terms in *dispositif*).

191. *See* Mammadov v. Azerbaijan, 2019 Eur. Ct. H.R. at 44-45 (holding that while the Court may supervise the execution, a State ultimately has choice of the

not an integral part of the binding obligation to ensure the outcome.[192]

A similar approach to non-compliance would be to argue along the lines of *Shamayev & Others v. Georgia & Russia*[193] that the United Kingdom was interfering with the judicial function. In *Shamayev*, the Court noted that Russia had given assurances directly to the Court to cooperate with its investigation and had not complied with those assurances.[194] The Court held that this action was a violation of Article 38(1)(a), where the ECHR obliges states to "furnish all necessary facilities" for the Court to undertake an effective investigation.[195] However, in the case of *Ireland v. UK*, the investigation is complete.[196] In addition, the obligation to cooperate and the related assurances constitute an obligation of result, whereas Article 38 only references a conduct obligation of an entirely different nature.[197]

Perhaps rather than use provisions in the ECHR, Ireland might want to claim the responsibility of the United Kingdom directly. In this option, Ireland would need to establish that the pledge created an obligation in favor of Ireland beyond the context of the Court. This argument would be much harder to maintain because the United Kingdom clearly intended for the pledge to be directed to the Court, not to Ireland. However, Ireland might create an argument using an estoppel theory.[198] After all, Ireland relied on the pledge by the United

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measures taken); Assanidze v. Georgia, 2004-II Eur. Ct. H.R. 47-48 (holding the State must release the applicant because there is no real choice as to the measures required to remedy the violation); Aydoğdu v. Turkey, 2016 Eur. Ct. H.R. 39-41 (holding the Court allows the State to consider the steps to implement the judgment).

192. *See* Christian Eckart, PROMISES OF STATE UNDER INTERNATIONAL LAW 142-45 (Hart Publishing 2012).

193. *See* Shamayev v. Georgia, 2005-III Eur. Ct. H.R. 124-26 (holding that the Russian Government hindered the establishment of part of the facts in the case).

194. *See id.* at 126 (holding Russia failed to discharge their obligations due to their interference).

195. *See id.* at 124-26 (finding Russia in violation of art. 38 §1 for violating its obligation to comply with assurances given to the Court).

196. Ireland v. the United Kingdom, 25 Eur. Ct. H.R. (ser. A) at 63 (1978) (previously holding is not essential to re-open the investigation).

197. *See* European Convention on Human Rights, *supra* note 111, art. 38 ("The Court shall examine the case together with the representatives of the parties and, if need be, undertake an investigation, for the effective conduct of which the High Contracting Parties concerned shall furnish all necessary facilities.").

198. *See, e.g.*, Temple of Preah Vihear (Camb. v Thai.), Preliminary Objections, Judgment, 1961 I.C.J. Rep. 17, 31 (May 26) ("The law prescribes no particular form;

Kingdom rather than an order of the Court. While it could try to bring such a claim before the ECtHR by invoking Article 34 of the ECHR, it might be possible for Ireland to make the same claim before, among others, the ICJ if it can establish that the United Kingdom owes it an obligation directly.

If these measures do not suffice, then there are a few other options. First, the Court could refuse to accept any pledges from the United Kingdom in the future due to it being unreliable. Certainly, other parties will also take note of the reputational costs to violating such a pledge and will not withdraw their complaints as generously as Ireland did in the face of a promise from the United Kingdom. This impact might also be felt in other cases where the United Kingdom has given or might give pledges.[199] Such an approach might also benefit other cases where states might give assurances in lieu of an adverse order, prompting the Court to adopt a more skeptical approach to unilateral pledges in the future. [200]

Another alternative would be for the Court to take an extra-judicial approach. After all, the Court has an existence on the international plane distinct from the treaty it supervises.[201] Instead of considering

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parties are free to choose what form they please provided their intention clearly results from it."); North Sea Continental Shelf Cases (Fed. Rep. of Ger./Den.), Judgment, 1969 I.C.J. Rep. 3, 25, § 27–30 (Feb. 20) (explaining that Denmark and the Netherlands could make a claim of estoppel by arguing reliance and prejudice suffered); Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, 1994 I.C.J. 6, 23, § 45 (Feb. 3) (citing Temple of Preah Vihear in that an agreement between two parties through conduct was sufficient).

199. *See* Chagos Marine Protected Area Arbitration (Mauritius v. U.K.), PCA Case Repository ¶ 547 (Perm. Ct. Arb. 2015) (generally holding that the United Kingdom's assurances of fishing rights and control to return to Mauritus as legally binding); Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. Rep. 1, ¶¶ 108, 177 (Feb. 25) (taking note of the Lancaster House Undertakings and also finding that the process of the decolonization of Mauritius was not completed by the United Kingdom in a manner consistent with the right to self-determination).

200. *See generally* William Thomas Worster, *Unilateral Diplomatic Assurances as an Alternative to Provisional Measures*, 15 L. & PRAC. INT'L CTS. & TRIBUNALS 445, 461 (2016) (The ECtHR has even taken the step of issuing "general statements" to governments regarding a widespread situation where provisional measures would be appropriate, inviting the government to refrain from the proposed actions generally, in lieu of mass orders of provisional measures).

201. Council of Europe, THE CONSCIENCE OF EUROPE; 50 YEARS OF THE

the pledge within the internal judicial process of cases before the Court or under supervision before the Committee, the Court could, as a subject of international law, make a claim for responsibility against the United Kingdom directly via its Registry. Such a step would be comparable to, for example, the Court as an institution complaining to its host state over compliance with its Headquarters Agreement. The claim need not constitute a case over which it has jurisdiction for it to still be a claim, though of course, it would not be a claim over which the Court would have compulsory jurisdiction.

Lastly, in an extreme scenario, the United Kingdom could be suspended or even expelled from the Council of Europe for failure to comply with obligations owed under the ECHR generally. In short, there are various alternative vehicles for seeking enforcement of the pledge.

VI. CONCLUSION

When the reports of continued use of the Five Techniques began emerging through various commissions and inquiries, the first and most important consideration was whether the United Kingdom had violated the human rights of many individuals. These victims deserve to be protected and made whole, insofar as that is ever possible.

In addition to apparently violating the human rights of these people, the United Kingdom may also have violated the separate obligation it owed to the ECtHR directly. The U.K. Attorney General promised the ECtHR that the United Kingdom would ban the use of the Five Techniques.[202] The Prime Minister stated the same to Parliament as well.[203] In making this pledge before the Court, the United Kingdom created a new legal obligation—an obligation to not use the Five Techniques—that was owed to the Court itself. Yet, the practice

EUROPEAN COURT OF HUMAN RIGHTS 16 (Jonathan L. Sharpe ed., Third Millennium Publishing Limited 2010) (arguing the ECtHR is the most important international body, more than the ICC or ICJ, because its impact on the daily lives of a sixth of the world's population).

202. *See* Ireland v. United Kingdom, rev'd, 2018 Eur. Ct. H.R. 11 (stating the Attorney General's declaration before the Court on February 8, 1977 saying the United Kingdom will not reintroduce the Five Techniques).

203. *See id.* (affirming that the Attorney General made the same statement to Parliament).

continued.

The question is then whether the United Kingdom broke its promise. This article has focused on compliance with the specific pledge by the United Kingdom. It has not argued that the Five Techniques necessarily constitute torture, although that conclusion is more likely following the development in the jurisprudence of the ECtHR. It has also not argued that the continued use of the Five Techniques in Iraq and Afghanistan constitutes violations of the ECHR, although once again, that is also the most likely conclusion. The less obvious violation in the cases now emerging is that the United Kingdom has not acted in compliance with its promise directly to the ECtHR. Because a pledge to the Court creates legal obligations owed to the Court, the United Kingdom may have, effectively, broken its promise and violated international law.