

# Reassessment of the Ireland v. the United Kingdom ECtHR case: A lost opportunity to clarify the distinction between torture and ill-treatment

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## Key points of interest

- The European Court of Human Rights' (ECtHR) decision on the Ireland v. the United Kingdom case in 1978 based its judgment on the severity of the treatment without considering the long-term psychological effects of the five (torture) techniques.
- The decision of the ECtHR, in 2018, not to reassess their original judgement, based on the Istanbul Protocol and by considering the long-term or permanent damage to the victims, may have adverse repercussions for future cases.

## Abstract

*Introduction:* In the 1978 Ireland v. the United Kingdom case, the European Court of Human Rights (ECtHR) did not consider that the so called “five techniques” did not cause enough severity of suffering to be considered torture. The intentionality criterion, outlined in the Convention against Torture’s definition of torture, was also not fully considered. The Istanbul Protocol, which is critical for evidencing

torture, did not exist at that time. Although a re-opening of the case was requested in 2014 by Ireland, forensic documentation using the Istanbul Protocol was not used; in 2018, the ECtHR decided against re-opening the case. *Objective:* By using the Ireland v. The United Kingdom case, this paper aims to map the origins of the five techniques, review whether applying them constitutes torture, analyze the information about the claimants available 30 years later, and explore the ramifications of the ECtHR decision not to revise its judgment. *Methodology:* Relevant texts were gathered from the HUDOC database, Cambridge University Press, Wiley Online Library, SCOPUS and MEDLINE /PubMed, and the Library of the ECtHR in Strasbourg. *Discussion/conclusions:* The five techniques, elaborated upon in the case of Ireland v. the United Kingdom, were used well before the incidents in Northern Ireland in 1971 and there is evidence that United Kingdom officials have, subsequently, used the techniques. Furthermore, there is clear evidence that the “Hooded Men” had cognitive, psychological and neurovegetative symptoms as a result of the five techniques, which had long-term effects. The ECtHR did not take this into consideration when it decided not to re-open the case and the full implications of this decision for future cases and victims remain to be seen.

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### Introduction

Article 3 of the European Convention on Human Rights (ECHR) enshrines one of the most fundamental values of democratic societies, stating that: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.” As one of the most difficult norms to interpret, the European Commission of Human Rights (EcommHR; the Commission) and the European Court of Human Rights (ECtHR; the Court) have faced a number of disagreements regarding what practices constitute torture. The *Ireland v. the United Kingdom* case provides a particularly illustrative case of this.

In 1971, the Irish Government brought an application to the ECommHR on behalf of 14 “Hooded Men,” who were subjected to five harsh interrogation techniques by the UK government during “the Troubles”—a conflict regarding the constitutional status of Northern Ireland.<sup>1</sup> These techniques comprised: hooding, wall-standing in stress positions for long periods of time, noise, sleep deprivation, and food and water deprivation. After the Commission unanimously decided that the “five techniques” were in breach of Article 3 of the European Convention on Human Rights (ECHR), it was referred to the ECtHR. In 1978, the ECtHR judged that the practices used amounted to “inhuman and degrading treatment” but not torture.

They judged that ill-treatment must attain a minimum level of severity to fall within the scope of Article 3 (Padeanu, 2018). The assessment of severity is relative and depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim (ECtHR, 1978: *Ireland v. the United Kingdom*, §162).

Several years after this judgment, the 1984 Convention against Torture (UNCAT) put forward a definition of torture in which both physical and mental suffering can constitute torture on the condition that they are purposefully inflicted. Intentionality is thus a critical criterion of torture; severe pain or suffering, whether physical or mental, must be intentionally inflicted on a person. Indeed, Pérez-Sales (2017) argues that intention and purpose go hand-in-hand; when a purpose can be identified, so too can intentionality. Purpose is, however, challenging to infer without proof of intentionality.

As evidenced by the *Ireland* case and others, initially, no precedent existed for the ECtHR using intention to infer torture; however, a number of cases have forced the ECtHR to reconsider its position in this regard. For example, if we analyze the Strasbourg jurisprudence with the intentionality criterion, *Aksoy v. Turkey* is an informative case. The Court noted, “...this treatment could only have been deliberately inflicted...” and found that a certain amount of preparation and exertion would have been required to carry it out (Reidy, 2002, p.13). This was in relation to the so-called “Palestinian hanging” case, where the victim was suspended by his arms, which were tied behind his back (ECtHR, 1996: *Aksoy v. Turkey*).

Despite this, in 2018, the ECtHR rejected Ireland’s request—made in 2014—

<sup>1</sup> Hooded Men is a term often used when referring to this group of 14 men in academic publications and news stories because hoods were placed on them while they were interrogated.

to revise the original decision relating to the Hooded Men, which was made on the basis of new evidence. This was a lost opportunity to clarify the conceptual distinction between torture and cruel, inhuman or degrading treatment (CIDT), particularly in relation to psychological torture.

After briefly detailing the methodology used, this paper proceeds as follows: demarcates psychological torture and maps the historical origins and application of the five techniques, which led to psychological torture; details the interpretation of the five techniques in the original *Ireland v. The United Kingdom* case; reviews the implications of the recent decision by the ECtHR not to revise its judgment; discusses other disagreements between these two institutions; explores the jurisprudence of the use of the five techniques documented in other cases globally regarding psychological torture; and concludes.

### Methodology

The data that informed this paper consisted of books, articles, newspaper searches, and cases. Some of the sources were collected during a research visit to the ECtHR in Strasbourg. Other sources were found using the Cambridge University Press database. Databases such as Wiley Online Library, SCOPUS and MEDLINE /PubMed were also used to locate articles in relation to the *Ireland v. The United Kingdom* case, psychological torture, and the long-term effects of the five (torture) techniques. Court cases were found using the HUDOC database and the IACtHR. In total, 54 sources were identified, of which 37 were deemed relevant and used in this research. The rationale for the selection of papers was not only influenced by the case in question as a whole but the consequences of it.

The documents were reviewed and analyzed through two approaches. Firstly, the sources were read thoroughly and annotated to develop themes and gain a clearer picture of psychological torture. Secondly, historical methods were used for gathering facts pertaining to different decades and continents, with the purpose of showing that the five (torture) techniques were applied well before the incidents in Northern Ireland and that they continued to be used after, although they were considered to be illegal. Based on this literature, comparable cases were also sought to form comparisons between the case in question and other cases from the Strasbourg and Inter-American case law. The purpose was to show that now the ECtHR has clarified that the assessment of the minimum level of severity is relative and depends on the circumstances of the case.

### Demarcating psychological torture

Both physical and psychological torture produce physical and mental suffering, which makes distinguishing between them challenging. “Psychological torture” can relate to two different aspects of the same entity. On the one hand, it can consist of non-physical methods as “physical methods” of torture are often self-evident, such as thumbscrews, flogging, application of electric current to the body, and other similar techniques. On the other hand, physical methods can also cause mental suffering. In this context, “non-physical” refers to a method that does not hurt, maim or even touch the body, but touches the mind instead (Reyes, 2007). Practices that constitute psychological torture include: isolation, debilitation, spatiotemporal disorientation, sensory deprivation, sensory assault, the threat of death or

violence, degradation, and pharmacological manipulation (Ojeda, 2008).<sup>2</sup>

Both physical and psychological effects of torture are comprehensively discussed in the Istanbul Protocol, which considers virtually all aspects of torture and its consequences, and establishes a procedure for governments or independent bodies to conduct a standardized investigation into the use of torture (Reyes, 2007). The application of the Istanbul Protocol can categorically document torture without there being a need for visible scars or marks.

Psychological torture, expressed through interrogation techniques, can also be described as an “assault to the mind.” Pérez-Sales (2017) explains that, in interrogation and torture, physical and psychological techniques aim to create the physical, cognitive and emotional exhaustion in the detainee considered necessary for the successful questioning of a potential source of information. The term “interrogation techniques” is ordinarily used to refer to methods of questioning as well as every aspect of a prisoner’s experience between arrest and release, all of which have an impact upon their will to cooperate (Newbery, 2009). Coercive interrogation is most frequently characterized by hours of exhaustive questioning with interrogators shifting roles, taking turns and using emotional and cognitive manipulation tactics (Pérez-Sales, 2017). This is a form of psychological torture, which, unlike its physical counterpart, more easily evades detection

and thus severely inhibits investigation, prosecution or prohibition attempts.<sup>3</sup>

### The five techniques and their historical application

According to the Commission’s findings, later elaborated on by the ECtHR, the five techniques of torture can be defined as follows (ECtHR, 1978: *Ireland v. the United Kingdom*, § 13):

- a) *Wall-standing*: forcing the detainees to remain for periods of hours in a “stress position,” described by those who underwent it as being “spread eagled against the wall, with their fingers put high above the head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers.”
- b) *Hooding*: putting a black or navy-blue colored bag over the detainees’ heads and, at least initially, keeping it there permanently except during interrogation.
- c) *Subjection to noise*: pending their interrogations, holding the detainees in a room where there was a continuous loud and hissing noise.
- d) *Deprivation of sleep*: pending their interrogations, depriving the detainees of sleep.
- e) *Deprivation of food and drink*: subjecting the detainees to a reduced diet during their stay at the center when interrogations were pending.

The five techniques were developed in the 1950s by officials in the Joint Services

<sup>2</sup> See Fields (2008), Leach (2016), Nowak (2008), Turner and Gorst-Unsworth (1993), and Williams and van der Merwe (2013) for discussions on torture methods and psychological symptoms.

<sup>3</sup> Both physical and psychological torture compromise the mind-body integrity and produce physical and functional changes in the brain that can be identified through neuropsychological testing and neuroimaging (Fields, 2008).

Interrogation Wing (Britain's only official interrogation training school), drawing from the experience of British campaigns in the colonies. The first reports on the use of some of the five techniques are from the Kenya Emergency (1953-1954) and there are also reports from the Malayan Emergency (1955-1960). In the British Cameroons, a territory mostly belonging to present-day Nigeria (1960), the use of the five techniques was considered to be effective during the interrogation of subversives from the neighboring Cameroon Republic. They were also successful in ascertaining that labor problems in Swaziland in 1963 were not created by a subversive organization as had been suspected. In another example, which took place in Aden (now part of Yemen) in 1964, the information produced by the interrogation of 11 suspects, arrested after a hand grenade was thrown at a senior official and his party at Aden airport, supported their innocence (Newbery, 2009).

In 1963, the British Army developed a large-scale interrogation operation in Brunei involving more than 2,000 suspects, with three interrogation centers working simultaneously. Hooding and white noise were used with all the detainees and the five techniques were used on "high value" suspects. It was the first time that reports distinguished between two basic components of psychological torture: "environment manipulation" and "handling of prisoners." The detainees were deprived of food and sanitary facilities, subjected to high temperatures, and were brutally beaten (Newbery, 2009).

The five techniques were also used in Northern Ireland. After training from British intelligence on the elusiveness of psychological torture—that psychological torture often lacks clear signs of abuse or visible marks to indicate the degree of

severity—the Royal Ulster Constabulary applied these methods on Irish Republican Army (IRA) suspects in Belfast in 1971. Enforced wall-standing, hooding, blaring music, sleep deprivation, and dietary manipulation were used (McCoy, 2012).

Although the British Government vowed not to use the five techniques after they took place in Northern Ireland, their use has been subsequently documented in Latin America in the 1970s and 1980s. The influence of this "British model" was particularly strong in Brazil and is evidenced by documents of the Brazilian Truth Commission and the testimonies of survivors of the Brazilian dictatorship (Pérez-Sales, 2017).

The five techniques also left a substantial impact on detainees in Iraq in 2003. Detainees recounted the long-term physical and psychological effects of these experiences in detention, including a series of suicide attempts and night terrors (Newbery, 2015). There are also long-standing allegations of the UK's involvement in prisoner abuse during counterterrorism operations as part of the United States-led so-called "war on terror" (Blakeley & Raphael, 2017). These techniques were applied to detainees, and one of them, Baha Mousa, died as a result of the brutality. The Baha Mousa Inquiry report, presented by Sir William Gage in 2011, concluded that use of the five techniques was a key factor that, in combination with others factors, led to the death of the detainee. The report found that Mousa's body had sustained numerous injuries (Her Majesty's Stationery (Office HMSO), Baha Mousa Inquiry, 2011, §2.1236). Stress positions were primarily used to ensure that the "shock of capture" was maintained from arrest until questioning. In Mousa's case, the standing

position was also used to the extent that pain or suffering was inflicted (*ibid.*, § 2.1612).<sup>4</sup>

### **Application of the five techniques in Northern Ireland**

On 16 December 1971, Ireland lodged an inter-state application against the United Kingdom before the ECtHR alleging that the use of the so-called five techniques of interrogation amounted to torture and violation of Article 3 of the ECHR.

Over the course of three decades (1968–1998), a conflict on the constitutional status of Northern Ireland led to violence across the UK and the situation was especially tense during the first half of the 1970s (Lopez Cursi, 2017). The Northern Ireland Government proposed (and the British Government approved) Operation Demetrius—a series of extrajudicial measures of detention and internment of suspected terrorists, which meant that detainees could be arrested without a warrant and held for 48 hours without bail for the purpose of interrogation. There are no official documents regarding the exact number of people who were arrested on suspicion of being IRA terrorists but some authors estimate that 342 people were arrested on the first day alone, although not everyone who was arrested was interrogated (Donahue, 1980). There is clear evidence that 14 men were subjected to these five techniques because of their alleged relations to the IRA: Jim Auld, Pat Shivers, Joe Clarke, Michael Donnelly, Kevin Hannaway, Paddy Joe McLean, Francis McGuigan,

Patrick McNally, Sean McKenna, Gerry McKerr, Michael Montgomery, Davy Rodgers, Liam Shannon, and Brian Turley (Murphy 2016).

The report of the Commission contains evidence on the effects of the application of these techniques, which was gathered through investigation over a number of years. There are also testimonies of two witnesses—“T.13” and “T.6”<sup>5</sup>—who were arrested, selected for special interrogation, and sent to an unknown interrogation center. On arrival, they were medically examined and then taken by helicopter to another location where they served a detention order for four or five days. The exact duration of the interrogation could not be determined by the Parker Inquiry or Compton Committees<sup>6</sup> (ECommHR Report, 1976).

In its report, the Compton Committee concluded that interrogation by means of the five techniques constituted physical ill-treatment, but not torture (Donahue, 1980). The Committee in the Parker Inquiry concluded that no rules or guidelines had been laid down to restrict the degree to which these techniques could be applied (Her Majesty’s Stationery Office [HMSO], Parker Inquiry, 1972, §12). The long-term mental repercussions were more challenging to determine due to the lack of reliable information concerning medical

<sup>4</sup> Ultimately, Mousa’s death resulted from his poor treatment throughout his detention combined with the application of the five techniques and beatings.

<sup>5</sup> While under interrogation they were given code-names to hide their identities.

<sup>6</sup> The Compton Committee was established in 1971 to prepare a Report of the inquiry into allegations against the Security Forces of physical brutality in Northern Ireland. Afterwards, it prepared a Report of the Committee of Privy Counsellors appointed to consider authorized procedures for the interrogation of persons suspected of terrorism, chaired by Lord Parker of Waddington.

evidence (*ibid*, §15). The Committee did identify that torture, whether physical or mental, is determined by the intensity of the techniques applied and on the provision of effective safeguards against their excessive use, and identified that torture is unjustifiable under any circumstance. Lord Parker<sup>7</sup> posed the following question: “where does hardship and discomfort end and, for instance, humiliating treatment begin, and where does the latter end and torture begin?” The answer, he stated, is found by interpreting “words of definition,” meaning that “opinions will inevitably differ” (*ibid*, § 28, 30, 34).

Lord Gardiner in the Parker Inquiry explained that both the physical and mental effects of the five techniques had been considered. There was evidence of minor injuries to detainees and the Committee received unchallenged medical evidence that subjection to a noise level of 85 decibels for 48 hours may result in 8% temporary loss of hearing and in 1% permanent loss of hearing (HMSO, Parker Inquiry §13). According to Lord Gardiner, in examining the physical and mental effects on the detainees, it was highlighted that these techniques were known to cause: artificial psychosis, episodic insanity, unbearable anxiety, tension, attacks of panic, and nightmares.

The mental consequences are also manifold. In-depth interrogation, as described in the first Compton report, is a form of sensory isolation leading to mental disorientation.<sup>8</sup> As one group of

distinguished medical specialists put it: “sensory deprivation is one method of inducing an artificial psychosis or episode of insanity and there are records that people who have been through such an experience do not forget it quickly and may experience symptoms of mental distress for months or years” (HMSO, Parker Inquiry, §13).

The Compton Report and Parker Inquiry gave figures for the total time each of the 14 men were interrogated for and identified that they were forced to stand at the wall for between nine and 43.5 hours (HMSO, Compton Report, 1971). Wall-standing was used to achieve security for the guards working at the center by ensuring that detainees’ hands were visible. White noise, which had been likened to a train letting off steam, was produced by an electronic noise generator and used to prevent communication between detainees. This also prevented them from overhearing the interrogation of their associates or any other activity in the center (Newbery, 2009).

There is a consensus that certain methods of physical ill-treatment are accepted as torture but the same cannot be said for those that cause mental suffering. Therefore, infliction of mental suffering may produce different consequences for different persons (Neziroglu, 2007). Moreover, Strasbourg case law<sup>9</sup> has shown that mental and psychological suffering alone may constitute torture, depending on its severity. In the 1978 *Ireland v. United Kingdom* case, the Court accepted that use of the five

<sup>7</sup> Lord Parker of Waddington was appointed as a Chairman together with Mr. J.A Boyd-Carpenter and Lord Gardener as members to prepare the Report of the Committee of Privy Counsellors.

<sup>8</sup> This was first developed by the Soviet Committee for State Securing (KGB) in Russia, where

they placed suspects in the dark and silence.

<sup>9</sup> It refers to the initiated cases and judgments brought by the ECtHR in relation to possible violations of the Conventions’ provisions.

techniques constituted inhuman treatment, as it caused intense physical and mental suffering to the victims. It did not mention any physical methods of torture that would supersede acute psychiatric symptoms.

### **Testimonies of the Hooded Men and evidence of psychological torture**

Cognitive, psychological and even neurovegetative symptoms are evident in the *Ireland v. United Kingdom* case, in which the Hooded Men showed signs of the symptoms discussed. During the interrogation sessions, Paddy Joe McClean reported to hear funeral hymns, see his own coffin and a firing squad. At one point, he reported to forget who he was, believing himself to be a farmer from Enniskillen he had met once. Francis McGuigan saw himself in the company of friends and could not understand why they would not take off his handcuffs (Conroy, 2001). He could also not spell his name, which indicates memory disturbance and poor concentration. Kevin Hannaway sang the song “Four Green Fields” because he thought that he would be shot (ibid).

The Hooded Men also exhibited symptoms of concentration camp syndrome, where the physical and the psychological effects can be demarcated. Physical symptoms include: weight loss, pathological fatigue, dizziness, headache, and sleep disturbance. For example, Francie McGuigan lost almost 10kg of his body mass. The mental symptoms consist of depression, nightmares, a reduction in memory, and an inability to concentrate (Turner & Gorst-Unsworth, 1993). Jim Auld suffered from blackouts, a likely symptom of post-traumatic stress. Sean McKenna subsequently went to a mental hospital as he could not bear noise in any form. Michael Montgomery was reported as not

being able to even tolerate the noise of a vacuum cleaner (Eldemire, 2018). Brian Turley suffers from nightmares, while Kevin Hannaway still suffers from anxiety attacks and heart problems. Five of the Hooded Men died as a result of health problems, so their long-term psychological effects cannot be discerned.

The testimonies of the Hooded Men illuminate the extent to which the five techniques were applied. One of the Hooded Men, Jim Auld, recalls that when he arrived at the Ballykelly facility he was severely beaten and a hood was placed on his head. He was put in a boiler suit against the wall, spread-eagled, with his hands way above his head, and there was a hissing noise in the background (Conroy, 2001). At one point, when Auld could no longer bear the noise and the pain, he contemplated suicide, and when his attempt to hit his head on a pipe failed, he was severely beaten again.

Paddy Joe Mclean, Michael Montgomery and Joe Clark were beaten, forced to stand against a wall, and deprived of food and water. Joe Clark began hallucinating and, at one moment, “snapped,” leading him to run around the room and grab one of his tormentors (McKay, 2015). Francie McGuigan recalls that he was severely beaten and forced to stand against a wall. He remembers that during those seven days in Ballykelly he was handcuffed to a cast iron pipe on a concrete floor with a hood on his head, up against the wall in the “music room,” and interrogated (Farrell, 2018). Brian Turley, Liam Shannon and Kevin Hannaway also experienced the five techniques of interrogation, which are said to have been used to erode their dignity. Liam Shannon remembers that when he was brought to a washroom and his hood was removed he could not recognize himself in the mirror (McKay, 2015).



In light of the evidence above, there is a possibility for the survivors of this case to be reassessed according to contemporary forensic standards contained within the Istanbul Protocol. Trained clinicians can examine all available signs and sequelae of physical and psychological abuse, and produce a medical-legal affidavit documenting their conclusions, which serve as evidence to prosecute perpetrators of torture. The decision of the Court not to revise its decision in the case of *Ireland v. United Kingdom* thus appears a lost opportunity.

### **Disagreements between the Commission and the Court**

The case of *Ireland v. the United Kingdom* underlined the different points of view of the Commission and the Court regarding the issue of what constitutes torture and what conduct amounts to torture. The Commission considered that the purpose of using the five techniques was to obtain information. Moreover, the Commission viewed that the combined use of the five techniques unanimously amounted to torture (EcommHR Report, 1976, §167). The Commission was triggered by the nature of sensory deprivation and the practice of all five techniques as a sophisticated method of breaking their willpower (*ibid*, § 792).

Paradoxically, the ECtHR (by a 13:4 vote) disputed that the five techniques amounted to torture. Eventually, they were classified as a practice of inhuman and degrading treatment (ECtHR, 1978, §167-8). According to Rodley and Pollard (2009), that was unsatisfactory reasoning and a distinction should have been made between torture and other ill-treatment; the Court found a lack of evidence for any “special stigma” attached to the interrogation techniques, therefore the

threshold to determine the practices as torture was not met.<sup>10</sup>

Furthermore, Judge Zekia expressed doubt regarding whether the Court was justified in disregarding the unanimous conclusions of the Commission in respect of torture, which had not been contested by the representatives of both states. He stated that the word “torture,” included in Article 3 ECHR, is not capable of an exact and comprehensive definition (ECtHR, 1978: *Ireland v. UK*). Judge Fitzmaurice stated, “Article 3 ascribes no meaning to the terms concerned and gives no guidance as to their intended scope” (*ibid*, p.105). However, Judge Zekia also disagreed with the view that the intensity of physical or mental suffering is a requisite for a case of ill-treatment to amount to torture. In light of the evidence that was brought before the Commission, Judge O’Donoghue reiterated that the Court did not have the advantage of hearing any evidence from witnesses (*ibid*, p.96), and based its judgment on only two cases. In contrast, the Commission’s judgment was based on an analysis of 502 pages and hundreds of witnesses.

### **A missed opportunity for case revision**

The case recently resurfaced in the public’s consciousness. On 20 March 2018, the ECtHR refused to revise its judgment from 1978 and decided not to re-open the case because it expressed doubts about whether the submitted documents contained sufficient *prima facie* evidence of the alleged new facts.

The request for revision had been submitted on 4 December 2014, in line with Rule 80 of its Court Rules, which states:

<sup>10</sup> See Rodley (2014) who, by applying the UNCAT definition, makes clear that the pain or suffering inflicted can be both mental and physical.

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

The legal grounds for revision came to light with the appearance of “the torture files,” pursuant to the “thirty-year rule” of United Kingdom Government public archives (Padeanu, 2018). In its request, Ireland formulated two grounds for revision. Firstly, that the UK had information within their possession including medical reports from “Dr L.” demonstrating that the effects of the five techniques could be substantial, severe and long-lasting while the Government, through the evidence of the same “Dr L.” before the Commission had alleged that the said effects were minor and short-term. Secondly, the archive material revealed that the use of the five techniques had been authorized at a ministerial level (ECtHR, 2018: *Ireland v. the United Kingdom*, § 20). Moreover, there is a handwritten note in the margin of a letter written in 1977 by the British home secretary, Merlyn Rees, to Prime Minister, James Callaghan, related to the use of methods of torture in Northern Ireland. The note in the margin reads: “This could grow into something awkward if pursued” (Mc Kay, 2015). Further, a document described as a “loose minute” contains a letter of 15 December 1976 from Roy Mason MP, Secretary of State for Northern Ireland, to Airey Neave MP. It argues that the Hooded Men cases had to be settled out of court because of the embarrassment which could arise for those concerned, including Lord Carrington,

the then Defence Secretary (ECtHR, 2018, *Ireland v. UK* § 30). Ireland, as the applicant Government, argued that neither Rule 80 nor the Court’s case law indicated that the Court would be prevented from modifying the grounds on which a violation was found. In their view, the Court was called to consider the grounds on which it had found a violation of Article 3 in respect of the five techniques, in light of the new material (*ibid*, § 69).

Pursuant to the different interpretations of the true meaning of the right to request case revision upon Rule 80, O’Boyle (2018) argues that the Court only has an inherent power to revise a judgment where an error has been made concerning matters that were unknown to the Court and which, had they been known, might have had a decisive influence on the outcome of the case. However, a number of elements have changed or come to light subsequently. If the original case was first raised today, it is likely that the five techniques would be found to constitute torture, particularly given the UNCAT definition on torture and the Istanbul Protocol.<sup>11</sup> Secondly, the British authorities never disputed the use of the five techniques, even promising not to use them again. Thirdly, it is clear that the UK had withheld material evidence from the Court (O’Boyle, 2018). The ECtHR, however, did not re-open the case. Some legal professionals argue that this was based on the chaos and uncertainty that would have perhaps ensued, for legal certainty is a fundamental aspect of justice (Padeanu, 2018). Others have looked to counterfactuals, such as what would have happened if the Court had originally *not*

<sup>11</sup> See the Torture Journal issue 2019-1 for papers focusing on the Istanbul Protocol.

focused on the intensity and severity of the treatment, but on the long-term effects of the use of the five techniques instead.

### **Worldwide jurisprudence on psychological torture other than the Ireland case**

If we analyze Strasbourg case law, it becomes clear that the Court has now clarified that the assessment of the minimum level of severity is relative and depends on the circumstances of the case, which distinguishes between torture and other forms of ill-treatment. For instance, in the *Cambell and Cosans v. United Kingdom* case, which involved the threatened use of corporal punishment on two schoolboys, the Court stated that, “provided it is sufficiently real and immediate a mere threat of conduct prohibited by Article 3 may itself be in conflict with the provision. Thus, to threaten an individual with torture might in some circumstances constitute at least inhuman treatment” (ECtHR, 1982: *Cambell and Cosans v. United Kingdom*). Furthermore, in *Elçi and others v. Turkey*, the Court considered the conditions of detention as inhuman treatment. In *Gäfgen v. Germany*, the Grand Chamber of ECtHR was confronted with a difficult issue: can police officers threaten to torture a suspect if they believe this may save the life of an innocent child? The Court clearly stipulated that they cannot.<sup>12</sup>

In *Selmouni v. France*, the Commission found medically certified trauma on various parts of the body as proof of torture in the form of beatings over a period of days, involving punches, kicks, and blows with

a truncheon and a baseball bat (ECtHR, 1994: *Selmouni v. France*). The Court unanimously agreed, using diction that marks a departure from the language used in the *Ireland v. the United Kingdom* case; it was observed that these acts were violent and would be heinous and humiliating for anyone, irrespective of their condition. It also found that all injuries, when taken together, established the existence of physical and mental pain and suffering.

More recently, in *Dikme v. Turkey*, the ECtHR found that the treatment inflicted on the victim consisted of “at the very least a large number of blows and other similar forms of torture,” which cause both physical and mental pain or suffering followed by permanent damage to the applicant. The Court considered that such treatment was intentional (ECtHR, 2000: *Dikme v. Turkey*). Furthermore, in *Aydin v. Turkey*, the applicant alleged that she was raped in police custody. The Court, when finding that she had been raped, stated, “rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim (ECtHR, 1997: *Aydin v. Turkey*). In *Akkoç v. Turkey*, the victim, in this case, had been subjected to electric shocks, hot and cold-water treatment, blows to the head, and threats concerning the ill-treatment of her children (ECtHR, 2000: *Akkoç v. Turkey*). This treatment left the applicant with long-term symptoms of anxiety and insecurity, and post-traumatic stress disorder (PTSD), which required medical treatment. Thus, PTSD found in prisoners subjected to coercive interrogations would qualify as significant psychological harm and permanent damage.

<sup>12</sup> See: ECtHR, *Elçi and others v. Turkey*, App. No. 23145/93; 25091/94 and ECtHR, *Gäfgen v. Germany*, App. No.22978/05

The Inter-American Court further observed that, according to international standards, torture could be inflicted through physical violence and through acts that produced severe physical, psychological or moral suffering in the victims. In the case of *Cantoral Benavides v. Peru*, the Court considered that the acts were planned and inflicted deliberately upon Mr. Cantoral Benavides for at least two purposes. Prior to his conviction, the purpose was to wear down his psychological resistance and force him to incriminate himself or to confess to certain illegal activities. After he was convicted, the purpose was to subject him to other types of punishment and imprisonment (IACtHR, 2000: *Cantoral Benavides v. Peru*). Consequently, the Court noted acts of psychological torture and a failure of Peruvian authorities to prevent such conduct.

The definition of torture contained in the Inter-American Convention to Prevent and Punish Torture (IACPPT) goes further than UNCAT because it does not require the pain or suffering to be severe and refers to “any other purpose” rather than “such purposes as.” In *Tibi v. Ecuador*, the Court found that the aim of repetitive execution of violent acts was to diminish the physical and mental abilities of the victim and annul his responsibility for him to plead guilty of a crime (IACtHR, 2004: *Tibi v. Ecuador*). Similarly, the Human Rights Committee (HRC) in its case law had classified the threat of serious physical injury as a form of psychological torture. For instance, in the *Kooijmans First Report*, the Committee found there to be torture including applications of electric shocks, use of submarino,<sup>13</sup> beatings,

suffocation, near asphyxiation in water, and other torture methods.

### Conclusion

In the case of *Ireland v. the United Kingdom*, the Court established that the five techniques used on the Hooded Men did not amount to torture. This paper has emphasized the importance of the intentionality criterion when reconsidering previous cases, and outlined how systematic psychiatric forensic reports based on the Istanbul Protocol can reveal psychological torture.

However, the Istanbul Protocol did not exist at the time of the initial hearing. It is likely that this influenced the Court’s original judgment, which was based on the consideration of the severity of the methods and speculative assumptions regarding the severity of suffering in the absence of thorough medical and psychiatric documentation. However, in the request for revision in 2018, the Court could have reassessed their original verdict, based on assessments of the victims using the Istanbul Protocol, to evidence long-term permanent damage suffered by the Hooded Men. They elected not to do so. With this, the ECtHR missed a historic opportunity to: establish a clear distinction between ill-treatment and torture by giving full consideration to the intentionality criterion; consider the suffering criteria according to present day conditions; and to clarify its position in relation to the use of the five techniques, as well as other psychological torture techniques.

One important question that remains unanswered is whether the decision not to re-open the case has encouraged, and will influence on an ongoing basis, other state

<sup>13</sup> Inter alia, immersion in a mixture of blood, urine, vomit and excrements, which leads to a “near-

drowning” experience where victims are suffocated by having to hold their breath underwater.

governments to rely on the 1978 judgment as a basis to validate acts that are now considered as torture. The decision may also deter others from requesting historical decisions to be reconsidered. If this is the case, the consequences for victims of torture for accessing full justice and reparations, as part of their wider rehabilitation process, extends far beyond the 14 men who had their life trajectories altered at the hands of the United Kingdom. The ripple effects may be far more wide-reaching.

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