

How has the ECtHR articulated the difference between “torture” on the one hand, and “inhuman and degrading treatment” on the other in its jurisprudence over the years? What is the significance of the distinction? In your answer, include a discussion of *Ireland v UK (1978-79)* and *Ireland v UK (2018)*.

This paper discusses Article 3 of the ECHR, which protects the individual from torture, inhumane and degrading treatment and punishment. This paper will discuss the significance of the distinction. This paper will then discuss the jurisprudence in *Ireland v. United Kingdom* in respect of this Article and the restrictive approach taken by the courts. Then using recent judgment, this paper highlights the courts change of approach. This paper will look at how the allegation of rape satisfies the test for torture. This paper will look at problems with the decision of *Ireland* and the reasons for this. Lastly this paper will critically examine the revision request for *Ireland* forty years later.

Article 3 protects against torture, inhumane, or degrading treatment and punishment. A minimum degree of severity is required for ill treatment to fall within the scope of Article 3. Then it must be determined if the mistreatment is torture, inhumane, or degrading treatment. This is significant since a finding of torture will result in a criminal penalty. Furthermore, distinguishing between appropriate and inappropriate care practises demonstrates the line between acceptable and unacceptable activity. Furthermore, the monetary award provided by the ECtHR must be symbolic of the ill treatment received.

Torture was described by the court in *Ireland v. United Kingdom*¹ as “deliberate inhuman treatment causing very serious and cruel suffering”.² Then the court went on to define inhumane treatment as treatment which has caused physical and mental suffering and degrading treatment was the humiliation of person enough to debase them and break their moral resistance.³ The UK government was the respondent in the Ireland case because it had arrested alleged IRA terrorists. The Irish government was contesting the UK's use of extrajudicial powers. The security forces used five tactics, including hooding, which involves placing a black bag over the detainee's head and holding it there during the day except during questioning. The inmates were exposed to sleep deprivation, food deprivation, and had displayed symptoms of acute psychological disturbances after being interrogated using the five techniques. Khan argues the reason for such care was addressed in *Padilla II*,⁴ where it was held that it was built for its “psychological impacts,” to

¹ (1978) 2 EHRR 25, Fitzmaurice and Evrigenis JJ dissenting

² (1978) 2 EHRR 25 Paragraph 167

³ The court has updated this definition in *Price vs United Kingdom*, Judgment of 10 July 2001, paras. 24 30; *Valas˘inas vs Lithuania*, Judgment of 24 July 2001, para. 117; and *Pretty vs United Kingdom*, Judgment of 29 April 2002, para. 52

⁴ 243 F. Supp. 2d at 459

establish a “atmosphere of dependency,” and to give the prisoner the impression that “help is not on the way,” and thus to break down human will.⁵

Nowak and McArthur claim that the deciding factor in separating torture from inhuman, or degrading abuse is not the severity of the pain or suffering suffered, as the ECtHR and numerous scholars have argued, but the intent of the conduct and the victim's powerlessness, and that as such, the distinction is specifically related to the issue of personal liberty.⁶ Nowak and McArthur conclude that the “*scope of operation*” of cruel, inhuman or degrading treatment is a relative term, and that any restriction of this term is proportional outside of imprisonment and related direct regulation. Cruel, inhuman or degrading treatment should be understood to mean an excessive use of police force. In a case of incarceration or equivalent direct supervision, however, no proportionality test can be applied.⁷ Every use of physical or mental coercion against a detainee with the intent of humiliating him or her constitutes degrading treatment or punishment.⁸

The courts determination in Ireland involved examining the issues of the case as a whole, they held the duration and effects of treatment, age, and sex, physical and mental make-up of the victim were determining factors.⁹ The ECtHR found the treatment of the prisoners to be attaining a minimum level of severity to fall within the ambit and be a violation of Article 3. However, they held that it was not serious in severity to be termed torture within the Convention.¹⁰ This was heavily critiqued by many dissenting voices.¹¹ The European Commission of Human Rights (“Commission”)¹² believed it to constitute torture, under the definition from the Greek Case;¹³ however, the court took an opposite view. The definition of torture set by the court was restrictive and also opposed to definition forwarded by Amnesty and other human rights instruments.¹⁴ It is argued the difference lies in the definition of torture but is also affected through its application. The decision in Ireland seems to give the term of torture a somewhat narrow meaning. It seems to be one that is confined to ‘limited to extreme barbarity’.¹⁵

⁵ Arfan Khan, International and human rights aspects of the treatment of detainees (2005) 69(2), Criminal Law Journal 168-187

⁶ Nowak, Manfred, and Elizabeth McArthur, “The distinction between torture and cruel, inhuman or degrading treatment”, (2006) 16(3) Torture, 147-151

⁷ Ibid.

⁸ Gafgen v Germany [2010] 6 WLUK 4

⁹ (1978) 2 EHRR 25 Paragraph 162

¹⁰ (1978) 2 EHRR 25 Paragraph 167

¹¹ Simonsen, Natasha Jane, A critique of the decision of the European Court of Human Rights in Ireland v United Kingdom, and its effect on Article 3 jurisprudence, (Dissertation Oxford University, 2012)

¹² Cases were previously brought through the Commission structure.

¹³ First Greek Case, 1969, 12 Ybk, p. 186 (“Greek Case”)

¹⁴ The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was signed on 10 December 1984 and entered into force in 1987. It particularly built upon the Declaration on the Protection of All Persons from being Subject to Torture or Punishment adopted by the General Assembly in 1975 via GA res 3452 (XXX).

¹⁵ M. O'Boyle, ‘Torture and Emergency Powers under the European Convention on Human Rights’, (1977) 71 American Journal of International Law 674, 684-8

In the case of Aksoy v. Turkey,¹⁶ Mr Askoy was arrested by security services, he claim ill treatment while in police custody. His claims consisted of Palestine hanging and electrocution, which resulted in paralysis of his arms. The court was particularly concerned with the lack of safeguards and remedies through national courts and the fact Mr Askoy was killed shortly after his application was lodged with the Commission. The court in this case found they are to be minimum level of severity and the serious infliction of humane treatment, which could constitute torture, notwithstanding their restrictive approach, applied in Ireland.¹⁷

Adyin v Turkey¹⁸ involved a girl who had been arrested with her family by security forces and stripped naked, thrown in a tyre, sprayed with a water cannon and subsequently raped. The court again stressed their concern with the lack of National remedy available to the victim and directed their mind to the factors laid down in Ireland. Again, the courts determination involved examining the issues of the case as a whole, they held the duration and effects of treatment, age, and sex, physical and mental make-up of the victim were determining factors. They held that this treatment would have had a damaging emotional effect on the young girl; in particular the rape was a very distasteful form of ill treatment.¹⁹ The courts in its vague and concealed fashion of judgement found this to constitute torture. The departure from Ireland was becoming apparent. However the court did not unveil a new conceptual approach until Selmouni.

In Selmouni v. France,²⁰ the French police had arrested a suspect from a drug smuggling gang. Mr Selmouni claimed he had been raped in police custody, this had already been held to constitute torture in Aydin. The other type of ill treatment included: the police beating the suspect, making him run through corridors where he was tripped over and an incident where he was urinated on. The court went further then to class this as torture; they applied the definition of torture as found in Article 1 and 16 of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which identified the deliberately serious infliction of cruelty for the purpose of obtaining confessions or information from suspects. They held the level of severity in torture would the minimum type needed for ill treatment to fall into the ambit of Article 3. The court recognised that acts that had previously been considered inhumane treatment could in the future been classed as torture. In the courts opinion: “... *the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.*”²¹

¹⁶ Aksoy v Turkey (1997) 23 EHRR 553

¹⁷ (1997) 23 EHRR 553 paragraph 61

¹⁸ Adyin v. Turkey [1997] ECHR 75

¹⁹ [1997] ECHR 75 paragraph 83

²⁰ Selmouni v France (2000) 29 EHRR 403

²¹ Selmouni v France (2000) 29 EHRR 403 paragraph 101

The reasons for this inaccurate approach in the past were recognised and justified through the broad dicta of how the Convention is a living instrument which must be interpreted according to living day conditions. It seems suspect that the UK in Ireland was afforded a more restricted test of severity which has been proved to be an outdated approach. Even shockingly the English judge in the case of Ireland refused even to find inhumane treatment of the IRA suspects.²² It appears the Convention is not ready to find old democracies at serious fault, until new democracies have disturbed the human rights equilibrium.²³

In Ireland, the definition of extreme pain is introduced, which is ambiguous and open to interpretation. It also provides an objective evaluation test for determining whether or not anyone has been tortured, which ignores the fact that pain and suffering are subjective concepts and therefore the victim's point of view.²⁴ For instance, much will depend on all of the case's conditions, such as the length of care, its physical or mental consequences, and, in certain cases, the victim's sex, age, and state of health.²⁵ Furthermore, in Ireland the court did not investigate the intended purpose of Article 3 because the definition of torture as described in Ireland appears to be at odds with the *travaux préparatoires* of the European Convention on Human Rights. Following Article 5 of the Universal Declaration of Human Rights, the drafters of the legislation sought to expand the ban on torture to other types of actions such as hooding that inflict intolerable pain or impair the victim's dignity by adding inhumane and degrading treatment to the definition of torture. Lastly the decision in Ireland seems to be at odds with Article 1 of the UN Convention Against Torture, which describes torture as “*any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession*”.

Recently, an application for revision was made based on the 1978 initial Ireland decision.²⁶ The Irish government focused on the more recent case of Selmouni v France, as well as the ever-changing definition of torture.²⁷ The Court determined that the details known to the UK Government at the time regarding the long-term consequences of the ill-treatment, which the Irish Government brought to the Court's attention in this review request, may not have had a definitive influence on the Court in 1978.²⁸ Thus the Court was not willing to retroactively re-interpret the evidence known at the time of the original judgement.

Due to a selective interpretation of the Court's jurisprudence and the rationale of the initial judgement, the Court missed an opportunity to finally end arguments that punishments analogous to the “five techniques”

²² Separate opinion of Sir Gerald Fitzmaurice

²³ Alastair, Mowbray “A study of the principle of fair balance in the jurisprudence of the European Court of Human Rights”, (2010) 10(2) *Human Rights Law Review* 289-317

²⁴ L. Doswald-Deck, “What Does the Prohibition of Torture or Inhuman or Degrading Treatment or Punishment Mean? The Interpretation of the ECHR”, (1978) 25 *Netherlands International Review* 24, 33

²⁵ Selmouni v France (2000) 29 EHR 403

²⁶ Ireland v. United Kingdom (2018) 67 E.H.R.R. SE1

²⁷ (2018) 67 E.H.R.R. SE1 paragraph 60

²⁸ (2018) 67 E.H.R.R. SE1 paragraph 135

should not be regarded as torture. Judge O'Leary differed from the majority on many occasions, the most important of which was her assertion that the majority took an overly narrow view of how the Court arrived at its decision in the initial judgement.²⁹

Principally Judge O'Leary opined that the majority were incorrect to interpret the revision request as if it were trying to alter the legal meaning of torture, or the stigma attached to it, as it existed in 1978.³⁰ According to Judge O'Leary, the revision request was intended to determine if the Court would have interpreted the same meaning in 1978 if it had all of the evidence that were excluded at the time. In this regard, it was suggested that if the original Court had had access to the now-available archives, it would have been "*it very difficult, if not impossible to displace*" the Commission's unanimous finding of torture in the original proceedings.³¹

In conclusion Judge O'Leary indicated that the original Court's determination that the "five techniques" did not constitute acts of torture may have been motivated by the Court's reluctance to hold the UK, a founding state of the European Convention, accountable for a breach of Article 3 due to the particular stigma attached to such violations.³² It is argued that if the Court had to consider the "five techniques" today, in light of evolving case law and interrogation techniques, it would find that they constituted torture. It is also not impossible to believe that the Court would feel uncomfortable to revise a case settled 40 years earlier in light of little new facts. The Grand Chamber's referral of the present judgement is still pending. The Convention does not seem to be prepared to hold established democracies accountable for grave violations of human rights before emerging democracies disrupt the human rights equilibrium. The original decision in Ireland can be critiqued from many angles however; the ECtHR was presented with a fresh jurisprudence, which is developing.³³ It can be argued that the amount of clarification given in the judgments of the original Ireland decision is very poor, reasons need to be advanced and not broad statements of principle, however, the decision in Selmouni was welcomed and well overdue.

²⁹ Dissenting Opinion of Judge O'leary, paragraph OI-74

³⁰ Dissenting Opinion of Judge O'leary, paragraph OI-10

³¹ Dissenting Opinion of Judge O'leary, paragraph OI-63

³² Dissenting Opinion of Judge O'leary, paragraph OI-70

³³ McGlynn, Clare, "Rape, torture and the European convention on human rights", (2009) *International and comparative law quarterly* 565-595

Bibliography

Journals

Doswald-Deck, L., "What Does the Prohibition of Torture or Inhuman or Degrading Treatment or Punishment Mean? The Interpretation of the ECHR", (1978) 25 *Netherlands International Review* 24, 33

Evans, M., 'Getting to Grips with Torture', (2002) 51 *International and Comparative Law Quarterly*, p. 365

Khan, Arfan, 'International and human rights aspects of the treatment of detainees', (2005) 69(2), *Criminal Law Journal* 168-187

Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?', (2005) 16 *European Journal of International Law*, p. 171

McGlynn, Clare, "Rape, torture and the European convention on human rights", (2009) *International and comparative law quarterly* 565-595

Mowbray, Alastair, "A study of the principle of fair balance in the jurisprudence of the European Court of Human Rights", (2010) 10(2) *Human Rights Law Review* 289-317

Nowak, Manfred, and Elizabeth McArthur, "The distinction between torture and cruel, inhuman or degrading treatment", (2006) 16(3) *Torture*, 147-151

O'Boyle, M., 'Torture and Emergency Powers under the European Convention on Human Rights', (1977) 71 *American Journal of International Law* 674, 684-8

Rodley, N., 'The Prohibition of Torture: Absolute Means Absolute', (2006) 34 *Denver Journal of International Law and Policy*, p. 145

Books

Cismas, I., The Intersection of Economic, Social, and Cultural Rights and Civil and Political Rights, in E. Riedel, G. Giacca, and C. Golay (eds), *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (OUP 2014) pp. 448-472

Dissertations

Simonsen, Natasha Jane, A critique of the decision of the European Court of Human Rights in Ireland v United Kingdom, and its effect on Article 3 jurisprudence, (Dissertation Oxford University, 2012)

Table of Cases

Adyin v. Turkey [1997] ECHR 75

Aksoy v Turkey (1997) 23 EHRR 553

Ireland v. United Kingdom (1978) 2 EHRR 25

Ireland v. United Kingdom (2018) 67 E.H.R.R. SE1

Selmouni v France (2000) 29 EHRR 403

Foreign Jurisdiction cases

Padilla v. Rumsfeld, 243 F. Supp. 2d 42

Table of International Conventions

UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Article 1

Article 5

Article 16

Convention for the Protection of Human Rights and Fundamental Freedoms 1950

Article 3