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Winter 1-1-2010

## A Dark Descent into Reality: Making the case for an objective definition of torture

Michael W. Lewis

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### Recommended Citation

Michael W. Lewis, *A Dark Descent into Reality: Making the case for an objective definition of torture*, 67 Wash. & Lee L. Rev. 77 (2010).

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

Michael W. Lewis\*

## *Abstract*

*The definition of torture is broken. The malleability of the term "severe pain or suffering" at the heart of the definition has created a situation in which the world agrees on the words but cannot agree on their meaning. The "I know it when I see it" nature of the discussion of torture makes it clear that the definition is largely left to the eye of the beholder. This is particularly problematic when international law's reliance on self-enforcement is considered.*

*After discussing current misconceptions about intelligence gathering and coercion that are common to all sides of the torture debate, this Article describes the reality of intelligence collection. It then reviews the wide range of competing definitions of torture: those provided by international courts, those proposed by commentators, and those implemented by governments around the world. Some proposed definitions are so broad that practically any form of interrogation would be illegal, others so narrow as to allow for a wide variety of shockingly brutal techniques.*

*What becomes apparent, not surprisingly, is that people or governments under pressure from terrorist attacks view the definition of "severe pain and*

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\* Associate Professor of Law at Ohio Northern University Pettit College of Law. As a former combat aviator I have personal experience with the SERE training techniques that are at the core of the debate about coercive interrogations at Guantanamo Bay. I would like to thank the many participants in the 2008 Oxford University Roundtable on Global Security for their comments on my presentation of a draft of this Article, as well as the participants in the Wake Forest National Security Law Scholars Conference for their recommendations. I would also like to thank Professor Bobby Chesney of the University of Texas School of Law for his review of early drafts of this Article, Professor John Paul Jones of the University of Richmond School of Law for his many comments and substantial input, Professor John Parry of Lewis and Clark School of Law for his review and suggestions, and Professor Jens Ohlin of Cornell University for his suggestions concerning the discussion of reciprocity. I would also like to thank my research assistant, Kyle Bickford, for his tireless efforts.

*suffering" differently from those outside such a cauldron. Yet international law's reliance upon self-enforcement requires a good faith interpretation of malleable terms such as "severe pain and suffering" by those under such pressure. The inevitable result, as witnessed in the United States after 9/11, in the United Kingdom at the height of IRA violence in the early 1970s, in Germany during the "German Autumn" battle against the Red Army Faction in 1977, and in Israel during its struggles against Palestinian violence, is that such a "good faith" interpretation is not readily forthcoming from those charged with the protection of their civilian population. The excesses that followed were generally later regretted, but such regrets do little to comfort the victims of these excesses.*

*This Article proposes a solution. To prevent the definition of "severe pain and suffering" from changing between September 10 and September 12 (or more accurately from not being considered at all on September 10 to being considered in a very dark light on September 12), it recommends tying the definition to preexisting standards that are difficult to manipulate and internally self-policing.*

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

Oliver Wendell Holmes, Jr.  
Letter to Elmer Gertz, March 1, 1899<sup>1</sup>

### *I. Introduction*

The definition of torture is broken. Yet in spite of tremendous interest in the subject since 9/11, little has been done to address this problem seriously. This is due, in part, to the preference for generalities that most scholars have, as Holmes noted over 100 years ago. Such a preference for thinking and speaking in generalities becomes even more pronounced when the details of a problem are as unpleasant and gruesome as those surrounding the topic of torture. For most authors writing about ticking time bombs, moral dilemmas, torture

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1. LIVA BAKER, *THE JUSTICE FROM BEACON HILL: THE LIFE AND TIMES OF OLIVER WENDELL HOLMES* 172 (1991).

warrants, waterboarding, criminal prosecutions, necessity defenses, and the moral underpinnings of the rule of law, the "I know it when I see it" approach that Justice Potter Stewart made famous when attempting to define pornography,<sup>2</sup> has generally been sufficient for defining torture. While such vague standards may be sufficient for those speaking in generalities, the recent debate concerning possible criminal prosecutions of CIA interrogators or Bush Administration legal advisors has highlighted the inadequacy of the current definition in practice.<sup>3</sup>

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

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

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

Following the 9/11 attacks there were numerous questions posed about torture. Is torture ever permissible under any circumstance? Are there different

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2. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

3. Carrie Johnson & Joby Warrick, *Bush Anti-Terror Policies Get Reluctant Revisit*, WASH. POST, July 13, 2009, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/12/AR2009071202118.html?sub=AR> (discussing the debate concerning possible criminal prosecutions of CIA interrogators and Bush Administration legal advisors).

4. Sanford Levinson, *In Quest of a "Common Conscience": Reflections on the Current Debate About Torture*, 1 J. NAT'L SEC. L. & POL'Y 231, 252 (2005) (emphasis in original).

degrees of torture? Who has committed torture during the "War on Terror"? What defenses might be available to someone accused of committing torture? Much has been written in attempting to answer these questions, focusing on the justifications for torture and going so far as to describe both the circumstances in which it would be permissible, the procedural safeguards against "excessive use" of "torture," and the form that such "permissible torture" might take.<sup>5</sup>

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

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5. See, e.g., ALAN M. DERSHOWITZ, *WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE* 144, 156–63 (2002) (arguing for the use of "torture warrants" to create some judicial oversight over what he views as the inevitable use of the practice during interrogations); PHILIP B. HEYMANN & JULIETTE N. KAYYEM, *PROTECTING LIBERTY IN AN AGE OF TERROR* 31–39 (2005) (proposing that specific techniques of "highly coercive interrogations" that are short of torture be authorized under limited circumstances involving "emergency exceptions" approved by the President); Miriam Gur-Arye, *Can the War Against Terror Justify the Use of Force in Interrogations?*, in *TORTURE: A COLLECTION* 183, 195 (Sanford Levinson ed., 2004) (recharacterizing the Israeli defense of "necessity" as "self-defense" and stating that force should only be permitted in interrogations in the narrowest of "ticking time bomb" scenarios); see also Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 *COLUM. L. REV.* 1681, 1714–15 (2005) (rejecting the use of "ticking time bomb" scenarios in the torture debate as strawmen to allow the contemplation of acts otherwise unthinkable).

6. See, e.g., Glenn Greenwald, *The Effects of Obama's Refusal to Investigate Bush Crimes*, Jan. 20, 2009, <http://www.salon.com/opinion/greenwald/2009/01/20/turley/index.html> (last visited Feb. 22, 2010) (quoting Jonathan Turley of George Washington University College of Law as stating that "[t]hese are war crimes" and comparing George Bush to Augusto Pinochet) (on file with the Washington and Lee Law Review); Nat Hentoff, *Considering the War-Crimes Trial of the Bush Administration*, Oct. 1, 2008, <http://www.villagevoice.com/content/printVersion/658475> (last visited Feb. 22, 2010) (quoting Dean Lawrence Velvel of the Massachusetts School of Law as saying that "[w]e've already seen how the torture president has exercised his 'inherent unitary-executive constitutional authority'" at a conference organized by Velvel to plan for war-crimes trials of the Bush Administration) (on file with the Washington and Lee Law Review).

7. Waldron, *supra* note 5, at 1700.

not a sufficient basis for bringing criminal charges. At a minimum, a defendant so charged might be forgiven a certain degree of incredulity at being criminally charged for waterboarding a detainee if he had performed the exact same act on numerous American service members both before and after the interrogation of the detainee.<sup>8</sup> This begs the question: What exactly is torture and how should its boundaries be legally defined?

## II. *Universal Condemnation, Practical Uncertainties*

Torture is a universally condemned practice. It is a violation of both positive<sup>9</sup> and natural law<sup>10</sup> and yet it is undoubtedly practiced by both states and private individuals with some frequency.<sup>11</sup> There is near universal agreement that torture is not merely wrong, but evil, and there is a generally agreed upon definition for the term that prohibits the intentional infliction of "severe pain or suffering, whether physical or mental."<sup>12</sup> However, there is very little consensus on what that definition actually means. Those scholars that have addressed this question are hopelessly divided. Some have remarked on the fact that "[t]orture does not have a clear *legal* meaning, in part because there

8. Waterboarding was a standard training technique used by the U.S. military in its Survival, Evasion, Resistance and Escape (SERE) courses that all special forces and combat aviators went through. As a graduate of SERE training in the early 1990s, I can personally confirm that waterboarding was used at that time. See 153 CONG. REC. S14147, 14148 (2007) (statement of Sen. Durbin) (quoting testimony of Malcolm Nance, a former SERE instructor, speaking of training Navy SEALs to resist torture: "I know the waterboard personally and intimately. . . . I personally led, witnessed and supervised waterboarding of hundreds of people").

9. See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, U.N. Doc. A/RES/39/45/Annex (Dec. 10, 1984) [hereinafter CAT].

10. Along with genocide and piracy, torture is recognized as a prototypical *jus cogens* violation. Torture was clearly established as a violation of the law of nations before the CAT was created. See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980) ("Having examined the sources from which customary international law is derived the usage of nations, judicial opinions and the works of jurists we conclude that official torture is now prohibited by the law of nations."). Since the creation of the CAT, torture has been consistently viewed as a violation of the law of nations.

11. See Ariel Dorfman, *The Tyranny of Terror: Is Torture Inevitable in Our Century and Beyond?*, in *TORTURE: A COLLECTION*, *supra* note 5, at 3, 5 (stating that, at last count, there are 132 countries around the world in which torture is contemplated as inevitable).

12. See CAT, *supra* note 9, art. 1 ("For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession . . .").

have been no general and systematic attempts to map the border between 'torture' and 'not torture.'<sup>13</sup> Similarly, the recently released Office of Legal Counsel memoranda on the CIA interrogation techniques qualified their analysis by stating that the task of interpreting and applying the prohibition of severe pain and suffering is complicated by the "imprecision in the statutory standard and the relative lack of guidance in the case law."<sup>14</sup> Others that have chosen to, or in some cases been required to, "map the border between torture and not torture" have produced widely varying answers, be they commentators, legislators, or members of the executive branch after 9/11.<sup>15</sup> The resulting definitions range from very narrow interpretations of what constitutes torture that would permit the intentional infliction of substantial pain,<sup>16</sup> to expansive definitions that would practically outlaw interrogations of any kind.<sup>17</sup> Still others argue that any attempt to define torture clearly is counterproductive and should not be attempted because it encourages behavior that necessarily approaches whatever line is drawn.<sup>18</sup> Whatever their positions on the definition of torture, those that have attempted to define it usually have done so as a way

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13. See Kim Lane Scheppele, *Hypothetical Torture in the "War on Terrorism"*, 1 J. NAT'L SEC. L. & POL'Y 285, 289 (2005) (noting that the overlapping prohibitions of "cruel, inhuman or degrading treatment" and "torture" found in the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights, have blurred the distinction between these two acts); cf. Nigel S. Rodley, *The Definition(s) of Torture in International Law*, in 55 CURRENT LEGAL PROBS. 467, 468-89 (Michael Freeman ed., 2002) (providing a painstaking review of treaty and case law establishing the development of the definition of torture with a particular focus on the standards used by the European Court of Human Rights).

14. Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att'y Gen., to John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency (May 10, 2005) [hereinafter Bradbury Memo] (on file with the Washington and Lee Law Review).

15. See, e.g., Memorandum from Jay S. Bybee, Assistant Att'y Gen., to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), [hereinafter Bybee Memo] ("We [Office of the Assistant Att'y Gen.] further conclude that certain acts may be cruel, inhuman, or degrading, but still not produce pain and suffering of the requisite intensity to fall within Section 2340A's [18 U.S.C. §§ 2340-2340A] proscription against torture.") (on file with the Washington and Lee Law Review); John T. Parry, *What is Torture, Are We Doing It, and What If We Are?*, 64 U. PITT. L. REV. 237, 260-61 (2003) (arguing coercive interrogation must be a last resort and describing how the dynamic of custodial interrogations easily crosses the line into torture).

16. See Bybee Memo, *supra* note 15, at 6 (concluding that the word torture and the prohibition on torture should be reserved only for the infliction of the sort of extreme pain that would be associated with death or organ failure).

17. See Parry, *supra* note 15, at 249 (arguing that torture is also the infliction of potentially escalating pain for purposes that include dominating the victim and seeking to make the victim responsible for the pain incurred).

18. See Waldron, *supra* note 5, at 1715 ("And [torture] is corrupt because it attempts to use a farfetched scenario, more at home in a television thriller than in the real world, deliberately to undermine the integrity of certain moral positions.").

of furthering other goals. Whether those goals were protecting individual rights, maintaining moral standards of conduct, or protecting national security, the debate has devolved into a struggle to determine who will be the "master of the language" that is used.<sup>19</sup> Although, as Levinson points out, it may have been acceptable for Humpty Dumpty to assert that "when I use a word, it means just what I choose it to mean,"<sup>20</sup> there is something seriously wrong when commentators, legislators, and executives take such an approach toward defining something as important as torture.<sup>21</sup>

What is made apparent by this struggle to even speak the same language, much less reach consensus, is that the subjectivity inherent in the current definition of torture is a fatal flaw.<sup>22</sup> An examination of the state practices of Germany, Israel, and the United Kingdom when faced with terrorist threats, as well as our own reaction to 9/11, demonstrates that even liberal democracies have used the subjectivity inherent in the term "severe pain or suffering" to permit interrogations and detention techniques that have later been criticized as torture.<sup>23</sup> This Article proposes a first step toward solving this problem by providing a clear definition of "severe pain or suffering" based upon a morally defensible objective standard that is internally self-policing and difficult to manipulate.

Critical to fashioning this proposal is the acknowledgment of its limitations. Because it recognizes that its impact will be limited to states that are willing to be influenced by human rights treaties, this Article carefully examines the question of how the definition of torture can be fashioned to increase compliance by willing states. Such a "modest" goal that concedes from the outset that there are states that are not influenced by human rights treaties, even though they have officially acceded to those treaties, might seem like an embrace of a legal realist view of international law and a repudiation of

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19. See Levinson, *supra* note 4, at 236 ("In many ways, the best way of understanding the contemporary debate about torture is as a fundamental struggle over who will get to be the 'master' of the language we use when giving concrete definition to 'torture.'").

20. *Id.*

21. See Waldron, *supra* note 5, at 1716 (arguing that there will always be some deprived individuals who act in a way that is simply abusive).

22. See, e.g., Dana Priest & Barton Gellman, *U.S. Decries Abuse But Defends Interrogations; 'Stress and Duress' Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities*, WASH. POST, Dec. 26, 2002, at A01 (discussing concerns with the definition of torture where officials maintain that "stress and duress" techniques are unpleasant but fall short of torture).

23. See Waldron, *supra* note 5, at 1684 ("The use of torture has in recent decades disfigured the security policies of . . . Britain (in Northern Ireland), Israel (in the Occupied Territories), and now the United States (in Iraq, Afghanistan, and Cuba).").

natural law idealism.<sup>24</sup> This is not the case. Instead, it is based on the belief, supported by Professor Oona Hathaway's empirical work on the effectiveness of international law, that "domestic enforcement of international law is essential to compliance."<sup>25</sup> Domestic enforcement, or perhaps more accurately "self-enforcement," of international legal obligations is critical for compliance where transnational legal enforcement mechanisms are weakest.<sup>26</sup> If this is true, and the available empirical evidence on the effectiveness of international law strongly suggests that it is, then the question "how should torture be legally defined?" is insufficient. Instead, the question must become "how can the definition of torture be fashioned to improve the incentives for self-enforcement?"

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

Part III of this Article will examine the use of coercive interrogation in intelligence collection. It will dispel often referenced misconceptions about the intelligence gathering process that often prevent serious debate about where and how lines defining torture should be drawn. Discussions of "ticking time bomb" scenarios generally lead to the conclusion that there are some situations in which we "must do what we have to do" no matter where the lines are drawn. Similarly, the argument that "coercion does not work because it only produces unreliable information" leads to the conclusion that there is no value at all in the use of *any* coercion, so line-drawing is unnecessary. Part III also will discuss the realities of intelligence collection to show the very narrow area in which the coercion question arises, and it will explain why there remain situations in which coercive techniques are still regarded as being effective.

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24. Compare JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 25 (2005) ("[Traditional theory] does not explain why states sometimes say they will abide by particular customary international laws and then violate their promise."), with MARY ELLEN O'CONNELL, *THE POWER AND PURPOSE OF INTERNATIONAL LAW* 132 (2008) (arguing in favor of a legal process theory to address the concern of whether international law has power in the international community).

25. Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 520 (2005) ("The integrated theory presented here makes clear that strong domestic institutions are essential not only to domestic rule of law, but also to international rule of law.").

26. See *id.* (describing the primacy of self-enforcement to support compliance with treaties in which transnational legal enforcement mechanisms are very weak); see also Oona A. Hathaway, *The Promise and Limits of the International Law of Torture*, in *TORTURE: A COLLECTION*, *supra* note 5, at 205–08 (discussing the importance of self-enforcement for compliance with the Convention Against Torture).

Part IV will describe the current prohibitions against torture found in international law and specifically the provisions of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). It will examine interpretations of this prohibition, ranging from the very restrictive to the highly expansive, and it will review court decisions that have addressed what specific acts constitute torture and consider how the related prohibition against the use of cruel, inhuman or degrading treatment impacts how torture is viewed. Part V will examine the detention and interrogation measures taken by a variety of nations in response to terror threats, illustrating why a subjective definition of torture cannot be effective in constraining state behavior within the current system of international law. Part VI will describe the objective definition that is being proposed and will discuss benefits that its adoption will produce. The Article will conclude by attempting to answer anticipated criticisms of the proposed definition.

### *III. Coercion in Intelligence Collection*

#### *A. Intelligence Collection Myths*

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

#### *1. Ticking Time Bombs*

The ticking time bomb scenario is seductively appealing in its simplicity. A bomb is planted in a large metropolitan area threatening hundreds—or in the nuclear variant, even hundreds of thousands—of innocent lives. The state has custody of an individual who knows where the bomb is, or how it may be disabled, but that individual will not talk. Surely saving the lives of thousands

justifies inflicting even the most egregious pain on one person, or even a handful of people.<sup>27</sup> While some have eloquently refused to be seduced by such logic,<sup>28</sup> others, even from a part of the political spectrum not usually sympathetic to things like harsh interrogation or torture, including Senator Charles Schumer<sup>29</sup> and Leon Panetta,<sup>30</sup> have mentioned ticking time bombs in their discussions of when harsher interrogation methods or torture might be used.

Although there certainly are examples of real world ticking time bomb scenarios in which coercion or torture resulted in lives being saved,<sup>31</sup> these incidents are extremely rare, no matter what 24 and Jack Bauer may imply. The infrequency of such occurrences and the lack of certainty about the harms or the immediacy involved even in these rare instances make the ticking time bomb scenario a grossly overused point of discussion.

Several scholars have quite ably exposed the flaws of considering the ticking time bomb hypothetical when debating the use of coercion or torture in interrogations.<sup>32</sup> Their criticism focuses on the unrealistic assumptions that

27. See, e.g., David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425, 1440 (2005) ("[W]e shouldn't be too squeamish to torture the information out of him and save hundreds of lives [in a ticking bomb situation]."); see also Henry Shue, *Torture, in TORTURE: A COLLECTION*, *supra* note 5, at 47, 57 (arguing if a nuclear device is going to explode in Paris, then torture is appropriate because in extraordinary cases the benefits of pure interrogational torture would greatly outweigh the cruelty of the torture itself); Scheppele, *supra* note 13, at 285–86 ("Of course [in a ticking bomb situation], you would torture. Only those completely indifferent to grotesquely bad consequences would not.").

28. See Dorfman, *supra* note 11, at 17 ("I can only pray that humanity will have the courage to say no, no to torture, no to torture under any circumstance whatsoever . . .").

29. See *DOJ Oversight: Terrorism and Other Topics: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. (2004) (statement of Sen. Charles Schumer, Member, S. Comm. on the Judiciary) (rejecting the idea "that torture should never ever be used" when confronted by a ticking time bomb scenario).

30. See Mark Mazzetti, *Panetta Open to Tougher Methods in Some C.I.A. Interrogation*, N.Y. TIMES, Feb. 5, 2009, at A14 ("If we had a ticking bomb situation, and obviously, whatever was being used I felt was not sufficient, I would not hesitate to go to the president of the United States and request whatever additional authority I would need." (quoting Leon Panetta, Director of the Central Intelligence Agency)).

31. See Luban, *supra* note 27, at 1441–42 (discussing a foiled plot to assassinate the Pope and the al-Qaeda Pacific airliner plot).

32. See, e.g., Scheppele, *supra* note 13, at 293–95, 305–06 ("I will argue, the pitched debate over [the ticking time bomb] hypothetical and its logical entailments obscures rather than identifies what the real choices are in the present situation."); Luban, *supra* note 27, at 1442 ("The ticking-bomb scenario cheats its way around these difficulties by stipulating that the bomb is there, ticking away, and that officials know it and know they have the man who planted it. Those conditions will seldom be met."); Shue, *supra* note 27, at 58 ("The distance between the situations which must be concocted in order to have a plausible case of morally permissible torture and the situations which actually occur is, if anything, further reason why the existing

underlie the hypothetical. None of the certainties that exist in the hypothetical are found in the real world. Interrogators rarely, if ever, will know the magnitude of the threat or its imminence for certain. It is also unlikely that the interrogators will know with certainty that the suspect they are interrogating actually has the information necessary to avert the disaster. Nor is it certain that resorting to torture will yield the information desired.<sup>33</sup> Finally, as Kim Lane Scheppelle points out, the hypothetical also avoids the complex difficulties with which this Article is grappling, by posing the question as an individual moral choice, not the rationale for a bureaucracy creating regulations that allow for torture in certain situations.<sup>34</sup>

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

## 2. "Torture Does Not Work"

Another commonly used oversimplification in the torture debate is one that attempts to eliminate the need for any debate at all by negating any possible justification for coercion. This simplification states that torture does not work because it elicits unreliable information. Given the general agreement that exists, at least among states that are willing to be influenced by the definition of torture, that torture as punishment or torture to extract confessions is always wrong, the only context in which it might be permissible would be in the

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prohibitions against torture should remain and should be strengthened by making torture an international crime.").

33. See Waldron, *supra* note 5, at 1715 ("It is silly because torture is seldom used in the real world to elicit startling facts about particular ticking bombs; it is used by American interrogators and others to accumulate lots of small pieces of relatively insignificant information . . .").

34. See Scheppelle, *supra* note 13, at 305 ("The hypothetical assumes that the interrogator is making an individual decision as an independent moral agent. But in reality, the interrogator is following rules about when torture may be permitted—rules of a bureaucracy in which the interrogator is in a subordinate position, following established procedures."); Luban, *supra* note 27, at 1445–50 ("[A]ny responsible discussion of torture must address the practice of torture, not the ticking-bomb hypothetical.").

interrogational setting.<sup>35</sup> If, in fact, it is unreliable as an interrogational tool, then there can be no justification for coercion whatsoever.

Like the ticking time bomb scenario, this line of argument also contains some truth. There is strong evidence that the most effective way to exploit an intelligence source over an extended period of time is usually through rapport-building and patient, noncoercive interrogations.<sup>36</sup> However, acceptance of the premise that noncoercive interrogations generally are superior in the long-term exploitation of an intelligence source does not negate the claim that coercive methods can produce results in time-critical or high-value situations.<sup>37</sup>

The claim that coercion is not a valuable interrogational tool is made by a variety of people for a variety of reasons. Not surprisingly, some commentators that are most critical of the ticking time bomb scenario, and those generally opposed to any form of coercion, embrace the "torture does not work" oversimplification as further support for their position that no possible justification for coercion exists.<sup>38</sup> But the warning that coercion yields unreliable results also is employed tactically by the military as a training tool that reinforces compliance with the Geneva Conventions by its interrogators.<sup>39</sup>

35. See Shue, *supra* note 27, at 53 (discussing at length the different reasons for torture).

36. See Randy Borum, *Approaching Truth: Behavioral Science Lessons on Educating Information from Human Sources*, in EDUCING INFORMATION: INTERROGATION: SCIENCE AND ART—FOUNDATIONS FOR THE FUTURE, INTELLIGENCE SCIENCE BOARD, PHASE I REPORT 17, 17–37 (Russell Swenson ed., 2006) ("[S]ocial science research on persuasion and interpersonal influence could provide a foundation for a more effective approach to educating information in intelligence-gathering contexts.").

37. See Greg Miller, *Departing CIA Chief Defends Interrogations*, L.A. TIMES, Jan. 16, 2009, at A14, available at <http://articles.latimes.com/2009/jan/16/nation/na-cia16> ("These [enhanced interrogation] techniques worked. . . . Do not allow others to say it didn't work. . . . It worked." (quoting former CIA Director General Michael Hayden)).

38. See, e.g., Scheppele, *supra* note 13, at 335–37 (describing several sources, including a 1960s-era CIA manual, that assert that coercive interrogation techniques do not produce reliable information); *All Things Considered: Holder Calls Waterboarding Torture* (NPR radio broadcast Jan. 15, 2009), available at <http://www.npr.org/templates/story/story.php?storyId=99404524> (explaining his position that torture does not work, Attorney General Eric Holder said that "[p]eople will say almost anything to avoid torture"); *Dems Slam Bush Veto on Waterboarding Ban*, U.S.A. TODAY, Mar. 8, 2008, [http://www.usatoday.com/news/washington/2008-03-08-bushaddress\\_N.htm](http://www.usatoday.com/news/washington/2008-03-08-bushaddress_N.htm) (last visited Feb. 22, 2010) ("On the other hand, I do know that coercive interrogations can lead detainees to provide false information in order to make the interrogation stop." (quoting Senator Jay Rockefeller, Chairman of the Senate Select Committee on Intelligence)) (on file with Washington and Lee Law Review).

39. See CHRIS MACKEY & GREG MILLER, *THE INTERROGATORS: INSIDE THE SECRET WAR AGAINST AL-QAEDA* 31–32 (2004) (relating stories from instructors in U.S. Army interrogator training programs about torture of prisoners by South Vietnamese forces that elicited false information).

Although the "ticking time bomb scenario," much like the "torture does not work" line of argument, has a large number of adherents from across the political and policy making spectrum, it does not stand up well to reality. There are many examples of torture, or at least highly coercive interrogation techniques, foiling terrorist plots and saving the lives of civilians or soldiers. Some of these examples are well documented, such as the torture used by Filipino police in disrupting a 1995 al-Qaeda plot to simultaneously blow up eleven U.S. airliners over the Pacific.<sup>40</sup> Other examples of coercion being effective are impossible to assess fully until the interrogations are declassified. These examples include the Israeli claim that its security service had foiled ninety planned terrorist attacks—including suicide bombings, car bombings, kidnappings, and murders—based upon information gained through the use of coercive interrogations.<sup>41</sup> Similarly, former CIA operations officer John Kiriakou and others claim that waterboarding Abu Zubaydah and Khalid Sheikh Mohammad yielded information that led to major intelligence breakthroughs that disrupted "a number of attacks, maybe dozens of attacks."<sup>42</sup> Even though some of these claims cannot be fully corroborated yet, it is clear that coercive interrogation techniques are effective at quickly eliciting information, a portion of which has real intelligence value.

### B. Actual Intelligence Collection

Intelligence collection typically is a long, tedious process that involves gathering countless fragments of information and gradually piecing them together to form an overall picture.<sup>43</sup> These fragments can be scraps of paper

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40. See Luban, *supra* note 27, at 1441–42 (describing how a Pakistani bomb-maker confessed after weeks of torture by "agents [that] hit him with a chair and a long piece of wood, forced water into his mouth, and crushed lighted cigarettes into his private parts").

41. See U.N. Comm. Against Torture [CAT], *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Second Periodic Reports of States Parties Due in 1996: Add.: Isr.*, ¶ 24, U.N. Doc. CAT/C/33/Add.2/Rev.1 (Feb. 17, 1997) ("Among these planned attacks are some 10 suicide bombings; 7 car-bombings; 15 kidnappings of soldiers and civilians; and some 60 attacks of different types including shootings of soldiers and civilians, hijacking of buses, stabbing and murder of Israelis, placing of explosives, etc.").

42. See ABC News: *Interview by Brian Ross with John Kiriakou: CIA—Abu Zubaydah* 17–18, 39 (ABC television broadcast Dec. 10, 2007), available at [http://abcnews.go.com/images/Blotter/brianross\\_kiriakou\\_transcript1\\_blotter071210.pdf](http://abcnews.go.com/images/Blotter/brianross_kiriakou_transcript1_blotter071210.pdf) [hereinafter *Kiriakou Interview*] (stating that accused terrorist Abu Zubaydah began cooperating with interrogators after being waterboarded for thirty-five seconds).

43. See MACKAY & MILLER, *supra* note 39, at 71–451 (chronicling the experiences of five U.S. interrogators at Afghan military prisons). Some of the understanding of intelligence collection contained in this section also is based on the author's seven years of personal

found in the pocket of a captured enemy, a consistent phrase used by a number of prisoners, or an inconsistent remark made by one. They may be files found on the hard drive of a captured laptop, an intercepted cell phone call, or the nervous glance of a prisoner in response to a pointed question. There is good information, bad information, and a great deal of noninformation that is gathered from the tens of thousands of interrogation sessions that take place during a conflict. There are places that act as safe houses or weapons stores that can be physically verified. There are descriptions of internal communications procedures, decisionmaking processes, and command structures that are cross-referenced against similar descriptions provided by other prisoners. And there are opinions and observations about individuals' personalities and motivations that provide valuable insight, but are practically impossible to verify independently. The veracity of this last type of information is judged by the demeanor of a prisoner when giving the information. Almost all prisoners tell the truth at least part of the time, and almost all prisoners lie at least part of the time. While research on detecting deception seems to provide little support for any reliable nonverbal indicators of deception, it also concedes that most of the studies are conducted in a laboratory setting using very short interviews.<sup>44</sup> Some degree of confidence can be established in the ability to detect deception in *some* prisoners by interviewing the same prisoner on numerous separate occasions for hours at a time and carefully noting when and how the subject behaves when he is giving information that has been verified as true and when he gives information that has been verified as false.<sup>45</sup>

Like any other aspect of warfare, intelligence collection is characterized by continual innovation and adaptation of tactics and techniques. Once one side understands how its people will be interrogated, it is able to prepare them to resist that sort of interrogation. When the interrogators learn which resistance techniques their opponents are using, they will modify their interrogational approach. The ebb and flow of technique and counter-technique is constant and readily apparent to those that are involved in the process. One interrogator in Afghanistan remarked: "It was strange to see a prisoner trying [resistance]

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experience in the U.S. Navy and the author's father's thirty-five years as an intelligence analyst for the National Security Agency.

44. See Gary Hazlett, *Research on Detection of Deception: What We Know vs. What We Think We Know*, in EDUCING INFORMATION: INTERROGATION: SCIENCE AND ART—FOUNDATIONS FOR THE FUTURE, INTELLIGENCE SCIENCE BOARD, *supra* note 36, at 45, 45–61 (suggesting improvements in deception detection research, including studying the target population, using larger sample sizes and longer interrogations, and investigating cultural differences).

45. See MACKAY & MILLER, *supra* note 39, at 123–29, 132–38 (describing the narrator's repeated interrogation sessions with Prisoner 140 and how, over time, he learned to recognize physical cues that indicated when the prisoner was lying).

techniques that we hadn't encountered in months. We thought perhaps he had been on the run and isolated from the fleeing Arab scene in Pakistan's cities, where more sophisticated resistance techniques were being devised and spread by word of mouth."<sup>46</sup>

The fundamental goal of any interrogator is to keep the prisoner off balance, confused, disoriented, and, at times, afraid.<sup>47</sup> This fear need not be of physical harm. It may be fear of betrayal by one's comrades, fear of prolonged separation from family, fear that a prior interrogation session provided valuable information to the enemy, or simply fear of the unknown.<sup>48</sup> While interrogators try to prolong this fear, confusion, and disorientation, it is a difficult task. As Chris Mackey, an Army interrogator in Afghanistan, said, "Fear is often an interrogator's best ally, but it doesn't have a long shelf life."<sup>49</sup>

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

Hold out on providing any information for at least twenty-four hours, it said, to give "brothers" enough time to adjust their plans. The Americans "will not harm you physically," the manual said, but "they must be tempted into doing so. And if they do strike a brother, you must complain to the authorities immediately." It added that the baiting of Americans should be sufficient to result in an attack that leaves "evidence." You could end the career of an interrogator, maybe even prompt an international outcry, if you could show the Red Cross a bruise or a scar.<sup>50</sup>

Once the prisoners had been held for a couple of days and had learned that this description of their captivity was accurate, that they would be well fed, and that there were no adverse physical consequences for lying or refusing to answer questions, any fear of the unknown rapidly vanished.<sup>51</sup>

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46. *Id.* at 310.

47. *See* DEP'T OF THE ARMY, FIELD MANUAL NO. 2-22.3, HUMAN INTELLIGENCE COLLECTOR OPERATIONS 8.21 (2006) ("[Prisoners] tend to be disoriented and exhibit high degrees of fear and anxiety. This vulnerable state fades over time, and it is vital for [human intelligence] collectors to interrogate EPWs [enemy prisoners of war] as soon as and as close to the point of capture as possible.").

48. *See id.* at 479-83 (listing the various techniques employed by Army interrogators, found in the Army Field Manual (FM 34-52)).

49. *Id.* at 8.

50. *Id.* at 179.

51. *See id.* at 181 (speculating that the regularity and routine of life in U.S. Army captivity

The interrogations in Afghanistan were limited to the techniques found in the Army Field Manual, and as the cat-and-mouse game between the al-Qaeda prisoners and interrogators continued, there was a sense that these limitations restricted the effectiveness of the interrogations. "Our experience in Afghanistan showed that the harsher the methods we used—though they never contravened the Conventions, let alone crossed over into torture—the better the information we got and the sooner we got it."<sup>52</sup>

It should be remembered that Mackey's assurance that interrogations "never crossed over into torture" was based upon his subjective understanding of the definition of torture. Even if Mackey's group never crossed such a line, there is a widespread belief that others at Guantanamo and Abu Ghraib did.<sup>53</sup> As we turn to the variety of definitions of torture both employed and proposed, it becomes clear that there are those who claim that some of the techniques that Mackey employed were torture, while others go so far as to justify the conduct at Abu Ghraib. Arriving at a definition that closes this gap by dealing with the specifics of how torture should be defined will be critical to the future of intelligence gathering.

#### IV. Prohibitions Against Torture

##### A. The International Prohibition of Torture

There can be no question that international law prohibits torture.<sup>54</sup> It is well established that customary international law prohibits torture and views its use as a *jus cogens* violation. In his opinion in *Filartiga v. Pena-Irala*, Judge Kaufman canvasses numerous conventions and commentators and finds that they all come to the same conclusion: The law of nations prohibits official torture.<sup>55</sup> Not only is this prohibition clearly established in customary

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weakened the ability to interrogate effectively).

52. *Id.* at 477.

53. See Mark Danner, *Tales from Torture's Dark World*, N.Y. TIMES, Mar. 15, 2009, at WK13, available at <http://www.nytimes.com/2009/03/15/opinion/15danner.html> (detailing the leaked reports from the International Committee of the Red Cross on the mistreatment of the "high value" detainees at Guantanamo).

54. See *Filartiga v. Pena-Irala*, 630 F.2d 876, 884–85 (2d Cir. 1980) ("The prohibition is clear and unambiguous . . ."); see also *Prosecutor v. Furundzija*, Case No. IT-95-17/1, Judgment, ¶ 111 (July 21, 2000), available at <http://www.unhcr.org/refworld/pdfid/402768fc4.pdf> ("[T]here is now general acceptance of the main elements contained in the definition set out in Article I of the Torture Convention, and . . . the definition given in Article 1 reflects customary international law.").

55. See *Filartiga*, 630 F.2d at 880–85 ("Having examined the sources from which

international law, but it also is a positive obligation on all the signatories of several widely accepted international treaties and conventions. Most notably, each of the four Geneva Conventions of 1949—the only international treaties to ever achieve universal acceptance—prohibits torture.<sup>56</sup> Common Article 3 of these Conventions (so named because each of the four conventions contains the identical article) prohibits "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture."<sup>57</sup> Likewise, Additional Protocol II of 1977, which supplements Common Article 3, reiterates the prohibition on torture and includes a list of other prohibited actions such as rape, pillage, slavery, the taking of hostages, and collective punishments.<sup>58</sup>

Although the Geneva Conventions and their Additional Protocols only apply in times of armed conflict, human rights conventions—both aspirational and binding—also clearly prohibit torture in all circumstances. The Universal Declaration of Human Rights, a nonbinding U.N. General Assembly Resolution passed in 1948, provides that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."<sup>59</sup> The International Covenant on Civil and Political Rights (ICCPR) used the same language in its binding prohibition of torture in 1966.<sup>60</sup> The identical language also is found in

customary international law is derived—the usage of nations, judicial opinions and the works of jurists—we conclude that official torture is now prohibited by the law of nations.").

56. See Press Release, Int'l Comm. of the Red Cross, A Milestone for International Humanitarian Law (Sept. 22, 2006), <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/geneva-conventions-statement-220906> (last visited Feb. 22, 2010) (noting that, with the 2006 decisions of Nauru and Montenegro to accede to the Geneva Conventions, all 194 of the world's countries have accepted the treaty) (on file with the Washington and Lee Law Review).

57. Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, ¶ 1(a), Aug. 12, 1949, 6 U.S.T. 3114, 3116, 75 U.N.T.S. 31, 32; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea art. 3, ¶ 1(a), Aug. 12, 1949, 6 U.S.T. 3217, 3222, 75 U.N.T.S. 85, 88; Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 3, ¶ 1(a), Aug. 12, 1949, 6 U.S.T. 3316, 3320, 75 U.N.T.S. 135, 138; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 3, ¶ 1(a), Aug. 12, 1949, 6 U.S.T. 3516, 3520, 75 U.N.T.S. 287, 290.

58. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 4, ¶ 2, June 8, 1977, 1125 U.N.T.S. 609, 612 [hereinafter *Additional Protocol II*] ("All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely . . .").

59. Universal Declaration of Human Rights art. 5, G.A. Res. 217A, at 73, U.N. GAOR, 3d Sess., 1st plen. mtg., UN Doc. A/810 (Dec. 10, 1948).

60. See International Covenant on Civil and Political Rights art. 7, G.A. Res. 2200A, at 53, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter *ICCPR*] ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or

Article 3 of the European Convention on Human Rights and nearly identical language, merely transposing the words "punishment" and "treatment," is found in the American Convention on Human Rights.<sup>61</sup> Although these and other conventions all clearly prohibit the practice, none of them attempt to define further either torture or inhuman or degrading treatment.

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

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.<sup>62</sup>

There is widespread acceptance of this definition, indicated by the fact that there are 146 state parties to the Convention.<sup>63</sup> However, this consensus on the wording of the Convention misleadingly implies agreement on the actual scope of the prohibition, which is not borne out in practice.

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

One factor that blurs the practical definition of torture is its pairing with "cruel, inhuman or degrading treatment or punishment" (CID).<sup>64</sup> Many of the

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punishment.").

61. See European Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, Europ. T.S. No. 005 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment."); American Convention on Human Rights art. 5, ¶ 2, Nov. 22, 1969, 1144 U.N.T.S. 123, 146 ("No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.").

62. CAT, *supra* note 9, art. 1, ¶ 1.

63. See United Nations Treaty Collection, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1–3, available at <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-9.en.pdf> (listing the Convention Against Torture's 146 parties and seventy-six signatories).

64. See Scheppele, *supra* note 13, at 289 ("Torture does not have a clear *legal* meaning, in part because there have been no general and systematic attempts to map the border between 'torture' and 'not torture.'"); see also Levinson, *supra* note 4, at 238–40 ("I think it is especially important to differentiate between 'degrading treatment' and 'torture,' lest one end up trivializing the concept of torture and diminishing the special horror attached to that term.").

Conventions that prohibit torture also prohibit CID.<sup>65</sup> However, a split has developed over whether these conventions recognize any legal distinction between the two forms of treatment. On the one hand, the ICCPR, the European Convention on Human Rights, and the American Convention on Human Rights all prohibit both torture and CID, and also state that no derogation may be made from either of these provisions in time of emergency.<sup>66</sup> For these conventions, both types of conduct are equally impermissible. In contrast, the CAT separates its prohibition against torture, found in Articles 2, 3, and 4, from its prohibition of "acts of cruel, inhuman or degrading treatment or punishment," found in Article 16.<sup>67</sup> It goes on to specify that torture and CID are not coextensive, stating that CID is defined as those acts "which do not amount to torture as defined in article 1."<sup>68</sup> Article 16 further differentiates CID from torture by selectively applying some articles of the convention to the prevention of CID, while leaving others applicable only to allegations of torture.<sup>69</sup> More importantly, Article 2(2) of the CAT provides that the

65. See CAT, *supra* note 9, art. 16, ¶ 1 ("Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1 . . ."); ICCPR, *supra* note 60, art. 7 ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."); European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 61, art. 3 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment."); American Convention on Human Rights, *supra* note 61, art. 5, ¶ 2 ("No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.").

66. See ICCPR, *supra* note 60, art. 4, ¶ 2 ("No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision."); European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 61, art. 15, ¶ 2 ("No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision."); American Convention on Human Rights, *supra* note 61, art. 27, ¶ 2 ("The foregoing provision does not authorize any suspension of the following articles: . . . Article 5 (Right to Humane Treatment) . . . or of the judicial guarantees essential for the protection of such rights.").

67. Compare CAT, *supra* note 9, art. 2, ¶ 1 ("Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."), *id.* art. 3, ¶ 1 ("No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."), and *id.* art. 4 ("Each State Party shall ensure that all acts of torture are offences under its criminal law."), with *id.* art. 16, ¶ 1 (requiring states to prevent "other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1" when the state is complicit in such acts).

68. CAT, *supra* note 9, art. 16, ¶ 1.

69. See *id.* art. 16, ¶ 1 ("In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture or references to other forms of cruel, inhuman or degrading treatment or punishment."); see also *id.* arts. 10–13 (addressing the prevention of both CID and torture, while all articles of the CAT apply to situations involving

prohibition on torture is nonderogable, even in time of war or state emergency, while similar status is not afforded the prohibition against CID.<sup>70</sup>

The CAT is the most recent of these Conventions, and it more specifically addresses questions of torture and CID than do the broader ICCPR and human rights conventions. These general principles of statutory interpretation would seem to favor deference to the distinction that CAT establishes between torture and CID. This distinction is further supported by the fact that a number of European Court of Human Rights cases dealing with claims of torture and CID, including the seminal case of *Ireland v. United Kingdom*,<sup>71</sup> have distinguished between torture and CID in their rulings.<sup>72</sup> However, since 9/11, specific efforts have been made, at least by the Council of Europe, to confirm the absolute and nonderogable prohibition of both torture and inhuman or degrading treatment.<sup>73</sup> There also have been medical studies that have indicated that the distinction between torture and CID is not particularly meaningful when the long term outcome of the victims is considered.<sup>74</sup>

Arguments can be made on either side of the debate as to whether the definition of torture has been made irrelevant by the expansion of the absolute

torture).

70. See *id.* art. 2, ¶ 2 ("No exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture."); see also Levinson, *supra* note 4, at 239–40 ("Why did the drafters not simply copy the provision of the earlier International Covenant on Civil and Political Rights, which established a non-derogable requirement that 'no one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment'?").

71. *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) (1978) (considering whether five techniques used by the UK government on suspected IRA terrorists constituted torture).

72. See *id.* at 66 ("[I]t was the intention that the Convention, with its distinction between 'torture' and 'inhuman or degrading treatment,' should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering."); see also *Aydin v. Turkey*, 1997-VI Eur. Ct. H.R. 1866, 1945–46 ("This distinction would appear to have been embodied in the Convention to allow the special stigma of 'torture' to attach only to deliberate inhuman treatment causing very serious and cruel suffering.").

73. See COMM. OF MINISTERS OF THE COUNCIL OF EUR., GUIDELINES ON HUMAN RIGHTS AND THE FIGHT AGAINST TERRORISM 7, 21 (2002), available at [http://www.coe.int/T/E/Human\\_rights/h-inf\(2002\)8eng.pdf](http://www.coe.int/T/E/Human_rights/h-inf(2002)8eng.pdf) (stating that the "use of torture or of inhuman or degrading treatment or punishment, is absolutely prohibited"); see *id.* at 12 ("States may never . . . derogate . . . from the prohibition against torture or inhuman or degrading treatment or punishment.").

74. See Metin Basoglu, Maria Livanou & Cvetana Crnobaric, *Torture vs. Other Cruel, Inhuman, and Degrading Treatment: Is the Distinction Real or Apparent?*, 64 ARCHIVES GEN. PSYCHIATRY 277, 284 (2007) [hereinafter *Mental Torture*] ("[A]ggressive interrogation techniques . . . and other psychological manipulations conducive to anxiety, fear, and helplessness in the detainee do not seem to be substantially different from physical torture in terms of . . . their long-term traumatic effects.").

prohibition to the much broader category of CID. I note this impasse mainly to prevent it from being used to undermine the purpose of this Article. While I am persuaded by Levinson's arguments that there is value in continuing to differentiate between torture and CID,<sup>75</sup> others will not be.<sup>76</sup> This Article will not try to persuade in either direction on that question. To the extent that torture is considered to be legally distinct from CID, this Article seeks only to define the boundaries of torture. To the extent that CID is viewed as the legal equivalent of torture in all respects, this Article's proposal will define the boundaries of the broader category of CID.

### C. Court Decisions

The European Court of Human Rights has been by far the most active judicial body in deciding cases related to claims of torture in the context of coercive interrogations. Given the vague definition, it is not surprising that the jurisprudence is somewhat unclear as to where exactly the lines are to be drawn.<sup>77</sup>

In the leading case of *Ireland v. United Kingdom*,<sup>78</sup> decided by the court in 1978, the Government of the Republic of Ireland complained, *inter alia*, that the techniques used by the authorities of the United Kingdom to interrogate suspected members of the IRA violated Article 3 of the European Convention of Human Rights.<sup>79</sup> These complaints involved approximately 228 cases of alleged abuse.<sup>80</sup> Of these, the European Commission on Human Rights examined sixteen "illustrative" cases in detail and considered medical reports

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75. See Levinson, *supra* note 4, at 238 ("I think it is especially important to differentiate between 'degrading treatment' and 'torture,' lest one end up trivializing the concept of torture and diminishing the special horror attached to that term.").

76. See, e.g., Scheppele, *supra* note 13, at 290 ("The U.S. torture statute, then, undermined an apparently solid consensus in international law condemning highly coercive interrogation, regardless of whether the interrogation methods amounted to full-blown torture or to 'merely' cruel, inhuman or degrading treatment.").

77. For an excellent summary of the evolution of ECHR jurisprudence in this area, see Rodley, *supra* note 13, at 467.

78. See *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) at 94 (1978) (finding that "the use of the five techniques in August and October 1971 constituted a practice of inhuman and degrading treatment, which practice was in breach of Article 3" and that the use "did not constitute a practice of torture within the meaning of Article 3").

79. See *id.* at 58 ("[T]he Commission accepted the allegations that: the treatment of persons in custody, in particular the methods of interrogation of such persons, constituted an administrative practice in breach of Article 3 . . .").

80. See *id.* at 40 ("The applicant Government submitted written evidence to the Commission in respect of 228 cases concerning incidents between 9 August 1971 and 1974.").

and written documents relating to an additional forty-one.<sup>81</sup> The five techniques at issue were wall standing, hooding, subjection to noise, sleep deprivation, and deprivation of food and drink.<sup>82</sup> The detainees were interrogated over a period of several days but seldom were held longer than one week.<sup>83</sup>

The Commission heard these cases in 1972 and concluded unanimously that "the combined use of the five techniques in the cases before it constituted a practice of inhuman treatment and of torture in breach of Article 3."<sup>84</sup> After the Commission's final report was filed with the Council of Europe in 1976, the Republic of Ireland made application to the European Court of Human Rights, as the superior body, asking that it "confirm the opinion of the Commission that breaches of the Convention have occurred."<sup>85</sup>

In response to this application, the court considered the distinction between torture and inhuman or degrading treatment. Because this opinion was decided before the ratification of the CAT, the court turned to a definition provided by UN General Assembly Resolution 3452, which described torture as "an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment."<sup>86</sup> The court concluded that "[a]lthough the five techniques, as applied in combination, undoubtedly amounted to inhuman and degrading treatment, . . . they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood."<sup>87</sup>

81. *See id.* ("The Commission examined in detail with medical reports and oral evidence 16 'illustrative' cases selected at its request by the applicant Government. The Commission considered a further 41 cases . . . on which it had received medical reports and invited written comments . . .").

82. *See id.* at 42 (discussing the five techniques used during the interrogations). The court described wall-standing as a "stress position" in which detainees are forced to stand spread-eagled against a wall with their feet back away from the wall, causing all of their weight to be borne by the fingers and toes. *Id.* Hooding is the practice of keeping detainees' heads and faces covered by an opaque hood whenever they are not being interrogated. *Id.* Subjection to noise involved keeping detainees in a room in which there was a continuous loud hissing noise. *Id.* Sleep deprivation is self-explanatory, although the court did not discuss a specific timeframe. *Id.* The court described deprivation of food and drink as keeping the detainees on a "reduced diet" during their stay at the interrogation centers (which lasted for several days but seldom exceeded one week). *Id.*

83. *See id.* at 41–48 (discussing the instances where the five techniques were used and finding that one man was interrogated for less than a day while others were "subjected to the five techniques during four or possibly five days").

84. *Id.* at 59.

85. *Id.* at 60.

86. *Id.* at 67 (citations omitted).

87. *Id.*

Since *Ireland*, the court has stated that the level of severity required for a showing of torture, as opposed to inhuman and degrading treatment, has decreased.<sup>88</sup> In cases such as *Selmouni v. France*,<sup>89</sup> the court has found that severe beatings that leave sequelae can rise to the level of torture, even though such injuries formerly were viewed as evidence of inhuman and degrading treatment.<sup>90</sup> It is not clear, however, whether this development changes the *Ireland* court's holding that the five techniques constituted inhuman and degrading treatment but not torture.

Another oft-cited case examining the use of coercive interrogations is *Public Committee Against Torture in Israel v. Israel*,<sup>91</sup> handed down by the Israeli Supreme Court in 1999. The Israeli Supreme Court considered allegations that coercive techniques used by Israeli security forces, which were similar to those examined in *Ireland*, violated international law.<sup>92</sup> The techniques under review in *Committee Against Torture* included hooding, shaking, stress positions, and sleep deprivation.<sup>93</sup> The Israeli Supreme Court concluded that these techniques were illegal, although it did not address whether they constituted torture rather than cruel, inhuman, and degrading treatment, which is also prohibited.<sup>94</sup> The court's general approach was to allow any physical restrictions on the prisoners that are inherently necessary in a custodial interrogation.<sup>95</sup> Therefore, some interruption in the prisoner's

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88. See Rodley, *supra* note 13, at 477–80 (discussing the decreasing relevance of aggravation of pain and severity to the definition of torture).

89. See *Selmouni v. France*, 1999-V Eur. Ct. H.R. 151, 189 (finding that the Government violated Article 3 and Article 6 § 1 of the Convention).

90. See Rodley, *supra* note 13, at 476–77 (discussing the *Selmouni* court's approach to defining torture under the Convention); *id.* at 477 ("Evidently the *Selmouni* court was accepting that sustained beatings leaving physical sequelae, which it would previously have categorized as inhuman and degrading treatment, was now to be considered as torture.").

91. HCJ 5100/94 Pub. Comm. Against Torture in Israel v. Israel [1999] IsrSC 54(4) 817, reprinted in 38 I.L.M. 1471.

92. See *id.* at 1476 ("These methods, argue the applicants, are in violation [of] International Law as they constitute 'Torture,' which is expressly prohibited under International Law. Thus, the GSS investigators are not authorized to conduct these interrogations.").

93. See *id.* at 1474–76 (describing the physical means employed by the GSS investigators). Like the *Ireland* opinion, the Israeli Supreme Court failed to discuss a specific duration with respect to sleep deprivation. *Id.* at 1476.

94. See *id.* at 1482–85 (stating the reasons why each of the techniques under review were prohibited methods of interrogation).

95. See *id.* at 1489 ("[W]e declare that the GSS does not have the authority to 'shake' a man, hold him in the 'Shabach' position, . . . force him into a 'frog crouch' position and deprive him of sleep in a manner other than that which is inherently required by the interrogation.").

normal sleep routine was expected and permissible, as long as he was not deprived of sleep for a prolonged period for the purpose of "breaking him."<sup>96</sup>

The Israeli Supreme Court went on to analyze the question of whether the contours of the "necessity" defense could be established *ex ante* to determine what sort of exigent circumstances might allow the use of otherwise prohibited coercive techniques.<sup>97</sup> The court declined to provide such guidance, stating that "[n]ecessity is certainly not a basis for establishing a broad detailed code of behavior such as how one should go about conducting intelligence interrogations in security matters, when one may or may not use force, how much force may be used and the like."<sup>98</sup> Although this opinion does little to clarify our understanding of the difference between torture and cruel, inhuman, or degrading treatment, by strictly limiting conduct to just that which is inherent in custodial questioning, it comes close to prohibiting any form of coercive interrogation. Of course, this prohibition remains subject to the necessity defense, which allows for coercive techniques under certain ill-defined circumstances that constitute sufficient exigency. It is under these circumstances where the line between torture, which is subject to a nonderogable prohibition, and cruel, inhuman, and degrading treatment, which is not, becomes important.

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

#### *D. Expansive Definitions of Torture*

Some commentators have argued for an expansive reading of the definition of torture established by the CAT.<sup>99</sup> This argument often begins by

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96. *See id.* at 1484 ("If the suspect is intentionally deprived of sleep for a prolonged period of time, for the purpose of tiring him out or 'breaking' him—it shall not fall within the scope of a fair and reasonable investigation.").

97. *See id.* at 1486 ("The question before us is whether it is possible to infer the authority to, in advance, establish permanent directives setting out the physical interrogation means that may be used under conditions of 'necessity.'").

98. *Id.*

99. *See, e.g.,* John T. Parry, *Escalation and Necessity: Defining Torture at Home and*

examining the perverse dynamic of interrogational torture, in which the victim is asked to provide information to end the torture<sup>100</sup> and his continued failure to do so places the responsibility for continued torture on the victim's "consent" to continue. Because the interrogator is the only one who can decide whether the withdrawal of consent (the information provided) is sufficient, the dynamic of torture is defined as the utter and complete domination of one individual by another.<sup>101</sup> "The suspect's endurance is based partly on his self-confidence and self-respect; the aim of the interrogator is to destroy these components of his character, as well as his consciousness of himself, his 'I.'"<sup>102</sup> This destruction of the suspect's identity and worldview has less to do with the severity of the pain inflicted than it does with the torturer's ability to escalate the pain or coercion being used.<sup>103</sup> This leads one commentator, Professor John Parry, to conclude that torture need not involve severe pain. He finds that a practice is torture even though it "lasts relatively briefly and causes less than severe pain, if it does so against a background of total control and potential escalation that asserts the state's dominance over the victim."<sup>104</sup> Although Parry concedes that his proposed definition broadens the one found in the Convention, it could be argued that his definition can be linguistically reconciled with the CAT by characterizing the conduct as the intentional infliction of severe suffering, which the CAT prohibits.

While this proposed definition, whether viewed as an interpretation of the CAT or a proposed expansion of its coverage, is intellectually appealing, it is practically problematic. By focusing on escalation and the assertion of dominance or control over the victim, the definition could be used to describe

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*Abroad*, in TORTURE: A COLLECTION, *supra* note 15, at 154 ("This definition broadens the Convention's carefully negotiated definition of torture and deliberately blurs the uneasy distinction between torture and cruel, inhuman, or degrading treatment or punishment."); Mordechai Kremnitzer, *The Landau Commission Report: Was the Security Service Subordinated to the Law, or the Law to the "Needs" of the Security Service?*, 23 ISR. L. REV. 216, 252 (1989) ("It turns out, then, that what the Commission describes as 'moderate physical pressure' which does not reach the point of torture or degrading treatment is none other than degrading treatment or torture.").

100. See Shue, *supra* note 27, at 53 (discussing the difference between interrogational torture, that some may contend is justifiable under certain circumstances, and terroristic torture employed purely as punishment).

101. See Parry, *supra* note 15, at 247 (describing the logic of torture as being about "complete domination").

102. Kremnitzer, *supra* note 99, at 250.

103. See Parry, *supra* note 99, at 153 ("Indeed, the victim's knowledge of the torturer's ability to escalate the pain at will is an important component of torture's dominating, world-destroying capacity.").

104. *Id.* at 153-54.

practically any custodial interrogation as torture. The detention of any individual against his or her will is an exercise of "the state's dominance over the victim."<sup>105</sup> And, as discussed in Part III.B, interrogations usually involve some form of "escalation" or negotiation over the provision or withdrawal of privileges, creature comforts or "luxuries" such as a favorite food. When the past use of allegations of torture by terrorist groups is considered,<sup>106</sup> there is a reason to pause before creating an overinclusive definition of torture that undermines the seriousness of the charge being leveled.<sup>107</sup>

### E. Restrictive Definitions of Torture

While overly expansive definitions of torture may risk undermining the seriousness of torture allegations, overly restrictive definitions result in unacceptable harm being visited upon detainees. The acceptance of very narrowly drawn definitions of torture permits a wide range of conduct that most observers would facially consider to be torture. The most infamous "restrictive" definition of torture almost certainly is the "Bybee Memo" written by John Yoo and Assistant Attorney General Jay Bybee to White House Counsel Alberto Gonzales on August 1, 2002. Its second paragraph contains the oft-quoted sentence stating that "[p]hysical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death."<sup>108</sup> Because there was widespread disagreement with this definition of "severe pain," it does little to further our understanding of how torture should be defined. But the story of how this definition was arrived at speaks volumes.

The definition was drafted by John Yoo in answer to the Bush Administration's questions about the limits on coercive interrogation, questions prompted by the capture of Abu Zubaydah, al-Qaeda's chief of operations, in March 2002.<sup>109</sup> Until Zubaydah's capture, questions about the boundaries of

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105. *Id.* at 153.

106. See *infra* Part V.B.1 for a discussion of RAF complaints of "isolation torture."

107. See Levinson, *supra* note 4, at 238 ("I think it is especially important to differentiate between 'degrading treatment' and 'torture,' lest one end up trivializing the concept of torture and diminishing the special horror attached to that term.").

108. Bybee Memo, *supra* note 15, at 1.

109. See John R. Richardson, *Is John Yoo a Monster?*, *ESQUIRE*, June 2008, at 126, 131 [hereinafter *Yoo*], available at <http://www.esquire.com/features/john-yoo-0608> ("But they did believe that this was a strange new kind of war, where the front lines were inside the heads of men like Padilla and Abu Zubaydah. So, what about things like isolation, prolonged interrogation, forced exercise, and limited sleep? Where was the line, exactly?").

acceptable interrogation practices were thought of as an academic exercise.<sup>110</sup> But when it became apparent that Zubaydah was successfully resisting the standard interrogation techniques being employed, Yoo was tasked with describing where exactly the line should be drawn.<sup>111</sup> He was asked to draw this line when his answer was urgently needed to extract information from a man that undoubtedly possessed a vast knowledge of al-Qaeda operations, which targeted U.S. troops in Afghanistan and civilians throughout the world.<sup>112</sup>

Yoo considered the language of 18 U.S.C. § 2340<sup>113</sup> and § 2340A,<sup>114</sup> the statutes passed by Congress in response to the United States' ratification of the Convention Against Torture. The statutes prohibited the infliction of "severe physical or mental pain,"<sup>115</sup> but what did that mean in practice? The Justice Department had never prosecuted anyone for violating this statute, so there were no U.S. court opinions to guide the definition.<sup>116</sup> The European Court of Human Rights opinion in *Ireland* held that a combination of several techniques such as hooding, stress positions, noise, and sleep deprivation amounted to cruel, inhuman and degrading treatment, but not torture.<sup>117</sup> So Yoo turned to language found in other U.S. statutes that defined severe pain in the context of emergency health care.<sup>118</sup> It was from these statutes that the terms "severe organ failure or death" were extracted.<sup>119</sup> The memo did go on to describe other practices that clearly constituted torture, including the use of electric

110. *See id.* ("But this was all just an academic exercise until late March 2002, when the CIA captured Al-Qaeda's chief of operations, a man named Abu Zubaydah.")

111. *See id.* ("On top of that, Zubaydah was an expert in interrogation and how to resist interrogation.")

112. *See id.* ("They approached Yoo and said they had solid reasons to believe that Zubaydah knew the names of hundreds of terrorists and the details of attack plans that could include nuclear weapons.")

113. *See* 18 U.S.C. § 2340 (2006) (defining "torture" and "severe mental pain or suffering").

114. *See id.* § 2340A (establishing "torture" as a criminal offense).

115. *Id.* § 2340(1).

116. *Yoo, supra* note 109, at 150.

117. *See Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) at 80 (1978) ("Although the five techniques, 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.")

118. Bybee Memo, *supra* note 15, at 5 ("Significantly, the phrase 'severe pain' appears in statutes defining an emergency medical condition for the purpose of providing health benefits."). In particular, Yoo cites to 8 U.S.C. § 1369 and 42 U.S.C. §§ 1395–1396. *Id.* at 5–6.

119. *Id.*

shocks, rape, extracting teeth, mock executions, beatings with metal pipes, etc.,<sup>120</sup> but the damage done to effective self-enforcement by the one sentence in the summary, equating torture with the pain associated with organ failure or death, is incalculable.

Although portions of this memo were later rescinded,<sup>121</sup> the fact that it was adopted at all illustrates why meaningful self-enforcement of the international prohibition against torture is unlikely to be successful. Contrary to some claims,<sup>122</sup> Yoo probably is not a "monster," and his response to this situation certainly is not unique. As Part V will illustrate, when someone is tasked with legally defining the boundaries of torture in a time critical situation, where the lives of many civilians may depend upon the answer provided, whether the author is German, British, Israeli, or American, the Bybee Memo, or something that looks very much like it, is likely to be the result.<sup>123</sup> While this may be intensely disappointing, it should not be surprising.

#### *F. The Price of Indeterminacy*

The widely varying interpretations of the Convention's actual scope make it clear that any practical consensus on the current definition of torture is illusory. As a result, the broad agreement on the words used to define torture actually may do more harm than good. While international law can claim to have successfully implemented a convention that has received overwhelming support, such a claim of success is hollow. Because transnational legal enforcement mechanisms in this area are relatively weak, self-enforcement is critical to upholding the international prohibition against torture.<sup>124</sup> Yet the subjectivity of the definition that lies at the heart of the Convention makes meaningful self-enforcement extremely unlikely. This is because the prohibition against inflicting severe pain or suffering does little to establish

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120. See *id.* at 24 ("[I]t is likely a court would find that allegations of such treatment would constitute torture: (1) severe beatings . . . ; (2) threats of imminent death . . . ; (3) threats of removing extremities; . . . (5) electric shocks . . . ; (6) rape or sexual assault . . .").

121. See Memorandum from Daniel Levin, Acting Assistant Att'y Gen., Office of Legal Counsel, to James B. Comey, Deputy Att'y Gen., Regarding Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A (Dec. 30, 2004), available at <http://www.justice.gov/olc/18usc23402340a2.htm>.

122. See *Yoo*, *supra* note 109, at 126 ("[John Yoo has] been accused of war crimes and compared to the Nazi lawyers who justified Hitler.").

123. For a discussion of analogous responses in similar circumstances, see *infra* Part V.

124. See Hathaway, *supra* note 25, at 520 ("Where international bodies are less active in enforcement of treaty commitments—as in the areas of human rights and the environment—it falls to domestic institutions to fill the gap.").

behavioral boundaries. It leaves the practical meaning of the term to the eye of the beholder. When the time comes for a national government to determine whether it is resorting to torture under international law, the circumstances that have brought it to that point almost certainly will make a good faith interpretation impossible.

#### V. *Detention, Interrogation, and Terror*

##### A. *Common Reactions to Terror Threats*

This part of the Article examines the reaction of several states to terrorist threats. When states are placed under pressure by terrorist groups, they invariably respond by enacting legislation designed to counter the threat. This legislation typically includes prosecution-friendly changes in judicial process and procedure, and harsher detention and interrogation policies. Like the United States' reaction to the 2001 attacks discussed above, the responses of Germany, the United Kingdom, and Israel to terrorist threats all included measures that were criticized by human rights organizations as either torture or inhuman and degrading treatment that allegedly violated the human rights conventions to which each state was a signatory. The purpose of examining the responses of these states to terror threats is not to determine whether the allegations of torture were well founded, nor is it to attempt to outline some form of state practice justifying such behavior.<sup>125</sup> Rather, it is to illustrate further the fatal flaw in the current definition of torture when it is implemented within the present system of international law.

Because compliance with the prohibition on the use of torture in the present system largely relies on self-enforcement,<sup>126</sup> the subjectivity and malleability of the current standard undermines the effectiveness of the prohibition, even in states that are serious about abiding by their treaty obligations. By effectively leaving the interpretation of "severe pain and suffering" to the eye of the beholder, the current system *hopes* that states will

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

126. See Hathaway, *supra* note 25, at 520 (noting areas, such as human rights, where international bodies do not enforce treaty commitments as vigorously).

interpret this definition in good faith. The fact that the question of how torture is defined usually arises under circumstances that make a good faith interpretation almost impossible for a government charged with protecting its citizens, means that the current system's "hope" has proven time and again to be a forlorn one.

## B. Specific Examples

### 1. Germany

During the 1970s, the Red Army Faction (RAF), also known as the Baader-Meinhof gang, conducted numerous terrorist attacks against West German targets.<sup>127</sup> During a series of sporadic bombings and bank robberies between 1970 and 1974, the RAF killed at least eight police officers, judges, industrialists, and U.S. Army personnel and wounded dozens of others.<sup>128</sup> After most of the founding members were arrested, the group staged a dramatic takeover of the West German embassy in Sweden in 1975.<sup>129</sup> When their demands for their colleagues' release were not met, the RAF executed two diplomats before the accidental detonation of an RAF bomb, designed to destroy the building, ended the siege.<sup>130</sup> The German government's refusal to negotiate with the RAF in Stockholm and the RAF's public execution of German diplomats during the siege hardened both sides' approach to the continuing struggle.<sup>131</sup>

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127. See Wolfgang S. Heinz, *Germany: State Responses to Terrorist Challenges and Human Rights*, in NATIONAL INSECURITY AND HUMAN RIGHTS: DEMOCRACIES DEBATE COUNTERTERRORISM 157, 162 (Alison Brysk & Gershon Shafir eds., 2007) (noting that the most eventful years for the RAF were between 1970 and 1977, in which twenty-eight people died from assassinations or shootings).

128. See Richard Huffman, *The Baader-Meinhof Gang at the Dawn of Terror*, <http://www.baader-meinhof.com/timeline/timeline.html> (last visited Feb. 22, 2010) (describing the activities and assassinations of the Baader-Meinhof Gang in the early 1970s) (on file with the Washington and Lee Law Review).

129. See *id.* at <http://www.baader-meinhof.com/timeline/1975.html> ("24 April, Stockholm: Six Red Army Faction terrorists, most of whom were former members of the Heidelberg Socialist Patients Collective (SPK), take over the West German Embassy in Stockholm, taking 11 hostages.").

130. See *id.* (describing how the terrorists killed Lieutenant Colonel Baron Andreas von Mirchbach and Dr. Heinz Hillegart before a wiring short caused the TNT to explode prematurely).

131. See *id.* (describing the escalating tensions between the German government and the RAF).

As the two-year trial of the RAF leadership came to a close in 1977, the "second-generation" RAF stepped up their attacks, killing a federal prosecutor, his driver, and his bodyguard in April.<sup>132</sup> After the trial concluded with the conviction and sentencing of the original RAF members, the group responded with a series of attacks that became known as the "German Autumn."<sup>133</sup> At the end of July, Jürgen Ponto, the chairman of the Dresdener Bank, was shot and killed in his home by three RAF members.<sup>134</sup> After a failed rocket attack on the Federal Prosecutor's Office in Karlsruhe in August, the RAF kidnapped Hanns-Martin Schleyer, the President of the Confederation of German Employers' Associations and the Federation of German Industries on September 5.<sup>135</sup> In this attack, they killed the three police officers assigned to protect Schleyer as well as his driver.<sup>136</sup>

When the RAF demanded that its imprisoned leaders be flown to foreign nations of its choosing, the German government stalled and prolonged the negotiated details of the flights for over a month.<sup>137</sup> In mid-October, a Lufthansa jet of German tourists was hijacked by Palestinian terrorists affiliated with the RAF.<sup>138</sup> The hijackers demanded the release of the RAF leadership, and over the next five days ordered the jet flown from Rome to Cyprus, Bahrain, Dubai, Yemen, and ultimately Somalia.<sup>139</sup> The terrorists executed the plane's captain in Yemen<sup>140</sup> before ordering the co-pilot to fly on to Mogadishu where they threatened to blow up the plane if the RAF prisoners were not

132. See *id.* at <http://www.baader-meinhof.com/timeline/1977.html> ("7 April, Karlsruhe: Federal Prosecutor General Siegfried Buback is murdered, along with two others, near his home in Karlsruhe.").

133. See *id.* ("5 September, Cologne: Hanns-Martin Schleyer . . . is kidnapped from his car, despite the protection of three police officers. . . . This is the first day of what would later be called 'the German Autumn.'").

134. See *id.* ("30 July, Oberursel: . . . Albrecht, Brigitte Mohnhaupt, and an unidentified man, shoot Ponto five times, killing him.").

135. *Id.*

136. *Id.*

137. See Huffman, *supra* note 128, at <http://www.baader-meinhof.com/timeline/1977.html> ("13–21 September, Wiesbaden: The BKA, through Denis Payot, spends as much time as possible stalling the kidnappers, dragging out the details of the escape flight for the prisoners. The kidnappers grow impatient.").

138. See *Terror and Triumph at Mogadishu*, TIME, Oct. 31, 1977, at 42 [hereinafter *Terror and Triumph*] (reporting on the hijacking of Lufthansa Flight 181).

139. See *id.* at 42–43 (describing the flight path and movements of the Palestinian hijackers).

140. See *id.* at 43 ("When [the pilot] climbed back aboard, Mahmud confronted him in a towering rage. 'Are you guilty or not guilty?' he yelled, forcing the pilot at gunpoint to kneel at the head of the cabin aisle. Then Mahmud placed a pistol in Schumann's face and killed him with one bullet.").

freed.<sup>141</sup> Meanwhile, German GSG-9 commandos, an anti-terrorist unit created after the massacre of the Israeli athletes at the 1972 Olympics in Munich,<sup>142</sup> that had been shadowing the plane's movements around the Persian Gulf landed at the Mogadishu airport.<sup>143</sup> Shortly before the hijackers' latest deadline expired, the commandos successfully stormed the plane, killing three hijackers and wounding the fourth.<sup>144</sup> One commando, one crew member, and four passengers sustained minor injuries.<sup>145</sup>

That night in Germany, the imprisoned RAF leadership allegedly learned of the demise of the hijackers from a radio that had been smuggled in to them by their lawyers.<sup>146</sup> Four of the RAF leaders attempted suicide that night.<sup>147</sup> Three of them died within a day while the fourth's stab wounds to her chest narrowly missed her heart.<sup>148</sup> When word of the suicides broke the next day, the RAF members holding Schleyer killed him and left his body in the trunk of a car to be found a few days later.<sup>149</sup> The suicides and Schleyer's killing ended the "German Autumn" and effectively ended the RAF, despite the fact that some of the "second generation" members conducted sporadic acts of terror over the next several years.<sup>150</sup>

141. See *id.* ("Next morning, with Co-Pilot Jürgen Victor, 35, at the controls, Charlie Echo flew on to Mogadishu, capital of Somalia.").

142. See *New Breed of Commando*, TIME, Oct. 31, 1977, at 44 ("*Grenzschutzgruppe Neun*, or Border Protection Group 9, was created five years ago, after a bungled West German rescue attempt led to the Munich massacre of nine Israeli hostages and five of their Palestinian captors.").

143. See *Terror and Triumph*, *supra* note 138, at 43 (describing how a German 707 with a contingent of GSG-9 commandos took off from Crete and landed in Mogadishu).

144. See *id.* at 44 (describing how twenty-eight German commandos successfully stormed the aircraft, killing Mahmud and two others and wounding the fourth).

145. See *id.* ("One commando, one stewardess and four passengers were slightly injured. Except for the murdered Captain Schumann, all the hostages survived.").

146. See Richard Huffman, *supra* note 128, at <http://www.baader-meinhof.com/timeline/1977.html> (last visited Feb. 22, 2010) ("Back in Stammheim, Raspe has been following the drama on his small, smuggled transistor radio. After hearing of the success of the raid, he spends the next few hours talking to Baader, Ensslin, and Möller on their secret 'phone' system. They agree to a suicide pact.") (on file with the Washington and Lee Law Review).

147. See *id.* (describing the attempts of Baader, Raspe, Ensslin, and Möller attempt to committed suicide on the night of October 17).

148. See *id.* (noting that Baader, Raspe, and Ensslin successfully commit suicide, while Möller came within millimeters of stabbing her heart).

149. See *id.* ("19 October, Paris: . . . After police find Schleyer's body in the trunk of the Audi, they determine that he had been shot three times in the head, probably while kneeling in a forest (his mouth had pine needles in it).").

150. See Heinz, *supra* note 127, at 162 (noting that, while the RAF assassinated twenty-eight people in the 1970s, only thirteen assassinations occurred between 1979 and 1993).

The German government took several legislative measures in response to the RAF threat. Because there were strong indications that lawyers for the Baader-Meinhof defendants were collaborating with the defendants and actively aiding the terrorist struggle, laws were passed that provided for the exclusion of defense counsel.<sup>151</sup> These laws allowed the authorities to prohibit the hiring of private defense counsel and to appoint defense counsel for the specified defendants.<sup>152</sup> Although a striking procedural step, this restriction did not result in claims of torture or mistreatment.

What did result in such claims was the *Kontaktsperre* or "isolation law."<sup>153</sup> This law was introduced by the government after Schleyer was kidnapped.<sup>154</sup> It was approved and implemented in just a few days, a record time for legislation in Germany.<sup>155</sup> It took effect on September 30, 1977, and allowed for the government to order the complete isolation of prisoners for up to thirty days if the government had a "reasonable suspicion" that a terrorist group was endangering the "physical integrity, life, or liberty of a person."<sup>156</sup> Lawyers for the RAF challenged this "isolation torture," as did Amnesty International a couple of years later.<sup>157</sup> Neither of these challenges dissuaded the German

151. See ANTONIO VERCHER, *TERRORISM IN EUROPE* 245 (1992) ("This measure has its origin in the innumerable problems caused by the defense counsel of the Baader-Meinhof group, because of the links and apparent collaboration between the detainees and their lawyers.").

152. See *id.* ("In those cases, to avoid rendering the suspected terrorist completely defenseless, the law provides him with the right of attendance of a lawyer, although the lawyer will be appointed ex officio by the authorities.").

153. See Heinz, *supra* note 127, at 165 ("When it became likely that lawyers would challenge the measure before the Federal Constitutional Court, the government introduced a law permitting the total isolation of prisoners (*Kontaktsperre*), which was approved in a record time of just a few days.").

154. Compare Richard Huffman, *The Baader-Meinhof Gang at the Dawn of Terror*, <http://www.baader-meinhof.com/timeline/1977.html> (last visited Feb. 22, 2010) (noting that Schleyer was kidnapped on September 5, 1977) (on file with the Washington and Lee Law Review), with Heinz, *supra* note 127, at 165 (indicating that the "isolation law" was passed during the Lufthansa hijacking on October 13, 1977).

155. Heinz, *supra* note 127, at 165.

156. See VERCHER, *supra* note 151, at 246 ("Regarding incommunication of the suspected terrorists, the Law of 30 September 1977 Amending the Introductory Act to the Law of the Constitution of Courts (Incommunicado Law) introduced some provisions regulating the barring of prisoners from contact with the outside world." (footnote omitted)); see also Ensslin v. Fed. Republic of Germany, 14 Eur. Comm'n H.R. Dec. & Rep. 64, 95 (1978) ("On 2 October 1977, under a legislative amendment which had entered into force on the same day (*Kontaktsperre*gesetz), the Federal Minister of Justice ordered the suspension of all contacts of the applicants with each other and with the outside world, including oral and written contacts with their defence counsel . . .").

157. See Heinz, *supra* note 127, at 165–66 ("One of the most difficult and emotional issues were allegations made by RAF prisoners and their defense lawyer that they were actually

government from continuing the practice of isolating RAF prisoners, even though the prisoners' health seriously deteriorated.<sup>158</sup>

Following the suicides of the three RAF prisoners,<sup>159</sup> their families petitioned the European Commission of Human Rights for a ruling that, *inter alia*, the social isolation authorized by the *Kontaktsperre* violated Article 3 of the European Convention on Human Rights.<sup>160</sup> While the Human Rights Commission ultimately rejected these claims, it recognized that isolation may constitute inhuman treatment violative of Article 3.<sup>161</sup> "Complete sensory isolation coupled with complete social isolation can no doubt ultimately destroy the personality; thus it constitutes a form of inhuman treatment which cannot be justified by the requirements of security, the prohibition on torture and inhuman treatment contained in Article 3 . . . being absolute in character."<sup>162</sup>

Compared with the struggles against other terror organizations described below, Germany's fight against the RAF appears almost trivial. In terms of both the lives lost and the human rights abuses allegedly perpetrated by the government in response, these events do not measure up to the struggles against the IRA, PLO/Hamas, or al-Qaeda. There were no claims of physical violence against the RAF prisoners, and the conditions of their confinement generally included access to recreation, television, radio, and books.<sup>163</sup> Yet even in these circumstances, with less than thirty people killed over six years,<sup>164</sup> the government took unprecedented legislative action to curtail the rights of prisoners. And for their part, even when the conditions of their confinement

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tortured by such isolation. . . . Amnesty International criticized certain aspects of imprisonment without accepting any allegation of 'torture' . . .").

158. *See id.* at 166 ("[T]he Stammheim court asked independent experts to interview prisoners. In their reports—confidential, only for the courts—they state that the prisoners' health had seriously deteriorated.").

159. *See Ensslin*, 14 Eur. Comm'n H.R. Dec. & Rep. at 101–02 (describing how, on October 18, 1977, Baader and Raspe committed suicide by pistol and Ensslin hung herself in her cell).

160. *See id.* at 102–03 ("The applicants argued that they were subject to exceptional conditions of detention . . . . These conditions of detention, and in particular prolonged isolation, had been tantamount to torture or, at the very least, to inhuman treatment within the meaning of Article 3 of the Convention.").

161. *See id.* at 109 (holding that the dangerousness of the prisoners and the likelihood of release attempts were compelling reasons for isolation of RAF prisoners, while acknowledging that isolation could, in certain scenarios, constitute inhuman treatment).

162. *Id.* at 109–10 (citation omitted).

163. *See id.* at 92–98 (detailing the conditions of the RAF prisoners' detentions).

164. *See Heinz, supra* note 127, at 162 ("During the most eventful years, 1970–77, twenty-eight people died from assassinations and shootings . . .").

were relatively benign, restrictions on television or social interaction with other RAF members were challenged as torture or inhuman treatment.<sup>165</sup>

## 2. United Kingdom

The historical struggle between Britain and Ireland goes back hundreds of years and was marked by numerous incidents, rebellions, and spikes in violence.<sup>166</sup> After a period of relative calm following the end of World War II, what became known as "The Troubles" started in the late 1960s and early 1970s.<sup>167</sup> Violence rapidly escalated in 1971.<sup>168</sup> In 1971 and 1972, 644 people were killed by sectarian violence in Northern Ireland.<sup>169</sup> In July 1972 alone, there were ninety-five killings, nearly 200 explosions, and 2,800 shooting incidents.<sup>170</sup> All this occurred in a geographical area smaller than Connecticut.

The British response to the violence was swift, and changes were made in both criminal procedure and interrogation methodology. In the realm of criminal procedure "Diplock courts" were created to deal with the special challenges of prosecuting suspected terrorists.<sup>171</sup> These courts took their name from the commission report that recommended the changes.<sup>172</sup> The report first recommended that crimes commonly linked to terrorist organizations, which it

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165. For a discussion of the allegations by RAF prisoners of torture and inhuman treatment, see *supra* note 157 and accompanying text.

166. See, e.g., Christopher K. Connolly, *Living on the Past: The Role of Truth Commissions in Post-Conflict Societies and the Case Study of Northern Ireland*, 39 CORNELL INT'L L.J. 401, 411 (2006) ("Northern Ireland's history is particularly long, complex, and violent.").

167. See, e.g., *id.* at 415 (indicating that "The Troubles" erupted after 1969).

168. See Police Service of Northern Ireland, *Deaths Due to the Security Situation in Northern Ireland, 1969–August 31, 2009*, [http://www.psni.police.uk/deaths\\_cy.pdf](http://www.psni.police.uk/deaths_cy.pdf) (last visited Feb. 22, 2010) (indicating a seven-fold increase in killings between 1970 and 1971 in Northern Ireland) (on file with the Washington and Lee Law Review).

169. See *id.* (indicating that 174 were killed in 1971 and an additional 470 were killed in 1972).

170. See *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) at 42 (1978) ("In July 1972 alone, 21 members of the security forces and 74 civilians were killed; in addition, there were nearly 200 explosions and 2,800 shooting incidents.").

171. See VERCHER, *supra* note 151, at 120–21 (explaining that the Diplock courts were created and specifically tailored to deal with the prosecution of terrorist activities in Northern Ireland).

172. See *id.* at 120 ("In 1972 the British government set up a Commission under the chairmanship of Lord Diplock to consider legal procedures to deal with terrorist activities in Northern Ireland.").

termed "scheduled offences," should be tried before courts employing modified criminal procedures.<sup>173</sup>

These modified procedures included the elimination of juries<sup>174</sup> and the possible admission of confessions obtained through coercion.<sup>175</sup> The rationale for eliminating juries was two-fold. There were concerns about both juror intimidation and jury nullification.<sup>176</sup> The primary reason for suspending the rules excluding confessions obtained through coercion simply was the practical problem of obtaining convictions without them.<sup>177</sup> The Diplock Report recommended that "[a]ny inculpatory admission made by the accused may be given in evidence unless it is proved on a balance of probabilities that it was obtained by subjecting the accused to torture or to inhuman or degrading treatment,"<sup>178</sup> thereby placing the burden of proof on the defendant to show that he had been subjected to torture or inhuman treatment. Although Parliament did not fully adopt this recommendation, it implemented an intermediate standard that allowed confessions to be introduced into evidence if the prosecution could satisfactorily rebut the defendant's prima facie evidence that the confession was obtained through "torture or . . . inhuman or degrading treatment."<sup>179</sup> These changes remained in place until the Northern Ireland (Emergency Provisions) Act of 1987<sup>180</sup> expanded the provision's scope to protect against the introduction of admissions induced by "violence or threat of violence (whether or not amounting to torture) . . . ."<sup>181</sup>

173. See SECRETARY OF STATE FOR NORTHERN IRELAND, COMMISSION ON LEGAL PROCEDURES TO DEAL WITH TERRORIST ACTIVITIES IN NORTHERN IRELAND, 1972, Cm. 5185, at 3 [hereinafter DIPLOCK REPORT] ("Recommended changes in the administration of justice, unless otherwise stated, apply only to cases involving terrorist crimes, defined as scheduled offences . . .").

174. See *id.* at 18 ("We recommend that for the Scheduled Offences in Parts I and II trial by judge alone should take the place of trial by jury for the duration of the emergency.").

175. See *id.* at 32 ("[T]he current technical rules, practice and judicial discretions as to the admissibility of confession ought to be suspended for the duration of the emergency in respect of Scheduled Offences . . .").

176. See VERCHER, *supra* note 151, at 125–33 (discussing the decision of the Diplock report to eliminate juries in order to avoid both juror intimidation and juror nullification).

177. See *id.* at 141–42 ("Approximately 75–80 per cent of all prosecutions which are brought for scheduled offences rely for evidence on confessions.").

178. DIPLOCK REPORT, *supra* note 173, at 32.

179. Northern Ireland (Emergency Provisions) Act, 1973, c. 53, § 6 (N. Ir.); see also VERCHER, *supra* note 151, at 144 ("Parliament did not accept the Diplock recommendation in its original form, and instead adopted an intermediate formula between the Report's proposal and the ordinary common-law approach.").

180. Northern Ireland (Emergency Provisions) Act, 1987, c. 30, § 5 (N. Ir.).

181. *Id.*; see VERCHER, *supra* note 151, at 142–43 (noting that Section 8 of the NIEPA 1978 was replaced by Section 5 of the NIEPA 1987 which, among other things, requires a

In reaction to the sparse and outdated intelligence information that they possessed on the IRA in early 1971, senior British intelligence officials met with members of the Royal Ulster Constabulary's (RUC) special branch in April of that year.<sup>182</sup> During that meeting it was determined that this intelligence gap could be closed through a massive series of arrests and the use of the five interrogation techniques (wall-standing, hooding, etc.) discussed in Part II.C.<sup>183</sup> Shortly after the July spike in violence, this program of arrests and interrogations was implemented, resulting almost immediately in a stream of complaints of mistreatment.<sup>184</sup> In response to the complaints, a Committee of Enquiry headed by Sir Edmund Compton was established to look into the complaints.<sup>185</sup> The Compton Report concluded that ill-treatment had taken place during the interrogations, but ascribed this to the inadequate application of the techniques, rather than to any impropriety in the use of such techniques.<sup>186</sup> This initial failure of self-enforcement was sharply criticized,<sup>187</sup> and several months later, after the violence had somewhat subsided, the government announced that the use of these techniques would be discontinued.<sup>188</sup>

### 3. Israel

This same pattern of violence triggering a harsh governmental reaction, followed by an internal investigation supporting the harsh reaction, and concluding with an eventual retreat from the use of harsh techniques also was

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showing by the accused of the prima facie elements of torture in order to exclude testimony).

182. VERCHER, *supra* note 151, at 65–66.

183. *See id.* at 66 (describing "the Five Techniques" as an interrogation method consisting of hooding, isolation from communication, sleep deprivation, food deprivation, and wall-standing). For a further discussion of these interrogation techniques, see *supra* Part II.C.

184. *Id.* at 66–67.

185. *See generally* HOME DEPARTMENT, REPORT OF THE ENQUIRY INTO ALLEGATIONS AGAINST THE SECURITY FORCES OF PHYSICAL BRUTALITY IN NORTHERN IRELAND ARISING OUT OF THE EVENTS OF 9TH AUGUST, 1971, Cmnd. 4823.

186. *See id.* at vi (concluding that the authorized interrogation methods were neither cruel nor brutal and any problems with interrogations stemmed from the difficulty of implementing the existing rules "in circumstances in which rigorous and intensive interrogation is vitally and urgently necessary"); *see also* VERCHER, *supra* note 151, at 67 ("The Compton Report . . . stated that adverse findings were solely due to the inadequate application of the techniques.").

187. *See, e.g.,* Ian Brownlie, *Interrogation in Depth: The Compton and Parker Reports*, 35 MOD. L. REV. 501, 502 (1972) (noting that the reports significantly downplayed the nature and effect of the treatment suffered by the detainees at issue).

188. VERCHER, *supra* note 151, at 67.

seen in Israel. Israel's decades-long struggle with terrorism is a matter of common knowledge. From spectacular attacks, such as the killing of eleven Israeli athletes at the 1972 Olympic Games in Munich, to the thousands that have been killed in the ebb and flow of violence since the end of the Six-Day War in 1967, the Israeli government has been under near constant pressure to protect its citizens against such violence. In the 1980s, Israel was involved in a domestically unpopular occupation of Lebanon, and questions about the conduct of its security services came to the forefront in 1987.

The issue of Israeli General Security Services' (GSS) use of coercive interrogations against suspected terrorists was called into question in 1987 after two incidents raised serious concerns about the treatment of Palestinian prisoners. The first event, the "300 bus affair," occurred on April 12, 1984, when four Palestinian terrorists hijacked bus number 300 with forty-one passengers on board.<sup>189</sup> The bus was forced to drive to the Gaza Strip where a standoff ensued. The Palestinians demanded the release of 500 PLO members being held in Israeli jails.<sup>190</sup> The Israelis refused to meet the demands and stormed the bus early the following morning. Two hijackers and one soldier were killed and seven passengers were wounded in the assault.<sup>191</sup> The public was told that the other two hijackers were mortally wounded during the assault and had died on their way to the hospital.<sup>192</sup> A photograph showing the remaining two hijackers walking off the bus, injured but alive, had been banned by the Israeli Military Censor.<sup>193</sup> It was later discovered that the GSS members had been ordered to kill the other hijackers by Avraham Shalom, the head of the GSS, once they left the scene.<sup>194</sup> A subsequent investigation resulted in the resignation, but not the prosecution, of Shalom.<sup>195</sup>

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189. See Mordichai Kremnitzer, *National Security and the Rule of Law: A Critique of the Landau Commission's Report*, in NAT'L SECURITY AND DEMOCRACY IN ISRAEL 153, 153-56 (Avner Yaniv ed., 1993) (describing the details of the "300" bus hijacking and the judicial inquiries that followed).

190. IAN BLACK & BENNY MORRIS, *ISRAEL'S SECRET WARS: A HISTORY OF ISRAEL'S INTELLIGENCE SERVICES* 402 (1991).

191. Kremnitzer, *supra* note 189, at 154.

192. See BLACK & MORRIS, *supra* note 190, at 403 ("[T]he IDF spokesman said that two terrorists had been killed in the storming of the bus and that the two others had died on their way to [a] hospital in Ashkelon.").

193. Kremnitzer, *supra* note 189, at 154.

194. See *id.* at 155 ("The police investigation revealed that the two terrorists were killed by the GSS men pardoned by the president's second pardon, under an order from the head of the GSS.").

195. See *id.* (stating that the director of GSS was pardoned for his involvement in the bus 300 affair shortly after the investigation into the event was commenced).

The second event, the Izzat Nafsu case, involved the perjury by GSS members at the treason trial of an Israeli soldier.<sup>196</sup> Nafsu had been convicted of treason in 1982 although he had claimed that his confession had been extracted under torture.<sup>197</sup> A "trial within a trial" (the Israeli term for a suppression hearing) had been held to determine whether the confession was admissible.<sup>198</sup> GSS members testified during the "trial within a trial" that the confession had been voluntary and that no coercion had been used.<sup>199</sup> However, when GSS obstruction of investigations into the 300 bus affair in 1984 cast further doubt on the veracity of GSS witnesses, an internal investigation into the Nafsu case made it apparent not only that GSS members perjured themselves in that case but also that there was an established practice of perjury within the GSS that involved denying torture or coercion in any suppression hearings.<sup>200</sup>

The Landau Commission was established in response to this crisis of confidence concerning the GSS and its interrogation methods.<sup>201</sup> It acknowledged the various international conventions that prohibit torture and cruel and inhuman treatment and specifically referenced the five techniques discussed in *Ireland*.<sup>202</sup> While it labeled the pervasive perjury by the GSS a "dismal and regrettable" picture, it took satisfaction in the fact that the practice had been "totally abolished."<sup>203</sup> More controversially, it also concluded:

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196. See ISRAELI GOV'T PRESS OFFICE, COMMISSION OF INQUIRY INTO THE METHODS OF INVESTIGATION OF THE GENERAL SECURITY SERVICE REGARDING HOSTILE TERRORIST ACTIVITY (1987), reprinted in 23 ISR. L. REV. 146, 149–54 (1989) [hereinafter LANDAU REPORT] (describing the trial of Izzat Nafsu and the orchestrated perjury committed by GSS personnel).

197. See *id.* at 150 (describing Nafsu's allegations and the response given by the court).

198. See *id.* (describing the suppression hearing including Nafsu's allegations and the response given by the court).

199. See *id.* ("These allegations [of coercion] were denied in the testimony under oath of the interrogators, headed by the person who at that time was Head of the GSS Interrogation team which investigated Nafsu's case.")

200. See *id.* at 151 ("[Nafsu's interrogators] claimed that even in giving false testimony at the trial within a trial, in which they denied having exerted such pressures, they also had not deviated from accepted practice in the GSS, and this with the knowledge of their superiors.")

201. See MALCOLM EVANS & RODNEY MORGAN, PREVENTING TORTURE: A STUDY OF THE EUROPEAN CONVENTION FOR THE PREVENTION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 42 (1998) (describing the reasons the Landau Commission was established).

202. See LANDAU REPORT, *supra* note 196, at 179–81 (referencing the court's treatment of the five interrogation techniques at issue in *Ireland v. United Kingdom*).

203. *Id.* at 163–64.

The effective interrogation of terrorist suspects is impossible without the use of means of pressure, in order to overcome an obdurate will not to disclose information . . . .

Interrogation of this kind is permissible under the law, as we interpreted it above, and we think that a confession thus obtained is admissible in a criminal trial . . . .<sup>204</sup>

It went on to explain that in cases where psychological pressure was ineffective in obtaining information, "the exertion of a moderate physical pressure cannot be avoided."<sup>205</sup> The Landau Report also included a classified appendix in which it issued guidelines for the permissible pressure techniques that it assured readers were less severe than the five techniques described in *Ireland*.<sup>206</sup>

Not surprisingly, these conclusions were met with extensive criticism.<sup>207</sup> Some of the criticism mirrored the criticism of ticking time bombs discussed in Part I.A. It was argued that the certainties claimed to permit the GSS to conduct such interrogations on the basis of "necessity" were illusory, and that the balance of the harms was, therefore, not being correctly assessed.<sup>208</sup> Amnesty International was even harsher in its assessment of the Landau Commission Report, stating:

Israeli security services have routinely tortured Palestinian political suspects . . . and from 1987 the use of torture was effectively legal. The effective legalization was possible because the Israeli government and the judiciary, along with the majority of Israeli society, accepted that the methods . . . used by the [GSS] were a legitimate means of combating "terrorism."<sup>209</sup>

204. *Id.* at 184.

205. *Id.*

206. *See id.* at 186 ("[T]he substance of the means of pressure permitted under these guidelines is less severe than the 'techniques' which occupied the British Commissions of Inquiry that considered the methods of the war against terrorism in Northern Ireland.").

207. *See, e.g.,* Gur-Arye, *supra* note 5, at 184–86 (summarizing many of the critical responses to the Landau Commission's findings); Kremnitzer, *supra* note 99, at 251 ("[The Commission's recommended means] applied with the aim of breaking a suspect's resistance violate his human dignity and necessarily cause him severe mental suffering; they constitute, therefore, instruments of torture.").

208. *See* Kremnitzer, *supra* note 99, at 243–45 (analyzing the deficiencies of the necessity rule including its susceptibility to manipulation and its tendency to sacrifice the suspect's identifiable individual interests in order to protect the interests of unidentified individuals facing an unidentified threat).

209. AMNESTY INT'L, COMBATING TORTURE—A MANUAL FOR ACTION § 2.2 (2003), available at <http://www.amnesty.org/en/library/info/ACT40/001/2003/en>.

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

### *C. Implications of State Practice*

The pressures faced by Germany when reacting to the violence of the RAF in the 1970s, by the United Kingdom when responding to IRA violence in the 1970s, by the Landau Commission in Israel when dealing with the Palestinian terrorists, and by the United States after the 2001 terror attacks, all resulted in the use of interrogation or detention techniques that have been criticized by human rights organizations and often have been characterized as torture. In each of these cases, government officials made claims that their conduct did not violate international human rights laws. This was because national security concerns and innocent civilian lives were thought to be in the balance. Whether the exceptional measures taken by these governments amounted to torture may remain a matter of debate, but there can be little question that the subjective definition of torture or inhuman and degrading treatment applied by these nations under pressure was not the same definition that would have prevailed under less trying and dangerous circumstances. This is why the subjective element in defining torture must be eliminated; the definition of torture should have been the same on September 12, 2001 as it was on September 10, 2001. Under the present system, such consistency is not possible.

## *VI. Defining Torture*

### *A. Effective Rulemaking*

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

seem obvious, but by all appearances it is one that is frequently forgotten by rule makers of all stripes.

While this conceptualization of rulemaking is easily articulated, it can be very difficult to implement, particularly in the international law context. Taking nothing away from the continuing and valuable efforts to create and expand the reach of the International Criminal Court, as well as regional judicial bodies such as the European Court of Human Rights, it is clear that international law still lacks a meaningful enforcement mechanism, particularly in the realm of human rights protection. The available empirical evidence relating to the effectiveness of the Convention Against Torture supports this assessment.<sup>210</sup> This means that, in the near term at least, the effectiveness of defining torture will be found in its ability to encourage nations to exercise self-restraint at a time when it is most difficult to do so. Therefore, the typical criminal law approach, which aligns self-interest with the desired outcome by promising punishment if the actor to be influenced fails to deliver that outcome, is inapplicable to the current situation. Absent an enforcement mechanism that delivers the promised punishment, an actor's self-interest is never properly re-aligned. Other means, therefore, must be found for aligning the self-interest of an interrogating state in extracting information to protect its civilian population, with the exercise of desirable self-restraint.

### B. *The Proposed Standard*<sup>211</sup>

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

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210. See Hathaway, *supra* note 26, at 205 (stating that the Convention Against Torture "is remarkably weak in enforcement").

211. It is important to clarify that the proposed standard addresses the use of coercion in an intelligence gathering context, *not* a law enforcement context. The standard advanced and the line-drawing that is done is not for the purpose of determining whether evidence obtained from an interrogation should be admissible in court, but rather to describe clearly what absolute limits international law should place on coercive interrogations.

All nations subject their trainees to stressors in order to better prepare them for the rigors of warfare. In order to protect their trainees, nations also have well established standards limiting the type and duration of the stressors that can be applied. When these standards were written, it was never contemplated that they would limit the scope of interrogations that the state might perform; the only competing considerations in balance were the effectiveness of the training and the safety of the trainees. Any changes in these standards that allow for the use of harsher interrogation methods against detainees will be meaningfully checked by the interrogating state's belief that the harsher measures do not cause any lasting physical or emotional harm for its own trainees. The state's self-interest in protecting its own people, its military and civilian trainees, far more of whom will be subjected to these techniques than the handful of detainees that will be interrogated using such techniques, will provide a meaningful deterrent to changes in these standards that are likely to lead to permanent harm.<sup>212</sup>

Basing the treatment of detainees upon the treatment afforded to one's own forces during wartime is not a new concept in international law. Geneva Convention (III) Relative to the Treatment of POWs requires that prisoners must be "quartered under conditions as favorable as those for the forces of the Detaining Power who are billeted in the same area."<sup>213</sup> This convention also limits the imposition of disciplinary or judicial penalties against POWs to those that may be imposed against members of the Detaining Power's armed forces of equivalent rank for the same acts.<sup>214</sup> It also requires that POWs receive the same judicial process, appellate rights, and the same conditions of pretrial and postconviction confinement afforded to members of the Detaining Power's armed forces.<sup>215</sup> The sufficiency of equivalent treatment also has been applied to noninternational armed conflicts such as the conflict between the United States and al-Qaeda. Justice Kennedy indicated that a showing of equivalence between the judicial treatment of detainees at Guantanamo and that afforded

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212. See Robert D. Kaplan, *Fear Hath No Shelf-Life: Our Torture Dilemma*, ATLANTIC ONLINE, Jan. 22, 2009, <http://www.theatlantic.com/doc/200901u/kaplan-torture> (last visited Feb. 22, 2010) (stating that far more American servicemen have been subjected to waterboarding than have prisoners at Guantanamo Bay) (on file with Washington and Lee Law Review); see also Bradbury Memo, *supra* note 14, at 37–38 ("Each of the CIA's enhanced interrogation techniques has been adapted from military SERE [Survival, Evasion, Resistance, and Escape] training, where the techniques have long been used on our own troops.").

213. Geneva Convention Relative to the Treatment of Prisoners of War art. 25, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III].

214. *Id.* arts. 87–88.

215. *Id.* arts. 95, 102–03, 106, 108.

U.S. service personnel under the UCMJ would be sufficient to satisfy Common Article 3's requirements for "regularly constituted courts."<sup>216</sup>

Adopting this standard would provide much needed clarity to the definition of torture. It would also prevent the inevitable contraction of the definition of "severe pain and suffering" that numerous states have employed when faced with a terrorist threat. Perhaps most importantly, this standard will give the term sufficient definiteness to allow for criminal prosecutions that might well be avoided under the current system. It no longer will be possible to rely on the arguments provided by qualified legal authorities that advocate a restrictive definition.

### *C. Implementation*

#### *1. How the Proposal Addresses the Problem*

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

This Article's proposal, attaching a clearer and more objective standard to "severe pain and suffering," addresses both of these elements. By clarifying the line between torture and "not torture," it removes much of the subjectivity found in the current definition that will, in turn, encourage self-enforcement. States no longer will be able to point to a Landau Commission Report or a Compton Commission Report or a Bybee or Bradbury Memo that "legally determines" that the coercive methods being used do not inflict severe pain or suffering to avoid prosecuting those that may have crossed the line. Instead they will have to demonstrate that their training methods and interrogation methods were the same, or concede that they are unwilling to discharge their self-enforcement responsibilities under the CAT.

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216. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 643–46 (2006) (Kennedy, J., concurring) (addressing the question of whether the military commissions can be considered "regularly constituted courts" by comparing their procedures with the procedural requirements in court-martial practice under the UCMJ).

## 2. Practical Application and Bright Line Rules

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

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

Medical experimentation on prisoners of war is prohibited by the Geneva Conventions, and violations of this prohibition are labeled a "grave breach" of those conventions.<sup>217</sup> Because some states, including the United States, have engaged in medical experimentation on their own trainees in the past,<sup>218</sup> it is necessary for the proposed objective definition of torture to include an explicit prohibition against any experimentation on detainees. This provision would mirror Geneva Convention III's prohibition on medical experimentation and could be amplified further by the Commentary to Article 130 of that Convention, which describes medical experimentation as

experiments [that] are injurious to body or health and as such are dealt with in most penal codes. The memory of the criminal practices of which certain prisoners were victim led to these acts being included in the list of grave breaches. The prohibition does not, however, deny a doctor the possibility of using new methods of treatment justified by medical reasons

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217. Geneva Convention III, *supra* note 213, arts. 13, 130.

218. See generally *CIA v. Sims*, 471 U.S. 159 (1985) (providing an extensive discussion of the MK-ULTRA program, which included LSD experimentation on military trainees).

and based only on concern to improve the state of health of the patient. It must be possible to use new medicaments offered by science, provided that they are administered only for therapeutic purposes.<sup>219</sup>

Another instance in which the protections that a state provides to its own trainees may prove insufficient for detainees is in the area of chemical and biological warfare training. Many nations train their armed forces in the use of biological/chemical protective gear by exposing them to chemical or biological agents. In a few cases, there is evidence that this training exposure, while wearing proper protective gear, is to lethal agents.<sup>220</sup> Even if a detaining power finds trainee casualties in biological or chemical weapons simulations to be an acceptable price for properly training its forces, it may not use that judgment to imperil detainees. Therefore, the proposed standard would include a bright line rule stating that any intentional exposure of detainees to any form of chemical or biological agent, except for the use of nonlethal agents as a last resort for the purposes of controlling an uprising within a detention facility, constitutes torture and is a violation of the CAT.

Murder of detainees already is explicitly prohibited by Common Article 3 of the Geneva Conventions<sup>221</sup> and Article 75 of Additional Protocol I.<sup>222</sup> These prohibitions, coupled with the proposed standard, might seem to make it unnecessary for the definition of torture to include a bright line rule against murder. While it is certainly unlikely that any government would intentionally kill its own trainees, the history of wartime conduct of many nations, and particularly recent events in the Colombian civil war, should give anyone pause before asserting that it never happens.<sup>223</sup> It has been reliably reported that the

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219. JEAN DE PREUX ET AL., COMMENTARY: III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 627–28 (Jean S. Pictet ed., A.P. de Heney trans., 1960) [hereinafter GENEVA III COMMENTARY].

220. See Lev Aleksandrovich Federov, *Chemical Weapons in Russia: History, Ecology, Politics* § I.4 (1994), [http://www.fas.org/nuke/guide/russia/cbw/jptac\\_008\\_194001.htm](http://www.fas.org/nuke/guide/russia/cbw/jptac_008_194001.htm) (last visited Feb. 22, 2010) (describing Soviet testing of nerve agents on people as recently as the 1980s) (on file with the Washington and Lee Law Review).

221. See Geneva Convention III, *supra* note 213, art. 3 (expressly prohibiting "violence to life and person, in particular murder of all kinds").

222. See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, at art. 75(2)(a)(i), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I] (reincorporating the prohibition of murder from Geneva Convention III).

223. See, e.g., Sibylla Brodzinsky, *In Colombia, Army Acknowledges Civilian Killings*, CHRISTIAN SCI. MONITOR, Nov. 7, 2008, at 7, available at <http://www.csmonitor.com/2008/1107/p07s02-wogn.html> ("The Army's successes . . . have been muted by a macabre revelation that the Colombian military reportedly killed civilians to inflate their rebel body count in an effort to appear more successful."); Simon Romero, *Colombian Army is Accused of Killing Poor Civilians and Labeling Them Insurgents*, INT'L HERALD TRIB., Oct. 29, 2008,

Colombian Army lured young, unmarried, unemployed men away from home and murdered them so that their bodies could be used to increase the "body count" in their ongoing civil war with the Revolutionary Armed Forces of Colombia (FARC).<sup>224</sup> Such events require that the murder of detainees be included as a bright line prohibition within the definition of torture.

Rape perpetrated for the purpose of punishment or intimidation has been held to be torture by the European Court of Human Rights.<sup>225</sup> However unlikely it is that a state would use rape as a "training tool," a bright line rule against rape would be included in the proposed definition.

Like rape, mock executions also have been found to constitute torture,<sup>226</sup> and like rape, this practice also would be explicitly prohibited. This is particularly true because there can be no claim of equivalency between a "mock execution" conducted in training, which will obviously not result in death, and the mental stress associated with the mock execution of a detainee.<sup>227</sup>

The last bright line prohibition would be against mutilation. Like murder, it already is explicitly prohibited by Common Article 3 of the Geneva Conventions and Article 75 of Additional Protocol I.<sup>228</sup> However, there are a variety of rites of passage that involve tattooing, branding, or the removal of

available at <http://www.nytimes.com/2008/10/29/world/americas/29iht-colombia.4.17352270.html> ("Columbia's government . . . has been buffeted by the disappearance of . . . young, impoverished men and women . . . [who] were catalogued as insurgents or criminal gang members and killed by the armed forces."); Karl Penhaul, *Colombian Military Fires 27 Soldiers in Probe of Killings*, CNN.COM, Oct. 29, 2008, <http://www.cnn.com/2008/WORLD/americas/10/29/colombiafirings/index.html> (last visited Feb. 22, 2010) (discussing the firing of twenty-seven soldiers involved in the killing of eleven poor Bogota residents) (on file with the Washington and Lee Law Review).

224. See articles cited *supra* note 223 (reporting on Colombian military engaging in this practice).

225. See, e.g., *Aydın v. Turkey*, 1997-VI Eur. Ct. H.R. 1866, 1891–92 (1997) (holding rape of detainee to be torture under Article 3 of the European Convention of Human Rights).

226. See Mark Benjamin, *Will Psychologists Still Abet Torture?*, SALON, Aug. 21, 2007, <http://www.salon.com/news/feature/2007/08/21/psychologists/> (last visited Feb. 22, 2010) (discussing resolution adopted by the American Psychological Association that condemned certain interrogation practices, including mock executions, as torture) (on file with the Washington and Lee Law Review); JUSTICE, Art 4. Prohibition of Torture and Inhuman or Degrading Treatment: JUSTICE Commentary, EU Charter of Fundamental Rights, [http://www.eucharter.org/home.php?page\\_id=78](http://www.eucharter.org/home.php?page_id=78) (last visited Feb. 22, 2010) ("Such actions as mock executions, death threats, threats of rape, various humiliating acts and threats of reprisals against a detainee's family may all constitute mental suffering for the purposes of Article 4.") (on file with the Washington and Lee Law Review).

227. See *supra* Part IV.E (discussing mental stress).

228. See Geneva Convention III, *supra* note 213, art. 3(I)(a) (prohibiting mutilation of detainees); Protocol I, *supra* note 222, art. 75(2)(a)(iv) (same).

fingers.<sup>229</sup> While these examples are found outside of the military, if fraternities or criminal organizations impose such requirements on their members, then it certainly is foreseeable that military subgroups might also voluntarily engage in such practices. Even if such practices are common within the training structure of the detaining power, however, the proposed standard would prohibit any mutilation or coercion that resulted in permanent disfigurement.

#### D. Additional Benefits

##### 1. Internal Checks on Behavior

The proposed definition does more than provide much needed clarity to the torture question.<sup>230</sup> It also will greatly improve internal checks on behavior or what might be termed *ex ante* self-enforcement.<sup>231</sup> Currently most soldiers, in Western militaries at least, are aware that torture is illegal.<sup>232</sup> But they are no more likely to have a clear and unshakeable understanding of what constitutes severe pain and suffering than anyone else.<sup>233</sup> So when they are ordered to utilize coercive interrogation techniques they generally assume that those techniques have been properly approved and that the techniques do not constitute torture.<sup>234</sup> When Sergeant Javal Davis, sentenced to six months in jail for his role in the Abu Ghraib abuses, was asked why he did not inform the chain of command of the abuses, he said, "Because I assumed that if they were doing things out of the ordinary or outside the guidelines, someone would have said something."<sup>235</sup>

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229. See DAVID KAPLAN & ALEC DUBRO, *YAKUZA: JAPAN'S CRIMINAL UNDERWORLD* 14 (2003) (describing the Japanese practice of *yubitsume* or "finger-shortening" used by the Yakuza as both a punishment and a voluntary ritual of atonement); Tyra Black et al., *Racism, Sexism, and Aggression: A Study of Black and White Fraternities*, in *AFRICAN AMERICAN FRATERNITIES AND SORORITIES: THE LEGACY AND THE VISION* 363, 380 (Tamara L. Brown et al. eds., 2005) (discussing hazing in black fraternities, including use of branding).

230. See *supra* Part II (criticizing subjectivity and vagueness of current definitions of torture).

231. See *supra* Part IV.F (discussing importance of effective self-enforcement in this area).

232. See, e.g., Scheppele, *supra* note 13, at 314 (noting that American soldiers are "extensively trained" in the Geneva Conventions).

233. See *supra* Part II (noting lack of consensus on definition of severe pain and suffering).

234. See Levinson, *supra* note 4, at 251–52 (noting the "actual or perceived approval" by superiors that makes it difficult for individuals to recognize the illegal nature of certain actions).

235. See Seymour Hersh, *Torture at Abu Ghraib*, *NEW YORKER*, May 10, 2004, at 42, 45, available at [http://www.newyorker.com/archive/2004/05/10/040510fa\\_fact](http://www.newyorker.com/archive/2004/05/10/040510fa_fact) (discussing responsibility for abuses by U.S. military personnel at Abu Ghraib).

Even if the soldiers are uneasy about these techniques, the hierarchical structure of the military makes it very difficult to question their superiors about the legality and morality of their orders.<sup>236</sup> "Sir, isn't what you are telling me to do torture?" is, in most circumstances, just too difficult a question to ask because it directly challenges both the judgment and the morality of the superior officer. On the other hand, if the standard for interrogation techniques simply is "we will only do to others what we do to our own people" then the question becomes much easier to ask: "Sir, do we really do this to our own people?" The answer to that question is either a simple yes or no, and the question is not one that directly attacks the judgment or morality of the superior. As a result, it is a question that is likely to be asked much more frequently, thereby bringing to light violations like those that occurred at Abu Ghraib much sooner, or preventing them from occurring in the first place.

## 2. Bridging the "Expectation Gap"

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

One might think, "What a clever lawyer. He defined 'torture' so narrowly and the defenses to torture so broadly that we can never be found guilty. He has done a great service to the Nation." One would be dead wrong. We have seen the consequences of that sort of twisted legal analysis and we must never repeat it.<sup>237</sup>

While Hutson may be right in decrying the "clever lawyer," his hollow exhortation of "never again" is all too familiar in international law. Hutson complains that the rule of law was not followed,<sup>238</sup> and yet at the very heart of the matter is the fact that the definition of torture was vague enough that a

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236. *See id.* (quoting Sergeant Davis as saying "I witnessed prisoners . . . being made to do various things that I would question morally. . . . We were told that they had different rules.").

237. *See Confirmation Hearing on the Nomination of Michael B. Mukasey to Be Attorney General of the United States: Hearing Before S. Comm. on the Judiciary*, 110th Cong. 423 (2007) (statement of Dean John D. Hutson, RADM JAGC USN (ret.)) (calling for the next Attorney General to ensure that the U.S. military complies scrupulously with the law).

238. *See id.* at 424 ("I believe the Rule of Law has come off the rails in recent years.").

"clever lawyer" could entirely eviscerate it. Hutson's proposed solution is to put the right people in place to get the rule of law "back on the tracks."<sup>239</sup>

But who would those people be? How can we find people that will not see something as acceptable when under great stress, only to later realize that it was, in fact, monstrous? As California Attorney General, Earl Warren was involved in the internment of hundreds of thousands of Japanese-Americans, a decision he later regretted terribly.<sup>240</sup> Likewise, in the current debate concerning the use of waterboarding, legislators who later moved to prohibit waterboarding in 2007<sup>241</sup> were briefed on the practice in 2002, and at that time, none of them objected to the practice.<sup>242</sup> The Washington Post's discussion of this change of heart was telling. It quoted an official who had been present at initial briefings: "In fairness, the environment was different then because we were closer to Sept. 11 and people were still in a panic."<sup>243</sup>

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

The second statement that illustrates the gap between aspiration and reality was made by Michael Posner, President of Human Rights First, in response to

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239. See *id.* ("Our next Attorney General must work tirelessly and courageously to get [the Rule of Law] back on the tracks.").

240. See CHIEF JUSTICE EARL WARREN, *THE MEMOIRS OF EARL WARREN* 149 (1977) ("I have since deeply regretted the removal order and my own testimony advocating it.").

241. See Scott Shane, *House Passes Restrictions on Interrogation Methods*, N.Y. TIMES, Dec. 14, 2007, at A18, available at [http://www.nytimes.com/2007/12/14/world/americas/14iht-cia.4.8751421.html?\\_r=1](http://www.nytimes.com/2007/12/14/world/americas/14iht-cia.4.8751421.html?_r=1) ("[T]he House of Representatives voted Thursday to prohibit waterboarding and other harsh interrogation methods used by the CIA against high-level prisoners from Al-Qaeda.").

242. See Joby Warrick & Dan Eggen, *Hill Briefed on Waterboarding in 2002*, WASH. POST, Dec. 9, 2007, at A1, available at <http://www.washingtonpost.com/wpdyn/content/article/2007/12/08/AR2007120801664.html> (describing early briefing of key legislators on waterboarding and other coercive interrogation techniques).

243. *Id.*

the proposed standard advanced by this Article.<sup>244</sup> "No U.S. official should engage in any conduct with respect to the treatment of detainees that we would not expect for an American who is captured by our adversaries."<sup>245</sup> While Posner made this statement in opposing the standard as too permissive of coercion, his statement as written actually would allow for far more coercive means than the standard proposed by this Article. This is because of the difference between the words "expect" and "hope." If he sought to hold U.S. officials to a higher standard, Posner should have stated that America's treatment of detainees ought to be the same as the treatment we *hope* for a captured American. The treatment that American servicemen receive in SERE School,<sup>246</sup> which is where most of the techniques at issue in the current debate about Guantanamo originated, is precisely what we *expect* Americans to face when captured, and historically it has always been a mere shadow of what actually awaits them.<sup>247</sup>

This should not be taken to imply that the proposed standard is based upon linear reciprocity. It does not allow for the treatment that detainees receive to vary based upon the treatment that the detaining state's own soldiers receive; a detaining state is not allowed to mistreat detainees just because the other side mistreats the detaining state's soldiers. The proposed standard would not have excused many of the abuses that occurred at Abu Ghraib and Guantanamo even though al-Qaeda quite dramatically beheaded a number of civilians that it

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244. See Michael Lewis, *Advice to the Next Administration Regarding Coercive Interrogation*, 30 A.B.A. NAT'L SECURITY L. REP. 18, 18–19 (2008) (proposing the standard suggested in this Article).

245. See Michael Posner & Michael W. Lewis, *Advice to the Next Administration Regarding Coercive Interrogation*, ABA NAT'L SECURITY L. REP., Sep/Oct 2008, at 18.

246. SERE School is run by the U.S. military for special forces and combat aviators (those personnel at high risk of capture) to provide them with a small taste of what the rigors of captivity will be like. See generally Jane Mayer, *The Experiment*, NEW YORKER, July 11, 2005, at 60, available at [http://www.newyorker.com/archive/2005/07/11/050711fa\\_fact4](http://www.newyorker.com/archive/2005/07/11/050711fa_fact4) (discussing SERE programs). My own experience at SERE School contributed greatly to my development and advocacy of the standard proposed in this Article. Numerous articles and testimony before the Senate Armed Services Committee have confirmed that some of the techniques used at SERE School were reverse-engineered to be used during interrogations at Guantanamo Bay. See *id.* (discussing the use of SERE techniques on detainees held by United States); see also *Hearing to Continue to Receive Testimony on the Origins of Aggressive Interrogation Techniques: Hearing Before S. Comm. on Armed Services: Part I of the Comm.'s Inquiry into the Treatment of Detainees in U.S. Custody (P.M. Session)*, 110th Cong. 2–44 (2008) (statement of William J. Haynes, former Dept. of Def. Gen. Counsel) (responding to questions about origins of SERE techniques in interrogations by U.S. officials).

247. See generally JEREMIAH DENTON, JR., *WHEN HELL WAS IN SESSION* (1982) (describing torture and abuse suffered by author as a POW in Vietnam).

captured.<sup>248</sup> What the proposed standard does do is provide a clear and realistic guideline that does not rely on some hoped for good faith interpretation of severe pain and suffering, but rather mitigates the damage that can be done by a bad-faith interpretation.

### *E. Common Objections*

#### *1. Mental Stress*

The most common objection to the proposed standard raised by the panelists at the Oxford Roundtable, as well as by a number of other scholars that have reviewed this proposal, has been that the equivalent physical treatment of trainees and detainees does not mean that the overall experience is the same. This is absolutely true. The mental anxiety of being in the hands of your enemy cannot be replicated in a training environment, nor can the fear of escalation that John Parry and others discuss in arriving at their expansive definitions of torture.<sup>249</sup> This criticism is bolstered by the fact that there also is at least some evidence that the long-term psychological impact of physical torture does not differ greatly from the long-term impact of psychological stressors.<sup>250</sup>

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

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248. See, e.g., Douglas Jehl, *The Beheader: C.I.A. Says Berg's Killer Was Very Probably Zarqawi*, N.Y. TIMES, May 14, 2004, at A12, available at <http://www.nytimes.com/2004/05/14/world/struggle-for-iraq-beheader-cia-says-berg-s-killer-was-very-probably-zarqawi.html> (reporting on beheading of American Nicholas Berg).

249. See *supra* Part IV.D (discussing control and escalation factors in defining torture).

250. See *Mental Torture*, *supra* note 74, at 283 ("[P]hysical torture did not contribute to long-term psychological outcome over and above the effects of nonphysical stressors."). The value of this study in the present context is somewhat limited because it included stressors such as sleep deprivation, sham executions, death threats, rape threats, and watching the torture of others as psychological rather than physical stressors. These techniques are considered torture and forbidden, or in the case of sleep deprivation clearly limited, by the standard proposed by this Article. Therefore, the implied equivalency between physical torture and psychological stressors described by the *Mental Torture* study does not correlate with the mental versus physical divide that exists in the standard proposed by this Article.

But what about the mental aspects of captivity and interrogation? The standard does little to account for the mental scars that long-term captivity and interrogation can cause. That is due to the fact that International Humanitarian Law allows for indefinite captivity and interrogation, particularly in the context of noninternational armed conflicts.<sup>251</sup> The only limitations placed on the detention and interrogation of detainees in a noninternational armed conflict are those found in Article 4 of Additional Protocol II.<sup>252</sup> These include prohibitions against murder, mutilation, torture, cruel, humiliating and degrading treatment, rape, and enforced prostitution.<sup>253</sup> There can be no question that the detaining power is allowed to ask questions of its detainees, and few would argue against the use of noncoercive interrogation techniques such as trickery or deception in order to extract valuable information from enemy detainees. When it is considered that among the most psychologically damaging things that can happen to a detainee is the realization that he has provided information to the enemy, or that his comrades believe that he has done so,<sup>254</sup> it is difficult to conceptualize the limitation that can be placed on the imposition of mental stress. It is a hard truth that captors in wartime cannot be the guarantors of a detainee's mental health, and are in fact permitted to take actions that are likely to cause psychological harm. The goal of the proposed standard is to at least make the captors the guarantors, or close to it, of the prisoner's physical health.

## 2. *A Race to the Bottom*

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

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251. See Additional Protocol II, *supra* note 58, art. 4 (setting standards of humane treatment, but omitting any limits on length of imprisonment).

252. See *id.* (establishing "fundamental guarantees" for detainees).

253. See *id.* art. 4(2) (listing specific prohibited actions by detaining state).

254. Many Vietnam POWs have said that their lowest moments during captivity were not after being physically tortured, but after giving up information. See Discussions with Doug Hegdahl, former Vietnam POW; Dick Stratton, former Vietnam POW, Lecture (early 1990s); see also DENTON, *supra* note 247, at 44–83 (recounting episodes of torture and forced confessions as a POW in North Vietnam).

Any new stressors would be applied to many more trainees than detainees, so these new stressors would not be considered potentially harmful by the state applying them. The only exception to this would be in states that truly do not care about the well-being of their own people. While such states do exist, they are not likely to be ones that are willing to be influenced by international law. It may be possible to imagine North Korea creating a special unit of its own soldiers that are horribly mistreated to justify its equally horrible mistreatment of prisoners. But this presupposes that North Korea would require such a justification to commit torture in the first place.

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

### 3. *The Proposal Undermines Reciprocity*

Reciprocity is a cornerstone of International Humanitarian Law (IHL),<sup>255</sup> and it has been argued that the standard proposed by this Article undermines that reciprocity<sup>256</sup> because the proposed standard allows for differing baselines for the treatment of detainees based upon the internal regulations of each party to the conflict. Where two warring nations, State *A* and State *B*, treat their own trainees substantially differently, with State *A* treating its trainees much more harshly than State *B*, the standard likewise would allow them to treat their detainees substantially differently. As a result, it is possible that both parties could be operating in full compliance with the proposed definition of torture advanced by this Article, and yet the detainees of State *A* may be interrogated with far harsher techniques than the detainees of State *B*. Put another way, under the proposed standard, State *B* might be found guilty of having committed torture for treating its detainees in *exactly* the same way that State *A* was treating its detainees, even though the standard would find State *A* to be fully compliant.

While in this context the inequality of outcomes appears problematic, it is in keeping with the current trend in IHL regarding "negative reciprocity."<sup>257</sup>

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255. See Sean Watts, *Reciprocity and the Law of War*, 50 HARV. INT'L L.J. 365, 366–68, 386–417 (2009) (providing a detailed discussion of the role and development of reciprocity in IHL).

256. Debate with Jens Ohlin, Professor of Law, Cornell Law School, in Ithaca, N.Y. (Apr. 13, 2009).

257. See Watts, *supra* note 255, at 386–418 (discussing the trend toward limiting negative reciprocity). "Negative reciprocity" is a form of "observational reciprocity." See *id.* at 375

Negative reciprocity "refers to state suspensions of legal obligations in response to breaches."<sup>258</sup> It would allow State *B*, as described above, to cease fulfilling its legal obligations to State *A* in reaction to State *A*'s failure to meet its parallel obligations to State *B*. As IHL and human rights law converge in areas like the CAT, there is a trend toward limiting State *B*'s ability to suspend its obligations merely because State *A* has breached its obligations to State *B*.<sup>259</sup> This is because the obligations of State *B* to treat its detainees in a certain manner are viewed as being owed to State *B*'s detainees rather than to State *A*.<sup>260</sup> So while this may result in the inequality of outcomes discussed above, the alternative, which would allow State *B* to treat its detainees worse in reaction to State *A*'s conduct, greatly undermines the protections that the CAT should provide, and would generally result in those protections being limited to the handful of bright line prohibitions discussed in Part IV.C.<sup>261</sup>

There is another, far more practical reason for tying the standard for detainee treatment to the internal regulations of the detaining state, rather than attempting to achieve reciprocal treatment between states. That is the absence of a reliable flow of information during a conflict. When two states are in conflict with one another, they are unlikely to share willingly, or openly reveal to each other, what treatment standards are being maintained.<sup>262</sup> While neutral third parties such as the International Committee of the Red Cross (ICRC) can

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(explaining that under observational reciprocity, "states are bound by a treaty only to the extent that other states observe the treaty's substantive provisions in practice"). This is similar to what Derek Jinks terms "second-order reciprocity." See Derek Jinks, *The Applicability of the Geneva Conventions to the "Global War on Terrorism"*, 46 VA. J. INT'L L. 165, 193–95 (2005) (defining second-order reciprocity as the idea that "[i]f states seek to promote the values embodied in the Conventions, then they should reward treaty-regarding behavior and punish treaty-disregarding behavior").

258. See Watts, *supra* note 255, at 376 (defining negative reciprocity).

259. See *id.* at 418 (describing rise of "multilateral treaties, stating broad, normative rules of conduct applicable across the spectrum of states parties' international conduct"); see also Jinks, *supra* note 257, at 193–95 (claiming that the Geneva Conventions do not contain a requirement for "second-order reciprocity" that would allow for the suspension of obligations).

260. This Article does not attempt to unravel the complicated issue of individual personality in international law. It is fair to say, however, that the concept of state obligations to the individual, rather than merely to other states, is one that has received ever-increasing amounts of support over the past half century. See, e.g., Watts, *supra* note 255, at 418 ("[A] less sovereign-focused outlook on protections has emerged. It is not uncommon to hear states' obligations under the law of war referred to as 'rights' that vest in individuals.").

261. See *supra* Part IV.C (discussing judicial decisions that "provide a general idea of the line between permissible conduct and cruel, inhuman or degrading treatment").

262. See, e.g., *The War: Blowing the Whistle*, TIME, Sept. 12, 1969, at 31, available at <http://www.time.com/time/magazine/article/0,9171,901396,00.html> (reporting on revelations by released POWs of poor treatment by the North Vietnamese).

observe compliance with established standards of treatment, their neutrality and access are based upon the fact that they cannot share this information with outside sources.<sup>263</sup> While it would be possible for the ICRC to confirm that State *A* is adhering to its own internal standards, it would be impossible for it to attempt to harmonize standards between the various parties to a conflict while maintaining the confidentiality that allows it access in the first place.

#### 4. *What About Waterboarding?*

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

The last four U.S. Attorneys General have very different opinions about whether waterboarding constitutes torture. Within the past year, John Ashcroft and Alberto Gonzales have maintained that waterboarding, as conducted by the CIA in 2002, did not constitute torture,<sup>264</sup> while Michael Mukasey has consistently refused to state definitively whether waterboarding constituted torture,<sup>265</sup> and the current Attorney General, Eric Holder, definitively stated that waterboarding was and is torture.<sup>266</sup> Such wide disagreements between legal professionals would not exist if torture were more clearly defined.

The waterboarding example also is valuable in demonstrating why the current standard will adapt successfully to changes in customary international law. If the waterboarding of Abu Zubaydah and Khalid Sheikh Mohammad was done in the manner described by both John Kiriakou and the Bradbury memo,<sup>267</sup> with a doctor present and for less than a minute, then according to the

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263. See, e.g., Mayer, *supra* note 246 (noting that International Committee of the Red Cross was required to keep confidential the results of Guantanamo investigations).

264. See Interview by Dan Abrams with John Ashcroft and Alberto Gonzales, in L.A., Cal. (Apr. 27, 2009), [http://docs.google.com/Doc?id=df6kzgt\\_23gjhchbgk](http://docs.google.com/Doc?id=df6kzgt_23gjhchbgk) (last visited Feb. 22, 2010) (documenting Ashcroft's statement that waterboarding "was not torture" and agreement by Gonzales) (on file with the Washington and Lee Law Review).

265. See Philip Shenon, *So Is Waterboarding Torture? Mukasey May Never Say*, N.Y. TIMES, Jan. 26, 2008, at A11, available at <http://www.nytimes.com/2008/01/26/washington/26justice.html> ("I didn't say I wouldn't answer it,' [Mukasey] said at a news conference. 'I didn't say that I would.'" (quoting former Attorney General Michael Mukasey)).

266. David Stout, *Holder Tells Senators Waterboarding Is Torture*, N.Y. TIMES, Jan. 15, 2009, available at <http://www.nytimes.com/2009/01/16/us/politics/16holdercnd.html> ("Eric H. Holder Jr. said on Thursday that he believes unequivocally that 'waterboarding' is torture, and that it must not be practiced by the United States regardless of the circumstances.").

267. See Kiriakou Interview, *supra* note 42, at 39 (describing waterboarding of Abu

proposed standard, the limited use of the technique in 2002 would not have been torture because of its routine use on American service members at the time.<sup>268</sup> However, it would no longer be permitted today. When America completed the valuable public debate about the costs and benefits of interrogation techniques, it concluded that waterboarding was not acceptable. It discontinued the practice on trainees. Therefore, according to the proposed standard, waterboarding would be considered torture if it were used today for interrogations by the United States.<sup>269</sup>

Two final aspects of waterboarding that appear to confirm its place on the borderline between "torture" and "not torture," thereby making it a useful technique to examine when considering where and how to place that line, are that waterboarding largely is immune to the mental stress objection,<sup>270</sup> and that it has attracted a number of volunteers that have undergone the technique.<sup>271</sup> The technique is immune from the mental stress objection—things are different for trainees than for detainees—because the fear caused by waterboarding is generated by the body's involuntary reaction to the sensation of drowning. The body does not care if it is your best friend or most hated enemy that is drowning you, it just reacts with a gag reflex and panic.<sup>272</sup> In addition to all the American

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Zubaydah with a doctor present); *see also* Bradbury Memo, *supra* note 14, at 16 ("During the use of the waterboard, a physician and a psychologist are present at all times.").

268. However, the Bradbury Memo indicates that these individuals were waterboarded many times. *See* Bradbury Memo, *supra* note 14, at 17 ("[T]he waterboard has been used by the CIA on three high level al-Qaeda detainees, two of whom were subjected to the technique numerous times."). Because no American serviceman was subjected to such repeated exposure to the technique, the proposed standard would have prohibited the repeated waterboarding of Zubaydah and Mohammad in 2002. *See id.* at 16 ("The waterboard has been used many thousands of times in SERE training provided to American military personnel, though in that context it is usually limited to one or two applications of no more than 40 seconds each.").

269. *See* Christopher Hitchens, *Believe Me, It's Torture*, VANITY FAIR, Aug. 2008, at 70, available at <http://www.vanityfair.com/politics/features/2008/08/hitchens200808> ("Until recently, 'waterboarding' was something that Americans did to other Americans.").

270. *See supra* part VI.E.1 (discussing the different psychological effects of interrogation practices on trainees versus detainees).

271. *See, e.g.,* Hitchens, *supra* note 269, at 70–73 (describing the author's experience being waterboarded at his own request); Kaj Larsen, *A Lesson for Mukasey: Why I Had Myself Water-Boarded*, HUFFINGTON POST, Oct. 31, 2007, [http://www.huffingtonpost.com/kaj-larson/a-lesson-for-mukasey-why-\\_b\\_70651.html](http://www.huffingtonpost.com/kaj-larson/a-lesson-for-mukasey-why-_b_70651.html) (last visited Feb. 22, 2010) (explaining why former special forces officer, who had been waterboarded during SERE School, volunteered to be waterboarded again for film crews in reaction to Mukasey's refusal to state that the procedure was torture during his confirmation hearings) (on file with the Washington and Lee Law Review).

272. *See, e.g.,* Kiriakou Interview, *supra* note 42, at 26 (explaining the choking and gagging that waterboarding induces); Hitchens, *supra* note 269, at 71–72 (describing the author's reaction to waterboarding). This also is based on the self-reporting of numerous U.S.

service members that experienced the technique, a number of writers and intelligence analysts also volunteered to undergo waterboarding, and they did not report taking any comfort from the fact that they were being subjected to waterboarding by "friends."<sup>273</sup> While most of the writers that have undergone waterboarding have subsequently declared it to constitute torture,<sup>274</sup> there is a seemingly fundamental contradiction between the ideas of volunteerism and torture.<sup>275</sup> It is this belief that volunteerism and torture are incompatible concepts that, in part, undergirds the standard proposed by this Article.

### VII. Conclusion

Few have accepted Levinson's invitation to descend into the muck and confront the realities of warfare, terrorism, and interrogation because it is difficult to address this subject seriously without feeling uneasy about the realities being discussed. It remains far easier to sit back and say "John Yoo is a monster," "the Landau Commission legalized torture," "the Diplock Courts were a travesty," and "we should be better," and then avoid answering the difficult questions of exactly how that is to be accomplished.<sup>276</sup> Accepting that these criticisms are valid and that we should have been better does not change things for the future. The only path to "being better" is to understand the human realities associated with warfare, terrorism, and interrogation. Those realities tell us people are not "better" when they are under siege. If the rule of

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Navy colleagues of mine that were water boarded during SERE School.

273. See, e.g., Hitchens, *supra* note 269, at 70–73 (discussing author's voluntary waterboarding); Larsen, *supra* note 271 (same).

274. See, e.g., Hitchens, *supra* note 269, at 72 ("[I]f waterboarding does not constitute torture, then there is no such thing as torture.").

275. Although this Article is a reaction in opposition to the "I know it when I see it" definition for torture, there is something viscerally at odds between the ideas of volunteerism and torture. I am not aware of any volunteers willing to have their genitals connected to a car battery, their torsos burned with blow torches, their arms pulled from their sockets, or their fingernails ripped out to make a point about those practices that continue to be used in some countries. While the mere fact that someone is willing to volunteer to undergo a coercive technique does not, by itself, mean that the technique is not torture, it is a strong indication that the label "torture" is being misapplied to the technique.

276. See Yoo, *supra* note 109, at 150 (noting that Jonathan Freiman, attorney for Jose Padilla, after criticizing John Yoo, refused three times to say where he himself would "draw the line" in defining torture). In a recent debate at Rutgers-Camden School of Law on this topic, the audience asked my opponent, who clearly disagreed with the proposed standard, what techniques he would find acceptable. See Debate at Rutgers-Camden College of Law, in Camden, N.J. (Mar. 2009). Like Freiman, he evaded the question several times without providing any specifics. *Id.*

law has been repeatedly subverted by men, be they American, British, German, or Israeli, then changing the men is not likely to provide a lasting solution to the problem. What must be changed is the law, or at least how it is interpreted.

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