**The Marks of Civilisation: The Special Stigma of Torture**

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**ABSTRACT**

The European Court of Human Rights attached a special stigma to torture, for the first time, in *Ireland v United Kingdom*, in its interpretation of the distinction between torture and other forms of ill-treatment. The concept is now central to the European Court’s description of torture under article 3 of the European Convention on Human Rights. In this article, I argue that it is significant that the Court reached for this particular phrase. I consider the special stigma as a parapraxis facilitating a reading of the Court’s ‘unconscious text’. I connect the power to stigmatise with torture to explore the special stigma’s figurative, material and theological implications. Stigma, with its multi-layered meaning and its deep connections to torture, is useful in working out how Western powers generated their self-images as civilised whilst persisting with practices of torture. With the special stigma, the European Court rehabilitated the civilising standard and resurrected the historic association between torture and stigma.

**KEYWORDS:** torture, special stigma, article 3, civilisation, political theology

1. **INTRODUCTION**

The abolition, prohibition and condemnation of torture are intrinsic to European or Western state identities as liberal and democratic. Torture is, nevertheless, practiced by those states, though such practices are concealed or denied or, when irrefutable, defended as an aberration. There is more than hypocrisy at work in this tension between condemnation and practice. To understand torture - its abolition, prohibition and persistence – we have to make sense of seemingly irreconcilable phenomena: ‘civilised’ states abhor torture; torture is an instrument of the civilising mission. To bridge this contradiction, it is necessary to understand that states torture bodies that they stigmatise as uncivilised. Stigma, with its multi-layered meaning, and its deep connection to the practice of torture, is useful in working out how European and other Western states generated their self-images as civilised and non-torturing whilst persisting with practices of torture. Stigma is also useful in understanding the historical and contemporary practice of torture. In this article, therefore, I examine the ‘special stigma’ of torture.

The European Court of Human Rights attached a special stigma to torture, for the first time, in the case of *Ireland v United Kingdom*,[[2]](#footnote-2) in its interpretation of the distinction between torture and other forms of ill-treatment.[[3]](#footnote-3) The concept is now central to the European Court’s description of torture under article 3 of the European Convention on Human Rights. Despite its centrality to the jurisprudence, and to the contemporary legal and moral understanding of torture, the special stigma has received little attention in the literature.[[4]](#footnote-4) The inattention is somewhat unsurprising. The phrase does not, at first glance, seem to play a decisive adjudicatory role in article 3 cases. Moreover, the idea of a special stigma attaching to torture seemsintuitive. It appears to simply confirm that torture is a particularly deviant act; it demarcates torture as disgraceful behaviour whilst stigmatising the state for breaching the prohibition.[[5]](#footnote-5) From this perspective, by introducing the phrase, the Court was merely reinforcing the Convention drafters’ intention to denounce torture and its perpetrators. The special stigma, on this reading, upholds the idea of torture as particularly immoral, whilst ensuring that states that deviate from the absolute ban are appropriately stigmatised. There is more to the special stigma than meets the eye, however. The Court introduced the phrase in a case in which it found no stigma. The Court produced this language, then, to remove the stigma from the specific acts in question. In so doing, the Court saved the UK from stigmatisation.

Figuratively, stigma refers to attributes that are deemed abnormal – a stigmatised individual or group possesses an ‘undesired differentness’,[[6]](#footnote-6) for which they are ‘shunned’.[[7]](#footnote-7) On the international plane, stigma works analogously. States or political communities might be stigmatised for particular abnormal or shameful practices or behaviours, torture amongst them.

This figurative or social stigma derives from the literal meaning. As Tyler remarks, we do not ‘ordinarily associate stigma with physical violence’ or use the word to describe ‘physical wounds or scars’,[[8]](#footnote-8) yet stigma, in its literal sense, means a mark or a brand which is inscribed on the body as a sign of infamy.[[9]](#footnote-9) Social stigma refers ‘more to the disgrace itself than to the bodily evidence of it’.[[10]](#footnote-10) Both meanings signify an individual or political community that is marked out.

There is also a theological significance to the material meaning of stigma. The stigmata refer to the ‘marks resembling the wounds on the crucified body of Christ’ and evoke a powerful image of the story of Christ’s torture and suffering, sacrifice and redemption.[[11]](#footnote-11) In her work, Tyler emphasises the power to stigmatise. She recouples social stigma with material stigma and the history of bodily marking to show how stigmatisation is a form of power. In this article, drawing on Tyler, I connect the power to stigmatise with torture and demonstrate the significance of the European Court’s choice of language through an exploration of the figurative, material and theological workings of the special stigma. I consider the special stigma as a parapraxis, or ‘Freudian slip’, facilitating a reading of the Court’s ‘unconscious text’.[[12]](#footnote-12)

Part 1 examines the European Court’s invocation of the special stigma in *Ireland v UK*, its afterlife in article 3 cases and, particularly, in the 2019 decision to deny revision of the 1978 decision. Novel in 1978, the special stigma has since functioned ideologically to rehearse Europe’s civilised status and hermeneutically to investigate the bodily evidence of torture. It is significant that the Court reached for the language of stigmatisation in its determination of the distinction between torture and other ill-treatment. The Court adopted this language apparently to underline the exceptional abhorrence of torture, yet it did so whilst interpreting torture as a quantitative, legible experience of pain and suffering. Part 2 considers the legacy of *Ireland v UK*, in relation, in particular, to the persistence of torture in British practice and shows how the Court’s invocation of stigma accommodated British imperial torture. Part 3 explores the relationship amongst social stigma, civilisation and torture to demonstrate how the special stigma updated the civilising standard to confirm Europe’s ‘sense of self’ as civilised, a place where torture is aberrational.[[13]](#footnote-13) Whilst constituting civilised Europe, the special stigma disappeared European, and British, practices of torture.

Part 4 investigates the material stigma of torture and discusses the historical interrelationship between torture and stigma in the early modern European criminal justice process, in the European witch-hunts and in the transatlantic slave trade. European powers historically used torture, and its scars, to rationalise indictment, persecution and exploitation. In *Ireland v UK*, the Court adopted early modern logic in its search for the bodily evidence of torture to verify the victims’ tortured status. In so doing, by interrogating the bodies of the victims, the Court both deflected and reflected the modern state’s power to stigmatise and torture, and to conceal and deny that torture. Part 5 turns to the stigmata to investigate the theological significance of torture and the theological subtext of *Ireland v UK*. By attaching the special stigma, the Court roused the political theology of torture. On a theological reading, torture is deserved or purgative and redemptive.[[14]](#footnote-14) Torture, universally abhorred as a *human* rights violation, is practiced to subjugate or civilise those who have been racialised or otherwise constructed as less than human and, in so doing, to constitute and rationalise the normal order of humanity.

1. **THE SPECIAL STIGMA OF TORTURE**

The European Court first decided that a special stigma attaches to torture in *Ireland v UK*,its first inter-state case, in 1978. The case concerned allegations of the use of torture against fourteen men. The so-called ‘hooded men’ were arrested, detained, interrogated and tortured in secret detention centres in Northern Ireland, during Operation Cabala, which followed Operation Demetrius, an arrest operation carried out following the introduction of internment in 1971.[[15]](#footnote-15) Internment targeted so-called ‘Republican terrorism’.[[16]](#footnote-16) During Operation Cabala, the men, all members of the minority Catholic community, were subjected to five techniques of interrogation in depth – wall-standing in a stress position, hooding, subjection to continuous noise, sleep deprivation and reduced diet and water – perpetrated over a period of days and enforced through assaults and death threats. The European Court found that the techniques constituted an administrative practice of inhuman and degrading treatment, but that the techniques did not reach the threshold of torture.[[17]](#footnote-17) In making this distinction between torture and inhuman and degrading treatment or punishment, the Court introduced the idea of the special stigma.

Prior to the Court’s decision, the case had been heard by the European Commission, which had found that the five techniques amounted to torture under article 3.[[18]](#footnote-18) The Court’s decision was a departure from the Commission’s report. Neither government had contested the Commission’s finding.[[19]](#footnote-19) The special stigma was significant in justifying the Court’s departure. It was adopted to aid the distinction between torture and other ill-treatment and to emphasise a hierarchy of ill-treatment:

…this distinction derives principally from a difference in the intensity of the suffering inflicted… it appears … thatit 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.[[20]](#footnote-20)

For the Court, torture is different to inhuman treatment, then, on the basis of intensity of suffering and because torture has this special stigma. This formulation is now a feature of article 3 determinations.[[21]](#footnote-21)

1. **The Invention of European Torture Abhorrence**

Article 3 prohibits torture, inhuman and degrading treatment or punishment.[[22]](#footnote-22) Both the Court and the Commission have considered that there is a need for interpretative disaggregation amongst these categories. The idea of a special stigma as an interpretative tool for distinguishing torture from other ill-treatment is, however, nowhere to be found in the Convention itself. Curiously, the Court determined that it was ‘the intention that the Convention…should’ attach this special stigma to torture. The Court inferred that the drafters of the Convention had intended such an understanding of torture. The drafting history is, however, silent on this.[[23]](#footnote-23) Article 3 of the European Convention has its roots in article 5 of the Universal Declaration of Human Rights, but there is nothing in its drafting history either to explain the European Court’s introduction of the special stigma.[[24]](#footnote-24) As such, this language was novel in 1978. The phrase was introduced for the purpose of deciding this case and its departure from the Commission report. The language of the Court suggested, however, that the special stigma was innately attached to torture – the judges were merely translating the customary understanding of torture as having a special stigma into those exact words. From the liberal, normative perspective, in this invocation, the Court was simply interpreting an existing international legal impression that torture is more severe than inhuman and degrading treatment, is at the apex of human suffering and is particularly condemnable behaviour.

The special stigma was, however, not an evolution in the interpretation of the ban on torture and its distinction from other forms of ill-treatment. It was a new interpretation in which the Court gave an interpretative spin to an old torture-related idea – stigma – to invent a history of European opposition to torture. Crucially, the Court underlined the seriousness of torture by setting a particularly brutal bar for what constitutes torture, allowing it to deny the applicants their recognition as torture victims, whilst sending ‘a subliminal message to the UK government that it could continue to tolerate heavy-handed interrogation tactics without having to worry too much about international opprobrium’.[[25]](#footnote-25) The Court used the special stigma to translate, in Rejali’s words, the ‘long, unbroken, though largely forgotten history of torture’ by liberal democratic states into an imagined history of opposition to torture.[[26]](#footnote-26) The special stigma has now been repeated so often in the case law of the Court that it is barely noticed. But ‘novelty is no less novelty for being able to dress up as antiquity’.[[27]](#footnote-27) In *Ireland v UK*, the European Court adopted an interpretation of torture that suited the particularities of the case and it framed that interpretation as deep-rooted, whilst re-routing the definition of torture.

1. **The Appearance of Stigma**

It is significant that the special stigma was first invoked in *Ireland v UK*. As Ní Áoláin has observed, this was a ‘politically sensitive case’. [[28]](#footnote-28) A hegemonic European power was accused by another Council of Europe member state - the UK’s nearest neighbour - of practising torture against its own citizens in the context of a militarised conflict. The Court reached for the special stigma to free the UK from the charge of using torture in these circumstances. It also freed the Court from the decisional parameters and precedents set by the Commission both in the *Greek* and *Ireland* cases. This was also the first opportunity for the Court to develop its interpretation of article 3.

In the 1969 *Greek* case,[[29]](#footnote-29) an inter-state application brought by Denmark, Norway, Sweden and the Netherlands in response to allegations of widespread human rights abuses, including systematic torture, following the military coup in April 1967, the European Commission established the approach of breaking down Article 3 in to its component parts.[[30]](#footnote-30) The Commission reported an administrative practice of torture, comprising repetition of acts and official tolerance, in violation of article 3.[[31]](#footnote-31) The Commission held that the components were interrelated: ‘it is plain that there may be treatment to which all these descriptions apply, for all torture must be inhuman and degrading treatment, and inhuman treatment also degrading’.[[32]](#footnote-32) It concluded that the word torture ‘is often used to describe inhuman treatment, which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment’.[[33]](#footnote-33) It defined inhuman treatment as deliberately causing ‘severe suffering, physical or mental’.[[34]](#footnote-34) The Commission identified torture as distinct on the basis of purpose and aggravation. The Commission did not specify what it was that made torture an ‘aggravated form’ of inhuman treatment.[[35]](#footnote-35) Whilst it likely encompassed contextual and consequential factors of the ill-treatment – a discriminatory motive, the powerlessness or particular characteristics of the victim, or the presence of sexual violence, as examples –the Court, in 1978, took a narrow view and synonymised aggravated for intensity of suffering.[[36]](#footnote-36)

In 1976, following extensive fact-finding and hearing of witnesses, the European Commission delivered its report in *Ireland v UK*.[[37]](#footnote-37) The Commission found that the five techniques used in combination amounted to torture on the basis that they were imposed ‘to break the will’ and were applied for a purpose:

Indeed, the systematic application of the techniques for the purpose of inducing a person to give information shows a clear resemblance to those methods of systematic torture which have been known over the ages. Although the five techniques…might not necessarily cause any severe after effects the Commission sees in them a modern system of torture falling into the same category as those systems which have been applied in previous times as a means of obtaining information and confessions. [[38]](#footnote-38)

The Commission endorsed the approach taken in the *Greek* case that torture constitutes purposive inhuman treatment. The decision pivoted on the Commission’s interpretation of the actions of the perpetrator.

In 1978, the European Court applied a very different interpretative methodology.[[39]](#footnote-39) The Court reasoned that the five techniques used in combination constituted inhuman and degrading treatment: ‘although their object was the extraction of confessions, the naming of others and/or information and although they were used systematically, they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood’.[[40]](#footnote-40) The Court relied on the subjective - the impact of the techniques on the victims and their experience of suffering; on the abstract – the special stigma; and on the ostensibly intuitive – ‘as so understood’. Significantly, the Court departed from the Commission decision absent any new findings. The new determination rested, then, not on new facts or evidence but on a new interpretation of what constitutes torture.

To distinguish torture from inhuman treatment, the Court maintained that the UN Declaration against Torture had drawn a distinction between torture and other ill-treatment. The Court suggested that the authors of the Declaration also attached this special stigma to torture: ‘Moreover, this seems to be the thinking lying behind Article 1…of Resolution 3452… which declares: “Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment”.’[[41]](#footnote-41) The drafters of the Declaration had, in fact, taken these words from the Commission’s decision in the *Greek* case.[[42]](#footnote-42) There was nothing in either the *Greek* case or the drafting of the Declaration to suggest that ‘aggravated’ meant an elevated level of severity of pain and suffering, nor was there any reference whatsoever to the special stigma, as the Court’s reasoning suggests.

The Court was not unanimous in its departure from the Commission; three judges (from seventeen) questioned the introduction of the severity distinction. Importantly, however, the severity distinction and the special stigma have permeated the article 3 case law since.

1. **No Marks, No Stigma**

Whilst the special stigma is now established in article 3 cases, it is tied to the particular complexities of the 1978 case. The Court reached for those words to escape the Commission’s findings. The phrase was introduced apparently to signal a taboo but it aided the re-interpretation of torture, paving a path to the outcome – inhuman and degrading treatment. The Court also introduced the phrase to avoid stigmatising the accused state, whilst gesturing to an underpinning architecture of torture as a determinant of civilised and uncivilised political communities. At first glance, the Court appeared to have employed the special stigma to underline the gravity of torture. Yet, the Court framed torture in this way for deferential reasons.[[43]](#footnote-43) In so doing, it destigmatised the five techniques.

The Court introduced this phrase in a case where it was unable to find sufficient evidence of torture – the bodies of the men, under the Court’s examination, did not disclose the stigmata. The special stigma and the intensity or severity distinction disguised a crude inquiry. The Court examined the men’s experience; how much do we think these men have suffered, the judges essentially asked. In its examination, the Court fixed its gaze on the victims, looking for bodily evidence of ill-treatment, rather than on the acts of the state. The special stigma, whilst seeming to indicate the special abhorrence of torture, served as a means for the Court to search the victims for the marks of suffering. In the 90s, the Court found evidence of the special stigma, for the first time, in a number of cases involving Turkey, in the context of rising allegations of the systematic use of torture. In *Aksoy v Turkey*, in 1996, the treatment was of such ‘a serious and cruel nature that it can only be described as torture’.[[44]](#footnote-44) The medical evidence showed that the victim had been subjected to ‘Palestinian hanging’.[[45]](#footnote-45) The following year, in *Aydin v Turkey,* the Court again found torture in violation of article 3. In this case, the victim had been raped, which the Court determined to be ‘an especially grave and abhorrent form of ill-treatment’ which ‘leaves deep psychological scars on the victim’.[[46]](#footnote-46)

In *Selmouni v France*, in 1999, the Court attempted to recalibrate the severity level it had set in 1978, through an oft-cited, evolving interpretation: ‘…having regard to the fact that the Convention is a “living instrument which must be interpreted in the light of present-day conditions”, the Court considers that certain acts which were classified in the past as “inhuman and degrading treatment” as opposed to “torture” could be classified differently in future’.[[47]](#footnote-47) The applicant had been subjected to ill-treatment including violent beatings, the evidence of which was corroborated by medical reports. The Court noted that ‘the marks of the violence Mr Selmouni had endured covered almost all of his body’.[[48]](#footnote-48) The torture was plain for the Court to read and interpret – the victim’s body an archive of his suffering. Whilst *Selmouni* could be viewed as judicial recalibration of the severity threshold set in *Ireland v UK*, the Court has continued, nevertheless, to reason its decisions through the severity distinction with reference to the special stigma.

In *Jalloh v Germany*, the Court slightly reworded its usual formula to explain that the admission of a forced emetic to retrieve evidence (a cocaine bubble) constituted inhuman treatment rather than torture: ‘Although the treatment to which the applicant was subjected did not attract the special stigma reserved to acts of torture, it did attain in the circumstances the minimum level of severity covered by the ambit of the Article 3 prohibition.’[[49]](#footnote-49) Unusually, the Court referenced the special stigma in the context of its determination that there was a violation of article 6, because the use of evidence obtained by intentional acts of ill-treatment ‘not amounting to torture’ had rendered the trial against the victim unfair.[[50]](#footnote-50) In its reasoning on article 3, the Court undermined the absolute nature of the prohibition as a whole by introducing the language of justification:

…any recourse to a forcible medical intervention in order to obtain evidence of a crime must be convincingly justified on the facts of a particular case. This is especially true where the procedure is intended to retrieve from inside the individual’s body real evidence of the very crime of which he is suspected.[[51]](#footnote-51)

The Court found ‘that force verging on brutality was used’, that the insertion of the tube ‘must have caused ‘pain and anxiety’, that ‘mental suffering was endured’ that being ‘forced to regurgitate’ was humiliating and that all of this was experienced under restraint,[[52]](#footnote-52) but it could not confirm evidence of the long-term impact of the treatment. The applicant’s stomach problems had not been established as a sequalae of the ill-treatment.[[53]](#footnote-53) Unlike Selmouni, Jalloh’s body was not visibly marked.

The finding that Jalloh’s treatment constituted inhuman treatment contrasted with the Grand Chamber’s decision the previous year, in *Nevmerzhitsky v Ukraine*, that force-feeding constituted torture. The administration of the emetic and the force-feeding shared features, including restraint, resistance and the insertion of a tube. In *Nevmerzhitsky*, the Court determined that the ‘restraints applied – handcuffs, a mouth-widener, a special rubber tube inserted into the food channel – in the event of resistance, with the use of force’ constituted torture.[[54]](#footnote-54) The Courtmade no mention of the special stigma, suggesting that this has not yet attached to force-feeding.[[55]](#footnote-55) The special stigma was present in *Jalloh* but to explain away torture. Overall, it is hard to escape the sense that the difference between *Jalloh* and *Nevmerzhitsky* was in the Court’s perception of the (un)justifiability of the State’s actions.[[56]](#footnote-56)

A similar point can be made about *Gäfgen v Germany*. In this case, it was uncontested, and corroborated by the domestic courts, that the applicant had been threatened by high ranking officers with imminent ‘intolerable pain’ that would ‘not leave any traces’, and that would be carried out by trained police officers under medical supervision, with the aid of ‘truth serum’, if necessary.[[57]](#footnote-57) This case, like *Jalloh*, contained an explicit indication of the Court’s identification with the state’s decision to use ill-treatment: ‘the Court accepts the motivation for the police officers’ conduct and that they acted in an attempt to save a child’s life’, though they tempered this extraordinary admission with reference to the absolute nature of article 3.[[58]](#footnote-58) The Court, found inhuman treatment, in spite of an accepted perception that the threat of torture ‘can amount to torture’, by contrasting ‘the applicant’s case to those in which torture has been found to be established in its case-law’.[[59]](#footnote-59) Whilst the Court had noted the ‘fear, anguish and mental suffering’ of the applicant,[[60]](#footnote-60) the special stigma was not present. The Court had no medical evidence of the psychological consequences.[[61]](#footnote-61)

As Mavronicola argues, ‘long-term effects and/or injuries appear to have been key determinants in several … findings of torture’ by the European Court.[[62]](#footnote-62) She observes that this emphasis ‘on locating tangible proof of injury or lasting damage risks eliding much of modern torture’.[[63]](#footnote-63) She does detect a ‘promising redirection’ in the Court’s reasoning in *Diri v Turkey*, where the emphasis shifts from the actual suffering caused to the intention to cause such suffering through particularly ‘serious and cruel treatment’.[[64]](#footnote-64) Whilst this may suggest a welcome move away from the study of scars and victims to the study of torture’s perpetrators, the decision of the Court, in 2019, to deny the request for a revision of the 1978 decision further emphasised the structural stranglehold in which the European Court has caught the prohibition of torture.

1. **Still No Stigma: The European Court’s Revision Decision**

Following the discovery of archival documents, ‘which by their nature might have had a decisive influence on the Court’s judgment in respect of Article 3 of the Convention had they been known to the Court at the time of delivering judgment’,[[65]](#footnote-65) in 2014, Ireland requested a revision of the 1978 decision,[[66]](#footnote-66) The documents contained medical evidence, ‘demonstrating that the effects of the five techniques could be substantial, severe and long‑lasting’, which the Irish government alleged had been suppressed during the proceedings in the 1970s. The archival material also ‘revealed the extent to which’ the five techniques ‘had been authorised at ministerial level’ and not ‘just’ at a high level, as had been determined in the original proceedings.[[67]](#footnote-67) The Court denied the application to revise the decision. On the suppressed medical evidence, the Court doubted whether the new documents ‘contained sufficient prima facie evidence of the alleged new fact…as to the serious and long-term effects of the five techniques’.[[68]](#footnote-68) On the evidence of ministerial authorisation, the Court did not think that this was ‘unknown’ at the time of the judgment, especially as the UK government accepted that there had been an administrative practice.[[69]](#footnote-69) Furthermore, the Court doubted whether the ‘new facts’ would have decisively influenced the Court in 1978 and, where such doubts exist for the Court, ‘legal certainty’ must prevail.[[70]](#footnote-70)

The revision decision demonstrates the normative emptiness of the special stigma in the liberal legal register. The Court reached its conclusion on procedural and technical grounds, with little pause for thought as to how the two new pieces of evidence could have substantiated that the five techniques were ‘worthy objects’ of the special stigma.[[71]](#footnote-71) Mégret, writing about stigmatisation practices in the international criminal justice context, has observed that when it can be argued that the effects of the accused’s acts are ‘not a spent force…but…will continue to be felt’, stigma tends to be projected by the prosecution, for example, ‘through a systematic invocation of the continuing suffering of the victims’.[[72]](#footnote-72) On this count, however, the Court chose the ‘judicial acrobacy’ of ‘decisive influence’,[[73]](#footnote-73) rather than recalibrating the special stigma to capture the proven long-term effects and physical and psychological sequelae of the five techniques.

Mégret also argues that stigma is most likely to result, at least in the international criminal justice context, when the act is authorised by those in high office ‘who have abused their positions in a way that resonates particularly badly with the human rights ethos’.[[74]](#footnote-74) In her dissenting opinion, Judge O’ Leary emphasised this point, arguing that, had the Court had this information, ministerial level ‘authorisation would have been central to the assessment of the seriousness of any breach flowing from the existence or exercise of an administrative practice’.[[75]](#footnote-75) On that count too, the Court was surprisingly flippant, giving no weight to the power behind the authorisation whilst giving great weight to the UK government’s own admission, in the proceedings before the Commission, that this was an administrative practice. This admission had, however, been part of the UK’s litigation strategy, ‘to give the appearance of cooperation’,[[76]](#footnote-76) but the level of authorisation was deliberately concealed; in fact, as Duffy shows, ‘a tight structure of denial’ and secrecy, on the part of the UK government, surrounded the allegations from the outset.[[77]](#footnote-77)

It is important to remember that the Commission had reached its determination that the five techniques constituted torture, absent the suppressed evidence both of the long-term impacts and of ministerial approval. The Court, in the revision decision, argued that the existence, or not, of after effects from the ill-treatment - long-term psychiatric effects, for example – were not determinate to its original judgment, rather the case was decided then, and would be now, on the basis of the intensity or severity of treatment inflicted,[[78]](#footnote-78) a claim that contradicts the Court’s own language, given it had held in 1978 that the techniques did not *occasion* suffering at the level of torture. As Judge O’ Leary pointed out, had the medical evidence been presented, it would have been hard to avoid a different determination on the intensity of the suffering inflicted.[[79]](#footnote-79)

The Court has been criticised for deciding this case on ‘a technicality’.[[80]](#footnote-80) Whilst the Court has also been praised for prioritising legal certainty,[[81]](#footnote-81) as Cavanaugh observes, applying ‘such a technical approach was strategic rather than…required’.[[82]](#footnote-82) The Court could not navigate the complexity of the ideological and definitional shackles it had placed on article 3 in 1978. Judge O’ Leary rightly remarked in her dissenting opinion that, in her view: ‘it was the Court and the Convention system and not the respondent State which was primarily under scrutiny in the context of this revision request’.[[83]](#footnote-83) According to O’Leary, it is difficult to avoid the impression that the Court sought to shelter itself behind the principle of legal certainty.[[84]](#footnote-84)

Legal certainty concealed the state-centric approach on which the Court has rested its construction, and interpretative manoeuvring, of article 3. Indeed, the Court had the opportunity to use the new evidence to adjust its interpretative path and revise the controversial decision. That, however, would have challenged the Court to face the history of that decision and why and how it had reached it. The Court has tended to overlook the stealth of democratic torture, which is often ‘clean’, causing ‘pain without marks’.[[85]](#footnote-85) Modern democratic torture tries to conceal its harms. Furthermore, obstructed by its hermeneutic approach to the special stigma, the Court has been unable to see the evolution of torture and has contributed, as such, to an understanding of modern torture that overlooks its European manifestations. The special stigma has contributed to an understanding of torture that is not only narrow, slippery, and synonymous with savagery but also accommodates European state violence.

1. **BRITISH TORTURE AND THE SPECTRE OF *IRELAND V UK***

*Ireland v United Kingdom* set definitional parameters of torture that have endured.[[86]](#footnote-86) The emphasis on the severity of torture vis-à-vis other ill-treatment is now accepted by the European Court. The severity threshold has also informed interpretations by other international and national courts and institutions.[[87]](#footnote-87) The decision clearly remains significant for the victims who have fought to have their torture recognised as such. The men all experienced long-term physical and psychological harms as a consequence of their torture. It reduced their life expectancies, impacted their families, and marked them out within their communities.[[88]](#footnote-88) *Ireland v UK* has also been manipulated by several states in enacting torture policies. In Israel, ‘moderate physical pressure’ was justified by the Landau Commission in the late 80s, with detailed reference to the 1978 decision; torture continues to be officially sanctioned in Israel.[[89]](#footnote-89) The Bush administration also developed its ‘enhanced interrogation’ policy in the permissive shadows of *Ireland v UK*.[[90]](#footnote-90) As such, self-described liberal democratic states reference the European Court to justify the introduction of torture policies.

 It was, however, the reappearance of the five techniques in practices of torture by British armed forces in Iraq that really called attention to the structural bias of the 1978 decision. The emergence of allegations of extensive abuse by UK armed and security forces, from 2003 onwards, in the context of the ‘war on terror’ and the war in Iraq, brought to light the truth that the five techniques had never been abandoned, despite the ‘solemn and unqualified undertaking not to reintroduce these techniques’, as provided by the UK in the context of the Strasbourg proceedings.[[91]](#footnote-91) The five techniques had been ‘banned’ by then Prime Minister Heath, in an announcement in the House of Commons in the context of the publication of the Parker Report, on 2 March 1972:[[92]](#footnote-92) ‘The government, having reviewed the whole matter with great care and with particular reference to any future operations, have decided that the techniques…will not be used in the future as an aid to interrogation’.[[93]](#footnote-93) The General Officer Commanding, Northern Ireland, was directed to discontinue the use of the five techniques’, in this same permissive and suggestive language, ‘as an aid to interrogation’.[[94]](#footnote-94) ‘Interrogation in depth’ was allowed to continue; in fact, it was encouraged. Heath emphasised: ‘I must make it plain that interrogation in depth will continue but these techniques will not be used. It is important that interrogation should continue’.[[95]](#footnote-95) Heath’s ‘ban’ resulted in a policy directive which contained a prohibition on the use of the five techniques in interrogation in internal security operations. This political ban on the five techniques was ineffective, beyond Northern Ireland, and in the longer-term.[[96]](#footnote-96) Coercive interrogation continued in Northern Ireland throughout the 70s and 80s.[[97]](#footnote-97)

In 2004, the allegations of British torture in Iraq emerged. The investigation into the ill-treatment and unlawful killing of Baha Mousa,[[98]](#footnote-98) who died in detention in Basra in September 2003, showed that the five techniques of interrogation in depth were still in use. His ill-treatment included hooding, stress positions, and brutal assaults, carried out by members of the armed forces.[[99]](#footnote-99) In 2011, the Baha Mousa Inquiry reported that, over time, the Ministry of Defence had lost its ‘corporate knowledge about the prohibition and its extent’.[[100]](#footnote-100) It was confirmed that the ban had been opposed in military quarters from the outset and was never applied beyond the internal security scenario to ‘wartime’. The Inquiry found that the ban had ‘failed over the next three decades to be incorporated into the doctrine relating to prisoners of war and their interrogation’.[[101]](#footnote-101)

In December 2020, the Office of the Prosecutor of the International Criminal Court closed its preliminary examination concerning allegations of the UK’s involvement in systematic detainee abuse in Iraq from 2003 to 2008.[[102]](#footnote-102) It determined that there is ‘a reasonable basis to believe that various forms of abuse were committed by members of British forces against Iraqi civilians in detention’, including the ‘war crimes of murder, torture, rape and/or other forms of sexual violence, and forms of mistreatment amounting to inhumane and cruel treatment or outrages against personal dignity’.[[103]](#footnote-103) Despite this finding, the OTP closed its preliminary examination on the basis that, under Article 17 of the Rome Statute, it could not conclude that ‘the UK authorities have been unwilling genuinely to carry out relevant investigative inquiries and/or prosecutions’. Yet, the OTP report is littered with concerns as to the ‘deficiencies of the domestic process’.[[104]](#footnote-104)

An investigation at the domestic level that captures the full, or systemic, picture has been avoided. The Iraq Historic Allegations Team, established in 2010 to investigate ‘mounting claims’ of ill-treatment, in particular,[[105]](#footnote-105) was closed in early 2017.[[106]](#footnote-106) Despite being criticised for several failings, including for delays, for inaccessibility and its incapacity to deal with systemic issues,[[107]](#footnote-107) it was the political and media critique of the IHAT ‘for giving excessive credence to the claims made and pursuing investigations of ex-service people in reportedly intrusive ways’ which led to its closure.[[108]](#footnote-108) The UK’s involvement in detainee abuse continues to be bounded by governmental narratives of denial and secrecy. As Duffy argues, the cover up of the ‘situation in Iraq bears a striking similarity to the manner in which allegations of detainee mistreatment were handled in Northern Ireland, and, before that, in the British colonies’.[[109]](#footnote-109)

The European Court, in 1978, could not see the decades of continued British torture stretching out before it. However, it did know about the British history of interrogation in depth. The five techniques, by then Prime Minister Heath’s own admission in 1972, had been in use for many years before their use in Northern Ireland. They had been ‘applied on a number of occasions in the past under successive Governments in various parts of the world’,[[110]](#footnote-110) in Kenya, Cyprus, Malaya, the British Cameroons, Swaziland, Brunei, Aden, Indonesia, Oman, and Palestine.[[111]](#footnote-111) This was established in the Parker Report and confirmed in the House of Commons.[[112]](#footnote-112) In the proceedings at Strasbourg, then, it was established that the UK had a colonial policy of so-called ‘interrogation in depth’. In addition, whilst the Court found no discrimination in the internment policy, they knew that interrogation in depth was reserved for persons perceived to be members of the Irish nationalist Catholic community. The Court also knew about the high-level authorisation of interrogation in depth in Northern Ireland. Moreover, the Court was aware that it had before it an uncooperative state. As Judge Evrigenis put it in his separate opinion in the 1978 case, the Commission and Court were confronted by a ‘wall of absolute silence’ from the British government.[[113]](#footnote-113)

The attachment of the special stigma to torture did not turn heads in 1978, nor has it since. The language appeared intuitive. However, to reflect the European liberal value system, and to justify the UK’s position within the established European public order of civilised states, the Court favoured a universal denunciation of torture over a particular denunciation of torture. It employed the special stigma to deny a practice of torture. The Court modernised the civilising standard.

1. **STIGMA AND CIVILISATION**

Stigma generally refers to ‘a mark of disgrace or infamy; a sign of severe censure or condemnation, regarded as impressed on a person or thing; a brand’ or ‘a distinguishing mark or characteristic (of a bad or objectionable kind)’.[[114]](#footnote-114) Stigmatisation occurs when marks, characteristics or behaviours are censured or condemned as outside the socially-accepted norm, leading to an individual, perceived to exhibit these, being marked out within a society. The word stigma derives from the Greek, στίγμα.[[115]](#footnote-115) Materially, it means a ‘mark made upon the skin by burning with a hot iron (rarely, by cutting or pricking), as a token of infamy or subjection; a brand’.[[116]](#footnote-116) Stigma, in this material sense, refers to practices of bodily marking, generally of the enslaved and outlaws, since antiquity.[[117]](#footnote-117) Material stigmatisation is an exercise of power on the body.[[118]](#footnote-118) This material meaning brings clarity to the figurative or social stigmatisation process. Stigmatisation, understood figuratively, is an exercise of power, or dominance, over an individual, or political community, with the purpose of marking out the disgraced, thereby, constituting the normal.

1. **Social Stigma**

For Goffman, stigma denoted ‘the individual who is disqualified from full social acceptance’.[[119]](#footnote-119) The stigmatised individual possesses an attribute making them different from others, reducing them ‘in our minds from a whole and usual person to a tainted, discounted one’.[[120]](#footnote-120) The ‘attribute is a stigma’, when it is incongruous with a society’s sense of self, of normality. For Goffmann, stigma is relational - for stigmatisation to occur, a society must stigmatise. The offensive attribute cannot exist as a stigma without the stereotype in relation to that attribute. The stigmatised cannot exist without ‘the normals’.[[121]](#footnote-121) Whilst the impact of stigma is, according to Goffman, embodied and material, ‘the normal and the stigmatized are not persons’ but rather socially-generated perspectives.[[122]](#footnote-122) These perspectives on the stigmatised and on ‘the normal’ are bound up with each other.[[123]](#footnote-123) The normals stigmatise; the stigmatised confirm ‘the normals’. The relationship between the stigmatised and the normals, then, is dialectic and constitutive; in the latter case, stigmatisation is constitutive of the normal, a Durkheimian insight that posits ‘deviance as crucial to the construction of social order’.[[124]](#footnote-124)

Tyler, in her study of stigma as a governmental technology of exploitation, reconceptualises stigma to show that it is the product of a socio-political machine.[[125]](#footnote-125) She explains that once we begin to see stigma as ‘a form of power embedded within political economies, we can begin to understand how stigma functions to devalue entire groups of people with the purpose of both fortifying existing social hierarchies and creating new opportunities for the redistribution of wealth upwards’.[[126]](#footnote-126) An individual, a group or a behaviour does not ‘become’ stigmatised, passively or organically; stigma is produced within hierarchical societies for the purpose of securing dominance.

1. **Stigmatisation as Civilisation**

Social stigma exists in the relations among states and affects states analogously to how it affects individuals or groups.[[127]](#footnote-127) Adler-Nissen explains that ‘international society does not require unanimous acceptance of the underpinning values or notions of normality, but it does require processes of stigmatisation to specify those that threaten order’.[[128]](#footnote-128) The stigmatised state is, accordingly, essential to the society of states as ‘it secures the performative enactment of the normal’.[[129]](#footnote-129) Adler-Nissen, echoing Durkheim, views stigmatisation as constitutive of the normative order: ‘For the notion of normal state behaviour to exist, it must have a constitutive outside’.[[130]](#footnote-130) Stigmatisation does not just constitute normal behaviour, then, it induces norms. The stigmatised and the normal are, consequently, bound up with each other in international relations, and in international law, where norms are codified. The norm-violating states are stigmatised and that stigmatisation doubles back to confirm ‘the normals’ and the norm: ‘Each time international society censures some act of defiance, it sharpens the authority of the violated norm and reestablishes the boundaries of international society’.[[131]](#footnote-131)

Making sense of the power to stigmatise at international level, Zarakol examines how the ‘Westphalian core’, the European society of modern, Christian, industrialised, capitalist states, crystallised through developments in the nineteenth century.[[132]](#footnote-132) The construction of Western or European states’ self-image as ‘the civilized world’ required the essentialisation of the East, or Second World, as barbaric, ‘orientalist’ and of the Third World as savage, ‘uncivilized’, constructions which were reinforced through the development of social Darwinism and race theory.[[133]](#footnote-133) To secure their group dynamic as the established, civilised, sovereign ‘normals’, the European society of states stigmatised outsider states as ‘inferior, backward, barbaric, effeminate, childish, despotic, and in need of enlightenment’.[[134]](#footnote-134) This group dynamic, secured by the ‘rise of the West’, and established through the ‘standard of civilisation’ andthe stigmatisation process, was necessary for the exercise of ‘mastery’ on the international stage.[[135]](#footnote-135) The European society of states folded their self-image as the civilised into the international institutions and the international legal regimes they created. As Zarakol observes, modern society, organised around the standard of civilisation,[[136]](#footnote-136) ‘was built on a dynamic of stigmatisation – many, but especially non-Westerner states - whether they escaped formal colonisation or not joined it at a disadvantage’.[[137]](#footnote-137)

The development of the international legal system – which is European, and Christian, in origin – can be illuminated through the constitutive role of stigma.[[138]](#footnote-138) As Anghie has shown, international law developed through a dynamic of difference, ‘an endless process’ of pitting the universal and civilised against the particular and uncivilised, inducing legal techniques ‘to normalise the aberrant society’; in short, international law developed through the colonial encounter.[[139]](#footnote-139) State sovereignty, as constructed and enjoyed by European states, was key to facilitating and legitimising the colonisation of non-European peoples, who were purposefully constructed as incapable of exercising sovereignty.[[140]](#footnote-140)

The foundational principle of sovereign *equality*, as developed by the great powers, obscures the hierarchies in the international order. Simpson argues that the international system is characterised by the legalised hegemony of the great powers and an anti-pluralism that categorises certain states as outlaw or uncivilised ‘based on internal politics, moral characteristics or temperament’.[[141]](#footnote-141) Rather than an international order characterised by the sovereign equality of states, the powerful established an international system composed of unequal sovereigns. The standard of civilisation, and the stigmatisation it facilitated, enabled the determination of international legal personality,[[142]](#footnote-142) the construction of the principle of sovereignty, the designation of unequal sovereigns,[[143]](#footnote-143) the creation of colonies,[[144]](#footnote-144) essentially, a hierarchy of states. Stigma effectuated the hierarchy.

Even if the explicit language of ‘civilisation’ gradually declined over the course of the twentieth century, the standard of civilisation continued to structure international relations and was absorbed by the international legal order. Tzouvala argues, in this respect, that the League of Nations mandate system ‘paved the way for the rhetorical marginalisation of “civilisation” as an explicit legal standard and its transmutation into an undercurrent of international legal argumentation that went on to manifest itself in manifold ways in the context of different institutions and legal fields’.[[145]](#footnote-145) The power to stigmatise via the civilisation standard persisted in the international sphere, albeit less explicitly. States continued to be stigmatised, through legal techniques and discourses, through the League of Nations mandate system,[[146]](#footnote-146) through development and good governance discourses,[[147]](#footnote-147) through the ‘war on terror’, as some examples. The standard of civilisation and the production of stigma have allowed social standards ‘masquerading as objective assessments’ to ‘create and perpetuate power hierarchies’.[[148]](#footnote-148)

International law and courts are central to the stigmatisation process. As Mégret observes of international criminal law, it is rooted in ‘the designation of pirates as *hostis humani generis*, the enemy of all humankind, a label that outlawed and against which ‘the peaceful society ordered around the needs of commerce and freedom of the seas’ was constructed.[[149]](#footnote-149) The pirate and, later, the slave trader, and the torturer appeared to become international law’s adversaries. Mégret examines the ‘potent and problematic…goal of international criminal tribunals: to assign stigma to certain behaviours’.[[150]](#footnote-150) He understands stigma as produced, whether deliberately or unconsciously, and, adopting a Durkheimian lens, he observes stigma’s sociolegal role in delineating acceptable from unacceptable behaviour, ‘forming a society’s deep sense of self and constituting a society through the designation of its other’.[[151]](#footnote-151) He observes the International Criminal Court as having abundant power to produce stigma and, in so doing, to shape international society and entrench norms.[[152]](#footnote-152)

Human rights institutions have an analogous capacity to stigmatise norm violating behaviour and to assign that stigma, directly to states. As such, human rights institutions can constitute, or shape, international society and norms. The special stigma of torture is a blunt example of this capacity.

1. **Civilised Europe and the Social Stigma of Torture**

By the turn of the eighteenth century, judicial torture, part of European criminal procedure since the thirteenth century, had been more or less abolished. Torture, in other words, was no longer part of the legal process. Abolition was proclaimed as Enlightenment-driven and Western powers made abolition the mark of the humanitarian and progressive or civilised state.[[153]](#footnote-153) The West consolidated this civilised self-identity through the stigmatisation of so-called semi-civilised and uncivilised political communities as barbaric or savage on the basis, in part, of their judicial and penal practices. Chen argues that the Western depiction of ‘Chinese or Oriental cruelty’ over the course of the nineteenth century bifurcated ‘the world into a community of “civilized” states that were full sovereign subjects of international law and another group’ that were backward, requiring tutelage.[[154]](#footnote-154) She describes ‘a constant flow of information’ to the West depicting Chinese judicial torture which ‘helped create an *imagined emotional community*’ suffused with a ‘sentimental liberalism’.[[155]](#footnote-155) The production of Chinese legal culture as inferior, cruel and depraved served the purpose of maintaining ‘the Western community’s self-image as the modern and civilized’.[[156]](#footnote-156) The racialised sentimental liberalism, generated in the West, transitioned to a ‘sentimental imperialism’,[[157]](#footnote-157) which manifested in the Western imposition of extraterritoriality in China and other countries.[[158]](#footnote-158)

Modelled on Europe’s relations with the Ottoman Empire,[[159]](#footnote-159) the development of the nineteenth century regime of unequal treaties between Western powers and so-called ‘semi-civilised’ states, China amongst them, established non-reciprocal regimes of extraterritoriality to allow the exercise of Western jurisdiction over their citizens abroad.[[160]](#footnote-160) Having orientalised political communities on the basis of the supposed inferiority of their legal and penal systems,[[161]](#footnote-161) Western powers imposed unequal treaties, establishing favourable trade conditions and granting immunity from local jurisdiction,[[162]](#footnote-162) whilst further consolidating the imaginary of fundamental differences between the legal and penal systems of the civilised West and barbaric East.[[163]](#footnote-163) As Tzouvala observes, the legal system became ‘the best benchmark’ of civilisation.[[164]](#footnote-164) The imposition of extraterritorial arrangements was rooted in the essentialisation of legal and administrative systems as, in Craven’s words, capricious due in great part to the use of torture in the criminal justice systems.[[165]](#footnote-165)

Following the first Opium War, China was coerced into the Treaty of Nanking. Whilst this and other treaties were resisted over time, the regime endured in China until the second world war, despite reforms.[[166]](#footnote-166) China was particularly stigmatised for its ‘Oriental torture’, a hypocrisy that was not lost on officials who retorted that ‘the famous “third degree” is not much less hideous than Chinese torture’.[[167]](#footnote-167) In the colonies, practices of corrective colonial violence were alleged as necessary in the face of indigenous savagery.[[168]](#footnote-168) Writing about colonial India, Rao details the publicization ‘back home’ by the colonial authorities of reports of routine torture in native society.[[169]](#footnote-169) The racialisation of torture ‘as a native inclination’ and a scandal legitimated the civilising mission and justified brutal colonial violence.[[170]](#footnote-170)

By 1948, when the prohibition on torture was ‘universalised’ as a common standard in the Universal Declaration on Human Rights, Western powers had established their credentials as abolitionist and civilised notwithstanding persistent domestic and colonial torture. The prohibition on torture was developed in the subsequent treaty architecture. Today, the prohibition has near universal normative and rhetorical commitment; states tend to support the prohibition, by ratifying treaties and condemning the practice, and they tend to deny their use of torture or to cloak it in semantics to avoid the word torture. States deny and conceal their practice of torture to avoid ‘being stigmatized as “uncivilized”’, an indication, for some, of the norm’s compliance pull.[[171]](#footnote-171)

The received Western history of the abolition and prohibition of torture, examined in the light of the civilisation - stigmatisation nexus, undermines, however, the seductive idea of the compliance pull. The prohibition and definition of torture have been developed in ways that have accommodated but obscured abusive practices. The backdrop to the prohibition of torture in the human rights texts was the ‘return’ of torture under the Nazi regime. Cocks, a British representative during the drafting debates of the European Convention, decrying the aberrational return of torture, proclaimed that ‘all forms of physical torture are inconsistent with civilised society, are offences against heaven and humanity…that it would be better even for Society to perish than for it to permit this relic of barbarism to remain’.[[172]](#footnote-172) Teitgen, the French representative and Chair of the committee with overall responsibility for drafting the Convention, decried: ‘Other countries, great, beautiful and noble countries, were also subjected to a sense of ethics and morality and civilisation. And then one day evil fell upon them’.[[173]](#footnote-173) All eyes were on Nazi Germany, then, as the drafters posited the practice of torture as an affront to civilisation. The drafters disassociated their civilised democratic states from their practices of torture both at home and in the acquisition and management of the colonies.

The European Convention was, at any rate, never intended to include colonial subjects,[[174]](#footnote-174) who, in the eyes of the colonial powers, were not civilised. This was a project of European unity, modelled on the standard of civilisation and the established/outsider dynamic. The European Convention drafters were motivated by waging war against communism,[[175]](#footnote-175) and by rehabilitating Germany, which, after all, shared Europe’s Christian ethos.[[176]](#footnote-176) Germany, having lost its way, was quickly re-established as a ‘normal’; it signed the European Convention in 1950 and ratified in 1953.[[177]](#footnote-177) Duranti writes:

The European unity movements envisioned European human rights law as a means of delineating the frontiers of ‘European civilization,’ an expression they often prefaced with the adjectives ‘Christian’ and ‘Western.’ This civilizational rhetoric, which had long fused the universal with the particular, was the bridge between their vision of the common attributes of Europe and those of humanity.[[178]](#footnote-178)

These were the ‘normals’, ‘like-minded’, with ‘a common heritage’,[[179]](#footnote-179) including, a common heritage of Enlightenment driven torture abolition. Torture remained available, however, as a civilising practice.

For Britain, and the other colonial powers, the colonised were not fully human and did not have rights. Britain simply never intended the European Convention to apply to the colonies. Nevertheless, in its violent suppression of the revolt by the Kikuyu people (‘Mau Mau’) in Kenya in the 1950s, the British government, having ratified the Convention in 1953, derogated under article 15.[[180]](#footnote-180) The French government, so heavily involved in the drafting of the Convention, held off on ratification until 1973, when the French-Algerian war, and the systematic use of torture there, was safely behind it.[[181]](#footnote-181) The unashamed rhetoric of opposition to torture during the drafting of the human rights treaties in the face of widespread imperial torture illustrates the paradox of civilised abhorrence of torture alongside the continued use of torture as a civilising practice.

That paradox is also evident in contemporary British domestic rhetoric and practice. In the House of Lords, in 2005, for example, in a decision on the admissibility of evidence potentially obtained in a torturous context, Lord Bingham held: it is ‘clear that from its very earliest days the common law of England set its face firmly against the use of torture’.[[182]](#footnote-182) He narrated a partial history of English abhorrence of torture. Contrasting the common law’s rejection of the practice with the prevalence of judicial torture in early modern continental Europe, he emphasised a British legal history of opposition to torture. The decision is littered with references to torture as ‘uncivilised’, implying the uncivilised nature of the ‘foreign torturer’[[183]](#footnote-183) and the ‘unscrupulous’ states that practice torture, with whom the UK security services had no choice but to co-operate. The Lords, like the drafters of the European Convention, focused on the law’s rejection of judicial torture; they overlooked the actual history, and contemporary practice, of torture.

The abolition and prohibition of torture are important to Western powers’ self-identities as civilised and superior. The European Court introduced the phrase special stigma to confirm this identity and to preserve the UK’s established, civilised status. As such, the special stigma transmutes and encodes the civilising standard. The phrase portrays torture as particularly abhorrent, rare, un-European – a practice that happens ‘elsewhere’, whilst facilitating the acceptance of actual practices of torture. The special stigma did not only serve the purpose of saving the UK from stigmatisation whilst fortifying the civilised status of Europe, it also operated materially as a means of interrogating the marks, pain and suffering of the victims. The court, seemingly instinctively, resuscitated the logic of early modern European powers that torture must leave its marks – the stigmata.

1. **THE MARKS OF CIVILISATION: THE TORTURED BODY AS TEXT**

Torture is practiced against those who have been marked out – that is, against the socially stigmatised. Material stigmatisation involves torture – the branding or marking of the enslaved and the indicted through the ages were forms of torture. Stigmata, physical and psychological, result from torture.

For Foucault, torture and stigma were inextricable:

[Torture] must mark the victim: it is intended either by the scar it leaves on the body, or by the spectacle that accompanies it, to brand the victim with infamy; even if its function is to purge the crime, torture does not reconcile; it traces around or, rather, on the very body of the condemned man signs that must not be effaced. [[184]](#footnote-184)

Torture, then, was also a material practice of bodily marking or public display. Torture had to stigmatise, either by producing stigmata or through a spectacular display of the accused’s infamy. This marking was part of a ritual which also required the calculated production of a certain degree of pain.[[185]](#footnote-185)

Such practices of stigmatisation and torture have co-existed through the ages. Penal tattooing, the literal inscription on to the skin, was widespread in the Ancient Greek and Roman empires.[[186]](#footnote-186) This stigmatisation marked out certain groups of people – outsiders, in particular, the enslaved, foreigners, so-called barbarians – as property or for subordination. Stigmatisation was, consequently, constitutive of ownership or of dominance and of the established order. It is in this sense that we can understand stigmatisation as ‘a material practice of bodily marking and subordination’ for ‘penal and property purposes’.[[187]](#footnote-187) These social classification and penal functions of stigma endured as forms of social discipline and control.[[188]](#footnote-188)

Judicial torture was part of the ordinary criminal procedure of most European states, from the twelfth century to the end of the eighteenth century.[[189]](#footnote-189) Torture became a routine means of eliciting confession or of punishment. The confession had a special place in the hierarchy of proof in European criminal procedure and, as Langbein has argued, the criminal procedure came to rely on the tortured confession.[[190]](#footnote-190) Torture became essential to the criminal process. Torture produced the criminal. Judicial torture declined in the liberal legal imagination for moral reasons, because of Enlightened humanitarian progressivism. In fact, judicial torture was abolished from the ordinary criminal process because of criminal reform, particularly the transformation of the law of proof, and because of penal reform. As Foucault argues, there was a transformation in the technology of power which brought with it a shift from the exertion of power over the body to generalised disciplinary control through, for example, the carceral system.[[191]](#footnote-191) Foucault, however, inflated the case for the disappearance of torture. He overlooked the reality that torture became ‘part and parcel’ of the disciplinary institutions,[[192]](#footnote-192) even if it had gone somewhat into hiding. European torture evolved. States pioneered clean coercive techniques.[[193]](#footnote-193) Corporal punishment, in various forms, endured. Moreover, as Tyler observes, ‘European colonialism spread its “arsenal of horrors” and penal practices across the world’.[[194]](#footnote-194)

The ‘return’ of torture coincided roughly with what Moore has famously called the formation of a persecuting society.[[195]](#footnote-195) According to Moore, from the twelfth century, ‘Europe’ came to require persecution.[[196]](#footnote-196) The persecuted included heretics, Jews, lepers, and, later, witches. Moore argues that these particular persecutions cannot be understood independently of each other or as a coincidence. Rather he sees such persecution holistically as having helped to consolidate authority through the construction of deviance.[[197]](#footnote-197)

Torture had an important role in the persecution of witches in the early modern era.[[198]](#footnote-198) In Europe, except for England, judicial torture, the queen of proofs, was used to obtain the witch’s confession as part of the inquisitorial process. Once indicted, it was common for the bodies of the accused to be searched for the devil’s mark, imagined to have been imprinted by his claw on his servant's body.[[199]](#footnote-199) The search for the devil’s mark involved the stigmatising practice of pricking:[[200]](#footnote-200) ‘If the mark would not bleed when pricked with a needle, the suspect was a witch.’[[201]](#footnote-201) Pricking was a frequent practice in this otherwise torturous examination which often ended in the execution or burning of the accused.

The history of the witch hunts is, unsurprisingly, contested on numerous fronts from the numbers persecuted to the phenomenon’s geographic and temporal scope to its overriding motivation.[[202]](#footnote-202) The witch-hunts were, however, underpinned by the persecution of women.[[203]](#footnote-203) Federici, whose historical interpretation is certainly contested, does provide a powerful political theoretical analysis of the persecution as a collaborative attack by church and state, ‘on women’s resistance to the spread of capitalist relations and the power that women had gained by virtue of their sexuality, their control over reproduction, and their ability to heal’.[[204]](#footnote-204) For Federici, alongside other misogynistic practices, the witch-hunts served to assure the demotion of women and their autonomy and to re-establish the patriarchal order, whereby women served their rightful function in the reproduction of labour power. The witch’s body became a pedagogical site of stigma, of torture and of ‘patriarchal power’.[[205]](#footnote-205) The pricking of the witch produced the witch. The Devil’s stigma was read into the witch’s body, a body that was then pricked for evidence. Torture and stigma gave material form to the witch’s indictment, and rationalised their persecution.

The society of persecution provided the model for exploitation, beyond Europe.[[206]](#footnote-206) The transatlantic slave trade was in motion as Europe was winding down its witch trials.[[207]](#footnote-207) Torture, employed to subjugate, transport and exploit, pervaded the slave trade and the institution of chattel slavery. The Oxford English Dictionary defines stigma, in part, through advertisements for ‘runaway slaves’ which contained descriptions of the stigmata, of ‘whippings and brandings, scars and cuts’, on their persons.[[208]](#footnote-208) Rejali, quoting a number of advertisements in US newspapers in the early to mid 1800s, remarks that these advertisements publicised ‘how to read a slave’s body’.[[209]](#footnote-209) Tyler, quoting a similar advertisement in *The London Gazette*, observes that ‘stigma marks functioned as a visual form of identification’, inculcating a ‘stigmatising gaze’ in the public, as readers were solicited ‘to search for identifying stigmata on the bodies of those they encounter’.[[210]](#footnote-210) The enslaved were stigmatised and shaped by torture, registered and advertised as property.[[211]](#footnote-211) Torture and stigmatisation were part of ‘the work of commodification, of “producing”’ the enslaved for the further purpose of European capital accumulation.[[212]](#footnote-212) These processes of subjugation were underpinned by the racialisation of Africans, as black and as savage, for the purposes of exploitation,[[213]](#footnote-213) a process that constituted Europe as white, and civilised, and, accordingly, superior. The enslaved were subjugated through torture. The marks gave material form to their status as property, and rationalised the underpinning racialisation that justified subjugation.

Stigmatisation, through torture, inscribed power on the body of victims, marking out their lesser status,[[214]](#footnote-214) and produced their subjectivities as criminals, witches, and enslaved. The stigmata rationalised their indictment, subjugation and transformed subjectivity. The criminal was sent to the scaffold because their body was marked with their confession. The witch burned because their stigmatised body had revealed the devil’s mark. The status of the enslaved as property was inscribed on their bodies. With the special stigma, the Court rehearsed the logic of antiquity and of the early modern state, where torture produced stigmata. It attached a special stigma to torture following a diagnosis of the victim’s pain and suffering as insufficient. In so doing, it reached for language that connects suffering to its bodily evidence: the marks. The Court sought the stigmata. Choosing not to see or decipher the scars, the Court determined the bodies to have been inhumanly treated and degraded, not tortured. No stigma, no torture.

1. **THE CHRISTIANISING MISSION**

In coming to grips with torture and ill-treatment, it is typical to think in secular terms. Yet, it is arguably theological ideology that has endured in the use of torture through the ages. Torture is a complex display of power over the body. It can, however, be understood as a practice that has historically been, and continues to be, perpetrated on bodies that are stigmatised, as uncivilised, un-Christian. Through the ages, the stigmatised have included the criminal, the witch, the enslaved, the colonised, the terrorist. Torture has been justified in the service of creating or preserving Christian civilisation, within Europe and beyond. It has been justified as a developmental or corrective process, producing new subjectivities – making ‘them’ more like ‘us’. It has been justified to master or eliminate.[[215]](#footnote-215)

1. **The Stigmata**

The special stigma evokes the stigmata, the ‘marks resembling the wounds on the crucified body of Christ’,[[216]](#footnote-216) said to have been supernaturally impressed on the bodies of certain saints and other devout persons’.[[217]](#footnote-217) St Francis of Assisi was the first recorded stigmatic. He is reported to have received the wounds of Christ upon his body in 1224, a ‘miracle’ that was defended by the papacy and led to his canonisation.[[218]](#footnote-218) From the late Middle Ages period, stigmatics proliferated. The interpretation of the meaning of the stigmata shifted from the early Franciscan emphasis ‘on the miraculous and physical nature of stigmatization’ to the more inclusive Dominican interpretation of the stigmata ‘as evidence of suffering undergone in an attempt to follow Christ’.[[219]](#footnote-219) Attitudes to the phenomenon have changed due to scientific and medical progress which shaped perspectives on pain and suffering and due to development s in rationality and psychiatry which altered thinking.[[220]](#footnote-220)

The stigmata recall the torture of Christ, which culminated in the crucifixion,[[221]](#footnote-221) a punishment, and death sentence, commonly inflicted on the enslaved in the Roman Empire. In St Paul’s Letter to the Galatians, he makes reference to the stigmata: ‘From now on, let no one make trouble for me; for I carry the marks of Jesus branded on my body’[[222]](#footnote-222)/’From henceforth let no man trouble me: for I bear in my body the marks of the Lord Jesus’.[[223]](#footnote-223) St Paul’s reference to the brands or marks may have signified his connection to the ancient practice of stigmatising the enslaved;[[224]](#footnote-224) the reference certainly symbolised Paul’s service to Christ, his willingness to suffer persecution, and torture, for his new found devotion.[[225]](#footnote-225)

Perspectives on the crucifixion have altered over the centuries. As Holland explains, only centuries after the apparent death of Christ on the cross, the offensive, humiliating idea of the Son of God suffering the torture and death of a slave had been replaced by the Roman empire’s celebration of the cross as ‘an emblem of triumph over sin and death’.[[226]](#footnote-226) The cross, the instrument of Christ’s pain and suffering, has, since, come to symbolise Christianity and its hegemony. As Holland puts it, ‘the cross on which Jesus had been tortured to death came to serve as the most globally recognised symbol of a god that there has ever been’.[[227]](#footnote-227) Whilst the meaning of the cross cannot easily be rendered,[[228]](#footnote-228) it has been interpreted, and used, to justify the infliction of suffering and torture, through the ages, ‘as just punishment for sin, rejecting God, or as a tool to provoke repentance for the salvation of souls’ and for retribution.[[229]](#footnote-229) The cross as a site of torture is omnipresent. The justification of torture in the service of Christianity, is also persistent.

Bourke remarks that in ‘Christian doctrine, pain is the consequence of sin’; suffering is purifying and necessary to avoid everlasting Hell.[[230]](#footnote-230) Pain is instructive, corrective and provides salvation. Over the course of the nineteenth century, with medical and scientific advancements, in anaesthesia and pain relief, pain became avoidable, manageable, indeed, curable.[[231]](#footnote-231) The celebration of pain, which had been rooted in the passion of Christ, declined.[[232]](#footnote-232) Pain was secularised.[[233]](#footnote-233) Bourke quips that blasphemous ejaculations replaced religious invocations.[[234]](#footnote-234) Asad, contrasting the unapologetic and public torture of the spectacle with modern denial of torture, argues that there is today ‘a liberal sensibility regarding pain’ and an associated disapproval of torture. He further argues that attitudes to pain have changed such that it is ‘difficult to make good sense of suffering today’.[[235]](#footnote-235) ‘The secular Christian must now abjure passion…Pain is not merely negativeness. It is, literally, a scandal’.[[236]](#footnote-236) Yet, notwithstanding secularisation, Bourke argues, contrary to Asad, ‘from the eighteenth century to the present (although with declining salience) religious interpretations of pain continue to provide the most prominent figurative languages and ideological justifications for pain’.[[237]](#footnote-237)

1. **The Political Theology of Torture**

Kahn conceptualises torture as an act of sovereign violence, ‘a form of sacrifice that inscribes on the body a sacred presence’.[[238]](#footnote-238) For Kahn, influenced by Schmitt, torture is a political theological practice: ‘The objective of torture was confession, which had the dual purpose of providing information and acknowledging sin – whether against God or the sovereign’.[[239]](#footnote-239) He argues that, whilst popular sovereignty founded on consent dispensed with the scaffold and public torture, wherever terrorism reappears, torture reappears in the modern state, as the terrorist and the torturer attempt ‘to break the sacrificial practices of the other’.[[240]](#footnote-240)

Schmitt viewed all ‘significant concepts of the modern theory of the state’ as ‘secularized theological concepts’ based both on their ‘historical development’ and their ‘systematic structure’.[[241]](#footnote-241) He argued the impotence of the liberal state which ‘tried to do away with the political’ and theorised political theology normatively to defend authoritarianism.[[242]](#footnote-242) The descriptive part of Schmitt’s political theology was not new. Engels, for example, had, in 1887, identified the ‘juristic world outlook’ as ‘a secularization of the theological outlook’ where ‘human right took the place of dogma, of divine right, the state took the place of the church’.[[243]](#footnote-243) Schmitt developed, however, a detailed account of the persistence of the theological. Schmitt, an anti-Semite, did not see the relationship between racism and political theology.[[244]](#footnote-244)

This broader connection, between race and political theology,[[245]](#footnote-245) is enlightening on torture. Torture is not the consequence of a Schmittian impasse between warring Gods, friend and enemy, terrorist and torturer. Torture is power exercised on the racialised or stigmatised body. The state tortures, in Kahn’s words, ‘to degrade’.[[246]](#footnote-246) Torture appears when the state is on a mission to subjugate and civilise. Witches were constructed as demonic figures, whose torture was justified because their bodies were read as proof of their pact with the Devil. The witch required civilising to contain their subjectivity and to control their reproductive value.[[247]](#footnote-247) The enslaved could be exploited because they were constructed as sub-human. Christian ideology provided numerous justifications for the domination of master over the enslaved; missionaries justified slavery as salvation, the enslaved were ‘being Christianised, thus civilised’.[[248]](#footnote-248) The enslaved were produced through Christian ideology to commodify their labour power. Secularisation, including the secularisation of pain, did not dispense with torture and theological ideology. Nineteenth century colonialism was justified by the civilising mission. Torture was employed as part of the mission to Christianise heathens and civilise ‘savage races’ across empires.

In the era of decolonisation, and since, the apparently secular human rights architecture has not dispensed with torture and theological ideology either.[[249]](#footnote-249) According to European standards, the colonies were not civilised. For the British, throughout decolonisation, Kenya was constructed as un-civilised and Mau Mau insurgents were portrayed as sub-human, ‘a barbaric, anti-European, anti-Christian sect’.[[250]](#footnote-250) Torture was part of the civilising mission.[[251]](#footnote-251) Elkins explains that detention without trial, and torture, of Mau Mau suspects was uncontroversial, given that colonial officers viewed Africans and Asians as ‘not yet civilized’ and, as such, not in possession of the rights and obligations of citizenship. She argues that they were further categorised as bestial, filthy, and evil rendering them ‘subhuman, and thus without rights’: ‘The British argued that Mau Mau threatened not just the life of the colony but that of British civilisation as well. Detaining these subhuman creatures amounted not only to saving Africans from themselves but also to preserving Kenya for civilized white people’.[[252]](#footnote-252)

The systematic practice of torture by the French in Algeria in the 1950s had a similar civilising logic, complicated by France’s conceptualisation of Algeria as part of metropolitan France, the birthplace of *les droits de l’homme*. Torture was a tool of subjugation of the colonial identity,[[253]](#footnote-253) employed against ‘savages’ in defence of France, of civilisation and of Christian values.[[254]](#footnote-254) As Maran writes, ‘the civilising mission was used to transmute actions considered odious into imperatives. Soldiers committed torture to save – as they described it – France, Western civilization, Christianity, and “a certain notion of what man is”’.[[255]](#footnote-255)

By searching the victims for the marks of pain and suffering occasioned by the five techniques, the Court made manifest its unconscious workings in reaching for the stigma. The reference to the stigma recalled the Christian celebration of pain and suffering as purgatory and redemptive, as part of the process of becoming human. The Court resurrected the historic association between torture and stigma, where the stigmata verified persecution. In the era of absolute prohibition, the special stigma has had to navigate in the negative, denying the scars whilst upholding the sovereign power to torture. The Court invoked the special stigma, emphasised verifiable pain and suffering and overlooked the state’s power to stigmatise and civilise without leaving legible scars. In fixing its gaze on the victims, the Court participated in the civilising theology of the state and translated the political theology of torture in to the modern interpretation of torture.

**CONCLUSION**

The European definition of torture has been moulded, through the pain and suffering of victims, in the interests of powerful states. With the special stigma, the European Court rehabilitated the civilising standard. The concept allowed the Court to accommodate and absolve the state’s excesses whilst searching the victims’ bodies for evidence of the extent of their wounds. The decision showed a deference that ought not to be explained away as owing to the difficult political circumstances. Rather, the decision, and the special stigma more broadly, are better understood as ideological iterations of Europe’s longstanding constitutive approach to torture, whereby the prohibition of torture is celebrated as a mark of civilisation and the practice of torture is retained to civilise.

 When the Court reached for the special stigma of torture, it intimated an intuitive understanding of stigma as a measure of the immorality of torture. It did so on the back of two centuries of Western imperial condemnation of torture elsewhere. That condemnation served the dual purpose of constituting the morally superior, civilised West whilst consolidating power and capital through unequal treaties, colonialism and torture. Reconsidered as social, material and theological power, the special stigma demonstrates the imperial qualities of the abolition, prohibition and definition of torture in Europe. The special stigma, as so understood, has the ironic potential to make visible the evolution and persistence of European torture and to inform the re-definition of torture in favour of the oppressed.

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2. *Ireland v United Kingdom* Application no 5310/71, 18 January 1978. [↑](#footnote-ref-2)
3. Ibid. at para 162 [↑](#footnote-ref-3)
4. Though, for some discussion, see Cavanaugh, ‘On Torture: The Case of the Hooded Men’ (2020) 42 *Human Rights Quarterly* 521. [↑](#footnote-ref-4)
5. *Ireland* 1978, supra n 1 at para 149. [↑](#footnote-ref-5)
6. Goffman*, Stigma: Notes on the Management of Spoiled Identity* (1986) at 9. [↑](#footnote-ref-6)
7. Adler-Nissen, ‘Stigma Management in International Relations: Transgressive Identities, Norms, and Order in International Society’ (2014) 68 *International Organization* 143, 145. [↑](#footnote-ref-7)
8. Tyler, *Stigma: The Machinery of Inequality* (2020) at 15. [↑](#footnote-ref-8)
9. Oxford English Dictionary (Online) [↑](#footnote-ref-9)
10. Goffman*,* supra n 5 at 8. [↑](#footnote-ref-10)
11. Hoffmeyer, ‘Torture and the Theology of the Cross’ (2008) 47 *Dialog* 240, 242. [↑](#footnote-ref-11)
12. Douzinas,’Psychoanalysis becomes the law: Notes on an Encounter Foretold’ (1996) 20 *Legal Studies Forum* 323, 328. [↑](#footnote-ref-12)
13. Mégret, ‘Practices of Stigmatization’ (2013) 3/4 *Law and Contemporary Problems* 287, 288. [↑](#footnote-ref-13)
14. Merback, *The Thief, the Cross and the Wheel: Pain and the Spectacle of Punishment in Medieval and Renaissance Europe* (1998) at 20. [↑](#footnote-ref-14)
15. See, Duffy, *Interrogation in Depth: Torture in Northern Ireland* (2019). [↑](#footnote-ref-15)
16. *Ireland* 1978, supra n 1 at para 213. [↑](#footnote-ref-16)
17. Ibid. at para 167. [↑](#footnote-ref-17)
18. *Ireland v United Kingdom* Application no 5310/71, 25 January 1976. [↑](#footnote-ref-18)
19. Rodley and Pollard, *The Treatment of Prisoners under International Law* (2011) at 103. [↑](#footnote-ref-19)
20. *Ireland* 1978, supra n 1 at para 162. [↑](#footnote-ref-20)
21. Cavanaugh, supra n 3 at 532; Schabas, *The European Convention on Human Rights: A Commentary* (2015) at 175; For a recent reiteration, see *Shuriyya Zeynalov v Azerbaijan* Application no 69460/12, 10 September 2020, para 49. The special stigma is not systematically present. It has appeared in approximately 100 cases which turn on the distinction between torture and other ill-treatment. There are cases, however, where the severity distinction is at issue but the special stigma is noticeable by its absence. See, for example, *Daydov and others v Ukraine* Application no 17674, 1 July 2010. [↑](#footnote-ref-21)
22. Article 3, Convention for the Protection of Human Rights and Fundamental Freedoms. [↑](#footnote-ref-22)
23. Council of Europe, European Commission on Human Rights, ‘Preparatory Work on Article 3 of the European Convention on Human Rights’ (1956) D.H (56) 5 at 1. Schabas, *The European Convention*,supra n 20 at 165-8. [↑](#footnote-ref-23)
24. Schabas, *The Universal Declaration of Human Rights: The travaux préparatoires*, Volume 1. (2013) at 736. [↑](#footnote-ref-24)
25. Dickson, *The European Convention on Human Rights and the Conflict in Northern Ireland* (2010) at 167. [↑](#footnote-ref-25)
26. Rejali, *Torture and Democracy* (2007) at 4. [↑](#footnote-ref-26)
27. Hobsbawm and Ranger, *The Invention of Tradition* (2012) at 5. [↑](#footnote-ref-27)
28. Ní Aoláin, ‘The European Convention on Human Rights and Its Prohibition on Torture’, in Levinson (ed), *Torture: A Collection* (2004) 213 at 216. [↑](#footnote-ref-28)
29. *Greek* case, 12 *Yearbook of the European Convention on Human Rights* (1969) 186. [↑](#footnote-ref-29)
30. Kamminga, ‘Is the European Convention on Human Rights Sufficiently Equipped to Cope with Gross and Systematic Violations’ (1994) 12 *Netherlands Journal of International Law* 153, 155; Pedaliu, ‘Human Rights and Foreign Policy: Wilson and the Greek Dictators, 1967-1970’ (2007) 18 *Diplomacy and Statecraft* 185. [↑](#footnote-ref-30)
31. Beckett, ‘The *Greek* Case before the Human Rights Commission’ (1970) 1 *Human Rights* 91, 110. [↑](#footnote-ref-31)
32. *Greek* case, supra n 28 at 186. [↑](#footnote-ref-32)
33. Ibid. [↑](#footnote-ref-33)
34. Ibid. [↑](#footnote-ref-34)
35. Farrell, ‘Just How Ill-Treated Were You: An Investigation of Cross-Fertilisation in the Interpretive Approaches to Torture at the European Court of Human Rights and in International Criminal Law’ (2015) 84 *Nordic Journal of International Law* 482, 506. [↑](#footnote-ref-35)
36. Ibid. at 511. [↑](#footnote-ref-36)
37. *Ireland* 1976, supra n 17. [↑](#footnote-ref-37)
38. Ibid. at para 402. [↑](#footnote-ref-38)
39. Ireland referred the decision to the Court. [↑](#footnote-ref-39)
40. *Ireland* 1978, supra n 1 at para 167. [↑](#footnote-ref-40)
41. Ibid. [↑](#footnote-ref-41)
42. Farrell, ‘Just How Ill-Treated’, supra n 34 at 506. [↑](#footnote-ref-42)
43. Ibid. at 511. [↑](#footnote-ref-43)
44. *Aksoy v Turkey* Application no 2987/93, 18 December 1996, para 64. [↑](#footnote-ref-44)
45. Ibid. at para 63. [↑](#footnote-ref-45)
46. *Aydin v Turkey* Application no 23178/94, 25 September 1997, paras 83, 86. [↑](#footnote-ref-46)
47. *Selmouni v France* Application no 25803/94, 28 July 1999, para 101. [↑](#footnote-ref-47)
48. Ibid. [↑](#footnote-ref-48)
49. *Jalloh v Germany* Application no 54810/00, 11 July 2006, para 106. [↑](#footnote-ref-49)
50. Ibid. [↑](#footnote-ref-50)
51. Ibid. at para 71. [↑](#footnote-ref-51)
52. Ibid. at para 79. [↑](#footnote-ref-52)
53. Ibid*.* at para 81. [↑](#footnote-ref-53)
54. *Nevmerzhitsky v Ukraine* Application no 54825/00, 5 April 2005, para 97. [↑](#footnote-ref-54)
55. This is corroborated in *Ciorap v Moldova* Application no 12066/02, 19 June 2007. [↑](#footnote-ref-55)
56. See, Smet, ‘The ‘absolute’ prohibition of torture and inhuman or degrading treatment or punishment: Truly a question of scope only?’ in Brems and Gerrards (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (2013) at 273. [↑](#footnote-ref-56)
57. *Gäfgen v Germany* Application no 22978/05, 1 June 2010, paras 94-95. [↑](#footnote-ref-57)
58. Ibid. at para 107. [↑](#footnote-ref-58)
59. Ibid. at para 108. [↑](#footnote-ref-59)
60. Ibid. at para 103. [↑](#footnote-ref-60)
61. Ibid. Compare with *Cestaro v Italy* Application no 6884/11, 7 April 2015, paras 177-190. [↑](#footnote-ref-61)
62. Mavronicola, *Torture, Inhumanity and Degradation under Article 3: Absolute Rights and Absolute Wrongs* (2021) at 64. [↑](#footnote-ref-62)
63. Ibid. at 65. [↑](#footnote-ref-63)
64. *Diri v Turkey* Application no 68351/01, 31 July 2007, para 45. [↑](#footnote-ref-64)
65. *Ireland v United Kingdom* Application no 5310/71, Revision Judgment, 10 September 2019, para 3. [↑](#footnote-ref-65)
66. Ireland requested this revised decision after new evidence was discovered by the Pat Finucane Centre and RTÉ, Ireland’s national broadcaster. In June 2014, RTÉ aired *The Torture Files*, which disclosed archival material demonstrating that the British government had withheld evidence during the European hearings. [↑](#footnote-ref-66)
67. *Ireland* 2019, supra n 64 at para 20. [↑](#footnote-ref-67)
68. Ibid. at para 113. [↑](#footnote-ref-68)
69. Ibid. at para 118. [↑](#footnote-ref-69)
70. Ibid. at para 122; Cavanaugh, supra n 3, at paras 527-534. [↑](#footnote-ref-70)
71. Mégret, supra n 12 at 302. [↑](#footnote-ref-71)
72. Ibid. 301. [↑](#footnote-ref-72)
73. *Ireland* 2019, supra n 64, Judge O’ Leary dissenting opinion at para 74. [↑](#footnote-ref-73)
74. Mégret, supra n 12 at 304. [↑](#footnote-ref-74)
75. *Ireland* 2019, supra n 64, Judge O’ Leary at para 67. [↑](#footnote-ref-75)
76. Duffy, *Interrogation in Depth*,supra n 14 at 79. [↑](#footnote-ref-76)
77. Ibid. seechapter 5. [↑](#footnote-ref-77)
78. *Ireland* 2019, supra n 64 at para 135. [↑](#footnote-ref-78)
79. Ibid. Judge O’ Leary, para 77. [↑](#footnote-ref-79)
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81. See, for example, Padeanu, ‘Why the ECHR decided not to revise its judgment in the *Ireland v the United Kingdom* case’ *EJIL: Talk!* 5 April 2018 available at:

<https://www.ejiltalk.org/why-the-echr-decided-not-to-revise-its-judgment-in-the-ireland-v-the-united-kingdom-case/> [↑](#footnote-ref-81)
82. Cavanaugh, supra n 3 at 532. [↑](#footnote-ref-82)
83. *Ireland* 2019, supra n 64, Judge O’ Leary at para 77. [↑](#footnote-ref-83)
84. Ibid. [↑](#footnote-ref-84)
85. Rejali, ‘The Field of Torture Today: Ten Years On from Torture and Democracy’ in Barela et al, *Interrogation and Torture: Integrating Efficacy with Law and Morality* (2020) at 72. [↑](#footnote-ref-85)
86. Bonner, ‘*Ireland v United Kingdom’* (1978) 27 *International and Comparative Law Quarterly* 897; Sifris, *Reproductive Freedom, Torture and International Human Rights* (2013) 230. [↑](#footnote-ref-86)
87. For example, *Prosecutor v. Delalić*, Judgment, Trial Chamber, 16 November 1998, paras 463-464. [↑](#footnote-ref-87)
88. Cavanaugh, supra n 3; RTÉ, *The Torture Files*. [↑](#footnote-ref-88)
89. *Tbeish v. Attorney General et al* HCJ 9018/17, 26 November 2018; *As’ad Abu Gosh et al v. Attorney General et al* HCJ 5722/12, 12 December 2017. [↑](#footnote-ref-89)
90. Bybee, Memorandum for Gonzales, ‘Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A, 1 August 2002’, in Greenberg and Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (2004) 172 at 173, 196-8. [↑](#footnote-ref-90)
91. *Ireland* 1978, supra n 1 at para 214. [↑](#footnote-ref-91)
92. The Parker Inquiry was established in November 1971 to examine the use of the five techniques. Lord Parker of Waddington, ‘Report of the Committee of Privy Counsellors appointed to consider authorised procedures for the interrogation of persons suspected of terrorism’ (1972). [↑](#footnote-ref-92)
93. HC Deb 02 March 1972 vol 832 cc744. [↑](#footnote-ref-93)
94. *Ibid*; Gage, ‘The Report of the Baha Mousa Inquiry: Volume II’(2011) 430. [↑](#footnote-ref-94)
95. HC Deb, supra n 92. [↑](#footnote-ref-95)
96. Cobain, *Cruel Britannia: A Secret History of Torture* (2012) 283-4. [↑](#footnote-ref-96)
97. Ibid. see chapter 6; Dickson, supra n 24 at 158. [↑](#footnote-ref-97)
98. Gage, supra n 93 at 10. The Inquiry was also tasked with investigating the use of ‘conditioning techniques’ in the case of nine other detainees, detained with Mousa. [↑](#footnote-ref-98)
99. Ibid. at 1287; Bennett, ‘The Baha Mousa Tragedy: British Army Detention and Interrogation from Iraq to Afghanistan’ (2014) 16 *The British Journal of Politics and International* *Relations* 211, 214-17. [↑](#footnote-ref-99)
100. Gage, supra n 93 at 430. [↑](#footnote-ref-100)
101. Ibid. at 449; Bennett, supra n 98 at 214. [↑](#footnote-ref-101)
102. Statement, ‘Prosecutor of the International Criminal Court, Fatou Bensouda, re-opens the preliminary examination of the situation in Iraq’ 13 May 2014 available at <https://www.icc-cpi.int/Pages/item.aspx?name=otp-statement-iraq-13-05-2014>. [↑](#footnote-ref-102)
103. The Office of the Prosecutor, ‘Situation in Iraq/UK: Final Report’ 9 December 2020, 6. [↑](#footnote-ref-103)
104. Farrell, ‘Legalising Torture’ *Tribune*, 8 February 2021 available at <https://tribunemag.co.uk/2021/02/legalising-torture> [↑](#footnote-ref-104)
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106. Ibid. at 4. The remaining cases were transferred to the Service Police Legacy Investigations. See <https://www.gov.uk/government/groups/iraq-historic-allegations-team-ihat>. [↑](#footnote-ref-106)
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110. HC Deb supra n 92, at cc743. [↑](#footnote-ref-110)
111. Parker Report supra n 91; for a discussion of the history of the five techniques, see, Newbury, ‘Intelligence and Controversial British Interrogation Techniques: the Northern Ireland Case, 1971-2’ (2009) 20 *Irish Studies in International Affairs* 103, 105. [↑](#footnote-ref-111)
112. HC Deb, supra n 92. [↑](#footnote-ref-112)
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