

*Rethinking Torture in International Law*

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## Abstract

This thesis seeks to identify the moral wrong of torture, and to trace the relationship between that wrong and the definition of torture in international law. Because understanding a concept's modern manifestation requires an understanding of its history, the thesis begins by tracing the historical trajectory of legal prohibitions of different forms of ill-treatment beginning with the English Bill of Rights in 1689, subsequently articulated in the 1948 Universal Declaration of Human Rights, that 'no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'. This prohibition, almost universally accepted by States, has come to be interpreted as embodying a hierarchy with torture at the apex. The shift towards a hierarchical interpretation of the prohibition of torture and ill-treatment in international law was remarkable, both for its decisiveness and for its surprisingly recent occurrence. The reasons for that shift are examined, before turning to a consideration of the competing accounts of what it is that makes torture wrong. Two predominant accounts of the moral wrong of torture are identified, described here as the 'dignitarian' and the 'defencelessness' accounts. Although most international instruments and judicial decisions on torture implicitly reflect the dignitarian account, the thesis argues that this account is open to challenge on normative grounds. Instead, it argues that the preferable account of the moral wrong of torture is a modified form of the defencelessness account, according to which torture is *the deliberate infliction of severe pain or suffering in the context of a profoundly asymmetric power relation*. Finally, the thesis turns to a consideration of the definitions of torture in international law. It contends that there are distinct conceptions of torture operating in the criminal paradigm, and in the human rights paradigm, respectively. While both conceptions of torture at present reflect the dignitarian account, the thesis argues that there is scope in the human rights paradigm for a more expansive 'defencelessness' conception of torture to be adopted.

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# Introduction

This thesis analyses the prohibition of torture in international law. Torture is prohibited along with cruel, inhuman or degrading treatment or punishment in myriad human rights treaties, and yet the definition of these concepts remains deeply contested in law and philosophy alike. In law, the leading multilateral treaty is the 1984 UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('CAT'), which offers a relatively narrow definition of torture as a criminal offence but which is silent on the concepts of cruelty, inhumanity and degradation.<sup>1</sup> Moreover, that treaty does not purport to define torture for all time and in all contexts. Rather, it stresses that the definition in that treaty is 'without prejudice' to any other instrument, whether domestic or international, 'which does or may contain provisions of wider application'.<sup>2</sup>

The definition of torture has been described as 'slippery',<sup>3</sup> 'murky',<sup>4</sup> and as having a fundamentally 'unstable'<sup>5</sup> character. One commentator contends that the definition is a 'chameleon', which to some extent 'changes the colour of its skin... depending on the context in which it is situated'.<sup>6</sup> Yet, at the same time, the prohibition of torture is widely recognised to be a peremptory norm of international law, from which no derogation is permitted.<sup>7</sup> For Waldron, the prohibition of torture is a legal archetype, 'which by virtue of its force, clarity, and vividness expresses the spirit that animates the whole area of law'.<sup>8</sup> The undermining or abandonment of this peremptory norm

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<sup>1</sup> United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85 (opened for signature December 10, 1984, entered into force June 26, 1987) ('CAT').

<sup>2</sup> *ibid* art 1(2).

<sup>3</sup> Kelly T, 'The UN Committee Against Torture: Human Rights Monitoring and the Legal Recognition of Cruelty' (2009) 31 Human Rights Quarterly 777, 778.

<sup>4</sup> Sifris R, *Reproductive Freedom, Torture and International Human Rights: Challenging the Masculinisation of Torture* (Routledge 2014) 29.

<sup>5</sup> Asad T, 'On Torture, or Cruel, Inhuman, and Degrading Treatment' [1996] Social Research 1081, 1082.

<sup>6</sup> Gaeta P, 'When Is the Involvement of State Officials a Requirement for the Crime of Torture?' (2008) 6 Journal of International Criminal Justice 183, 183-4.

<sup>7</sup> See, eg, *Filártiga v Peña-Irala* (1980) 630 F 2d 876 (US Ct of Appeals, 2nd Cir); *R v Bow Street Metropolitan Stipendiary Magistrate Ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147 (HL); *Prosecutor v Furundžija*, ICTY Case No IT-95-17/1, Trial Chamber Judgment, 10 December 1998; *Suresh v Canada* [2002] 1 SCR 3 (Canadian SC), *Al-Adsani v United Kingdom* (2001) 34 EHRR 273 (GC); *Attorney-General v Zaoui* [2005] NZSC 38; *Belgium v Senegal* (2012) ICJ Rep 422.

<sup>8</sup> Waldron J, 'Torture and Positive Law: Jurisprudence for the White House' (2005) 105 Columbia Law Review 1681, 1722.

threatens to wreak a ‘systemic, corrupting effect’ on an entire area of law.<sup>9</sup> Truly, torture is now understood to be—though it was not always—‘beyond the pale’.<sup>10</sup>

Against that background, this thesis asks four questions. First, what do we mean when we speak of ‘torture’? Second, what is it about torture that makes it wrong? Third, how is torture defined in law? Fourth and finally, how *should* torture be defined in law?

These questions are not susceptible of easy answers. In seeking to answer them, this thesis builds on recent scholarship in seeking to develop a principled justification for the legal definition of torture and how it relates to torture as a moral wrong.<sup>11</sup>

The original contribution of the thesis is twofold. The first is that the thesis brings together a wide range of sources—historical, legal, sociological and philosophical—to build a picture of the concept of ‘torture’. Although torture is much-discussed in each of those fields, there has been relatively little research to date seeking to synthesise and generalise across those disparate disciplines. It is hoped that the breadth of material drawn upon in this study represents a contribution to a cross-disciplinary conversation about what torture is, why it is wrong, and how it should be defined or proscribed in the law.

The second contribution lies in the tracing of a connection between competing accounts of the moral wrong of torture, and the way that torture is defined in different regimes of law. In distinguishing between ‘dignitarian’ and ‘defencelessness’ accounts of the moral wrong of torture, and identifying the implicit dignitarian bias in most legal and judicial formulations of the definition of torture, the thesis makes an important descriptive contribution. The thesis then takes a normative turn, arguing that the defencelessness account is preferable on moral grounds to the dignitarian account, and developing a nuanced version of the defencelessness account of torture’s moral wrong. Although there are strong considerations in favour of a relatively static conception of torture in the criminal paradigm, the thesis argues that the conception of torture in the human rights paradigm could and should expand to better reflect the modified defencelessness account of the moral wrong of torture.

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<sup>9</sup> *ibid* 1718.

<sup>10</sup> Kelly T, *This Side of Silence: Human Rights, Torture, and the Recognition of Cruelty* (University of Pennsylvania Press 2011) 3.

<sup>11</sup> See particularly, Luban D, ‘Human Dignity, Humiliation, and Torture’ (2009) 19 *Kennedy Institute of Ethics Journal* 211; Webster E, ‘Exploring the Prohibition of Degrading Treatment Within Article 3 of the European Convention on Human Rights’ (Doctoral thesis, University of Edinburgh 2009); Mavronicola N, ‘Delimiting the Absolute: The Nature and Scope of Article 3 of the European Convention on Human Rights’ (DPhil thesis, University of Cambridge 2014).

## 1.1 Methodological approach

The thesis advances an argument about the distinctive moral wrong of torture, and then conducts a doctrinal analysis of the various legal definitions of torture to evaluate the extent to which they reflect the moral wrong of torture. In Chapters One and Two, the thesis engages with accounts of torture advanced in legal history. In Chapter Three, the thesis turns to legal theory and philosophy, and then in Chapters Four and Five it employs a combination of doctrinal and comparative analytical techniques to describe and evaluate the definitions of torture in international law. This thesis is both a search for conceptual clarity, and for doctrinal coherence.

In following these approaches, the thesis assumes that torture is an identifiable concept; and that language can be used to describe it. This ostensibly straightforward statement is not free from controversy. In *Philosophical Investigations*, Wittgenstein contended that ‘mental language is rendered significant not by virtue of its capacity to reveal, mark, or describe mental states, but by its function in social interaction’.<sup>12</sup> ‘Things’ or ‘concepts’ are not objective facts; they are inextricably bound up with the language used to describe them. The point of language, on this view, is not to describe objective realities existing ‘out there’ in the world, but to communicate our subjective sensations, feelings and experiences. Wittgenstein said, ‘for a large class of cases of the employment of the word “meaning”—though not for all—this word can be explained in this way: the meaning of a word is *its use in the language*’.<sup>13</sup> Bourke further explains ‘the other way of expressing this is by saying that pain describes the *way we experience something, not what is experienced. It is a manner of feeling*’.<sup>14</sup>

In contrast to Wittgenstein and Bourke, this thesis presumes that it is possible to identify the concept of torture, as a matter of philosophical enquiry. Following Dworkin, the thesis distinguishes between the ‘concept’ of torture, and its various ‘conceptions’.<sup>15</sup> Searching for the ‘concept’ of torture means searching for a ‘more abstract idea’; for ‘a preinterpretive sense of the rough boundaries of the practice on which our imagination must be trained’.<sup>16</sup> This is the endeavour that is undertaken in Chapter Three, which seeks to identify the moral wrong of torture and as such the essential elements of its concept. This allows for the various ‘conceptions’ of

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<sup>12</sup> Wittgenstein L, *Philosophical Investigations* (Basil Blackwell 1953) (trans: Anscombe GEM) 188.

<sup>13</sup> *ibid* 43 (emphasis added).

<sup>14</sup> Bourke J, *The Story of Pain: From Prayer to Painkillers* (OUP 2014) 7. Bourke advances a Wittgensteinian argument in relation to the way pain is experienced and expressed throughout history.

<sup>15</sup> Dworkin R, *Law's Empire* (2nd edn, Hart 1998) 68-76. This distinction also appears in Rawls J, *A Theory of Justice* (Clarendon Press 1972), following Hart HLA, *The Concept of Law* (Clarendon Press 1961) 155-159 and especially 156.

<sup>16</sup> *ibid* 71, 75.

torture to be ‘identified and understood as subinterpretations of a more abstract idea’.<sup>17</sup> Two conceptions of torture are identified in Chapters Four and Five—a criminal law conception, and a human rights conception, respectively.

The thesis assesses the extent to which these conceptions reflect the accounts of torture’s moral wrong that are identified in Chapter Three. Methodologically this follows Kramer, who states that ‘instead of tailoring one’s account of torture to conform to a current legal definition, one should tailor one’s definition of torture to tally with one’s philosophical reflections on the issue’.<sup>18</sup>

The demarcation of the concept of torture that is attempted in this thesis necessarily has descriptive as well as normative elements. Indeed, Bennoune has shown that ‘security experts and apologists for harsh counter-terror strategies sometimes justify torture and cruel, inhuman or degrading treatment or punishment ... by alleging that there are definitional problems with those terms’.<sup>19</sup> Describing a concept is, at least in part, a normative endeavour.

## 1.2 Framing the argument

This thesis comprises a number of normative as well as descriptive claims. The normative claim is that as far as possible, the definition of torture in *law* should reflect the theoretical *concept* of torture, as developed in Chapter Three.<sup>20</sup> The concept of torture advanced in Chapter Three is used as the yardstick against which the conceptions of torture in the criminal and human rights paradigms (Chapter Four and Chapter Five respectively) are measured.

A further normative claim, implicit in this analysis, is that the legal definition of torture should generally conform to the rule of law requirements of clarity, coherence and consistency, so that the law can act as a guide to citizens, judges, lawyers and public officials.<sup>21</sup> Where the conception of torture within a particular regime of law lacks one or more of these qualities, the thesis advances normative claims as to how those deficiencies might be rectified.

The thesis makes a number of descriptive claims in relation to the historical development of legal prohibitions of torture and ill-treatment, and the way that torture is currently defined in international law. It contends that popular understandings of torture have changed significantly

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<sup>17</sup> *ibid* 71.

<sup>18</sup> Kramer MH, *Torture and Moral Integrity: A Philosophical Enquiry* (OUP 2014) 76.

<sup>19</sup> Bennoune K, ‘Terror/Torture’ (2008) 26 *Berkeley Journal of International Law* 1, 28-29.

<sup>20</sup> On the relationship between morality and criminal law, see further Duff A, ‘Legal and Moral Responsibility’ (2009) 4 *Philosophy Compass* 978.

<sup>21</sup> Raz J, *The Authority of Law: Essays on Law and Morality* (Clarendon Press 2002); Raz J, ‘The Rule of Law and Its Virtue’ (1977) 93 *Law Quarterly Review* 195.

over time. Where torture was once a term that was associated almost exclusively with pre-trial investigative techniques, today we understand torture as manifesting in a variety of forms and for a variety of purposes, often overlapping. These include—but are not limited to—interrogational torture, punitive torture, terroristic or intimidatory torture, discriminatory torture and sadistic torture. Torture is no longer a concept that is tethered to the trial process, and in particular, the pre-trial investigative process, as it once was. The term ‘torture’ is now frequently deployed in description of excessively harsh criminal sentences, as well as in description of acts of apparently meaningless cruelty, rape and other grave sexual assaults and indignities, and in other contexts. This is a reflection of the way the term has adapted in meaning since its first recorded appearance in the 12<sup>th</sup> century.<sup>22</sup>

The use of the word ‘torture’ in a range of new contexts raises questions about what that term is understood to mean, and how it is and should be defined in law. These questions assume a heightened importance in view of the *jus cogens* nature of the prohibition of torture,<sup>23</sup> and in view of the repeated emphasis by human rights courts that the prohibition of torture is ‘absolute’.<sup>24</sup> The thesis therefore seeks to identify and describe the different legal definitions of torture that are operative in international law.

The thesis does not engage with the question as to whether torture is ever morally or legally justifiable. As such, the vast literature on the so-called ‘ticking time-bomb’ scenario is largely beyond the scope of this work.<sup>25</sup> The thesis does not engage with empirical debates around the

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<sup>22</sup> OED Online (n22) ‘Torture, *n*’.

<sup>23</sup> *Belgium v Senegal* (n7) [99]. See also: *Filártiga v Peña-Irala* (n7); *Al-Adsani v United Kingdom* (n7); *R v Bow Street Stipendiary Magistrate (ex parte Pinochet)* (n7); *Case of Maritza Urrutia v Guatemala (Merits, Reparations and Costs)* Judgment of 27 November 2003, IACHR Series C No 103, 35 [92]; *Case of Tibi v Ecuador, Preliminary Objections, Merits, Reparations and Costs*, Judgment of 7 September 2004, IACHR Series C No 114.

<sup>24</sup> See, eg, *Chahal v United Kingdom* (1997) 23 EHRR 413 (GC); *Saadi v Italy* (2009) 49 EHRR 30 (GC); *Othman (Abu Qatada) & Ors v United Kingdom* (2012) 55 EHRR 1; *Tibi v Ecuador* (n23); *Maritza Urrutia v Guatemala* (n23). On the meaning of ‘absolute’ in this context, see Mavronicola, ‘Delimiting the Absolute’ (n11).

<sup>25</sup> See, eg, Shue H, ‘Torture’ (1978) 7 *Philosophy & Public Affairs* 124; Dershowitz A, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (Yale University Press 2002); Bagaric M and Clarke J, ‘Not Enough Official Torture in the World - The Circumstances in Which Torture Is Morally Justifiable’ (2004) 39 *University of San Francisco Law Review* 581; Davis M, ‘The Moral Justifiability of Torture and Other Cruel, Inhuman, or Degrading Treatment’ (2005) 19 *International Journal of Applied Philosophy* 161; Shue H, ‘Torture in Dreamland: Disposing of the Ticking Bomb’ (2005) 37 *Case Western Reserve Journal of International Law* 231; Luban D, ‘Liberalism, Torture, and the Ticking Bomb’ (2005) 91 *Virginia Law Review* 1425; Steinhoff U, ‘Justifying Defensive Torture’, in Clucas B, Johnstone G and Ward T (eds), *Torture: Moral Absolutes and Ambiguities* (Nomos 2009) 47-68. On torture and exceptionalism more generally, see Farrell M, *The Prohibition of Torture in Exceptional Circumstances* (CUP 2013) and the contributions in Levinson S (ed), *Torture: A Collection* (OUP 2004).

effectiveness of torture, although important recent work has been done in this area.<sup>26</sup> Also beyond the scope of this thesis is the literature on the nature of ‘absoluteness’ in the context of human rights.<sup>27</sup> Rather, this thesis is concerned with the philosophical parameters of the concept of torture, and with the elements of its legal definition.

### 1.3 Structure of the thesis

Aristotle famously said, ‘if you would understand anything, observe its beginning and its development’.<sup>28</sup> To that end, the thesis begins by tracing the history of prohibitions on torture and ill-treatment. Historical study of these prohibitions yields surprising results. Although the prohibition of torture today is characterised by its virtually unanimous—albeit sometimes skin-deep—support, the force with which torture is condemned belies the recent origins of its prohibition in law. In contrast, constraints on cruelty and inhumanity enjoy a more long-standing legal pedigree. Chapter One seeks to understand the modern formula ‘no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’, by observing its beginning and its development.

The discussion in Chapter One shows that our concept of torture has evolved radically from the 17<sup>th</sup> century to the present. For centuries, Western societies used the term ‘torture’ as though it was implicitly preceded by the adjective ‘judicial’. Torture was understood as a pre-trial process, not only *permitted* by the law, but which was *inextricably bound up* with the law, in its authorisation, application and administration. Judicial torture, once widespread, was gradually phased out in England in the years up to the 17<sup>th</sup> century, rendered unnecessary by the development of the jury trial—a novel institution that allowed the conviction of offenders even in the absence of a confession of guilt.<sup>29</sup> Although the English Bill of Rights purported to ban ‘cruel and unusual punishments’ in 1689, in fact it had little to do with the abolition of judicial torture,

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<sup>26</sup> See particularly, O’Mara S, *Why Torture Doesn’t Work: The Neuroscience of Interrogation* (Harvard University Press 2015). See also, Hajjar L, ‘Does Torture Work? A Sociolegal Assessment of the Practice in Historical and Global Perspective’ (2009) 5 *Annual Review of Law and Social Science* 311.

<sup>27</sup> See, eg, Gewirth A, ‘Are There Any Absolute Rights?’ (1981) 31 *Philosophical Quarterly* 1; Levinson J, ‘Gewirth on Absolute Rights’ (1982) 32 *Philosophical Quarterly* 73; Gewirth A, ‘There Are Absolute Rights’ (1982) 32 *Philosophical Quarterly* 348. More recently, see Mavronicola, ‘Delimiting the Absolute’ (n11); and Waldron J, ‘What Are Moral Absolutes Like?’ [2011] NYU School of Law, Public Law Research Paper No 11-62 <<http://papers.ssrn.com/abstract=1906850>> accessed 15 March 2014; Mavronicola N, ‘What Is an “Absolute Right”? Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights’ (2012) 12 *Human Rights Law Review* 723.

<sup>28</sup> Quoted in Anellis IH, ‘Preface and Prospectus to a Planned “History vs Philosophy of Logic” Text’, in Abeles FF and Fuller ME (eds), *Modern Logic 1850-1950, East and West* (Springer International 2016) 5-34, 33.

<sup>29</sup> See Langbein J, *Torture and the Law of Proof: Europe and England in the Ancien Régime* (2nd edn, University of Chicago Press 2006).

probably reflecting instead an emerging principle of proportionality between crime and punishment.<sup>30</sup> Barbarous criminal sentences continued to be lawfully imposed well into the 19<sup>th</sup> century and even in the early 20<sup>th</sup> century, at which time a period of penal reform led to the eschewal of brutal corporeal punishments in favour of imprisonment.<sup>31</sup>

In continental Europe, by contrast, the abolition of judicial torture and the elimination of brutal punishments occurred contemporaneously, albeit somewhat belatedly, around the turn of the 19<sup>th</sup> century. The 1789 French Declaration on the Rights of Man and Citizen was silent on torture and ill-treatment, and the practice of judicial torture remained pervasive in Roman canonical legal systems long after it had disappeared from England.

The contemporary formulation of many prohibitions of torture therefore represents the product of two quite separate developments. Those two developments are, first, the abolition of judicial torture as a pre-trial investigative technique, and second, the shift away from physical cruelty in criminal punishments. The sum of those two developments was exemplified in a single provision in the post-World War II period: Article 5 of the 1948 Universal Declaration of Human Rights, which provides that 'no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'.<sup>32</sup>

Though torture has only lately been prohibited by law, it has come to attract an almost unrivalled level of moral and political opprobrium. An appellate court in the United States famously declared in 1980 that 'the torturer has become, like the pirate and the slave owner before him, *hostis humani generis*, the enemy of all mankind.<sup>33</sup> In 1998 a trial chamber of the International Criminal Tribunal for the Former Yugoslavia ('ICTY') declared that the prohibition on torture was a *jus cogens* norm from which no derogation was permitted. Torture was singled out from its sister concepts of cruelty, inhumanity and degradation, and became invested with a special stigma over and above those other terms. How, then, did this remarkable transformation come about?

It is this evolution with which Chapter Two is concerned. The chapter examines how it was that the hierarchical relationship between the prohibition of torture on the one hand, and the prohibition of other 'lesser' forms of ill-treatment on the other hand, came about. It identifies a number of critical milestones from the 1960s to the conclusion of the CAT in 1984, which together explain the way torture was distilled from cruel, inhuman or degrading treatment or punishment.

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<sup>30</sup> See Granucci A, "'Nor Cruel and Unusual Punishments Inflicted": The Original Meaning' (1969) 57 California Law Review 839.

<sup>31</sup> See Foucault M, *Discipline and Punish: The Birth of the Prison* (Allen Lane 1977).

<sup>32</sup> See, eg, Universal Declaration of Human Rights, UNGA Res 271 A (III) (10 December 1948) ('UDHR') art 5.

<sup>33</sup> *Filártiga v Peña-Irala* (n7).

The early jurisprudence under the European Convention on Human Rights was particularly significant in that regard, as was the initiation of a hugely successful global campaign against torture by Amnesty International in the 1970s. The transformation was complete with the adoption of the CAT in 1984, which enshrined a two-tiered regime of State obligations, the most onerous of which attach only to torture, to the exclusion of cruel, inhuman or degrading treatment or punishment.

Having identified first a special stigma attached to torture over and above other forms of ill-treatment, which was then translated into a bifurcated regime of obligations for States in international law, the thesis proceeds to examine the theoretical justifications for the special status that torture has acquired. Chapter Three endeavours to understand and to explain the nature of torture as a moral wrong.

Two competing accounts of the moral wrong of torture are identified in Chapter Three. The first is the dignitarian account, according to which torture is wrong because it impermissibly instrumentalises the victim. Although there are many variations of the dignitarian account, most draw on the Kantian imperative that people should be used as ends in themselves, and not as means to other ends.<sup>34</sup>

Although the dignitarian account is perhaps the predominant account of the moral wrong of torture in the legal literature, it is argued here that the account has serious flaws. Chapter Three identifies two flaws in particular. They are, first, that the dignitarian account requires an autonomous victim, and that it excludes from its ambit the purely gratuitous or sadistic infliction of ill-treatment. If the distinctive wrong of torture is, as a Kantian analysis implies, the co-option of the autonomous will of the victim to serve the torturer's ends, then by definition a non-autonomous being cannot be the victim of torture, just as a senseless or sadistic act of cruelty cannot earn that label.

Chapter Three argues that these flaws compel the rejection of the dignitarian account of the moral wrong of torture. This is because purposeless, gratuitous cruelty is, as Montaigne contended, 'the farthest point that cruelty can reach'.<sup>35</sup> Similarly, the cruel infliction of suffering upon a very young child or a helpless animal inspires a special revulsion. Such treatment should properly be characterised as torture, but falls outside the dignitarian account.

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<sup>34</sup> Kant I, *Groundwork of the Metaphysics of Morals* (CUP 2012).

<sup>35</sup> Montaigne M, 'On Cruelty', in Montaigne M, *The Complete Essays* (Penguin Classics 1993) (trans: Screech M) 484.

The second account of the moral wrong of torture is referred to here as the 'defencelessness' account, and derives from the work of Shue and Luban.<sup>36</sup> Simpler and more straightforward than the dignitarian account, this conception of torture's moral wrong emphasises the defencelessness of the victim on the one hand, and the power and control of the perpetrator on the other hand. This account is capable of applying to non-autonomous beings, such as the mentally ill, the very young, and to non-human animals. It also encompasses the sadistic infliction of ill-treatment within the confines of the concept of torture. For those reasons, Chapter Three argues that the defencelessness account should be preferred to the dignitarian account.

However, the defencelessness account too has its critics. Although nearly every instance of torture involves a completely defenceless victim, there are credibly imaginable cases in which the victim has at her disposal some form of defence or ability to resist. Theorists such as Kramer and Kamm have rejected the defencelessness account on that basis.<sup>37</sup>

Responding to these critics, Chapter Three contends that the defencelessness of the victim need not be *total* in order to fall within the concept of torture. What is important is that the relationship between the perpetrator and the victim be fundamentally or seriously asymmetric. The victim may 'fight back', but if her suffering is severe, and it is deliberately inflicted by a person whose powerful control she is helpless to challenge, then her experience is rightly characterised as torture. Thus Chapter Three advances the normative claim that the moral wrong of torture is *the intentional infliction of severe pain or suffering in the context of a deeply asymmetric power relation*.

Chapters Four and Five trace the implications of these conceptions of torture for the way that torture is defined in international law. These chapters advance the normative claim that the legal definition of torture should, as far as possible, reflect the moral wrong of torture.<sup>38</sup> In making that argument, the thesis distinguishes between torture as a criminal offence on the one hand (within the 'criminal paradigm'), and torture as a human rights violation on the other (the 'human rights paradigm').<sup>39</sup>

Chapter Four contends that torture within the paradigm of criminal law broadly reflects the dignitarian account. The CAT, which functions as something akin to a criminal law statute, defines torture in terms of the purpose of the perpetrator in an echo of Kantian notions of instrumentalisation. The list of prohibited purposes in Article 1(1) CAT is indicative rather than

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<sup>36</sup> Although neither author expressly adopts this terminology, the basis of what is termed here the 'defencelessness' account derives from Shue, 'Torture' (n25) and Luban D and Shue H, 'Mental Torture: A Critique of Erasures in US Law' (2012) 100 Georgetown Law Journal 823.

<sup>37</sup> Kamm FM, *Ethics for Enemies: Terror, Torture and War* (OUP 2011); Kramer (n18).

<sup>38</sup> See further Duff, 'Legal and Moral Responsibility' (n20).

<sup>39</sup> This language is adapted from Cane P, *Responsibility in Law and Morality* (Hart 2002).

exhaustive, which may be seen as a reflection of the dignitarian account, insofar as the *existence* of a purpose is more important than the *nature* of that purpose. The one significant respect in which the definition of torture in the CAT does not reflect the dignitarian account of torture is that it requires the perpetrator to have a nexus with the State. Chapter Four argues that this requirement marks a departure from the dignitarian account of the moral wrong of torture.

Chapter Four also assesses the definitions of torture in the Rome Statute of the International Criminal Court ('*ICC*') and in the jurisprudence of the international criminal tribunals, both of which are squarely within the criminal paradigm. Torture may be prosecuted in these contexts as either a crime against humanity, a war crime, or a grave breach of the Geneva Conventions of 1949. In those contexts, proof of the crime of torture also requires several other definitional elements to be established. Nevertheless, the definition of torture as a war crime and as a grave breach reflects the dignitarian account, insofar as it emphasises the purpose of the torturer. To the extent that dicta from some of the tribunals suggest that the gratuitous or sadistic infliction of ill-treatment cannot be characterised as torture, this too reflects the dignitarian account of torture's moral wrong.

Chapter Five addresses the legal definition of torture within the paradigm of human rights law. In this fundamentally different context, the object and nature of the proceedings is victim- rather than perpetrator-oriented, the sanctions are compensatory rather than punitive, and the defendant is a State rather than an individual. In the human rights paradigm, the thesis argues that institutions charged with adjudicating claims of torture should not be constrained by the CAT's legal definition of torture—as the CAT itself anticipates.<sup>40</sup> Despite this, however, both the European Court of Human Rights ('*ECtHR*') and the Inter-American Court of Human Rights ('*IACtHR*') have to date relied heavily upon the CAT in adopting a dignitarian conception of the moral wrong of torture. Chapter Five criticises that reliance, and argues that uncritical transplantation of the criminal conception of torture into the human rights context is inappropriate. Rather, human rights courts adjudicating claims of torture should consider the moral wrong of torture, and adopt a legal definition which broadly reflects that moral wrong. On this basis, Chapter Five contends that courts operating within the human rights paradigm should embrace an account of torture as *the deliberate infliction of severe suffering in the context of a deeply asymmetric power relation*.

Finally, the conclusion draws together and reiterates the thesis' central findings. It closes with some observations about future directions for relevant or related research.

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<sup>40</sup> CAT (n1) art 1(2) provides that 'this article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application'.

# Chapter One: The Evolution of Prohibitions on Ill-treatment

## 2.1 Introduction

This chapter traces the historical trajectory of legal prohibitions on ill-treatment. The objective is to understand the form that those prohibitions currently take in light of their historical character and significance. The weight of the secondary historical sources considered here reflects a consensus that our modern conception of torture as the ‘wrong of wrongs’ is relatively recent in origin. It is well known that torture was long permitted in the legal systems of many States, and that torture has been practised in different forms by many societies dating back to ancient Greece and Rome.<sup>41</sup> What is less well known is that the earliest prohibitions of ill-treatment failed to single out *torture*—as distinct from cruel, unusual, or inhuman treatments—for particular stigma or condemnation. It was not until the 1970s and 80s that the modern view of torture as a unique moral wrong became widespread.

The historical evolution of prohibitions on ill-treatment may be divided into three broad phases. The first phase was the legal *prescription* of torture, which continued intermittently throughout the medieval period. Torture was inextricably bound up with law. It was carefully administered in accordance with a structured pre-trial process, and became known as ‘judicial torture’.<sup>42</sup> This first historical phase of the legally sanctioned use of torture came to an end at different points in different parts of the world. In England, the use of judicial torture gradually declined from the 13<sup>th</sup> century, and by the 17<sup>th</sup> century it was no longer widely used.<sup>43</sup> In continental Europe, however, judicial torture continued to be practised as a crucial part of Roman-canon law well into the 19<sup>th</sup> century.

The second historical phase was the *abolition* of torture, involving its removal from the statute books of States around the world. This shift occurred between the 17<sup>th</sup> and late 19<sup>th</sup> centuries in Britain and across Europe. It marked a significant change: from torture as a practice entwined with law, to law’s repugnance toward torture. Notably, torture continued to occur, indeed sometimes as an exercise of prerogative or executive power even as the law began to set its face against brutality. But by the start of the 20<sup>th</sup> century however, all European States had legislated to abolish judicial torture.

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<sup>41</sup> See Peters E, *Torture* (Basil Blackwell 1985).

<sup>42</sup> See, eg, Langbein, *Torture and the Law of Proof* (n29).

<sup>43</sup> *ibid.*

The third historical phase began at the end of World War II, and was marked by the universal *prohibition* and criminal *proscription* of torture. This phase has seen proliferation of post-war human rights instruments, and the inclusion of prohibitions on torture and cruel, inhuman or degrading treatment in the constitutional instruments of States in all corners of the globe. This virtually universal condemnation of torture is thus a recent historical phenomenon.<sup>44</sup> While prohibitions on cruelty, inhuman treatment, and acts of degradation possess a long historical pedigree, prohibitions of torture, by contrast, are more recent in origin, though their universality and the force with which they are asserted belies their meteoric rise.

These legal developments have also led to changes in the understanding of torture. Where once the word ‘torture’ was invariably preceded (whether explicitly or implicitly) by the adjective ‘judicial’, that historic association is now largely gone. Modern writers identify a range of different forms of torture, including ‘intimidatory’ torture (administered for the purpose of striking fear into the hearts of people other than the immediate victim of the abuse), ‘penal’ torture (ill-treatment in the context of criminal sentencing), and ‘sadistic’ torture (administered for no apparent purpose at all, save the sadistic gratification of the perpetrator).<sup>45</sup> These will be returned to in the discussion below.

## 2.2 Legally sanctioned torture and its abolition

The ancient societies of Greece and Rome possessed structured laws prescribing the infliction of torture in certain circumstances, as Ruthven and Peters observe.<sup>46</sup> It is striking that such laws differentiated between the class of the person concerned: citizens were ostensibly exempt, whereas foreigners, slaves, and prisoners of war were liable to be subjected to torture.<sup>47</sup> The relationship between ‘torture’ and ‘othering’ is a theme that will be returned to below.

Medieval systems of ecclesiastical and judicial proceedings contained detailed rules for when and how torture should be applied—under clerical or judicial supervision.<sup>48</sup> Langbein argues that the centrality of torture in these contexts was a reflection of the primacy of confessions in early

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<sup>44</sup> See further Peters (n41); Rejali D, *Torture and Democracy* (Princeton University Press 2007).

<sup>45</sup> See, eg, Shue, ‘Torture’ (n25); Kramer (n18). Further categories identified by these authors include ‘placatory torture’ (torture inflicted to mollify or appease in order to induce another actor or actors to refrain from perpetrating a threatened harm), ‘extortionate torture’, ‘act-impelling torture’, ‘discriminatory torture’, ‘humiliative torture’, ‘extravagantly reckless torture’, and ‘incapacitative torture’ (which seeks to either temporarily or permanently incapacitate another person).

<sup>46</sup> Ruthven M, *Torture: The Grand Conspiracy* (Weidenfeld and Nicolson 1978); Peters (n41).

<sup>47</sup> Ruthven, *ibid*, and particularly 23-42.

<sup>48</sup> *ibid* 43-71.

modern legal systems.<sup>49</sup> In effect, the only evidence that could be trusted was a confession by the wrongdoer—howsoever that confession was procured.<sup>50</sup> Other methods of evidence-gathering were viewed as unreliable unless their products were confirmed under torture.<sup>51</sup> Torture was ‘almost the first and only resort’.<sup>52</sup> The same was true of Christian religious proceedings, where priests presided over brutal rituals of trial by ordeal, fire or water at least until the Fourth Lateran Council of 1215,<sup>53</sup> and according to Lea and Bartlett, long after. It was believed that if individuals were subjected to deadly trauma, the guilty would die, whereas God would intervene to save the innocent.<sup>54</sup>

Judicial torture began to be phased out in England with the evolution of trial by jury, which permitted convictions based on the judgment by one’s peers rather than solely by virtue of the accused’s confession. Far from reflecting some noble sentiment, Langbein argues that the jury trial simply rendered torture unnecessary.<sup>55</sup> As confession evidence became less important in the trial process—in the sense that convictions could be secured by other means as well—the imperative to torture correspondingly diminished.

The 1628 judgment of the Privy Council in *Felton’s Case* represented perhaps the earliest recorded judicial aversion to torture.<sup>56</sup> The accused, who was charged with assassinating the Duke of Buckingham, had refused to confess to the crime. King Charles I asked the Privy Council to authorise his torture. Famously, the Privy Council refused, holding unanimously that ‘no such punishment is known or allowed by our law’.<sup>57</sup>

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<sup>49</sup> Langbein, *Torture and the Law of Proof* (n29).

<sup>50</sup> Greenberg KJ, ‘The Rule of Law Finds its Golem’ in Greenberg KJ (ed), *The Torture Debate in America* (CUP 2005) 1-9, 4.

<sup>51</sup> On the history of judicial torture in the Western world, see, eg, Langbein J, ‘Torture and Plea Bargaining’ (1978) 46 *University of Chicago Law Review* 3; Hope D, ‘Torture’ (2004) 53 *International & Comparative Law Quarterly* 807; Friedman D, ‘Torture and the Common Law’ (2006) 2 *European Human Rights Law Review* 180. On the use of torture in ancient societies, see Scott GR, *A History of Torture* (Bracken Books 1994); Evans M and Morgan R, *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (OUP 1998) 8-11; Ross J, ‘A History of Torture’ in Roth K and Worden M (eds), *Torture: Does It Make Us Safer? Is It Ever OK?: A Human Rights Perspective* (New Press 2005) 3-17; Peters (n41) 11-36.

<sup>52</sup> Langbein J, *Prosecuting Crime in the Renaissance: England, Germany, France* (Harvard University Press 1974) 241, referring to Germany in the 1500s.

<sup>53</sup> See, eg, Lea H, *The Ordeal* (University of Pennsylvania Press 1973); Bartlett R, *Trial by Fire and Water: The Medieval Judicial Ordeal* (Clarendon Press 1988).

<sup>54</sup> Lea *ibid*; Bartlett *ibid*.

<sup>55</sup> Langbein, *Torture and the Law of Proof* (n29).

<sup>56</sup> *Felton’s Case* (1628) 3 *Howell’s State Trials* 371 (PC).

<sup>57</sup> *ibid*.

Although *Felton's Case* is often celebrated as signifying the disavowal of torture by the common law,<sup>58</sup> in fact its claim to do so is a qualified one. Certainly, the Privy Council declined to order torture in common law courts. But as Jardine noted in the early 19<sup>th</sup> century, there was no question that the King could have ordered Felton to be tortured pursuant to the royal prerogative.<sup>59</sup> The High Court of Star Chamber—so called because the ceiling of the room in which it presided was gilded with stars<sup>60</sup>—continued to order stretching on the rack, whipping, pillory, and mutilation at least until its formal abolition in 1641<sup>61</sup> (Barnes argues that the Star Chamber continued to function even after that date).<sup>62</sup> In any event, punishments that would now be considered torturous—such as burning or disembowelment while still alive—continued to be imposed in England and in continental Europe well after that time.<sup>63</sup> Such punishments were simply not conceptualised as ‘torture’; that word was reserved for the pre-trial investigative techniques, which fell from favour long before harsh punishments were phased out in Britain. Up until the end of the medieval period, it was understood that ‘the function of prisons or jails was merely to hold offenders until *punishment*, in the form of either death, banishment, transportation, the forfeiture of property, or a variety of corporal penalties, could be enforced or inflicted’.<sup>64</sup>

With *Felton's Case* and then the Bill of Rights of 1689,<sup>65</sup> substantial inroads began to be made towards the abolition of torture in the British Isles. Notwithstanding the title of the 1689 Act, it is

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<sup>58</sup> See, eg, *A v Secretary of State for the Home Department (No 2)* [2005] UKHL 71; [2006] 2 AC 221, 275 (Lord Nicholls), 279, 280 (Lord Hoffmann). See also Baroness Helena Kennedy’s speech in the House of Lords, 12 October 2005, Col 369.

<sup>59</sup> Jardine D, *A Reading on the Use of Torture in the Criminal Law of England Previously to the Commonwealth* (Baldwin and Cradock 1837) 12; for discussion, see Veall D, *The Popular Movement for Law Reform, 1640-1660* (OUP 1970) 26.

<sup>60</sup> Abbott G, *Rack, Rope and Red-Hot Pincers: A History of Torture and Its Instruments* (Eric Dobby 2002) 4.

<sup>61</sup> Lowell A, ‘The Judicial Use of Torture, Part II’ (1897) 11 *Harvard Law Review* 290, 295-6. On the history of the Star Chamber, see, eg, Parry LA, *The History of Torture in England* (Sampson Low, Marston & Co, Ltd 1933) 4-12; Barnes TG, ‘Star Chamber Mythology’ (1961) 5 *American Journal of Legal History* 1; Riebli F, ‘The Spectre of Star Chamber: The Role of an Ancient English Tribunal in the Supreme Court’s Self-Incrimination Jurisprudence’ (2001) 29 *Hastings Constitutional Law Quarterly* 807.

<sup>62</sup> See Barnes TG, ‘Mr Hudson’s Star Chamber’, in Guth DJ and McKenna JW (eds), *Tudor Rule and Revolution: Essays for GR Elton from his American Friends* (CUP 1982) 286-308.

<sup>63</sup> See Classen A and Scarborough C (eds), *Crime and Punishment in the Middle Ages and Early Modern Age* (de Gruyter 2012)

<sup>64</sup> Zimring FE and Hawkins G, *Incapacitation: Penal Confinement and the Restraint of Crime* (OUP 1995) 6. See also the classic studies: Ives G, *A History of Penal Methods: Criminals, Witches, Lunatics* (Patterson Smith 1914); and Grünhut M, *Penal Reform: A Comparative Study* (Clarendon Press 1948). On the transition from contractual penal servitude in the early American republic to imprisonment in the modern American penal system, see McLennan RM, *The Crisis of Imprisonment: Protest, Politics and the Making of the American Penal State, 1776-1941* (CUP 2008).

<sup>65</sup> An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown, 1689. Note that the Act is sometimes cited as 1688 rather than 1689. For an explanation of the

well known that it was more concerned with the sovereignty of Parliament than with the rights and liberties of the King's subjects.<sup>66</sup> Significantly, however, the Bill of Rights did purport to prohibit 'cruel and unusual punishments'.<sup>67</sup> Legal historians such as Granucci and Mulligan continue to debate the meaning and effect of this provision.<sup>68</sup> Courts continued to impose brutal punishments such as being drawn and quartered, or disembowelled while still alive, long after the Bill of Rights was concluded.<sup>69</sup> Thus, it seems likely that the 'cruel and unusual punishment' clause was directed at the imposition of punishments 'unauthorised by statute, beyond the jurisdiction of the sentencing court, or disproportionate to the offence committed'.<sup>70</sup> Rather than the abolition of objectively cruel forms of punishment, the better view is that of Granucci, that this provision reflected the gradual development of a principle of proportionality between crime and punishment at this time.<sup>71</sup>

The first *legislative* prohibition of torture was Scotland's Treason Felony Act in 1708.<sup>72</sup> That Act provided that 'no person accused of any capital offence, or other crime in Scotland, shall suffer, or be subject or liable to any torture...'<sup>73</sup> The reference here to torture inflicted against accused persons reflects prevailing understanding of torture as a pre-trial, rather than post-conviction, phenomenon.

Blackstone proudly declared in 1789 that, unlike continental Europe, torture was 'unknown' in England.<sup>74</sup> He meant simply that 'judicial torture' had been removed from the statute books.<sup>75</sup> It would be some time yet before criminal sentencing would be conceptualised in terms of torture, and a further two centuries before freedom from torture would be protected as a human right.

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different dates, see <<http://www.legislation.gov.uk/aep/WillandMarSess2/1/2/introduction>> accessed 12 June 2015.

<sup>66</sup> Bingham T, *The Rule of Law* (Penguin 2011) 24. See also Bates, E 'History' in Moeckli D, Shah S and Sivakumaran S (eds), *International Human Rights Law* (2nd edn, OUP 2014) 15-33, 17.

<sup>67</sup> Specifically, the Bill of Rights provided: 'That excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted'.

<sup>68</sup> Granucci (n30) 860 arguing with reference to Blackstone's Commentaries that, at the time of its inclusion in the English Bill of Rights, the term 'cruel' meant 'disproportionate', 'severe' or 'hard'. But cf Mulligan WH, 'Cruel and Unusual Punishments: The Proportionality Rule' (1978) 47 *Fordham Law Review* 639, 641, taking the opposite view. See further Norrie A, *Crime, Reason and History: A Critical Introduction to Criminal Law* (3rd edn, CUP 2014) 21-22.

<sup>69</sup> See Granucci *ibid* 855-856; see also Sharpe JA, *Judicial Punishment in England* (Faber and Faber 1990) 18-45.

<sup>70</sup> Dayan C, *The Story of Cruel and Unusual* (MIT Press 2007) 6, citing Granucci *ibid*.

<sup>71</sup> Granucci (n30).

<sup>72</sup> Treason Felony Act: An Act for Improving the Union of the Two Kingdoms, 1708 (Scotland).

<sup>73</sup> *ibid*.

<sup>74</sup> Blackstone W, *4 Commentaries on the Laws of England* 3.

<sup>75</sup> Langbein argues that this shift was due to the evolution of trial by jury, which rendered torture unnecessary: *Torture and the Law of Proof* (n29).

The 19<sup>th</sup> century saw England's 'reactionary, bloody penal system' enter a period of significant reform.<sup>76</sup> This was 'fuelled by an increasing revulsion against cruelty', as well as by changing perceptions of the human person and of human pain.<sup>77</sup> As Khan explains, 'the spectacle of torture was replaced with the modern penitentiary, and the deployment of bodily pain with the ambition to reform the criminal personality'.<sup>78</sup>

In contrast to England, however, a macabre 'jurisprudence of torture' persisted in continental Europe well into the 17<sup>th</sup> and 18<sup>th</sup> centuries.<sup>79</sup> But by the early 19<sup>th</sup> century, every European jurisdiction had legislated for the abolition of torture.<sup>80</sup> The reasons for this shift are hotly contested. Historians such as Peters, Lippman and Hunt emphasise the role of Enlightenment thinkers (Voltaire, Beccaria, Montesquieu, Bentham and others) in influencing popular consciousness in favour of more humane methods of interrogation and punishment.<sup>81</sup> But according to Langbein, Ruthven and Bernstein, the work of these philosophers was popular because it echoed, rather than created, the *zeitgeist*.<sup>82</sup> Langbein contends that evolutions in the law of proof simply reduced the need for torture.<sup>83</sup> The social historian Hunt identifies a developing 'cultural practice' of autonomy and empathy, and a changing perception of the human body as possessing a kind of dignity.<sup>84</sup> For social anthropologist Bourke, this era saw a changing

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<sup>76</sup> Norrie A, *Crime, Reason and History: A Critical Introduction to Criminal Law* (3rd edn, CUP 2014) 19.

<sup>77</sup> See, eg, Shklar JN, *Ordinary Vices* (Belknap Press of Harvard University Press 1984) 35-37, arguing that this made way for a 'monstrous moral cruelty' disguised 'in the ministrations of philanthropy'. See also Hunt L, *Inventing Human Rights: A History* (WW Norton & Company 2007), arguing that a new notion of empathy began to develop at this time; and see Bourke (n14); but cf Moyn S, *The Last Utopia: Human Rights in History* (Belknap Press of Harvard University Press 2010).

<sup>78</sup> Khan PW, *Sacred Violence: Torture, Terror and Sovereignty* (University of Michigan Press 2008) 2 (reference omitted).

<sup>79</sup> Greenberg (n50) 5.

<sup>80</sup> Lippman M, 'The Development and Drafting of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (1994) 17 Boston College International and Comparative Law Review 275-283. See also Abbott (n60) 3.

<sup>81</sup> See, eg, Peters (n41); Lippman, 'The Development and Drafting of the CAT' (n80) 281-3; Asad (n5) 1088; Silverman L, *Tortured Subjects: Pain, Truth, and the Body in Early Modern France* (University of Chicago Press 2001); Hunt (n77). On the influence specifically of Beccaria's 1764 treatise *On Crimes and Punishment*, see Schwartz D and Wishingrad J, 'The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the *Weems v United States* Excessive Punishment Doctrine' (1974) 24 Buffalo Law Review 783.

<sup>82</sup> Langbein, *Torture and the Law of Proof* (n29) 9; Ruthven (n46) 12-14; Bernstein JM, *Torture and Dignity: An Essay on Moral Injury* (University of Chicago Press 2015) 9.

<sup>83</sup> Langbein, *Torture and the Law of Proof* (n29), citing in particular the development of the institution of trial by jury in England and the gradual reduction in the primacy of confessions. Langbein does not address the use of torturous methods of punishment, which continued long after judicial torture had been abolished in England and continental Europe.

<sup>84</sup> Hunt (n77) 108. See also Silverman (n81).

understanding of physical pain and its relationship to truth.<sup>85</sup> The philosopher and historian Foucault saw this shift away from excessively cruel punishments as merely the emergence of new forms of social control.<sup>86</sup> It was now 'the certainty of being punished and not the horrifying spectacle of public punishment' that assumed the role of deterrent in the criminal justice system.<sup>87</sup>

Regardless of the reasons for these changes, it is apparent that the period between the 17<sup>th</sup> and 19<sup>th</sup> centuries marked a dramatic shift in Western societies away from a system of criminal justice that had not only contemplated but explicitly sanctioned torture and ill-treatment, at all stages of the criminal process. Beginning with *Felton's Case* in 1628, and ending with the abolition of torture across Europe by the end of the 1800s, 'the common law and civil law traditions [ultimately came] together into a wider European legal tradition of the prohibition of torture'.<sup>88</sup>

Here too, however, the practice of torture remained bound up with the concept of the 'other'. Whatever the circumstances pertaining at home among the European powers, different rules applied abroad, where torture was widely used as a tool of oppression by colonial rulers. Anti-colonial forces were often brutally repressed.<sup>89</sup>

Notwithstanding its rather equivocal implementation in England, the 'cruel and unusual punishment' clause was imported into the American Bill of Rights in 1789, exactly one hundred

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<sup>85</sup> Bourke J, 'Pain and the Politics of Sympathy, Historical Reflections, 1760s to 1960s' (Inaugural Address on accepting the Treaty of Utrecht Chair, Utrecht University, 8 June 2011); Bourke, *The Story of Pain* (n14).

<sup>86</sup> Foucault (n31). See also Ignatieff M, *A Just Measure of Pain: The Penitentiary in the Industrial Revolution 1750-1823* (Pantheon 1978).

<sup>87</sup> Foucault *ibid* 9.

<sup>88</sup> Jenkins D, 'The European Legal Tradition against Torture and Implementation of Article 3 of the European Convention on Human Rights' [2007] Public Law 15, 21.

<sup>89</sup> The literature on colonial abuses is extensive. See particularly Lazreg M, *Torture and the Twilight of Empire: From Algiers to Baghdad* (Princeton University Press 2008) 3, arguing that '[t]orture was intimately linked to colonial history and to the nature of the colonial State'. See also Anderson D and Killingray D, *Policing the Empire: Government, Authority and Control, 1830-1940* (Manchester University Press 1991); Rao A, 'Problems of Violence, States of Terror: Torture in Colonial India' (2001) 3 *Interventions: International Journal of Postcolonial Studies* 186; Simpson AWB, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (OUP 2001); Elkins C, *Britain's Gulag: The Brutal End of Empire in Kenya* (Jonathan Cape 2005); Beigbeder Y, *Judging War Crimes And Torture: French Justice And International Criminal Tribunals And Commissions (1940-2005)* (Martinus Nijhoff 2006). See, further, the recent litigation in the UK regarding colonial abuses in Kenya during the Mau Mau uprising in the 1950s: *Mutua & Ors v The Foreign & Commonwealth Office* [2011] EWHC 1913 (QB) (EWHC) (QB); *Mutua & Ors v The Foreign And Commonwealth Office* [2012] EWHC 2678 (QB) (EWHC) (QB). Following the High Court's ruling that the claims were not time-barred, the litigation was settled out of court: see Cowell A, 'Britain Acknowledges Colonial-Era Torture in Kenya', *The New York Times* (6 June 2013), available at <<http://www.nytimes.com/2013/06/07/world/europe/britain-colonial-torture-kenya.html>> accessed 27 July 2014.

years later.<sup>90</sup> The Eighth Amendment to the United States Constitution provides that ‘excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted’. This Amendment was confirmed after only minimal debate.<sup>91</sup> They opted for this wording although an arguably more progressive precedent was available in the form of the 1641 ‘Body of Liberties’ adopted by the General Court of the Commonwealth of Massachusetts Bay. The Body of Liberties provided in Article 46, ‘For bodily punishments we allow amongst us none that are inhumane, barbarous or cruel’.<sup>92</sup> This model might have imposed more wide-ranging restrictions on sentencing procedures than the ambiguous and cumulative clause ‘cruel and unusual’.<sup>93</sup>

Having opted for the more minimal, and arguably more ambiguous, ‘cruel and unusual punishment’ clause, historians continue to debate what exactly the drafters intended to prohibit. Schwartz and Wishingrad argue that they intended to encapsulate an Enlightenment sensibility of humane treatment.<sup>94</sup> In contrast, Granucci argues that the founding fathers had simply wrongly assumed that the English clause had outlawed certain objectively brutal punishments.<sup>95</sup> Whatever their influences and intentions, almost a century later in the 1879 case of *Wilkinson v Utah*, the United States Supreme Court held that ‘punishments of torture... and all others in the same line of unnecessary cruelty, are forbidden’ by the Eighth Amendment’.<sup>96</sup>

These protections did not stretch to all persons within the United States, however; here again, the practice of torture was bound up with notions of ‘the other’. Severe physical punishment was an integral part of slavery.<sup>97</sup> Regulations in some States proscribed ‘whipping, beating, cutting or wounding or... cruelly and unnecessarily biting or tearing [slaves] with dogs’ only when it was ‘excessive and unjustified’.<sup>98</sup> It is difficult to imagine circumstances in which such treatment could

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<sup>90</sup> The wording from the English Bill of Rights was reproduced verbatim in the Constitution of Virginia, and then with minor changes ‘ought not to be’ was replaced by ‘shall not be’, and two commas were added. The drafting history is described in Granucci (n30).

<sup>91</sup> Mulligan (n68) 642.

<sup>92</sup> Whitmore WH (ed), ‘Massachusetts Body of Liberties 1641’, *Laws of the Massachusetts Colony from 1630-1686* (Rockwell and Churchill 1890). On the Body of Liberties, see further Barnes TG ‘The Laws and Liberties of Massachusetts’, in Barnes TG and Boyer AD, *Shaping the Common Law: From Glanvill to Hale, 1188-1688* (Stanford Law Books 2008) 195-204.

<sup>93</sup> Dayan (n70) 88.

<sup>94</sup> Schwartz and Wishingrad (n81); see also Schwartz, CW, ‘Eighth Amendment Proportionality Analysis and the Compelling Case of William Rummel’ (1980) 71 *Journal of Criminal Law and Criminology* 378, 380.

<sup>95</sup> *ibid.* See also Granucci (n30) 864.

<sup>96</sup> *Wilkinson v Utah* (1879) 99 USSC 130, 135-136, holding that a sentence of execution by being publicly shot did not fall foul of the Eighth Amendment.

<sup>97</sup> Ruthven (n46) 39.

<sup>98</sup> Dayan (n70) 13, and references *infra*.

be anything *other than* 'excessive and unjustified'. Certainly, as Dayan notes, different standards were applicable to free citizens.<sup>99</sup>

## 2.3 International humanitarian law

In addition to the virtually universal abolition of judicial torture, the end of the 19<sup>th</sup> century saw a burgeoning international movement towards the regulation of the conduct of hostilities in wartime. This would eventually culminate in the four Geneva Conventions of 1949 and in a complex of parallel principles of customary international law relating to *jus in bello*. The first such instruments, drafted in the late 1800s, reflected a dichotomy between inhumanity and humanity: on the one hand, prohibiting the most egregious acts as 'inhuman' treatment, and on the other hand, establishing a right for certain categories of persons to be treated humanely during and after any hostilities.

Among the earliest constraints on the conduct of hostilities was the United States military manual of 1863, which famously provided in the Lieber Code that 'military necessity does not admit of cruelty...nor of torture to obtain confessions...'.<sup>100</sup> Like the other instruments discussed above, torture was conceived of in narrow terms as an information-gathering exercise. The broader and more inclusive concept was that of cruelty, which could never be justified, not even on the basis of 'military necessity'.<sup>101</sup> Prisoners of war were entitled to further specific protections: they must not be subjected to 'revenge... by the intentional infliction of any suffering, or disgrace, by cruel imprisonment, want of food, by mutilation, death, or any other barbarity'.<sup>102</sup> The absence of any reference to *torture* in this context suggests that punishments such as 'mutilation', 'cruelty', 'disgrace' and 'other barbarities', were not conceived of in such terms. It was not until the early 20<sup>th</sup> century that the link between torture and information gathering would be shattered, and the label 'torture' would be applied to a wider range of conduct than pre-trial investigative procedures.

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<sup>99</sup> *ibid.*

<sup>100</sup> art 16, 'Instruction for Government of Armies of the United States in the Field' promulgated as 'General Orders No 100' by President Lincoln, 24 April 1863 (*Lieber Code*).

<sup>101</sup> *ibid.*

<sup>102</sup> art 56, *Lieber Code*, *ibid.*

The Lieber Code contributed to the incremental development of customary international law in relation to armed conflict. The early Geneva<sup>103</sup> and Hague<sup>104</sup> Conventions concluded in the latter half of the 19<sup>th</sup> century and early 20<sup>th</sup> century drew upon the principles set out in the Lieber Code and expanded its protections.<sup>105</sup> The Martens clause in the Hague Convention of 1899 provided that populations and belligerents would remain at all times subject to 'the laws of humanity and the requirements of the public conscience'.<sup>106</sup> The International Court of Justice pointed to the 'continuing existence and applicability' of this rule in its Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*.<sup>107</sup> Meron contends that 'since [its drafting], a broad understanding has emerged to the effect that the Martens clause reaches all parts of international humanitarian law'.<sup>108</sup>

Both the Lieber Code and the Martens clause reflected early efforts to enshrine a right of prisoners of war and injured soldiers to be treated humanely. Each successive renegotiation of the Hague and Geneva Conventions increased both the prominence of protections against ill-treatment, and the detail with which they were enumerated. Notably, however, these treaties were silent on torture. The focus at this time was on broader notions of ill-treatment and inhumanity. For example, the Geneva Convention of 1906 required signatory States to 'protect the wounded and dead from robbery and ill treatment'.<sup>109</sup> Article 28 of that same convention obliged signatory States 'to take, or to recommend to their legislatures, the necessary measures to repress, in time of war, individual acts of robbery and ill treatment of the sick and wounded of the armies'.<sup>110</sup> The Geneva

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<sup>103</sup> Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Geneva, 22 August 1864; reprinted in Schindler D and Toman J (eds), *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions, and Other Documents* (Martinus Nijhoff 1988) 280-281. The 1864 Convention was supplemented by Additional Articles Related to the Condition of the Wounded in War, Geneva, 20 October 1868, which attempted to extend the Convention to naval forces; reprinted in Schindler and Toman, 285-288. The Additional Articles did not secure any ratifications and did not enter into force. The 1864 Geneva Convention was revised and replaced by the more detailed Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Geneva, 6 July 1906; reprinted in Schindler and Toman, 301-310.

<sup>104</sup> Hague Convention I on the Pacific Settlement of International Disputes; Hague Convention II on the Regulations on the Laws and Customs of War on Land; Hague Convention III for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864. See Final Act of the International Peace Conference, The Hague, 29 July 1899; reprinted in Schindler and Toman (n) 50-51.

<sup>105</sup> See Dinstein Y, *The Conduct of Hostilities Under the Law of International Armed Conflict* (3rd edn, CUP 2016) 21-24.

<sup>106</sup> Hague Convention II, *ibid.* For discussion of the meaning and effect of the Martens clause, see Cassese, A, 'The Martens Clause: Half a Loaf or Simply Pie in the Sky?' (2000) 11 *European Journal of International Law* 187.

<sup>107</sup> *Legality of the Threat or Use of Nuclear Weapons* (1996) ICJ Rep 226, 260 [87] (the Court).

<sup>108</sup> Meron T, 'The Martens Clause, Principles of Humanity, and Dictates of Public Conscience' (2000) 94 *American Journal of International Law* 78, 79. See further Dinstein (n105) 13-15.

<sup>109</sup> art 3, Geneva Convention 1906 (n103).

<sup>110</sup> art 28, *ibid.*

Peace Conference of 1929 extended the protections afforded to the wounded and sick in predecessor conventions.<sup>111</sup> The prohibition of ill-treatment of the wounded and dead was preserved in Article 3 of the 1906 Geneva Convention,<sup>112</sup> but was supplemented by a new Article 1 which demanded that wounded soldiers be ‘respected and protected in all circumstances’ and ‘treated with humanity... without distinction of nationality’.<sup>113</sup> A further convention on prisoners of war<sup>114</sup> provided that they must ‘at all times be humanely treated and protected, particularly against acts of violence, from insults and from public curiosity’.<sup>115</sup>

These early conventions were the forerunners of the 1949 Geneva Conventions and the 1977 Additional Protocols, which would ultimately extend those protections to all combatants and all civilians in all armed conflicts, whether international or non-international in nature. The 1949 Geneva Conventions are now universally ratified, and much of the two Protocols is now accepted as reflective of customary international law, requiring compliance of all States.<sup>116</sup> These instruments evidence the evolution of the principle of humanity, in counterpoint to the principle of military necessity—principles which remain of crucial importance today.

Strikingly, the only one of these early instruments to mention torture specifically was the 1863 Lieber Code. Not only was torture not explicitly referred to in the Martens Clause, the Hague or Geneva Conventions, but neither the League of Nations Covenant, nor the Minorities Treaties for Eastern Europe made any mention of torture or ill-treatment.<sup>117</sup> This reflects what will be further demonstrated below: namely, that it was not until the mid to late 1900s that torture began to achieve prominence ‘as a harm above all others’.<sup>118</sup>

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<sup>111</sup> Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Geneva, 27 July 1929, reprinted in Schindler and Toman, 326-334.

<sup>112</sup> art 3 provided that ‘After each engagement the occupant of the field of battle shall take measures to search for the wounded and dead, and to protect them against pillage and maltreatment’: *ibid*.

<sup>113</sup> art 1, *ibid*, which provides in full that ‘Officers and soldiers and other persons officially attached to the armed forces who are wounded or sick shall be respected and protected in all circumstances; they shall be treated with humanity and cared for medically, without distinction of nationality, by the belligerent in whose power they may be. Nevertheless, the belligerent who is compelled to abandon wounded or sick to the enemy, shall, as far as military exigencies permit, leave them with a portion of his medical personnel and material to help with their treatment’.

<sup>114</sup> Geneva Convention Relative to the Treatment of Prisoners of War, Geneva, 27 July 1929, reprinted in Schindler and Toman, 341-364.

<sup>115</sup> art 2, *ibid*.

<sup>116</sup> See discussion in International Committee of the Red Cross, *The Geneva Conventions of 12 August 1949: Commentary* (J Pictet ed, International Committee of the Red Cross 1952).

<sup>117</sup> The Minorities Treaties did, however, provide for ‘full and complete life and liberty to all inhabitants...without distinction of birth, nationality, language, race or religion’. See, eg, art 2, Minorities Treaty, The Allies and the Republic of Poland, 28 June 1919.

<sup>118</sup> Kelly, *This Side of Silence* (n10) 23.

However, 'torture of civilians' was included in the list of violations of the laws and customs of wars identified by the Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties at the Paris Peace Conference in 1919.<sup>119</sup> Other violations included 'murders and massacres: systematic terrorism', rape, 'internment of civilians under inhuman conditions', and 'ill-treatment of wounded and prisoners of war'.<sup>120</sup> The Commission's report was not a direct source of international obligations, but it reflected an emerging principle of customary international law regarding individual criminal responsibility for such crimes.<sup>121</sup> Importantly, the Commission's report also expressed opposition to sovereign immunity being attached to such crimes, and to the availability of the defence of superior orders for subordinate officers.<sup>122</sup>

Notwithstanding these developments, torture was widely deployed by virtually all parties during World War II.<sup>123</sup> After the fact, a spurious narrative began to develop that torture had been exclusively 'the method of the enemy'.<sup>124</sup> The reality was that here too, torture was deployed against 'others' perceived as having low status within a particular community: whether Jews, homosexuals, traitors, nationals of a foreign or opposing power, or the disabled. The practice of torture would itself become a method of othering—only our enemies torture; we use 'tough tactics', but these tactics are necessary, and in any event do not amount to torture. This narrative acquired such power that the Allies 'emerged out of the war with the firm belief that the Gestapo invented modern torture'.<sup>125</sup>

Given the prominence of this narrative, one might have expected that the Nazi abuse of its own 'torturable classes' would have been comprehensively addressed by the post-war military tribunals. Surprisingly however, neither torture, nor cruel, inhuman or degrading treatment was referenced in the London Charter of the International Military Tribunal in 1945<sup>126</sup> or the Tokyo

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<sup>119</sup> Reports of Majority and Dissenting Reports of American and Japanese Members of the Commission of Responsibilities, Conference of Paris, 'Violation of the Laws and Customs of War' (Clarendon Press 1919) 17-18.

<sup>120</sup> *ibid* 17-18.

<sup>121</sup> For discussion, see Schabas WA, 'The Crime of Torture and the International Criminal Tribunals' (2005) 37 *Case Western Reserve Journal of International Law* 349.

<sup>122</sup> Reports of Majority and Dissenting Reports of American and Japanese Members of the Commission of Responsibilities, Conference of Paris, 'Violation of the Laws and Customs of War' (Clarendon Press 1919) 22.

<sup>123</sup> See Rejali (n44); Cobain I, *Cruel Britannia: A Secret History of Torture* (2nd edn, Portobello Books 2013) chapter 1.

<sup>124</sup> Rejali (n44) 538-539, quoting from a war poster at the time.

<sup>125</sup> *ibid* 540.

<sup>126</sup> London Charter of the International Military Tribunal (1945) 82 UNTS 279 ('*London Charter*').

Charter in 1946.<sup>127</sup> The terms ‘genocide’ and ‘crime against humanity’ both entered into the international legal lexicon around this time. The primary focus of both the London and Tokyo tribunals was on ‘crimes against peace’. It was the waging of aggressive wars that the Allies were predominantly concerned to condemn; the idea that States could be held to account for their treatment of their own nationals was still in its infancy.<sup>128</sup>

The London Charter conferred jurisdiction over crimes against humanity—that is, crimes against the civilian population—only when committed ‘in execution of or in connection with any crime within the jurisdiction of the Tribunal’.<sup>129</sup> Crimes against humanity could only be considered by the Tribunal if they were committed in the context of an unlawful war. This effectively excluded all Nazi atrocities against their own people, and certainly any committed before the invasion of Poland in 1939, from the jurisdiction of the Nuremberg Tribunal.<sup>130</sup> This controversial framing of the Tribunal’s jurisdiction was criticised as ignoring ‘the Holocaust as a distinctive element of Nazi criminality’.<sup>131</sup> In contrast, the crimes against humanity provision in the Tokyo Charter specifically conferred jurisdiction over acts committed ‘before or during the war’.<sup>132</sup>

In addition to crimes against peace, the London and Tokyo Charters conferred jurisdiction to prosecute war crimes,<sup>133</sup> participation in the criminal activities of a criminal group or organisation,<sup>134</sup> and crimes against humanity (the latter only where they were committed in connection with one of the other crimes within the jurisdiction of the tribunal: this was known as ‘the nexus requirement’).<sup>135</sup> Relevantly, the definition of war crimes included ‘ill-treatment’, and

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<sup>127</sup> Charter of the International Military Tribunal for the Far East, 26 April 1946, reprinted in Boister N and Cryer R (eds), *Documents on the Tokyo International Military Tribunal: Charter, Indictment, and Judgments* (OUP 2008) 7-11 (*‘Tokyo Charter’*).

<sup>128</sup> See Mettraux G, *Perspectives on the Nuremberg Trial* (OUP 2008).

<sup>129</sup> London Charter (n126) art 6(c).

<sup>130</sup> For discussion of the ultimately unsuccessful campaign by the Jewish lobby for a broader definition of crimes against humanity which would encompass pre-war acts and a distinct crime related to the Holocaust, see Marrus MR ‘A Jewish Lobby at Nuremberg: Jacob Robinson and the Institute of Jewish Affairs, 1945-46’ in Rafal L and others, *The Nuremberg Trials: International Criminal Law Since 1945: 60th Anniversary International Conference* (Bilingual edition, K G Saur Verlag 2006) 63-71.

<sup>131</sup> Marrus *ibid* 63.

<sup>132</sup> Tokyo Charter (n127) art 5(c).

<sup>133</sup> The London Charter (n126) art 6(b) defined war crimes as ‘including ill-treatment of civilians, prisoners of war or persons on the seas’. The Tokyo Charter (n127) art 5(b) conferred jurisdiction to prosecute ‘Conventional War Crimes: namely, violations of the laws or customs of war’.

<sup>134</sup> London Charter (n126) arts 9-11.

<sup>135</sup> Both the London Charter (n126) and the Tokyo Charter (n127) defined crimes against humanity using the following identical phrase: ‘murder, extermination, enslavement, deportation and *other inhumane acts...*’ (emphasis added) (arts 6(c) and 5(c) respectively).

the definition of crimes against humanity included 'other inhumane acts'. Again, neither Charter specifically mentioned torture.

Despite the absence of torture from both Charters, it was mentioned in both judgments – albeit only in passing. The Tribunal at Nuremberg made a handful of references to torture and inhuman or degrading treatment,<sup>136</sup> and the Tokyo Tribunal referred briefly to torture and 'other inhumane acts'.<sup>137</sup> The fact that torture was excluded from the Charters, but referred to in both judgments' discussion of war crimes and crimes against humanity, suggests that torture was considered to fall within the umbrella concepts of 'ill-treatment' and 'other inhumane acts'. Though torture would later acquire a 'special stigma' in the jurisprudence of the ECtHR,<sup>138</sup> and indeed in contemporary discourse,<sup>139</sup> it had not yet arisen by this time.

Since the London and Tokyo Charters were primarily drafted with 'crimes against peace' in mind, that was clearly reflected in the outcomes they produced. The Nuremberg trial was famed for its central focus on the crime of aggression, and the judgment spent 'a mere 12 paragraphs' considering 'the Nazis' systematic murder of the Jews'.<sup>140</sup> Nor did the Nuremberg judgment engage in any discussion of the substantive elements of war crimes or crimes against humanity; in this respect, the lack of precision and intellectual rigour in their judgments has attracted criticism.<sup>141</sup> Commentators on the Tokyo tribunal expressed disappointment at the shallow analysis of war crimes, arguing that this approach engendered a sense that war crimes were 'the less-important charges'.<sup>142</sup>

Although the London and Tokyo Charters referred to 'inhumane' acts, when the International Law Commission issued its 1950 'Principles of International Law Recognised in the Charter of the

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<sup>136</sup> This included: four references to torture, at 224, 227, 252, 292; nine references to cruelty and cruel treatment, at 227, 231, 234, 237, 246, 252, 254, 322, 332; seven references to inhumane acts, treatment, or conditions at 174, 220, 253, 254, 266, 319, 332 (of these, three references simply quoted the terms of the indictment); four references to inhuman treatment and/or inhumanity, at 136, 229, 231, 247, and; a solitary reference to degrading treatment, at 246. See *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg*, 14 November 1945-1 October 1946.

<sup>137</sup> *Judgment of the International Military Tribunal for the Far East*, 19 April 1946-12 November 1948, reprinted in Boister and Cryer, *Documents on the Tokyo International Military Tribunal* (n) 531, [49,592] finding that 'torture, murder, rape and other cruelties of the most inhumane and barbarous character were freely practised...'.  
<sup>138</sup> *Ireland v United Kingdom* (1978) Series A no 25 ('Ireland v UK (ECtHR)') 59 [167].

<sup>139</sup> See, eg, Amnesty International, *Torture in the Eighties* (Pitman Press, 1984).

<sup>140</sup> Heller KJ, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (OUP 2011) 4.

<sup>141</sup> See, eg, Heller *ibid* 3; Lippmann M 'Nuremberg: Forty-Five Years Later' in Mettraux G, *Perspectives on the Nuremberg Trial* (OUP 2008) 492-545, 524.

<sup>142</sup> Boister N and Cryer R, *The Tokyo International Military Tribunal: A Reappraisal* (OUP 2008), 190.

Nuremberg Tribunal and in the Judgment of the Tribunal', it dropped the 'e' from the word 'inhumane' in the crimes against humanity provision.<sup>143</sup> The word 'inhumane' was deleted completely from the war crimes provision, which read 'violations of the laws or customs of war include, but are not limited to, murder, ill-treatment or deportation to slave-labour...' etc.<sup>144</sup> Presumably the reference to ill-treatment was understood to cover what the London and Tokyo Charters had described as 'inhumane'. The ILC Principles contained no reference to torture, suggesting that even as recently as 1950, torture had not yet attained the heightened level of stigma and significance with which it has become associated today.

The prosecutions at the International Military Tribunals were limited in scope. In a letter to US President Truman, the chief prosecutor at Nuremberg stressed that further trials were needed because:

'[a] very large number of Germans... remain unpunished. There are many industrialists, militarists, politicians, diplomats and police officials whose guilt does not differ from those who have been convicted except that their parts were at lower levels and have been less conspicuous'.<sup>145</sup>

A more comprehensive trial of the atrocities inflicted during World War II came with the series of subsequent prosecutions at Nuremberg under Control Council Law No 10.<sup>146</sup> The purpose of this law, drafted in December 1945 and promulgated in 1946 by the Allied Control Council in occupied Germany, was 'to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal'.<sup>147</sup> While the London Charter was designed to prosecute the chief orchestrators of the Nazis' aggressive wars, it was pursuant to Control Council Law No 10 that prosecutions of less senior military commanders, civilian leaders of Nazi institutions, several German industrialists, lawyers and judges, and the many doctors and scientists who carried out atrocities in the concentration camps, took place. Control Council Law No 10 was intended to complement the London Charter, so that 'major criminals not tried under the one could be tried under the other'.<sup>148</sup>

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<sup>143</sup> International Law Commission, 'Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal' (1950) II *Yearbook of the International Law Commission* 374, Principle VI (c).

<sup>144</sup> Principle VI (b) *ibid.*

<sup>145</sup> Lippman M, 'War Crimes Trials of German Industrialists: The "Other Schindlers"' (1995) 9 *Temple International and Comparative Law Journal* 173, 180 and note 76.

<sup>146</sup> art II, Control Council Law No 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity (1946) 3 *Official Gazette Control Council for Germany* 50-55, (*Control Council Law No 10*).

<sup>147</sup> *ibid* (quotation taken from the long title of the ordinance).

<sup>148</sup> Taylor T, 'Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials Under Control Council Law No 10' (JAG School 1949) 7. For a fascinating summary and analysis of the prosecution of industrialists, see: Lippman M, 'War Crimes Trials of German Industrialists' (n145). On the prosecution of jurists, see Lippman M, 'The Prosecution of Josef Altstoetter *et al*: Law, Lawyers and Justice in the Third Reich' (1998) 16 *Dickinson Journal of International Law* 343.

In practice, many more individuals were prosecuted under Control Council Law No 10 than were prosecuted under the London Charter of the International Military Tribunal.<sup>149</sup> These prosecutions, which were likewise led by the US, have attracted much less academic attention than the judgment of the International Military Tribunal, despite the fact that the jurisprudence they yielded was in some respects more significant.<sup>150</sup> This heightened significance stemmed chiefly from the fact that judgments issued under Control Council Law No 10 elaborated more extensively on the nature of crimes against humanity and war crimes, and as such there was more scope for discussion of the concept of torture.

The subject matter jurisdiction in Control Council Law No 10 covered the same crimes as the London and Tokyo Charters—namely, war crimes, crimes against humanity, crimes against peace, and membership in a criminal organisation—but in slightly different terms. Some of these differences were of only marginal significance. For example, Control Council Law No 10 (unlike the London Charter) made clear that the list of acts that could constitute war crimes or crimes against humanity was illustrative rather than exclusive, by means of an additional clause ‘atrocities or offenses including...’. in both provisions.<sup>151</sup> However, it appears to have been assumed in the Nuremberg judgment that the lists were inclusive in any case.<sup>152</sup> In any event, Control Council Law No 10 made that assumption explicit. Other changes, however, may have held greater import: for example, the absence of a nexus requirement between crimes against humanity and aggressive war attracted conflicting interpretations of whether jurisdiction extended to pre-war acts.<sup>153</sup>

Like their counterparts in the Tokyo and London Charters, ill-treatment was referred to as a war crime,<sup>154</sup> and ‘other inhumane acts’ were criminalised as crimes against humanity.<sup>155</sup> However, unlike the London Charter, Control Council Law No 10 specifically mentioned torture as one of the

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<sup>149</sup> Although many of the sentences under Law No 10 would later be commuted in the game of Cold War politics: see Heller (n140) 350-367.

<sup>150</sup> The works of Lippman and Heller are notable exceptions. See, eg, Lippman M, ‘The Other Nuremberg: American Prosecutions of Nazi War Criminals in Occupied Germany’ (1992) 3 *Indiana International & Comparative Law Review* 1; Lippman M, ‘The Prosecution of Josef Altstoetter *et al*’ (n148); Lippman M, ‘War Crimes Trials of German Industrialists’ (n145); Lippman M, ‘The Nazi Doctors Trial and the International Prohibition on Medical Involvement in Torture’ (1993) 15 *Loyola of Los Angeles International and Comparative Law Journal* 395; and Heller (n140).

<sup>151</sup> Compare London Charter (n126) arts 6(b),(c); and Control Council Law No 10 (n146) arts II(1)(b),(c).

<sup>152</sup> As torture was referenced in the judgment despite its absence from the Charter list.

<sup>153</sup> See discussion in Heller (n140) 231-250, 382-383.

<sup>154</sup> art II(1)(b), Control Council Law No 10 (n146).

<sup>155</sup> *ibid* art II(1)(c).

acts that could constitute a crime against humanity.<sup>156</sup> Thus, although the Scottish Treason Felony Act of 1709 was the first instrument to prohibit torture, it was Control Council Law No 10 that first proscribed torture as a criminal offence.<sup>157</sup>

Control Council Law No 10 established that torture could be a crime against humanity when committed against any civilian population 'whether or not in violation of the domestic laws of the country where perpetrated'.<sup>158</sup> The indictment in *The Medical Case* accused the defendants of having committed crimes against humanity in the form of 'murders, brutalities, cruelties, tortures, atrocities and other inhuman acts'.<sup>159</sup> The judgment noted that 'in every one of the experiments the subjects experienced **extreme pain or torture**, and in most of them they suffered permanent injury, mutilation, or death, either as a direct result of the experiments or because of lack of adequate follow-up care'.<sup>160</sup> Thus, torture and a range of other acts falling short of torture (variously described as 'ill-treatment' or 'other inhumane acts') were grouped together as broadly similar, perhaps morally equivalent, forms of atrocity. Torture had not yet been singled out for special or particular condemnation.

The Supreme Court of Israel considered torture alongside 'other inhumane acts' in its 1962 judgment in the Eichmann case.<sup>161</sup> Eichmann was abducted in Argentina and rendered to Israel, whereupon he was convicted of crimes against humanity, war crimes and crimes against the Jewish people, for his role as the chief architect of the Holocaust. In this context too, the specific contours of the concept of torture were not discussed, and nor was torture singled out from the array of atrocities as attracting a particular stigma.

The assumption that torture could constitute a war crime as well as a crime against humanity, while implicit at Nuremberg and Tokyo, was made explicit in the Geneva Conventions of 1949,<sup>162</sup>

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<sup>156</sup> Interestingly, Control Council Law No 10 also added rape to the list of acts which could be prosecuted as a crime against humanity, although there were no prosecutions for rape under these laws: see Heller (n140) 381.

<sup>157</sup> art II(1)(c), Control Council Law No 10 (n146).

<sup>158</sup> Ibid art II(1)(a).

<sup>159</sup> *The Medical Case*, in *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No 10 (1949)* Vol I, 11, 16.

<sup>160</sup> *ibid* Vol II, 183 (emphasis added).

<sup>161</sup> *Attorney-General of Israel v Eichmann* [1962] IsrSC 16; (1968) 36 ILR 277, 2033.

<sup>162</sup> Convention I for the Amelioration of the Condition of the Wounded and Sick in armed Forces in the Field (*'Geneva Convention I'*); Convention II for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (*'Geneva Convention II'*); Convention III relative to the Treatment of Prisoners of War (*'Geneva Convention III'*); Convention IV relative to the Protection of Civilian Persons in Time of War (*'Geneva Convention IV'*).

and then later in the Rome Statute of the International Criminal Court in 2002.<sup>163</sup> Here again, torture was not singled out, but rather it was grouped together with ‘inhuman treatment’ and ‘wilfully causing great suffering or serious injury to body or health’ as grave breaches of the Geneva Conventions, when committed against persons or property protected by those Conventions.<sup>164</sup> This recalls the earlier established principle of humane treatment, which continues to exist in tension with, and operate as a constraint upon, military necessity.<sup>165</sup>

The Geneva Conventions of 1949 are now universally ratified, and widely accepted as reflecting customary international law.<sup>166</sup> Although the bulk of the Conventions apply only in international armed conflict,<sup>167</sup> Article 3, which is common to all four of the Geneva Conventions, establishes a minimum threshold of protection applicable even in non-international armed conflicts.<sup>168</sup> Common Article 3 requires that ‘persons taking no active part in hostilities.... Shall in all circumstances be treated humanely’. Further, those persons may not ‘at any time [or] in any place whatsoever...’ be subjected to ‘violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture’ and ‘outrages upon personal dignity, in particular humiliating and degrading treatment’.<sup>169</sup> Additionally, torture is specifically prohibited in a number of places elsewhere in the Geneva Conventions.<sup>170</sup>

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<sup>163</sup> arts 7(1)(f); 8(2)(a)(ii), Rome Statute of the International Criminal Court, 2187 UNTS 3 (opened for signature 17 July 1998, entered into force 1 July 2002) (*Rome Statute*).

<sup>164</sup> See art 50, Geneva Convention I; art 51, Geneva Convention II; art 130, Geneva Convention III; art 147, Geneva Convention IV.

<sup>165</sup> See discussion above.

<sup>166</sup> See Droege C, “‘In Truth the Leitmotiv’: The Prohibition of Torture and Other Forms of Ill-Treatment in International Humanitarian Law” (2007) 89 *International Review of the Red Cross* 515; Meron T, ‘The Geneva Conventions as Customary Law’ [1987] *American Journal of International Law* 348. See also Meron T, *Human Rights and Humanitarian Norms as Customary Law* (Clarendon Press 1989) 7-10.

<sup>167</sup> On classification of armed conflicts as international or non-international, see Akande D ‘Classification of Armed Conflicts: Relevant Legal Concepts’ in Wilmshurst E and Royal Institute of International Affairs (eds), *International Law and the Classification of Conflicts* (OUP 2012) 32-79.

<sup>168</sup> This principle represents ‘the minimum which must be applied in the least determinate of conflicts’: Pictet (n116) Vol IV, 38.

<sup>169</sup> Common art 3 to the four Geneva Conventions of 1949. The protections applicable in non-international armed conflicts are now supplemented by further protections in the two Additional Protocols of 1977, though the extent to which these protections reflect custom is a matter of some debate.

<sup>170</sup> See, eg, art 32, Geneva Convention IV, which prohibits ‘murder, torture, corporal punishment, mutilation and medical or scientific experiments... [as well as] any other measures of brutality’. The Commentary observes that the prohibition of torture in art 32 ‘is absolute; it covers all forms of torture, whether they form part of penal procedure or are quasi- or extra-judicial acts, and whatever the means employed. There need not necessarily be any attack on physical integrity since the “progress” of science has enabled the use of procedures which, while they involve physical suffering, do not necessarily cause bodily injury’: see Pictet (n116) Vol IV, 223. See also art 17 of Geneva Convention III, which prohibits ‘physical or mental torture, [and] any other form of coercion’ on prisoners of war.

Thus, the Geneva Conventions specifically proscribe torture as well as cruelty, without differentiating between them as warranting particular stigma or attracting different consequences. It could be argued that different consequences attach to degrading treatment, which is a violation of Common Article 3 but is not listed as a grave breach of the Geneva Conventions. Droege argues that this suggests ‘the seriousness of the physical or mental suffering must attain a higher threshold to constitute inhuman treatment [than degrading treatment]’.<sup>171</sup> However, it was clear by 1949 that torture, inhuman treatment, cruel treatment and degrading treatment were all to be regarded as ‘serious attacks on human dignity’.<sup>172</sup>

Although the Geneva Conventions on their face only apply to the particular categories of persons listed therein, Article 75 of Additional Protocol II ‘closes the “gap”, if there ever was one’.<sup>173</sup> That Article provides that ‘persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the [Geneva] Conventions... are to be treated humanely in all circumstances’.<sup>174</sup> This reflects the humanitarian principle first deriving from the Martens clause: namely, that humanity operates as a constraint upon military necessity. It is in this sense, then, that the principle of humane treatment is truly the ‘leitmotif’ of the Geneva Conventions.<sup>175</sup>

The above discussion has demonstrated that early laws of armed conflicts focussed on ill-treatment rather than torture. Well before torture was singled out as attracting unique opprobrium, a general principle was emerging that at least certain classes of person—civilians and prisoners of war—were entitled to be treated humanely. The most egregious breaches of this principle could be prosecuted on the international plane as crimes against humanity or as war crimes, depending on the contexts in which they were committed.

The third and final historical phase—the universal prohibition and proscription of torture—has seen the amalgamation of these historical developments. The prohibition on torture—understood as a technique of information gathering—and the prohibition of ‘excessive’ or ‘unjustified’ cruelties, were combined into a single prohibition. No doubt partly because of that amalgamation, the perceived connection between torture and information gathering began to break down. People began to conceptualise the treatment of prisoners—their criminal sentences, their living conditions in detention—in terms of torture, too. This coincided with important shifts in penal

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<sup>171</sup> Droege (n166) 532.

<sup>172</sup> *ibid.*

<sup>173</sup> Rodley NS, ‘The Prohibition of Torture: Absolute Means Absolute’ (2006) 34 *Denver Journal of International Law and Policy* 145, 151; see further Dinstein (n105) Chapter 1.

<sup>174</sup> art 75, Additional Protocol II (n169).

<sup>175</sup> Pictet (n116) Vol I, 52; Vol II, 34; Vol III, 38; Vol IV, 38.

theory, as well as in social understandings of the human body.<sup>176</sup> As Foucault concluded, punishment gradually became less focussed on the corporeal: if the body was targeted, such as through imprisonment, it was in an effort to reach the soul.<sup>177</sup>

## 2.4 Human rights law

We have thus far traced the history of legal prohibitions on torture, cruelty, inhumanity and ill-treatment. We considered the excision of torture—once an integral part of the criminal process, and administered and overseen by the State—from legal systems dating back millennia. Torture was gradually phased out from the pre-trial process in Britain in the 16<sup>th</sup> and 17<sup>th</sup> centuries, and in continental Europe it was abolished by the beginning of the 20<sup>th</sup>. In a parallel development, the worst excesses of criminal punishments began to be curtailed in a shift towards imprisonment as the cornerstone of modern penal policy.

Thus far, references to torture *specifically* have been few, as the instruments considered here prohibited cruelty, inhumanity or inhumane acts. The dichotomy between humanity and inhumanity, rather than an internal hierarchy between particular forms of brutality, was the primary concern of these early legal prohibitions. It was not until the post-World War II human rights movement that the concept of torture received further elaboration.

This movement arguably began in 1945, when the UN Charter affirmed in its preamble ‘faith in fundamental human rights’ as well as dignity and equality,<sup>178</sup> and established the promotion of human rights as one of the purposes of the United Nations.<sup>179</sup> Some States expressed support for the incorporation of an international bill of rights into the UN Charter, but the proposal was ultimately deferred.<sup>180</sup> Shortly after, however, the 1948 Universal Declaration of Human Rights (*UDHR*), was adopted by consensus in a non-binding resolution of the UN General Assembly.<sup>181</sup> That instrument set out in Article 4 what has now become the classic formulation of prohibitions on ill-treatment: ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’.

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<sup>176</sup> Hunt (n77) Chapter 2.

<sup>177</sup> Foucault (n31) Chapter 1.

<sup>178</sup> United Nations, ‘Charter of the United Nations’ 1 UNTS XVI (opened for signature 26 June 1945, entered into force 24 October 1945) (*UN Charter*) Preamble.

<sup>179</sup> *ibid* art 1(3).

<sup>180</sup> See Humphrey JP, ‘The International Bill of Rights: Scope and Implementation’ (1975) 17 *William & Mary Law Review* 527. For discussion of the movement for an international bill of rights in the immediate post-war period, see Lauterpacht H, *An International Bill of the Rights of Man* (Columbia University Press 1945).

<sup>181</sup> UDHR (n32).

Early versions of that Article referred to ‘unusual punishment or indignity’ in place of ‘cruel, inhuman or degrading treatment’, recalling the English Bill of Rights and the Eighth Amendment of the US Constitution.<sup>182</sup> The final wording that was settled upon would prove to be highly influential, and is included verbatim in many constitutions around the world.<sup>183</sup>

The same General Assembly resolution that adopted the UDHR also requested drafting to continue for a binding international bill of rights, which would later become the twin International Covenants.<sup>184</sup>

Also in 1948, the newly established Organisation of American States (*OAS*)<sup>185</sup> proclaimed the American Declaration of the Rights and Duties of Man,<sup>186</sup> Article XXVI of which provides that (inter

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<sup>182</sup> Commission on Human Rights Drafting Committee, ‘Draft Outline of International Bill of Rights’, Economic and Social Council, UN Doc.E/CN.4/AC.1/1, 4 June 1947; Commission on Human Rights, ‘Report of the Drafting Committee on an International Bill of Rights to the Commission on Human Rights’, Economic and Social Council, UN Doc.E/CN.4/21, 1 July 1947. Later versions introduced the word ‘cruel’ while retaining the references to torture and indignity that had appeared in earlier drafts: see Commission on Human Rights, ‘Report of the Drafting Committee to the Commission on Human Rights’, Economic and Social Council, UN Doc.E/CN.4/95, 21 May 1948, art 8(3). Regrettably, the UDHR drafting records do not shed much light on why the ultimate form of words was adopted, although the discussion and drafting process is summarised in depth in (1948-9) *Yearbook of the United Nations* 524-542. Other phrasings were suggested, such as prohibitions on ‘unusual punishment or indignity’ or ‘cruel or inhuman punishment or indignity’, based on the US Constitutional prohibition: see Danelius, H ‘Article 5’, in Eide, A, G Alfredsson, G Melander, L A Rehof, and A Rosas (eds) *The Universal Declaration of Human Rights: A Commentary* (Scandinavian University Press 1992) 101, 102.

<sup>183</sup> Torture is prohibited together with cruel, inhuman or degrading treatment or punishment in a large number of European constitutions, particularly those which were concluded in the 1990s or later. See, eg: art 25, Constitution of the Republic of Albania: October 21, 1998 (as Amended to September 18, 2012); art 7, Constitution of the Czech Republic: December 16, 1992 (as Amended to November 14, 2002); art 21, Constitution of the Republic of Lithuania: October 25, 1992 (as Amended to May 25, 2006); art 93, Constitution of the Kingdom of Norway: May 17, 1814 (as Amended to May 9, 2014); art 25(1), Constitution of the Portuguese Republic (Sixth Revision): April 2, 1976 (as Amended to July 24, 2004). The same or a very similar formulation appears in constitutions in South America, including: art 12, Constitution of the Republic of Colombia: July 5, 1991 (as Amended to July 22, 2005; note that ‘forced sequestration’ is also included in the provision); and in art 46, Constitution of the Bolivarian Republic of Venezuela: December 15, 1999. In Africa, see, eg: art 8, Constitution of the Republic of Namibia: March 21, 1990 (as Amended to December 24, 1998); ss 12(d)-(e), Constitution of the Republic of South Africa: December 16, 1996 (as Amended to December 14, 2007); art 24, Constitution of the Republic of Uganda: September 22, 1995 (as Amended to 2005). In the Asia-Pacific region, see, eg: s 35(5), Constitution of the People’s Republic of Bangladesh: December 16, 1972 (as Amended to June 30, 2011); ss 12(2), 19(1) Constitution of the Republic of the Philippines: February 2, 1987 (Philippines [ph]); art 11, Constitution of the Democratic Socialist Republic of Sri Lanka: August 31, 1978 (as Amended to September 9, 2010).

<sup>184</sup> UDHR (n32).

<sup>185</sup> Charter of the Organisation of American States, 119 UNTS 3 (opened for Signature 30 April 1948, Entered into Force 13 December 1951) arts 3(j), 13 (now arts 3(l), 17).

<sup>186</sup> Inter-American Commission on Human Rights, American Declaration of the Rights and Duties of Man, 2 May 1948.

alia) ‘every person accused of an offence has the right... not to receive cruel, infamous or unusual punishment’.<sup>187</sup> This built upon the establishment of the world’s first regional court in 1907 with the Central American Court of Justice. That court had jurisdiction to consider cases involving a ‘denial of justice’ between an individual and another State, and between States—but not between an individual and her State of nationality.<sup>188</sup> That court still exists today, although Article 25 of its revised statute cedes jurisdiction over human rights matters to the American Convention on Human Rights.

The European Convention for the Protection of Human Rights and Fundamental Freedoms (*European Convention on Human Rights*) was concluded in 1950. The prohibition of torture and ill-treatment in that instrument echoed Article 5 UDHR almost exactly.<sup>189</sup> Perhaps surprisingly, the prohibition on torture was a relatively late addition: the first draft of the European Convention on Human Rights contained a closed list of 11 rights, from which freedom from torture and ill-treatment was absent.<sup>190</sup> It is conceivable that torture was considered to be covered by the right to ‘security of life and limb’, but there is no record in the early *travaux* of discussions to that effect.<sup>191</sup> Indeed, the UDHR contains separate provisions on the right to life, liberty and security of person, *in addition to* a prohibition on torture and cruel, inhuman or degrading treatment or punishment.<sup>192</sup> Since the UDHR was considered at length during the drafting of the European Convention on Human Rights, the failure to include a specific prohibition of torture in the latter is a striking omission.<sup>193</sup>

During the drafting process in 1949, one of the British representatives proposed that the completed European Convention on Human Rights should be accompanied by a separation

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<sup>187</sup> *ibid* art XXVI.

<sup>188</sup> On the ‘impulse to regionalism’ in (inter alia) the Americas, see Shelton D, ‘The Promise of Regional Human Rights Systems’ in Weston BH and Marks SP (eds), *The Future of International Human Rights* (Transnational Publishers Inc 1999) 351-398.

<sup>189</sup> art 3, European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 221 (opened for signature November 4, 1950, entered into force September 3, 1953) (*European Convention on Human Rights*).

<sup>190</sup> The listed rights were, in order: security of life and limb; freedom from arbitrary arrest, detention and exile; freedom from slavery and servitude and from compulsory labour of a discriminatory kind; freedom of speech and of expression of opinion generally; freedom of association and assembly; the natural rights deriving from marriage and paternity and those pertaining to the family; the sanctity of the home; equality before the law; freedom from discrimination on account of religion, race, national origin or political or other opinion, and; freedom from arbitrary deprivation of property. See Council of Europe, *Collected Edition of the ‘Travaux Préparatoires’ of the European Convention on Human Rights (ECHR Travaux Préparatoires)*, vol I (Martinus Nijhoff 1975) 296-7, draft art 1(a)-(k).

<sup>191</sup> *ibid* 296, draft art 1(a).

<sup>192</sup> UDHR (n32) arts 3, 5.

<sup>193</sup> ECHR Travaux Préparatoires (n190) vol I, 196.

'motion'.<sup>194</sup> The motion would condemn 'any use of torture by public authorities or individuals' as a crime against humanity, and state that such treatment 'can never be justified on the grounds that it is being used for extracting information to save life or to protect the interests of the State or on any other grounds whatsoever'.<sup>195</sup> It was eventually agreed that a separate article in the European Convention on Human Rights would specifically prohibit 'torture and inhuman or degrading treatment or punishment', and the idea of a separate motion was abandoned.

Once torture and ill-treatment was included in the draft convention, it was quickly agreed that it should be non-derogable, even in wartime or in other states of emergency.<sup>196</sup> Close reading of the seven volume *travaux préparatoires* yields little indication of why the word 'cruel' was dropped from the otherwise identically formulated provision in the UDHR. However, one of the commentaries to the UN Convention Against Torture (discussed further below) suggests that 'cruel' was considered by the drafters of the European Convention on Human Rights to be 'too subjective'.<sup>197</sup> The basis for this conclusion is not clear, since no citation appears. We are left to speculate as to whether the adjective 'cruel' was deliberately abandoned, and if so, as to the reasons why.

Some sixteen years later, the 1966 International Covenant on Civil and Political Rights ('*ICCPR*') reinstated the word 'cruel' in an exact echo of Article 7 of the UDHR.<sup>198</sup> Once again, there is little indication in the *travaux préparatoires* as to why the formulation in the UDHR and not the European Convention on Human Rights was preferred.

Early versions of the prohibition in *ICCPR* Article 7 referred to 'cruel, unusual or degrading treatment',<sup>199</sup> in place of the reference to 'inhuman' treatment in the final version. This reflected the influence of the provision in the US Bill of Rights and the American Declaration, which, it will be recalled, prohibited 'cruel and unusual punishments'. Ultimately 'unusual' was replaced with 'inhuman' in the *ICCPR* because (among other reasons) 'it was argued that while cruel, degrading and inhuman treatment or punishment might be "unusual" the converse was not necessarily

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<sup>194</sup> ECHR *Travaux Préparatoires* (n190) vol II, 14.

<sup>195</sup> *ibid.*

<sup>196</sup> European Convention on Human Rights (n189) art 15(2).

<sup>197</sup> Burgers JH and H Danelius, *The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman, Or Degrading Treatment Or Punishment* (Martinus Nijhoff 1988) 11.

<sup>198</sup> International Covenant on Civil and Political Rights, 999 UNTS 171 (adopted 16 December 1966, entered into force 23 March 1976) ('*ICCPR*').

<sup>199</sup> Bossuyt M, *Guide to the 'Travaux Préparatoires' of the International Covenant on Civil and Political Rights* (Martinus Nijhoff 1987) 150.

true'.<sup>200</sup> The drafters thought the concepts were overlapping, but that 'unusual' had a broader scope than cruel, inhuman or degrading treatment, and ought to be excluded on that basis.

The decision to abandon the 'cruel and unusual' formula in the ICCPR marked a significant shift in legal language. That clause had endured since the 17<sup>th</sup> century and was derived from the English Bill of Rights. The 'cruel and unusual punishment' clause still appears, as previously mentioned, in the Eighth Amendment of the US Bill of Rights, as well as in: s 12 of the Canadian Charter of Rights and Freedoms;<sup>201</sup> Article 5 of the Constitution of the Trinidad and Tobago;<sup>202</sup> Article 17 of the Croatian Constitution;<sup>203</sup> and in Section 6(3) of the Constitution of the Republic of the Marshall Islands.<sup>204</sup> In the latter two cases, 'cruel and unusual punishment' is prohibited in addition to torture, which is also expressly mentioned in the same clause.

According to the Oxford English Dictionary, the meaning of the word 'unusual' has remained unchanged for centuries, and it has been 'in common use' from circa 1630.<sup>205</sup> In the late 17<sup>th</sup> century, when the first 'cruel and unusual punishment' clause was concluded, the nascent English criminal justice system was characterised by manifold idiosyncrasies and inconsistencies. In that context it may have made sense to speak of outlawing exceptional or uncommon punishments, in a way that seems ill-adapted to modern legal systems, which are more likely to have standardised sentencing practices. In spite of these differences, in the 2002 case of *Reyes*, Lord Bingham declared rather summarily that 'cruel and unusual punishment' and 'torture and inhuman or degrading treatment or punishment' essentially meant the same thing.<sup>206</sup> The significant historical differences between these provisions were thus masked by this sleight of hand.

Like Article 3 of the European Convention on Human Rights, the prohibition of torture and ill-treatment in Article 7 of the ICCPR is non-derogable in its entirety.<sup>207</sup> But Article 7 of the ICCPR differs from its counterpart in two important respects. The first is the inclusion of an additional clause: 'in particular, no one shall be subjected without his free consent to medical or scientific experimentation'. This inclusion is surprising, since medical or scientific experimentation without consent would almost certainly constitute cruel, inhuman or degrading treatment or torture.

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<sup>200</sup> *ibid* 151. It was also objected that the term 'unusual' was vague, and may differ in different country contexts.

<sup>201</sup> Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11.

<sup>202</sup> Constitution of the Republic of Trinidad and Tobago Act (Act No. 4 of 1976): March 29, 1976 (as Amended to November 2, 2000).

<sup>203</sup> Constitution of the Republic of Croatia: December 2, 1990 (as Amended to May 7, 2001).

<sup>204</sup> Constitution of the Republic of the Marshall Islands: May 1, 1979 (as Amended to 1995).

<sup>205</sup> OED Online (n22) 'Unusual, *adj*'.

<sup>206</sup> *Reyes v R* [2002] UKPC 11; [2002] 2 AC 235 (UK Privy Council) [30] (Lord Bingham).

<sup>207</sup> ICCPR (n198) art 4(1).

However, the drafters considered it 'so important as to require a specific provision, even at the risk of repetition'.<sup>208</sup> A similar debate occurred during the drafting of the Geneva Conventions, but resulting in the opposite outcome.<sup>209</sup> In the Geneva Conventions it was considered dangerous to identify particular prohibited practices, because 'however much care were taken in establishing a list of all the various forms of infliction, one would never be able to catch up with the imagination of future torturers', and as such, 'the more specific and complete a list tries to be, the more restrictive it becomes'.<sup>210</sup> The drafters of both the ICCPR and the Geneva Conventions arrived at different formulations, though their intentions were the same: to minimise the risk of a narrow construction of prohibited ill-treatment.

The second difference is that, in addition to the prohibition of torture and ill-treatment in Article 7, the ICCPR also provides in Article 10(1) that 'all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person'.<sup>211</sup> Recalling that the leitmotif of the Geneva Conventions was the principle of humane treatment,<sup>212</sup> the ICCPR enshrines that principle as a substantive right afforded to certain categories of people. The principle of humanity evolved in the context of the laws of armed conflict, as a constraint upon military necessity. But here, that principle was for the first time adopted outside the context of conflict. Not only do detainees possess the negative right to freedom from torture, but they also have a positive right to be treated in accordance with the standards of humanity. This provision was quickly and universally agreed among the drafters.<sup>213</sup>

By the time of the ICCPR's conclusion in 1966, both international human rights law and international humanitarian law specifically prohibited what they regarded as the most egregious attacks on human dignity (torture, inhuman acts, and acts of degradation/degrading treatment). Certain categories of people were also afforded a broader right to be treated humanely, such as

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<sup>208</sup> UN Secretary-General's Annotation to the Draft International Covenants on Human Rights, 10<sup>th</sup> Session of the General Assembly, 1 July 1955, UN Doc A/2929, 87-8.

<sup>209</sup> Pictet (n116) Vol I, 54.

<sup>210</sup> *ibid.*

<sup>211</sup> ICCPR (n198) art 10 also sets out a number of further specific rights for accused persons as distinct from convicted persons (art 10(2)) and juvenile prisoners (arts 10(2) and (3)). Art 10(3) further provides that 'the essential aim' of the prison system 'shall be [the prisoners'] reformation and social rehabilitation'. For commentary on arts 7 and 10, see O'Flaherty M, *Human Rights and the UN: Practice Before the Treaty Bodies* (2nd edn, Martinus Nijhoff/Kluwer Law International 2002); Conte A 'Security of the Person' in Conte A and Burchill R, *Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee* (Ashgate Publishing, Ltd 2009) 111-153; see also Joseph S and Castan M, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (OUP 2013).

<sup>212</sup> Pictet (n116) Vol I, 54; Droege (n166).

<sup>213</sup> UN Secretary-General's Annotation to the Draft International Covenants on Human Rights, 10<sup>th</sup> Session of the General Assembly, 1 July 1955, UN Doc A/2929, 37.

prisoners of war and *hors de combat* in international humanitarian law, and detainees in human rights law. Those categories would steadily expand over time.

Significantly, neither the UDHR, the ICCPR, the OAS Declaration of the Rights of Man, nor the European Convention on Human Rights gave any indication of a distinction in gravity between torture and other forms of ill-treatment. On the contrary, ‘torture’ was the latecomer to this provision—joining the long-established ‘cruel’ and ‘inhuman’ treatment formulation that had traced its origins to the 17<sup>th</sup> century, with echoes in the Hague and Geneva Conventions of the 19<sup>th</sup> and 20<sup>th</sup> centuries.

Shortly after the conclusion of the ICCPR, a similarly worded prohibition on torture and cruel, inhuman or degrading treatment was agreed in Article 5 of the 1969 American Convention on Human Rights.<sup>214</sup> Like its counterparts in the other instruments, that prohibition is non-derogable.<sup>215</sup> Article 5 of the American Convention declares in the *chapeau* that it confers a ‘right to humane treatment’ and lists particular infringements of that right as specifically prohibited (including torture and cruel, inhuman or degrading treatment or punishment). Further, Article 5 provides that ‘every person has the right to have his physical, mental, and moral integrity respected’.<sup>216</sup> Where the ICCPR did not, at least initially, perceive the right to humane treatment extending beyond persons deprived of their liberty, the American Convention afforded that right to everyone.

A similarly bold proposition appears in the 1981 African Charter of Human and Peoples’ Rights.<sup>217</sup> Article 4 of that Charter provides that ‘human beings are inviolable’ and that ‘every human being shall be entitled to respect for his life and the integrity of his person’.<sup>218</sup> The protection is not absolute, but may not be ‘arbitrarily’ denied.<sup>219</sup> In addition, the African Charter provides that ‘Every individual shall have the right to the respect of the dignity inherent in a human being...’;<sup>220</sup>

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<sup>214</sup> American Convention on Human Rights, 1144 UNTS 123 (opened for signature November 22, 1969, entered into force July 18, 1978).

<sup>215</sup> *ibid* Art 27(2). Note that the derogation provision in art 27(1) of the American Convention is significantly less strict than the derogation provision in the European Convention. The former contemplates derogations ‘[i]n time of war, public danger, or other emergency that threatens the independence or security of a State Party’. In contrast art 15 of the European Convention applies only ‘in times of war or other public emergency threatening the life of the nation’. This point is made in Nmeihelle VOO, *The African Human Rights System: Its Laws, Practice, and Institutions* (Martinus Nijhoff 2001) 59.

<sup>216</sup> American Convention on Human Rights (n214) art 5(1), *ibid*.

<sup>217</sup> African Charter of Human and Peoples’ Rights, 1520 UNTS 217 (opened for signature June 27, 1981, entered into force October 21, 1986) (*‘African Charter’*).

<sup>218</sup> art 4, *ibid*.

<sup>219</sup> *ibid*.

<sup>220</sup> art 5, *ibid*.

a right strongly reminiscent of what was described in the American Convention as a generally applicable right to humane treatment. Although a number of clauses in the African Charter contain limitations, commonly referred to as 'claw-back clauses', the right to dignity and the prohibition of torture and other ill-treatment in Article 5 is unlimited.<sup>221</sup>

A crucial difference between the African Charter and other regional human rights treaties is that the African Charter lacks any derogation provision. Some commentators have argued that in any event, States' right to derogate from human rights in public emergencies has become a general principle of international law, or alternatively is a customary norm.<sup>222</sup> If this is so, then the absence of a derogation clause in the treaty has little effect. On the contrary, it may even be counterproductive because 'by failing to set any standards at all' the Charter risks States simply '[acting] as they please'.<sup>223</sup> Indeed, the African Commission on Human and Peoples' Rights has held that the African Charter 'does not allow for States parties to derogate from their treaty obligations during emergency situations', even in the context of civil war.<sup>224</sup> Whether this position will be confirmed by the African Court on Human and Peoples' Rights remains to be seen. In a recently issued General Comment on the Right to Life, the African Commission on Human and Peoples' Rights stated that 'the right to life continues to apply during armed conflict' but that it 'needs to be interpreted with reference to the rules of international humanitarian law'.<sup>225</sup> In any event, it is unlikely that a purported derogation from the protection against torture in Article 5 of the African Charter would be valid.<sup>226</sup>

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<sup>221</sup> See Higgins R, 'Derogations under Human Rights Treaties' (1977) 48 *British Yearbook of International Law* 281, 281, defining a 'claw-back' as a clause 'that permits, in normal circumstances, breach of an obligation for a specified number of public reasons'. For discussion of claw-back clauses in the African Charter, see, eg: Gittleman R, 'The African Charter on Human and Peoples' Rights: A Legal Analysis' (1982) 22 *Virginia Journal of International Law* 667; Nmeihelle VOO, *The African Human Rights System: Its Laws, Practice, and Institutions* (Martinus Nijhoff 2001) 165-167; Naldi GJ, 'Limitation of Rights under the African Charter on Human and Peoples' Rights: The Contribution of the African Commission on Human and Peoples' Rights' [2001] *South African Journal on Human Rights* 109.

<sup>222</sup> And thus a source of law under article 38(1)(c) of the Statute of the International Court of Justice (1945) 15 *UNCIO* 355 ('*ICJ Statute*'). See, eg, Oraá J, *Human Rights in States of Emergency in International Law* (Clarendon Press 1992).

<sup>223</sup> See Murray R, *The African Commission on Human and People's Rights and International Law* (Hart Publishing 2000) 123.

<sup>224</sup> *Commission Nationale des Droits de l'Homme et des Libertés v Chad*, Communication No 74/92 (1997) 4 *IHRR* 94 (African Commission on Human and Peoples' Rights ('ACommHR')) [21].

<sup>225</sup> ACommHR, 'General Comment No 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)', adopted 18 November 2015, art 13. For a succinct analysis, see Todeschini V, 'The Relationship between International Humanitarian Law and Human Rights Law in the African Commission's General Comment on the Right to Life', *EJIL:Talk!*, 7 June 2016, available at <<http://www.ejiltalk.org/the-relationship-between-international-humanitarian-law-and-human-rights-law-in-the-african-commissions-general-comment-on-the-right-to-life/>> accessed 2 October 2016.

<sup>226</sup> A derogation to that effect would likely fall foul of the Vienna Convention on the Law of Treaties as 'incompatible with the effective execution of the object and purpose of the [African Charter] as

Although there is as yet no regional human rights court for Asia, in 2012 the Association of South East Asian Nations issued a Declaration of Human Rights, which provides in Article 14 that ‘no person shall be subject to torture or to cruel, inhuman or degrading treatment or punishment’.<sup>227</sup> This has declaratory effect rather than any legally binding force, but nevertheless reflects the near-universal (if not universal) public disavowal of torture and ill-treatment by States. Although debate around ‘Asian values’ has opened other rights to some degree of context-specific questions, it serves to further highlight the remarkable unanimity on torture, cruel, inhuman and degrading treatment.<sup>228</sup>

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a whole’: see art 41(1)(b)(ii), Vienna Convention on the Law of Treaties, 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980) (*VCLT*).

<sup>227</sup> ‘ASEAN Human Rights Declaration’, Phnom Penh, Cambodia, 18 November 2012. For discussion of recent efforts to develop a regional mechanism for human rights in South East Asia, see, eg, Durbach A, Renshaw C and Byrnes A, “‘A Tongue but No Teeth?’: The Emergence of a Regional Human Rights Mechanism in the Asia Pacific Region’ (2009) 31 *Sydney Law Review* 211; Tan H-L, *The ASEAN Intergovernmental Commission on Human Rights: Institutionalising Human Rights in Southeast Asia* (CUP 2011).

<sup>228</sup> On the ‘Asian values’ debate, see, eg: Sen A, ‘Human Rights and Asian Values’, 16th Morgenthau Memorial Lecture on Ethics & Foreign Policy (Carnegie Council on Ethics and International Affairs 1997); Davis MC, ‘Constitutionalism and Political Culture: The Debate over Human Rights and Asian Values’ (1998) 11 *Harvard Human Rights Journal* 109.

The 'torture and cruel, inhuman or degrading treatment' formula also has echoes in the constitutions<sup>229</sup> and domestic legislation of many States.<sup>230</sup> These provisions have been supplemented by a range of international instruments and guidelines, such as the Standard Minimum Rules for the Treatment of Prisoners, adopted by the UN Office for the High Commissioner of Human Rights in 1955.<sup>231</sup> The Standard Minimum Rules provide that 'corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments shall be completely prohibited'.<sup>232</sup> These Rules—non-binding 'soft' law, adopted by the UN Congress on the Prevention of Crime and the Treatment of Offenders in Geneva in 1955—did not expressly prohibit torture or ill-treatment but rather 'set out what is generally accepted as being good principle and practice in the treatment of prisoners and the management of institutions'.<sup>233</sup>

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<sup>229</sup> See, eg, Albania: Constitution of the Republic of Albania: October 21, 1998 (as Amended to September 18, 2012), art 25; Bangladesh: Constitution of the Peoples' Republic of Bangladesh, 1972, art 35(5); Belarus: Constitution of the Republic of Belarus: November 27, 1996, art 25; Colombia: Constitution of the Republic of Colombia: July 5, 1991 (as Amended to July 22, 2005), art 12; Czech Republic: Constitution of the Czech Republic: December 16, 1992 (as Amended to November 14, 2002), art 7; Georgia: Constitution of Georgia: August 24, 1995 (as Amended to July 1, 2004), art 17(1); Latvia: Constitution of the Republic of Latvia: February 15, 1922 (as Amended to November 15, 2005), art 95; Lithuania: Constitution of the Republic of Lithuania: October 25, 1992 (as Amended to May 25, 2006), art 21; Moldova: Constitution of the Republic of Moldova: July 29, 1994 (as Amended to July 25, 2003), art 24(2); Namibia: Constitution of the Republic of Namibia: March 21, 1990 (as Amended to December 24, 1998), art 8(2)(b); Norway: Constitution of the Kingdom of Norway: May 17, 1814 (as Amended to May 9, 2014), art 93; Philippines: Constitution of the Republic of the Philippines: February 2, 1987, ss 12(2), 19(1); Poland: Constitution of the Republic of Poland: April 2, 1997, art 40; Portugal: Constitution of the Portuguese Republic (Sixth Revision): April 2, 1976 (as Amended to July 24, 2004), art 25(1); South Africa: Constitution of the Republic of South Africa: December 16, 1996 (as Amended to December 14, 2007) ss12(d)-(e); Slovakia: Constitution of the Slovak Republic: September 1, 1992, art 16(2); South Sudan: Constitution of the Republic of South Sudan: July 9, 2011, art 18; Sri Lanka: Constitution of the Democratic Socialist Republic of Sri Lanka, August 31, 1978 (as Amended to September 9, 2010), art 11; Switzerland: Federal Constitution of the Swiss Confederation: April 18, 1999 (as Amended to March 15, 2012), art 10(3); Timor-Leste: Constitution of the Democratic Republic of Timor-Leste: May 20, 2002, art 30(4); Uganda: Constitution of the Republic of Uganda: September 22, 1995 (as Amended to 2005), art 24; Venezuela: Constitution of the Bolivarian Republic of Venezuela: December 15, 1999, art 46.

<sup>230</sup> See, eg, Armenia: Penal Code 2003, art 11(2) (note that 'humiliating' replaces the word 'degrading'; the provision is otherwise identical).

<sup>231</sup> Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva 1955; approved UN EcoSoc Res 663C (XXIV), 31 July 1957.

<sup>232</sup> *ibid*, Rule 31.

<sup>233</sup> *ibid* [1]. Part I of the Rules includes detailed guidance on accommodation arrangements, including floor space, health services, access to light and air, medical and sanitary facilities, exercise and nutrition. Part II sets out a set of principles applicable to particular categories of prisoners, including efforts to facilitate rehabilitation of prisoners under sentence, treatment of prisoners on remand, civil prisoners, persons detained without charge, and special provisions for mentally unsound prisoners.

Thus, the early 20<sup>th</sup> century saw the development of prohibitions on torture and ill-treatment in both human rights law and humanitarian law. International humanitarian law prohibited inhuman acts, or inhumane acts, without apparent attention to the difference in meaning between those terms. Torture was also prohibited, but somewhat belatedly, and at first was mentioned only in passing, in the judgments of the international military tribunals, and then addressed more substantially in trials under Control Council Law No 10.

International criminal law considered torture and inhuman treatment (though not degrading treatment) to be war crimes; and whether in international or non-international armed conflicts, all soldiers and civilians had a right to be treated humanely. A succession of universal and regional human rights treaties, followed by non-binding declarations and standards, prohibited torture and cruel inhuman or degrading treatment or punishment in all circumstances—including during times of emergency. While the ICCPR recognised a (derogable) right to humane treatment for persons deprived of their liberty, the African Charter and the American Convention went further and afforded a right to humane treatment to all persons, and (arguably) made that right non-derogable.

## 2.5 Conclusion

This chapter has considered the trajectory of torture, from its prescription by judges in the Middle Ages to its eventual abolition. From its initial conception as a form of inhuman treatment, to being grouped together with inhuman treatment in the immediate post-war period of the 1940s, and finally, to its elevation above inhuman treatment in the 1970s, the concept of torture has undergone significant evolution. Described by one commentator as a ‘seismic social transformation’,<sup>234</sup> the shift in public sensibilities with respect to torture has been vast.

That the prohibition of torture is universally recognised and is non-derogable is not to say that it is never breached. Teitel observes that ‘the normative reach of these declarations appears to exceed their enforcement potential’.<sup>235</sup> Rejali contends that the major change in the practice of torture over the course of the 20<sup>th</sup> century was not a reduction, but rather a change in its practice: ‘torturers... have turned more and more towards techniques that leave few marks’.<sup>236</sup> Importantly, however, it is rarely contended that the torture norm does not apply; rather, its scope is contested by definitional debates,<sup>237</sup> and breaches are either denied, or treated as aberrations from a norm the applicability of which is widely accepted.

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<sup>234</sup> Bernstein (n82) 7.

<sup>235</sup> Teitel R, *Humanity's Law* (OUP 2011) 135.

<sup>236</sup> Rejali (n44) 5.

<sup>237</sup> See the infamous torture memoranda under the Bush Administration, which adopted an extremely narrow definition of torture. This narrow definition was widely condemned: see, eg,

Prohibitions upon torture are today ubiquitous, and widely recognised to be non-derogable.<sup>238</sup> The prohibition of torture has *jus cogens* status—meaning that it is a norm from which no derogation is permitted, ‘and which can be modified only by a subsequent norm of general international law having the same character’.<sup>239</sup> In contrast, the concepts of cruel, inhuman or degrading treatment have garnered less attention and now attracts a lower level of stigma. Although inhuman treatment was the focus of early legal instruments and in the trials of major war criminals at Nuremberg and Tokyo, torture now occupies the apex of a hierarchy of forms of prohibited ill-treatment.

The prohibition of torture and ill-treatment in the law is now two-tiered, in terms of the opprobrium attached to its breach, and two-speed, in terms of the pace at which development and substantiation of the concepts has proceeded. It is to the nature and origins of this hierarchy that Chapter Two now turns.

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Paust JJ, ‘Executive Plans and Authorizations to Violate International Law concerning Treatment and Interrogation of Detainees’ (2004) 43 *Columbia Journal of Transnational Law* 811; Rodley, ‘The Prohibition of Torture: Absolute Means Absolute’ (n173); Cole D (ed), *The Torture Memos: Rationalising the Unthinkable* (New Press 2009). On the legal and policy debates over the definitions adopted, see Zelikow P, ‘Codes of Conduct for a Twilight War’ (2012) 49 *Houston Law Review* 5; Cole D, ‘The Taint of Torture: The Roles of Law and Policy in Our Descent to the Dark Side’ (2012) 49 *Houston Law Review* 53.

<sup>238</sup> Nowak M and McArthur E (eds), *The United Nations Convention Against Torture: A Commentary* (OUP 2008) 2.

<sup>239</sup> VCLT (n226) art 53.

# Chapter Two: Torture at the Apex of a Hierarchy of Wrongs

## 3.1 Introduction

The previous chapter traced the origins and evolution of prohibitions on torture and ill-treatment. As we saw, the *prohibition* of torture, as distinct from its *abolition*, is relatively recent in origin. The first express military prohibition of torture appeared in the Lieber Code, but the early Hague and Geneva Conventions prohibited inhuman/inhumane acts without specific mention of torture. As we saw, those prohibitions were not initially conceived of as being hierarchical. Rather, the form of words arrived at in most modern treaties reflects a grouping together of two distinct developments: movements to abolish and criminalise so-called ‘judicial torture’, and separate (albeit related) movements to constrain and outlaw the most severe and brutal criminal penalties. This amalgamation resulted in the provisions in:

- Article 5 of the Universal Declaration of Human Rights (*‘UDHR’*) adopted by the United Nations General Assembly on 10 December 1948;
- Article 3 of the European Convention on Human Rights (*‘ECHR’*) (formally the *Convention for the Protection of Human Rights and Fundamental Freedoms*) on 3 September 1953;
- Article 7 of the International Covenant on Civil and Political Rights (*‘ICCPR’*) adopted by the United Nations General Assembly on 16 December 1966; and,
- Article 5(2) of the American Convention on Human Rights, adopted by the Organisation of American States on 22 November 1969.

All of these instruments prohibit ‘torture and [cruel,] inhuman or degrading treatment or punishment’.<sup>240</sup>

Despite the grouping of those concepts into a single provision, the relationship between torture and other prohibited ill-treatment is now undeniably hierarchical in nature. Torture has acquired what the European Court of Human Rights (*‘ECtHR’*) termed in the case of *Ireland v UK* a ‘special stigma’.<sup>241</sup> Over thirty years later, the International Court of Justice recognised the prohibition of torture to be a *jus cogens* norm.<sup>242</sup> Developments such as these suggest that torture occupies a

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<sup>240</sup> Of the instruments listed here only the European Convention on Human Rights omits reference to ‘cruel’ treatment or punishment. The African Charter on Human and Peoples’ Rights is not included here because the formulation of the prohibition of torture in that instrument takes a different form. It will be considered in depth in Chapter Five below.

<sup>241</sup> *Ireland v UK* (n138) [167] (the Court).

<sup>242</sup> *Belgium v Senegal* (n7) [99] (the Court).

position at the apex of a hierarchy of legal wrongs. Chapter One outlined the *timeline* of this occurrence. This chapter considers the *process* by which that occurred.

Four pivotal moments in that process are identified and analysed here. They are: first, the early jurisprudence of the European Commission of Human Rights (*ECommHR*) in the 1960s; second, the 1975 UN Declaration against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (*1975 UN Declaration*); third, the 1979 decision of the ECtHR of Human Rights in *Ireland v United Kingdom* (*Ireland v UK*); and fourth, the conclusion of the 1984 UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (*CAT*).

One might wonder why, if at all, these developments matter. If torture and other forms of ill-treatment are *all* prohibited, why does it matter which is which? One might even argue that these are concepts which *should* be interpreted broadly—and perhaps that ambiguity as to the outer edges can only enhance the level of protection these provisions afford. After all, torture and cruel, inhuman or degrading treatment *all* ‘have the degradation of their victim at their core’.<sup>243</sup> Indeed, the jurisprudence of the UN treaty bodies appears almost deliberately ambiguous on the question of how these concepts should be differentiated.<sup>244</sup>

There are three reasons why the difference between torture and other forms of ill-treatment is significant. The first and perhaps most obvious is that States already exploit this ambiguity in their favour, as the infamous torture memoranda in the post 9/11 United States showed.<sup>245</sup> It could be argued that a precise delineation of the torture threshold may ‘create a line... which States will automatically move towards’.<sup>246</sup> This argument is difficult to sustain: would precision be likely to be exploited any more than existing ambiguity has been exploited? The counter-argument is that the lack of consensus on the legal definition of torture has contributed to ‘global under-enforcement... and the perpetuation of the practice’.<sup>247</sup> At the very least, the case is arguable either

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<sup>243</sup> Luban, ‘Human Dignity, Humiliation, and Torture’ (n11) 222.

<sup>244</sup> Kelly, ‘The UN Committee Against Torture’ (n3) 790.

<sup>245</sup> Greenberg K and Dratel J (eds), *The Torture Papers: The Road to Abu Ghraib* (CUP 2005); see also Senate Select Committee on Intelligence, ‘Committee Study on the Central Intelligence Agency’s Detention and Interrogation Program: Findings and Conclusions’, approved 13 December 2012, released 3 December 2014.

<sup>246</sup> Kelly, ‘The UN Committee Against Torture’ (n3) 790, describing the views of some members of the UN Committee against Torture. See also Parry JT, ‘“Just for Fun”: Understanding Torture and Understanding Abu Ghraib’ (2005) 1 *Journal of National Security Law & Policy* 253, 258 arguing that ‘creating a separate category for an intentionally narrow set of practices labelled and banned as “torture” only functions to normalise and legitimate the remaining practices that are “not-torture”’.

<sup>247</sup> Harper J, ‘Defining Torture: Bridging the Gap between Rhetoric and Reality’ (2009) 49 *Santa Clara Law Review* 893, 896.

way. Therefore, the spectre of potential negative future consequences—the probability of which it is impossible to assess—should not be an impediment to further study of this question.

The second reason is that serious legal and practical consequences follow from classifying an act as torture. Not only are there reputational consequences for States attached to such a finding,<sup>248</sup> but in addition, the classification of the treatment may affect the quantum of compensation awarded,<sup>249</sup> as well as the nature of the State's obligations.<sup>250</sup> The CAT enshrines a bifurcated regime of State obligations with respect to torture on the one hand, and other ill-treatment on the other hand. There is an extensive and relatively onerous set of obligations for torture, and a much less intrusive regime for 'other' cruel, inhuman or degrading treatment or punishment. For example, under the CAT, torture cannot be justified in any circumstances, not even in war or other public emergencies, though the CAT is silent on justifications for cruel, inhuman or degrading treatment or punishment.<sup>251</sup> A credible allegation of torture creates an obligation to prosecute or extradite; but an allegation of cruel, inhuman or degrading treatment does not.<sup>252</sup> Under the CAT regime, a person can be expelled to face cruel, inhuman or degrading treatment, but they cannot be expelled to face torture.<sup>253</sup> These and other differences in the scope of State obligations invest the classification of treatment as torture with a high level of significance.

Finally, torture is regarded as an international crime, whether committed during war or peace.<sup>254</sup> The status of acts of cruel, inhuman or degrading treatment in international criminal law is considerably murkier.<sup>255</sup> Some commentators have argued that the prohibition on cruel, inhuman or degrading treatment is just as absolute as the prohibition on torture, and that such treatment can never be justified in law.<sup>256</sup> However, this claim faces the difficulty of delineating the content

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<sup>248</sup> Ignatieff M, 'Moral Prohibition at a Price', in Roth and Worden (eds) (n51) 18-27, 19. See also ni Aolain F, 'The European Convention on Human Rights and its Prohibition on Torture', in Levinson S (ed), *Torture: A Collection* (OUP 2004) 213-227, 222.

<sup>249</sup> See, eg, art 41, European Convention on Human Rights; art 63, American Convention on Human Rights.

<sup>250</sup> Some of the implications of the distinction for the obligations of States are discussed in Roth BR, 'Just Short of Torture' (2008) 6 *Journal of International Criminal Justice* 215.

<sup>251</sup> CAT (n1) art 2(2).

<sup>252</sup> *ibid* art 7-8.

<sup>253</sup> *ibid* art 3.

<sup>254</sup> See, eg: *Filártiga v Peña-Irala* (n7); *Prosecutor v Delalić*, ICTY Case No IT-96-21-T, Trial Chamber Judgment, November 16, 1998 ('*Čelebići Prison Camp Case (Trial Chamber Judgment)*'); *R v Bow Street Metropolitan Stipendiary Magistrate Ex parte Pinochet Ugarte (No 3)* (n7).

<sup>255</sup> In certain circumstances such acts may be considered war crimes or crimes against humanity: see Rome Statute (n163) arts 7-8.

<sup>256</sup> See, eg, Rodley N, 'Reflections on Committee against Torture General Comment No 2' (2007) 11 *New York City Law Review* 353.

of that prohibition. Ambiguity persists as to the precise contents of the prohibition on cruel, inhuman or degrading treatment or punishment in international law.

In contrast, clear delineation of the torture threshold may help to achieve the objectives of the various human rights treaties in combating torture and ill-treatment. Clarity as to what exactly is forbidden by the prohibition of torture and cruel, inhuman or degrading treatment may encourage States to accept more intrusive supervision, or more extensive international obligations. One philosopher has observed that ‘absolutism about torture would be intuitively unsustainable if, for example, twisting a person’s arm to cause him pain were to count as torture. Indeed, in order for their view to seem at all plausible, absolutists are under pressure to set the threshold for torture rather high’.<sup>257</sup> It is difficult to secure State consent to (say) a broad construction of the exclusionary rule for evidence obtained by torture or cruel, inhuman or degrading treatment, or a broad interpretation of the *non-refoulement* obligation, in circumstances where, ‘even with the best will in the world, it is not easy to figure out what these provisions forbid’.<sup>258</sup>

Therefore, on this question: how much turns on the classification of treatment as ‘torture’? The answer is: a significant amount. Torture being torture matters. This chapter explains how that came to be so.

### 3.2 The early case law of the European Commission on Human Rights

The previous chapter described two distinct and parallel developments which, combined, led to the prohibition on torture and ill-treatment in the UDHR. As a non-binding, declaratory instrument, the UDHR did not, of course, arise in litigation. However, the European Convention on Human Rights, concluded just two years after the UDHR in 1950, and adopting a similarly worded prohibition on torture and ill-treatment to that in the UDHR, would prove an important source of jurisprudence on the meaning of those terms.

The European Convention on Human Rights contained the first legally binding prohibition on torture and ill-treatment in general international law.<sup>259</sup> Article 3 of that instrument provides that ‘no one shall be subjected to torture or to inhuman or degrading treatment or punishment’. Two institutions were invested with jurisdiction to hear claims under that Convention. They were the

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<sup>257</sup> McMahan J, ‘Torture in Principle and in Practice’ (2008) 22 Public Affairs Quarterly 111, 114.

<sup>258</sup> Waldron J, *Torture, Terror, and Trade-Offs: Philosophy for the White House* (OUP 2010) 270.

<sup>259</sup> The UDHR was declaratory rather than binding, and although the early Geneva and Hague Conventions established obligations binding upon States parties, they applied only in times of armed conflict.

ECommHR, established in 1955,<sup>260</sup> and the ECtHR, established in 1959.<sup>261</sup> As the first international judicial bodies to consider the meaning of the prohibition of torture in human rights law, their jurisprudence was highly influential. In the years to 1970, the ECtHR handed down just ten judgments, none of which raised Article 3 allegations. By contrast, the ECommHR was in greater demand, and of the many claims brought before it in that period, at least 27 applications concerning Article 3 violations were rejected.<sup>262</sup> Of the cases that were accepted, the following are notable for their impact on the development of the law:

- *Zeidler-Kornmann v Germany* in 1967;<sup>263</sup>
- *The Greek Case* in 1969,<sup>264</sup> and;
- *The East African Asians Case* in 1973.<sup>265</sup>

Each is considered below.

### 3.2.1 *Zeidler-Kornmann v Germany, 1967*

The first case in which an Article 3 allegation was held to be admissible was *Zeidler-Kornmann v Germany*.<sup>266</sup> The applicant alleged that he had been brutally assaulted by prison guards while in custody. Although the claim was rejected on its merits, and although the case is largely disregarded in the secondary literature, it reveals the early approach taken by the ECommHR to the interpretation of Article 3.<sup>267</sup>

The indicative aspects of *Zeidler-Kornmann* are twofold. The first was in the ECommHR's approach to admissibility. Questions were raised as to whether the applicant had withdrawn his application,

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<sup>260</sup> Following the required six ratifications of the treaty, in order, by: Sweden, Ireland, Denmark, Iceland, the Federal Republic of Germany and Belgium. It was abolished in 1998 pursuant to the Eleventh Protocol to the European Convention, ETS 5 (opened for signature 11 May 1994, entered into force 1 November 1998).

<sup>261</sup> Following the required eight ratifications, in order, by: Ireland, Denmark, the Netherlands, Belgium, the Federal Republic of Germany, Luxembourg, Austria and Iceland.

<sup>262</sup> *X v Federal Republic of Germany (Admissibility)* App No 627/59 (ECommHR, 14 December 1961).

<sup>263</sup> *Zeidler-Kornmann v Germany (Merits)* App No 2686/65 (ECommHR, 3 October 1967).

<sup>264</sup> *The Greek Case* (1969) 12 YB 1.

<sup>265</sup> *East African Asians v United Kingdom* (1981) 3 EHRR 76 (ECommHR, 14 December 1973) (*'The East African Asians Case'*).

<sup>266</sup> *Zeidler-Kornmann v Germany (Merits)* (n263).

<sup>267</sup> For example, Rodley and Pollard describe the later *Greek Case* as the first sustained attempt by an international tribunal to interpret the prohibition on torture and ill-treatment, in disregard of *Zeidler-Kornmann*: Rodley N and Pollard M, *The Treatment of Prisoners under International Law* (3rd edn, OUP 2009) 86. Nor is the decision mentioned in the leading text on the European Convention on Human Rights. See Harris D and others, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights* (3rd edn, OUP 2014).

and whether he had exhausted domestic remedies prior to the filing of the application. Notwithstanding these concerns, the ECommHR held that the claim ‘raised problems under the Convention which might extend beyond this particular Applicant’, and on that basis, it proceeded to consider the case on its merits.

The second respect in which the decision in *Zeidler-Kornmann* was indicative of future jurisprudence was that the ECommHR immediately separated Article 3 into its constituent elements. The ECommHR appeared to understand torture as qualitatively different from inhuman and degrading treatment. This was apparently so obvious that it could be cursorily dispensed with, stating simply that ‘taking the terms used in Article 3 of the Convention in their ordinary and natural meaning, [the ECommHR] had no difficulty in reaching the conclusion that the Applicant in this case had not been subjected to “torture”’.<sup>268</sup>

The ECommHR conducted a three-day hearing involving evidence from some 14 witnesses, and performed a site inspection at Tegel Prison in Berlin. These elaborate lengths reflected both the importance the Commission attached to allegations of Article 3 infringement and their rarity at this stage in the history of the European Convention system. Because of the early dismissal of the torture claim, the bulk of the 100-page opinion was concerned with the allegations of inhuman or degrading treatment or punishment, which were ultimately rejected.

After a lengthy exegesis of the facts, the ECommHR found it ‘doubtful whether the prison regulations in force were in all [respects] observed’ but that there was ‘no evidence of any substantial physical injury’.<sup>269</sup> Although force had been used in transferring the applicant to a particular prison cell, and although he was ‘severely and roughly handled’, ‘the weight of evidence [was] against Kornmann being struck or kicked in the process’.<sup>270</sup> Despite the fact that a straitjacket was used on him in the isolation cell, it was used ‘only later and then because of Kornmann’s violent behaviour’.<sup>271</sup> By 12 votes to one, the Commission held that, although it was ‘doubtful whether the prison regulations in force were in all [respects] observed’, there had been no violation of the prohibition on inhuman or degrading treatment.<sup>272</sup>

The ECommHR’s somewhat perfunctory dismissal of the torture allegation in *Zeidler-Kornmann* could be interpreted in two ways. The first is that the Commission saw a difference in gravity

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<sup>268</sup> *Zeidler-Kornmann v Germany (Merits)* (n263) 91.

<sup>269</sup> *ibid* 92.

<sup>270</sup> *ibid* 93.

<sup>271</sup> *ibid*.

<sup>272</sup> *ibid* 92.

between torture and other ill-treatment. The second is that the absence of premeditation was decisive in excluding the torture claim.

There is some support for the latter interpretation in the majority's factual conclusions that there had been no 'preconceived plan',<sup>273</sup> and that the 'events had developed spontaneously and unpredictably'.<sup>274</sup> Regrettably, the two pages which might have conclusively answered the question—the dissenting opinion of Mr Ermacora—are inexplicably omitted from the case report.<sup>275</sup> It is not clear whether torture was perceived as morally 'worse' than inhuman and degrading treatment at the time, or simply as qualitatively different. The historical origins of the prohibition of torture and ill-treatment explored in Chapter One provide support for the latter interpretation rather than the former.

A second difficulty with the reasoning in *Zeidler-Kornmann* relates to the discussion of injury. Although the applicant had been 'severely and roughly handled',<sup>276</sup> the ECommHR found that he had not suffered 'substantial physical injury'.<sup>277</sup> Insofar as that suggests that substantial physical injury is required to sustain a finding of inhuman or degrading treatment, it also sets an excessively high bar for proof of inhuman treatment (it would, for example, exclude entirely mental suffering, which cannot readily be assimilated to physical injury). The ECtHR would later hold that violations of Article 3 are possible even in the absence of serious physical injury.<sup>278</sup> Indeed, in later cases, treatment causing no physical injury has been held to constitute inhuman or degrading treatment.<sup>279</sup> It is the character of the treatment together with the pain and suffering inflicted, and not merely the severity of the victim's injuries, to which the standard must and should relate.<sup>280</sup>

This would be acknowledged in later cases—but only after the 'evolving' (or 'living tree') interpretative approach had been conclusively adopted by the ECtHR. It is notable, however, that in this early stage, the threshold for what constituted inhuman or degrading treatment was considered to be quite high. A further noteworthy feature of *Zeidler-Kornmann* is that the

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<sup>273</sup> *ibid* 91.

<sup>274</sup> *ibid* 6.

<sup>275</sup> *ibid*. The report skips directly from page 93 to 96. The table of contents at page (ii) indicates that Mr Ermacora's dissenting opinion appears on page 94. The final two paragraphs of Mr Fawcett's separate concurring opinion appears on page 96 of the report, in which he stated his preference for a lower threshold for 'inhuman treatment' than was preferred by the majority. Even so, he did not consider that inhuman treatment had been established.

<sup>276</sup> *ibid* 93.

<sup>277</sup> *ibid* 92.

<sup>278</sup> See, eg, *Jalloh v Germany* (2007) 44 EHRR 32 (GC); *Gäfgen v Germany* (2011) 52 EHRR 1 (GC).

<sup>279</sup> See, eg, *Dordevic v Croatia* App no 41526/10 (ECtHR July 24, 2012), finding discriminatory bullying and harassment by local children of a disabled man to be inhuman or degrading treatment.

<sup>280</sup> See further sections 3.4, 4.3 and 5.3 below.

ECommHR described an intermediary category of ill-treatment, which was 'rough' and could perhaps be 'unlawful' under domestic law, but which would not necessarily constitute inhuman or degrading treatment and would thus not engage Article 3.<sup>281</sup> This notion of an intermediate category of 'rough treatment' outside the ambit of Article 3 is one we will return to later.

### 3.2.2 *The Greek Case, 1969*

The next Article 3 case to be considered by the ECommHR on its merits was *The Greek Case* in 1969.<sup>282</sup> Unlike *Zeidler-Kornmann*, the importance of *The Greek Case* in laying the foundations of Article 3 jurisprudence has been widely recognised in the literature.

The facts of *The Greek Case* followed from a military coup in that country. Once in power, the *junta* rounded up and imprisoned numerous dissidents. A group of States brought a claim against Greece before the ECommHR, alleging, *inter alia*, wholesale violations of Article 3. Delegates of the Commission visited Greece and conducted a detailed fact-finding exercise, performing extensive hearings and even making site visits. With respect to Article 3, several individual applications were examined, as well as further claims alleging systematic practices of torture and ill-treatment at a number of detention facilities. The opinion of the ECommHR, which stretched over 500 pages, broke down Article 3 into its component parts and attempted to define each term. In doing so, it adopted an interpretative approach to Article 3 that continues to guide the ECtHR's case law to this day.

In the critical passage of the decision, the ECommHR stated:

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. The notion of **inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical**, which, in the particular situation, is unjustifiable. 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**. Treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others or drives him to act against his will or conscience.<sup>283</sup>

This passage is remarkable in several aspects. Not only did the ECommHR consider it necessary to isolate and define the terms in Article 3, but they also positioned inhuman treatment at the centre of the analysis, defining torture by its relation to that term. Torture was 'an aggravated form of inhuman treatment' inflicted with a purpose; inhuman treatment was deliberately inflicted and

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<sup>281</sup> The European Commission of Human Rights distinguished between treatment that was 'rough' and/or in breach of prison regulations on the one hand, and treatment violating Article 3 on the other hand: see *Zeidler-Kornmann (Merits)* (n263) 91.

<sup>282</sup> *The Greek Case* (n264).

<sup>283</sup> *The Greek Case* (n264) 186 [2] (emphasis added).

unjustifiable severe suffering; and gross humiliation or driving a person 'to act against his will or conscience' was the essence of degrading treatment.<sup>284</sup>

The ECommHR's approach was thus that the terms in Article 3 effectively represented 'a ladder of pain and suffering'.<sup>285</sup> Degrading treatment stood alone, whereas inhuman treatment was 'also degrading', and treatment that constituted torture must also necessarily be inhuman and degrading.<sup>286</sup> This was the first time that these concepts had been interpreted in an ostensibly hierarchical way. The influence arising out of this interpretation would be manifest and decisive.

And yet, in two respects, the ECommHR's opinion in *The Greek Case* reflected a more holistic approach to Article 3. First, the Commission acknowledged the overlapping nature of the terms. Second, the phrase 'torture and ill-treatment' was used throughout the opinion as shorthand for all of the concepts in Article 3, suggesting that the differences between them were less significant than their commonalities. Indeed, the opinion culminated in the finding that it was 'established beyond doubt that torture *or* ill-treatment contrary to Article 3 had been inflicted in a number of cases'.<sup>287</sup>

The ECommHR found a systemic practice of torture *and* ill-treatment had been inflicted upon political prisoners at the police cells at Bouboulinas Street in Athens.<sup>288</sup> In respect of the individually examined cases, the majority concluded that 'torture *or* ill-treatment' had been established vis-à-vis 11 individuals, and that there were 'indications' of the same treatment in a further 17 individual cases.<sup>289</sup> The use of 'or' in that context suggests either that the ECommHR was unable to ascertain into which category the treatment fell, or that it was not considered important.

The systemic practice of torture 'or' ill-treatment 'most often consisted in the application of 'falanga' or severe beatings of all parts of the body', and was inflicted with the purpose of 'the extraction of information including confessions'. The Commission found a further violation in the conditions of detention in the cells at Bouboulinas Street and Averoff Prison, but described them as 'contrary to Article 3', without specifying which limb of the provision had been impugned.<sup>290</sup> This may reflect a degree of uncertainty as to whether an omission or failure to act—in the sense of failing to provide proper care—was capable of constituting torture, inhuman or degrading

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<sup>284</sup> *ibid.*

<sup>285</sup> Rodley and Pollard, *The Treatment of Prisoners under International Law* (n267) 107, 129-130.

<sup>286</sup> *ibid* 107.

<sup>287</sup> *The Greek Case* (n264) 501 [10] (emphasis added).

<sup>288</sup> *ibid* 504 [17](ii).

<sup>289</sup> *ibid* 504 [17](iii) (emphasis added).

<sup>290</sup> *ibid* 505 [18] (the Commission).

treatment. Regardless, the question of which acts should be classified as ‘torture’, which ‘inhuman’, and which ‘degrading’ was not of defining import to the Commission at that time.

One member of the ECommHR, Mr Delahaye, would have favoured more specific and detailed conclusions on each of these findings. This was because ‘every fact considered as proved should be classified according to its nature, as an atrocity, torture etc’.<sup>291</sup> In Mr Delahaye’s view, ‘[t]he more degrading such treatment is for the victims, the more ignominious it will be for the State which tolerates it’.<sup>292</sup> On this view, the moral and reputational consequences for the accused State would vary, even if the legal consequences did not. It is interesting that Mr Delahaye considered there to be a further category of ill-treatment—acts of ‘atrocity’—positioned higher even than torture on the hierarchy of pain and suffering. There is no basis for such a concept in either the text or the *travaux préparatoires* to the European Convention on Human Rights, and it has not arisen in later cases.

The opinion of the ECommHR in *The Greek Case* represented the first comprehensive attempt by an international judicial body to define the distinct features of torture, inhuman treatment and degrading treatment. It broke the prohibition down into its component parts, and appeared to position torture at the apex of a hierarchy, describing torture as ‘an aggravated form of inhuman treatment’. In other respects however, the decision was ambivalent as to whether this hierarchy existed. The police practice had included both torture and ill-treatment; the treatment of individual prisoners could not definitively be described as torture, though it certainly included ill-treatment; and poor detention conditions contravened Article 3, though in an unspecified manner.

Though *The Greek Case* made an important contribution to the developing law of torture, in practical terms it could hardly be considered a success. In response to the ECommHR’s opinion, Greece simply left the Council of Europe, and did not re-join until the overthrow of the junta led to free elections in 1974.<sup>293</sup> In 1975, the leaders of the junta were prosecuted domestically for many of the acts that had formed the subject of the decision in *The Greek Case*, though the absence of a specific crime of torture in Greek law at that time meant that the recorded convictions were for offences such as ‘insults’, ‘abuse of authority’ and ‘bodily injury’, to name a few.<sup>294</sup> Described by

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<sup>291</sup> *ibid.*

<sup>292</sup> *ibid.*

<sup>293</sup> See Resolution (74) 34 of the Committee of Ministers of the Council of Europe (28 November 1974).

<sup>294</sup> The trials are described in detail in Amnesty International, *Torture in Greece: The First Torturers’ Trial 1975* (Amnesty International 1977), including with a list of convictions of the first trial in 1975 (*ibid* 72-74) and a partial list of the up to 400 ‘torture trials’, many of which were privately prosecuted, that took place across the country in the aftermath of the junta’s collapse: *ibid* 75-78.

Amnesty International as the world's first 'torturers' trials',<sup>295</sup> the global campaign against torture was thus, finally, appearing to gain ground.

The decisions of the ECommHR in *Zeidler-Kornmann* and *The Greek Case* represented the first increments towards an interpretative approach to Article 3. In some respects, however, they were inconsistent with one another. Whereas *Zeidler-Kornmann* appeared to regard torture as qualitatively different from inhuman and degrading treatment, the ECommHR in *The Greek Case* regarded torture and inhuman treatment as conceptually related, with degrading treatment as a separate and distinct notion. *The Greek Case* also contained the first suggestion of a hierarchy internal to Article 3 with the statement that torture was 'an aggravated form of inhuman treatment'.<sup>296</sup> At the same time, the ECommHR emphasised the overlapping nature of these concepts, and treated them collectively throughout the opinion. These decisions, and their consequences, would spark debate in other political and judicial institutions, as the prohibition on torture and ill-treatment further developed in following years.

### 3.2.3 *The East African Asians Case, 1973*

Four years after *The Greek Case*, the ECommHR handed down a further important decision in *The East African Asians Case*.<sup>297</sup> Its facts concerned the refusal by the United Kingdom government to allow entry and residence to 25 citizens of the UK and colonies, and six 'British protected persons'. All 31 applicants were of South Asian descent, and had been resident in East Africa during the period of the British Empire. Following the independence of the British colonies in East Africa and the introduction in Kenya and Uganda of 'Africanisation' policies, many became destitute and sought to migrate to Britain. Although all Commonwealth citizens and British subjects had previously possessed rights of entry and residence in the UK, in 1968, facing a wave of such migration, the Westminster Parliament passed emergency legislation to restrict those rights as applied to East African Asians. In response, the applicants claimed before the ECommHR that they had been subject to discriminatory treatment on the basis of their race, and that that treatment was degrading, in violation of Article 3 of the European Convention on Human Rights.

Although there is no express Convention right to enter or to reside in the country of which one is a national, the ECommHR held that 'in certain exceptional circumstances, the deportation of a person may... be contrary to the Convention and, in particular, constitute "inhuman treatment"

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<sup>295</sup> *ibid.*

<sup>296</sup> *The Greek Case* (n264) 186 [2].

<sup>297</sup> *The East African Asians Case* (n265).

within the meaning of Article 3 thereof.<sup>298</sup> That principle would take on a heightened importance more than a decade later in the case of *Soering v United Kingdom*, where the ECtHR confirmed that expulsion of a person to face a significant risk of torture or ill-treatment in a third state engaged the responsibility of the sending state.<sup>299</sup>

Returning to the *East African Asians Case*, the ECommHR accepted the applicants' submission that the ordinary meaning of 'degrading treatment' was treatment which 'lowers [a person] in rank, position, reputation or character, whether in his own eyes or in the eyes of other people'.<sup>300</sup> It also considered that 'this broad interpretation of the ordinary meaning... must be narrowed' in view of the purpose of Article 3, which was 'to prevent interferences with the dignity of man of a particularly serious nature'.<sup>301</sup> Recalling its statement from *The Greek Case* that treatment may be described as degrading 'if it grossly humiliates him before others or drives him to act against his will or conscience', the ECommHR observed that 'the word "grossly" indicates that Article 3 is only concerned with "degrading treatment" which reaches a certain level of severity'.<sup>302</sup> As such, the Commission considered that 'degrading treatment' had particular qualitative features, but was not necessarily less severe or grave than inhuman treatment.

In response, the UK contended that 'degrading treatment' referred to physical acts only, and could not be applied to more abstract circumstances such as refusal of entry or of residence. Importantly, in its response the ECommHR held that this interpretation would be 'too restrictive', particularly as 'even in the case of torture and inhuman treatment such a physical element is not essential'.<sup>303</sup> This was an early recognition by the ECommHR that psychological abuse alone could amount to torture.

The ECommHR confirmed that 'discrimination based on race could, in certain circumstances, of itself amount to degrading treatment within the meaning of Article 3 of the Convention'.<sup>304</sup> This was because 'to publicly single out a group of persons for differential treatment on the basis of race might, in certain circumstances, constitute a special form of affront to human dignity'.<sup>305</sup> A majority of the ECommHR held that the racially discriminatory immigration policy had reduced the 25

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<sup>298</sup> *ibid* 79 [186] (the Commission), citing *Nazih-Al-Kuzbari v Federal Republic of Germany*, App no 1802/62 (ECommHR, March 26, 1963) 6 Yearbook of the European Convention on Human Rights 462. That case concerned a challenge to deportation which was not accepted on the facts.

<sup>299</sup> *Soering v United Kingdom* (1989) 11 EHRR 439.

<sup>300</sup> *The East African Asians Case* (n265) 80 [189] (the Commission).

<sup>301</sup> *ibid* 80 [189] (the Commission).

<sup>302</sup> *ibid* 81 [195] (the Commission).

<sup>303</sup> *ibid* 80 [190]-[191] (the Commission).

<sup>304</sup> *ibid* 86 [207] (the Commission).

<sup>305</sup> *ibid* 86 [207] (the Commission).

British nationals to ‘second-class citizens’,<sup>306</sup> constituting ‘an interference with [the applicants] human dignity which, in the special circumstances described above, amounted to “degrading treatment”’.<sup>307</sup> However, the six ‘British protected persons’ were in a different category, since they did not at any time have British citizenship, and the discriminatory legislation had not effected changes to their legal status or rights.<sup>308</sup>

Three members of the ECommHR dissented on the finding that Article 3 had been violated in respect of the 25 British citizens. Mr Fawcett, from Britain, accepted that the emergency legislation discriminated on the basis of race, but he considered that the prohibition in Article 3 referred to acts of a different order of suffering than the treatment meted out in the present case. In his view, Article 3 prohibited ‘a set of closely related notions which taken together are the violent or oppressive treatment of the person, having direct and damaging effects on the body or personality’.<sup>309</sup> He thought that ‘to regard discrimination and degrading treatment as equivalent runs contrary to the background, terms, and interpretation by the Commission, of Article 3, and extends that Article beyond its proper limit without achieving more than the addition of emotive force to Article 14’.<sup>310</sup>

Mr Welter, of Luxembourg, dissented on a similar basis, stating that the majority interpretation of Article 3 was ‘clearly contrary to what was the common intention of the parties at the time of ratification’.<sup>311</sup> Although he accepted that discriminatory treatment could be ‘degrading or humiliating’, and also that ‘discrimination based on race or colour is particularly offensive’, Mr Welter considered that discriminatory access to rights of entry or residence was not degrading. The reason for this was that no such right was expressly provided in the European Convention on Human Rights, so the failure to provide it could not be said to be degrading.<sup>312</sup> In his view, the subjective intention of the legislators would have had to have been demonstrably discriminatory in order to engage Article 3, and that the purpose of the legislators here was not so.<sup>313</sup>

The third dissenting member did not write a separate opinion. Without speculating as to his reasons, it is clear that at least eight members of the ECommHR considered degrading treatment to be a particularly grave form of abuse. There is no definitive indication from the report that the

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<sup>306</sup> *ibid* 85 [205] (the Commission).

<sup>307</sup> *ibid* 86 [208] (the Commission).

<sup>308</sup> *ibid* 87 [213] (the Commission).

<sup>309</sup> *ibid* 97 [250] (Separate Opinion of Mr JES Fawcett).

<sup>310</sup> *ibid* 98 [253] (Separate Opinion of Mr JES Fawcett).

<sup>311</sup> *ibid* 99 [257] (Separate Opinion of Mr F Welter).

<sup>312</sup> *ibid* 100 [259] (Separate Opinion of Mr F Welter).

<sup>313</sup> *ibid* 101 [262] (Separate Opinion of Mr F Welter). The purpose of ‘avoiding over-population and assuring racial harmony’ was not, in his view, demonstrably discriminatory: *ibid*.

ECommHR considered degrading treatment to be intrinsically less severe than torture or inhuman treatment. Rather, the majority adopted the ordinary meaning of ‘degrading’, and *then* narrowed that definition by reference to the severity of the other terms in Article 3. Repeating its definition from *The Greek Case*, the majority opinion placed particular emphasis on the word ‘grossly’ in the phrase ‘grossly humiliates him before others’. Of the two dissenting members who appended separate opinions, Mr Fawcett appeared to regard racial discrimination as insufficiently serious to engage Article 3, while Mr Welter accepted that racial discrimination could in principle be degrading, but disputed that these applicants had in fact experienced the suffering inherent in degradation.

### 3.2.4 *Cyprus v Turkey, 1975-1976*

In 1975, the ECommHR considered an application by Cyprus against Turkey in relation to the Turkish invasion of the north of the island. A number of abuses were alleged, including violations of Article 2 (right to life), Article 3 (prohibition of torture and ill-treatment), Article 4 (slavery and forced labour), Article 5 (right to liberty), and Article 6 (right to a fair trial), among others. Turkey declined to participate at the merits stage,<sup>314</sup> having lost on admissibility.<sup>315</sup>

The ECommHR noted at the beginning of its 200 page opinion that ‘the Cyprus problem has many facets and elements—international and national, political, social, psychological, economic, humanitarian. Therefore the problem of human rights protection raised by the present applications is only one element...’.<sup>316</sup> In the context of this lengthy and complex claim, the ECommHR did not elaborate on the meaning of Article 3 in great depth. However, the decision is significant for the Commission’s conclusion that the systematic rape of Greek Cypriot women amounted to inhuman treatment.<sup>317</sup>

The ECommHR did not appear to contemplate the possibility that the rapes might constitute ‘torture’, notwithstanding their considerable (and obvious) severity. The rapes were ‘wholesale and repeated’, and they were perpetrated upon females as young as 12, and as old as 71.<sup>318</sup> In one particularly tragic case, a mentally disabled woman was raped by 20 soldiers in succession, before being thrown from a second-floor window. She sustained spinal injuries in the fall and as a result, was permanently paralysed.<sup>319</sup> Nevertheless, the ECommHR held that this was inhuman treatment

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<sup>314</sup> *Cyprus v Turkey (Merits)* App nos 6780/74 and 6950/75 (ECommHR July 10, 1976).

<sup>315</sup> *Cyprus v Turkey (Admissibility)* App nos 6780/74 and 6950/75 (ECommHR May 26, 1975).

<sup>316</sup> *Cyprus v Turkey (Merits)* (n314) 9 [18] (the Commission).

<sup>317</sup> *Cyprus v Turkey (Merits)* (n314) 120-135, [357]-[410] (the Commission) (Mr Busuttil dissenting).

<sup>318</sup> *ibid* 120 [357] (the Commission).

<sup>319</sup> *ibid* 121 [364] (the Commission).

rather than torture. It is inconceivable that such treatment was insufficiently 'severe' to justify a finding of torture. Rather, it seems likely that the ECommHR considered there to be other, more distinctive, features of torture that were absent on these facts. For example, the rapes appeared to be vengeful rather than inflicted for the purposes of interrogation or information gathering. This suggests a qualitatively different, but not necessarily a hierarchical, conception of the terms in Article 3.

Thus, *Cyprus v Turkey*, like *The East African Asians Case*, *The Greek Case* and *Zeidler-Kornmann* before it, reflected some elements of the hierarchical approach to Article 3, but other elements of a more holistic approach to interpreting the prohibition of torture and ill-treatment. As late as the decision in *Cyprus v Turkey* in 1976, the ECommHR's case law was ambivalent as to whether Article 3 implicitly embodied a hierarchy.

### 3.3 The 1975 UN Declaration Against Torture

The 1970s and 80s saw pronounced legal and theoretical development of the concept of torture. The military junta in Greece was one of many repressive regimes of the era, and a combination of refugee flows and a growing movement of human rights activists began to raise public awareness of the practice of torture as a means to control dissent.<sup>320</sup> This period of heightened global awareness of atrocities committed by regimes in Greece, Chile, Uruguay, Argentina, South Africa and others gave lie to the notion that torture was a thing of the past.<sup>321</sup> Decolonisation continued apace, and one historian contended that it was in part due to 'this retreat from the violence of imperial rule that suddenly made torture beyond the pale for Westerners'.<sup>322</sup>

In 1973, Amnesty International introduced a major global campaign against torture, convening a World Conference for the Abolition of Torture in Paris. More than 300 delegates from 40 nations attended, and the report produced became an important advocacy tool.<sup>323</sup> That same year, the UN General Assembly made torture and cruel, inhuman and degrading treatment a standing agenda item.<sup>324</sup> Many thousands signed petitions demanding that governments condemn these

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<sup>320</sup> Kelly, *This Side of Silence* (n10) 23; Amnesty International, *Torture in the Eighties* (1984) 4.

<sup>321</sup> See, eg, Rejali (n44) arguing that the practice of torture has remained constant throughout history, but that what has changed is the forms that it takes and the techniques that are used.

<sup>322</sup> Moyn S, 'Torture and Taboo: On Elaine Scarry', *The Nation*, 5 February 2013, available at <<http://www.thenation.com/article/torture-and-taboo-elaine-scarry/>> accessed 10 January 2016.

<sup>323</sup> Amnesty International, 'Conference for the Abolition of Torture: Final Report' (London, 1973)

<sup>324</sup> GA Res/A/3059 (XXVIII) (November 2, 1973).

atrocities.<sup>325</sup> By any measure, Amnesty International's campaign against torture was hugely successful, and one for which the organisation was later awarded the Nobel Peace Prize. The historian Moyn described it as 'one of the most successful exercises in moral consciousness-raising ever'.<sup>326</sup>

In 1975, the Fifth UN Congress on Crime Prevention and Criminal Justice saw significant discussion of the issue of torture and ill-treatment. The Congress unanimously proposed a special General Assembly declaration,<sup>327</sup> in which it was agreed that the starting point would be the prohibition of torture and cruel, inhuman or degrading treatment in Article 5 of the UDHR.<sup>328</sup> The result was the 1975 UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('1975 UN Declaration')<sup>329</sup> Adopted by consensus in the UN General Assembly, the resolution defined torture as 'an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment'.<sup>330</sup>

This language is, of course, familiar: it was derived from the ECommHR in *The Greek Case*, in which torture was defined as an aggravated form of inhuman treatment. The previous section argued that this was the first indication of a hierarchical relationship between the concepts prohibited in Article 3 of the European Convention on Human Rights. In the 1975 UN Declaration, this relationship was arguably extended, with cruel and degrading treatment grouped together with inhuman treatment in a 'second tier' of prohibited ill-treatment.

The use of language from *The Greek Case* by the drafters of the 1975 UN Declaration was unsurprising, since Sweden and the Netherlands, two of the applicant countries in that case, had provided the initial drafts of the declaration to the General Assembly.<sup>331</sup> Building on the opinion of the ECommHR in that case, the 1975 UN Declaration defined torture as:

'...any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions...'<sup>332</sup>

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<sup>325</sup> See Amnesty International, *Torture in Greece* (n294).

<sup>326</sup> Moyn, 'Torture and Taboo' (n322).

<sup>327</sup> UN Department of Economic and Social Affairs, 'Fifth UN Congress on the Prevention of Crime and the Treatment of Offenders: Report of the Secretariat, Geneva 1-12 September 1975', UN Doc A/CONF.56/10, 36-40.

<sup>328</sup> See Burgers and Danelius (n197) 15.

<sup>329</sup> UNGA Res 3452 (XXX) (9 December 1975) ('1975 UN Declaration').

<sup>330</sup> *ibid* [2].

<sup>331</sup> Evans and Morgan, *Preventing Torture* (n51) 77; see also Rodley and Pollard, *The Treatment of Prisoners under International Law* (n267) 29-36, describing the drafting process.

<sup>332</sup> 1975 UN Declaration (n329) art 1(1). This definition is discussed in Chapter Four below.

For the first time in the history of legal prohibitions on ill-treatment, the 1975 UN Declaration positioned torture as the central concept, with cruel, inhuman or degrading treatment or punishment distinguished as 'other' in the title of the instrument. Torture had become a lightning rod for public attention and global activism: the quintessential evil inflicted on citizens at the hands of the state.

Significantly, the UN Declaration failed to define 'cruel, inhuman or degrading treatment or punishment', apparently in part because those concepts were not considered to be of equal gravity.<sup>333</sup> This suggests that there may have been a further hierarchy perceived to exist between the latter terms.

In other respects, however, the 1975 UN Declaration, like *The Greek Case* before it, supported a holistic understanding of the concepts of torture, cruel, inhuman or degrading treatment. For example, prohibitions of torture *and* cruel, inhuman or degrading treatment or punishment were made non-derogable in the text.<sup>334</sup> Indeed, the 1975 UN Declaration described torture and cruel, inhuman or degrading treatment or punishment as 'offence[s] to human dignity' and demanded that they 'be condemned as a denial of the purposes of the Charter of the United Nations'.<sup>335</sup> Though there was a degree of differentiation between torture and other ill-treatment, insofar as torture was an 'aggravated' form of the latter, all of the prohibited forms of ill-treatment were condemned as offences to human dignity and against the Charter of the United Nations. It is difficult to imagine stronger language than this.

These developments appear to have coincided with a marked increase in the use of the word 'torture' in both academic publications, and those directed to a non-academic audience, between the early 1980s and today (See Figure 1 below). Further linguistic analysis would be needed to substantiate this hypothesis, but this apparent correlation provides some support for the contention that there was a growing public consciousness of torture at this time. Some commentators have argued that the burgeoning communications technology industry, facilitating the rapid dissemination of images, may have contributed to a public fascination with torture and torture survivors, mirroring the gruesome spectacle of torture in the medieval period.<sup>336</sup>

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<sup>333</sup> Burgers and Danelius (n197) 17.

<sup>334</sup> 1975 UN Declaration (n329) art 3, stating that 'Exceptional circumstances such as a state of war or a threat of war, internal political instability or any other public emergency may not be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment'.

<sup>335</sup> UN Charter (n178) art 2.

<sup>336</sup> On torture and spectacle, see further Foucault (n31); Spierenburg P, *The Spectacle of Suffering, Executions, and the Evolution of Repression: From a Preindustrial Metropolis to the European Experience* (CUP 1984); Simon TW, '1 of Torture: Going beyond the Tortuous Torture Debate' (2014) 43 *Denver Journal of International Law and Policy* 45; Sontag S, 'Regarding The Torture Of Others' *New York Times Magazine* (23 May 2004) available at

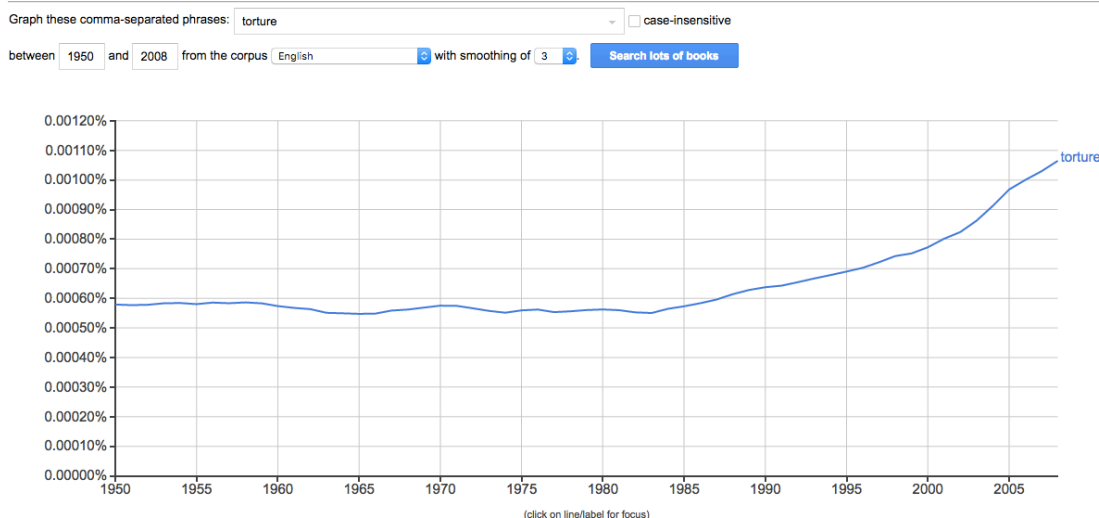


Figure 1: Incidence of the word 'torture' in books published 1950-2010<sup>337</sup>

The 1975 UN Declaration comprised 12 articles, all but three of which applied equally to torture and cruel, inhuman or degrading treatment or punishment. The articles applying exclusively to torture were Article 1, which proposed a definition of torture, Article 7 (which provided that states shall ensure that acts of torture are offences under its criminal law) and Article 9 (which provided that, where information has been obtained suggesting an act of torture has been committed, states must 'promptly proceed to an impartial investigation even if there has been no formal complaint').<sup>338</sup>

All of the remaining obligations applied equally to torture and cruel, inhuman or degrading treatment. They included:

- that exceptional circumstances may not be invoked to justify either torture or cruel, inhuman or degrading treatment;<sup>339</sup>

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<<http://www.nytimes.com/2004/05/23/magazine/regarding-the-torture-of-others.html>> accessed 14 February 2016.

<sup>337</sup> Source: Google Ngram viewer. Table available at: <[https://books.google.com/ngrams/graph?content=torture&year\\_start=1950&year\\_end=2008&corpus=15&smoothing=3&share=&direct\\_url=t1%3B%2Ctorture%3B%2Cc0](https://books.google.com/ngrams/graph?content=torture&year_start=1950&year_end=2008&corpus=15&smoothing=3&share=&direct_url=t1%3B%2Ctorture%3B%2Cc0)> accessed 6 August 2016.

<sup>338</sup> This *proprio motu* provision was not included in the CAT: see (n1).

<sup>339</sup> 1975 UN Declaration (n329) art 3.

- that states must ‘take effective measures to prevent’ both torture and cruel, inhuman or degrading treatment;<sup>340</sup>
- that law enforcement personnel and relevant public officials must be trained to take account of the prohibition on torture and ill-treatment;<sup>341</sup>
- that relevant regulations with respect to both torture and cruel, inhuman or degrading treatment must be kept under review;<sup>342</sup>
- that persons alleging either form of ill-treatment shall have the right to complain to competent authorities and to have their complaints examined impartially by those authorities;<sup>343</sup>
- that victims of torture and/or cruel, inhuman or degrading treatment shall have an enforceable right of redress;<sup>344</sup> and
- that statements obtained by either method must not be admitted in legal proceedings.<sup>345</sup>

Therefore, only the obligation to criminalise torture, and the obligation to conduct a *proprio motu* investigation where evidence of torture arises, were confined to torture in the 1975 UN Declaration.

There was one further substantive difference between torture and cruel, inhuman or degrading treatment in the 1975 UN Declaration. Article 10 provided that criminal proceedings must be instituted if an investigation establishes the commission of an act of torture. However, if an investigation established that cruel, inhuman or degrading treatment had been inflicted, the state concerned has more discretion: ‘criminal, disciplinary or other appropriate proceedings’ will suffice.<sup>346</sup> This is consistent with the scheme of the Declaration: there could hardly be an obligation to institute criminal proceedings given that the Declaration did not include a specific obligation to criminalise cruel, inhuman or degrading treatment.

In sum, the 1975 UN Declaration embodied a hierarchy between torture and other prohibited ill-treatment in four respects. The first and most obvious was the implicit hierarchy in the title of the instrument, according to which cruel, inhuman or degrading treatment was distinguished as ‘other’ ill-treatment. Not only did this place the primary focus of the instrument on torture, but arguably the reference to ‘other’ ill-treatment could be read as meaning ‘lesser’. The second was

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<sup>340</sup> *ibid* art 4.

<sup>341</sup> *ibid* art 5.

<sup>342</sup> *ibid* art 6.

<sup>343</sup> *ibid* art 8.

<sup>344</sup> *ibid* art 11.

<sup>345</sup> *ibid* art 12.

<sup>346</sup> 1975 UN Declaration (n329) art 10.

the obligation upon states to criminalise torture in their domestic law, combined with the absence of a parallel obligation in respect of cruel, inhuman or degrading treatment or punishment. The third aspect, following from the second, was that the legal consequences for perpetrators differed. Whereas torturers *must* be criminally prosecuted, regulatory or disciplinary consequences *may* suffice for the perpetrators of cruel, inhuman or degrading treatment. Finally, the Declaration purported to oblige states to conduct a *proprio motu* investigation into acts of torture, an obligation inapplicable to the second tier concepts. On the other hand, however, the 1975 UN Declaration grouped the apex and second tier provisions together, with a relatively uniform set of obligations applicable to both torture and cruel, inhuman or degrading treatment, both of which were classed as violations of human dignity and a denial of the purposes of the UN Charter.<sup>347</sup>

By adopting the statement from *The Greek Case*, namely that torture was an aggravated form of inhuman treatment (and removing the qualifier 'generally' with which it had appeared in the ECommHR's opinion), the 1975 UN Declaration contributed to the gradually building consensus that torture was a wrong to be condemned above other wrongs.

The 1970s saw other legal developments in shaping the contours of the prohibition on torture and other forms of ill-treatment, both in international law and in regional human rights systems. As mentioned in Chapter One, the Inter-American Commission on Human Rights ('IACommHR') was established in 1959, with the function of promoting compliance with the American Declaration on the Rights and Duties of Man.<sup>348</sup> In 1965, the Organisation of American States agreed to extend the mandate of the IACommHR, conferring onto it the power to 'examine communications' and to 'make recommendations' in order to secure the more effective protection of human rights.<sup>349</sup> To that end, the IACommHR produced a series of important reports on human rights in the 1970s, including in relation to Chile, Paraguay, Uruguay, and Argentina.<sup>350</sup>

The 1970s also proved to be an important period of transition for the European Convention on Human Rights and its organs. In the two decades prior, the ECommHR had been the quiet linchpin of the Convention system, striking out more than 90% of claims as inadmissible and negotiating diplomatically with offending governments. In the early 1970s, this dynamic shifted, and a more

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<sup>347</sup> *ibid* art 2.

<sup>348</sup> Statute of the Inter-American Commission on Human Rights, Resolution No 447 adopted by the OAS General Assembly, Ninth Regular Session, La Paz, Bolivia, October 1979, arts 1(2)(b), 9.

<sup>349</sup> Goldman RK, 'History and Action: The Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights' (2009) 31 *Human Rights Quarterly* 856.

<sup>350</sup> For discussion, see Farer TJ, 'The OAS at the Crossroads: Human Rights' (1987) 72 *Iowa Law Review* 401; Farer TJ, 'The Rise of the Inter-American Human Rights: No Longer a Unicorn, Not Yet an Ox' (1997) 19 *Human Rights Quarterly* 510.

robust approach to interpreting the European Convention on Human Rights began to be adopted by both the ECommHR and the ECtHR.<sup>351</sup>

### 3.4 *Ireland v United Kingdom, 1976-1978*

Against this backdrop, a critically important case came before first the ECommHR and then the ECtHR. At issue was the UK government's policy of 'internment', implemented in Northern Ireland between 9 August 1971 and 30 March 1972 (at which point direct rule was introduced).

The case arose out of a series of emergency powers including extrajudicial arrest, detention and special interrogation techniques, exercised by the Northern Irish authorities between 1971 and 1975.<sup>352</sup> Ireland alleged, inter alia, that these interrogation techniques constituted an official practice of ill-treatment in breach of Article 3.<sup>353</sup> The 'interrogation in depth' involved the combined use of five particular techniques, which both parties accepted had been authorised 'at a high level' and had been taught to security forces at an English intelligence training facility. The techniques were 'wall-standing' (standing close to a wall in a spread-eagled position with the weight of the body held on the fingers); hooding; subjection to noise; sleep deprivation; and deprivation of food and drink.<sup>354</sup> It was also alleged that these techniques were accompanied with, and enforced by, severe beatings (for example, individuals who slipped from the wall were beaten to return them to the stress position). As in *The Greek Case*, there were allegations about systematic government practices, as well as a number of indicative, individual cases.

A peculiar combination of factors positioned the case at a pivotal moment in history. These were the then relatively new organs of the European Convention on Human Rights, headquartered at Strasbourg; the limited case law to that date on Article 3; and the concessions made in submissions by the UK, which had the effect of focusing the debate on the gravity of the ill-treatment; and not least, the heightened tensions of the conflict over Northern Ireland at that time.

This was also an important period in the development of international law relating to torture and other forms of ill-treatment. As we have seen, the decisions of the ECommHR in the 1960s had reflected some features of a hierarchical interpretation and conversely, some features of a more

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<sup>351</sup> See Bates E, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (OUP 2010), chapters 2, 3; see also Christoffersen J and Madsen M (eds), *The European Court of Human Rights Between Law and Politics* (OUP 2011).

<sup>352</sup> The majority judgment contains a summary of the emergency powers and the background to the conflict: *Ireland v UK* (ECtHR) (n138) 5-33, [11]-[91] (the Court).

<sup>353</sup> Ireland also challenged the legality of the UK's emergency derogation under art 15, and the legality of the widespread arrests and detentions under art 5.

<sup>354</sup> *Ireland v UK* (ECtHR) (n138) 34-35 [96].

holistic interpretation of Article 3. So too with the 1975 UN Declaration, which on the one hand defined torture in a way that suggested a hierarchy, but on the other hand grouped torture and cruel and inhuman and degrading treatment together as a collective denial of human dignity, suggesting all were of similarly serious gravity. The outcome of the proceedings in *Ireland v UK*—first, the decision of the ECommHR, and then the judgment of the ECtHR—were of signal importance for the way in which torture and other forms of ill-treatment would subsequently be understood both in the European Convention system and beyond.

### 3.4.1 Decision of the European Commission on Human Rights, 1976

Ireland's challenge to the UK policy of internment raised claims under Articles 2, 3, 14, and 15 of the European Convention on Human Rights. The allegations in relation to Article 3—the prohibition on torture and inhuman or degrading treatment—are of most relevance here. The UK conceded that the five techniques had been authorised at a high level, were taught to members of the security forces, and that their systematic use constituted an 'administrative practice' as defined by previous Commission decisions.<sup>355</sup> Prior case law of the ECommHR had held that an 'administrative practice' was comprised of two elements: first, repeated acts, and second, official tolerance of those acts. The relevance here was that if such administrative practice could be demonstrated, there would be no obligation to exhaust domestic remedies.

Accepting the existence of an administrative practice, the UK focused its opposition to the claim on the contention that the practice did not breach Article 3.<sup>356</sup> It argued that the words 'inhuman' and 'degrading' ought to be construed as covering only those acts which were 'of a comparable level' of gravity to torture.<sup>357</sup> Because Article 3 was non-derogable even in a time of war or public emergency, the UK submitted that its terms should be construed narrowly.<sup>358</sup> This argument followed the more holistic approach to interpreting the terms of Article 3, in line with those parts of *The Greek Case* and the 1975 UN Declaration that did not unambiguously suggest a hierarchy.

The ECommHR rejected this submission, preferring to define the terms in Article 3 as encompassing a spectrum of severity; a hierarchy with torture at the top. The Commission adopted its earlier statement from *The Greek Case* that torture was an aggravated form of inhuman treatment, adding that torture required a context of interrogation, and a degree of

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<sup>355</sup> See *The Greek Case* (n264) [28].

<sup>356</sup> *Ireland v United Kingdom*, App no 5310/71 (ECommHR, January 25, 1976) ('*Ireland v UK (ECommHR)*'). It was not necessarily always clear whether the UK submissions amounted to an outright denial that the five techniques violated art 3 (as at 261), or rather whether the breach of art 3 was simply 'not admitted' (as at 356). This inconsistency did not escape the notice of the counsel for Ireland: *ibid* 368.

<sup>357</sup> *ibid* 363.

<sup>358</sup> *ibid*.

premeditation.<sup>359</sup> Significantly, the ECommHR said that a finding of torture was open to it on the facts, since 'the cases involved interrogation, and therefore this question could arise'.<sup>360</sup> This statement may shed some light on the surprising finding in *Cyprus v Turkey* that the repeated brutal raping of women constituted 'inhuman treatment' but not torture.<sup>361</sup> It may be that the ECommHR's conception of torture at this time was limited to interrogational torture, excluding from its ambit cruel treatment inflicted for other purposes and in other contexts.

Several of the illustrative cases in *Ireland v UK* led the ECommHR to find that beatings inflicted had 'deliberately caused severe suffering, both mental and physical, and therefore amounted to inhuman treatment within the meaning of Article 3'.<sup>362</sup> Further, because some prisoners had been humiliated in a way which 'severely interfered with [their] dignity',<sup>363</sup> they were found to have suffered degrading treatment.<sup>364</sup>

Notwithstanding the 'considerable degree of violence and even brutality', the ECommHR held that these beatings 'could not be qualified as torture as the term is being used here'.<sup>365</sup> Although the injuries sustained by detainees at some locations were 'massive' and 'substantial',<sup>366</sup> and at some locations, the beatings had been applied in 'a sort of scheme to make them speak',<sup>367</sup> there was insufficient evidence of 'such premeditated methods or techniques in the infliction of ill-treatment or to such a degree as would be required... to describe the treatment as torture'.<sup>368</sup> The Commission saw premeditation as an integral element of torture, so that spontaneous beatings and brutality could not, without more, amount to torture.<sup>369</sup>

In the ECommHR's view, those requirements of premeditation, interrogation and aggravated inhuman treatment were satisfied by the combined application of the five techniques, though not by the individual cases of beatings. The Commission found that applicants in the illustrative cases

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<sup>359</sup> *ibid* 463.

<sup>360</sup> *ibid* 463.

<sup>361</sup> *Cyprus v Turkey (Merits)* (n314) 121 [364] (the Commission).

<sup>362</sup> *Ireland v UK* (ECommHR) (n356) 463.

<sup>363</sup> *ibid* 469.

<sup>364</sup> *ibid*.

<sup>365</sup> *ibid*.

<sup>366</sup> *ibid* 39-40 [111].

<sup>367</sup> *ibid* 39 [110].

<sup>368</sup> *ibid*.

<sup>369</sup> This view was taken in Doswald-Beck L, 'What does the Prohibition of "Torture or Inhuman or Degrading Treatment or Punishment" Mean? The Interpretation of the European Commission and Court of Human Rights' (1978) 25 *Netherlands International Law Review* 24, 39-40.

had been subjected to wall-standing for periods of between 20 and 30 hours;<sup>370</sup> had been sleep- and nourishment-deprived; experienced weight loss and ‘acute psychiatric symptoms’.<sup>371</sup> In combination, the five techniques ‘[affected] the personality physically and mentally’, such that ‘the will to resist or to give in [could not]... be formed with any degree of independence’.<sup>372</sup> The denial of the senses, together with the compromising of the victims’ personalities, meant that the combined use of the five techniques was ‘in breach of Article 3 of the Convention in the form not only of inhuman and degrading treatment, but also of torture within the meaning of that provision’.<sup>373</sup>

Had the five techniques been considered separately, the ECommHR said that ‘deprivation of sleep or restrictions on diet might not as such be regarded as constituting treatment prohibited by Article 3’.<sup>374</sup> Rather, it would depend on ‘the circumstances and the purpose and would largely be a question of degree’.<sup>375</sup> Collectively, the Commission was left in no doubt that torture as well as inhuman and degrading treatment had been established, going so far as adopting the hierarchical interpretation of Article 3.

The opinion of the ECommHR in *Ireland v UK* marked a break with the jurisprudence that had come before it. While the Commission in *The Greek Case* and in *Cyprus v Turkey* had acknowledged different features of the terms in Article 3, it had also emphasised the commonality between them and in important respects had treated the Article as a cohesive whole. Similarly, the ECommHR in *Zeidler-Kornmann* had understood torture as qualitatively different to inhuman or degrading treatment, but without any necessary distinction in gravity or stigma. The 1975 UN Declaration had features of both hierarchical and holistic approaches. However, it is clear that the decision of the ECommHR in *Ireland v UK* represented a further step in the direction of a hierarchy.

### 3.4.2 Judgment of the European Court of Human Rights, 1978

Ireland referred the case to the ECtHR, inviting the Court to confirm the opinion of the ECommHR.<sup>376</sup> Importantly, neither party contested the findings with respect to Article 3. The

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<sup>370</sup> *Ireland v UK* (ECommHR) (n356) 37 [104].

<sup>371</sup> *ibid.* Although not available at the time, there is now medical evidence to the effect that after a prolonged period this treatment caused serious harm to the circulatory system and may even lead to organ failure. See, eg, Başoğlu, M, ‘A Multivariate Contextual Analysis of Torture and Cruel, Inhuman, and Degrading Treatments: Implications for an Evidence-Based Definition of Torture’ (2009) 79 *American Journal of Orthopsychiatry* 135.

<sup>372</sup> *Ireland v UK* (ECommHR) (n356) 402.

<sup>373</sup> *ibid.*

<sup>374</sup> *ibid* 401.

<sup>375</sup> *ibid.*

<sup>376</sup> *Ireland v UK* (ECtHR) (n138).

Chamber promptly relinquished jurisdiction to the Court in plenary, ‘considering that the case raise[d] serious questions affecting the interpretation of the Convention’.<sup>377</sup> Without contesting the substantive findings of the ECommHR, the UK argued that the ECtHR should decline to exercise its jurisdiction on the basis that the objective of the application had already been accomplished.<sup>378</sup> The UK submitted that ‘adjudication on the merits would be devoid of purpose’<sup>379</sup> as the five techniques had been abandoned, and additionally because the Attorney-General had given a ‘solemn undertaking’ to the Westminster Parliament that they would not be reintroduced.<sup>380</sup> Notwithstanding, the ECtHR reopened the case, and found that a practice of inhuman and degrading treatment, *but not of torture*, had occurred. This was a stunning result, reached in circumstances where the issue had not been raised nor argued before the Court.

The ECtHR’s reasoning identified three gradations of severity in Article 3 of the European Convention on Human Rights. At one end of the spectrum was ‘mere rough handling’, which may ‘be condemned both on moral grounds and also in most cases under the domestic law of the Contracting States but... does not fall within Article 3’.<sup>381</sup> At the other end of the spectrum was torture, positioned at the apex of a hierarchy of ill-treatment.<sup>382</sup> In the middle was ‘inhuman or degrading treatment’, an intermediate category of violence which violated Article 3 but did not attract the special stigma of torture.<sup>383</sup>

The majority of the ECtHR held that the use of the five techniques had exceeded the first threshold, and went beyond ‘mere rough handling’. This was because the techniques were applied ‘with premeditation and for hours at a stretch’, and that they caused ‘intense physical and mental suffering... and also led to acute psychiatric disturbances’.<sup>384</sup> They had therefore attained the ‘minimum level of severity to fall within the scope of Article 3’.<sup>385</sup>

However, the ECtHR went on to find that the five techniques ‘did not occasion suffering of the particular intensity and cruelty implied by the word torture’. Torture, in the Court’s view, was subject to ‘a special stigma’ for ‘deliberate inhuman treatment causing very serious and cruel suffering’.<sup>386</sup> Inhuman or degrading treatment, therefore, amounted to an intermediate tier on the

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<sup>377</sup> *ibid* 2 [5] (the Court).

<sup>378</sup> *ibid* 53 [151] (the Court).

<sup>379</sup> *ibid*.

<sup>380</sup> *ibid* 53-54 [152] (the Court).

<sup>381</sup> *ibid* 59 [167] (the Court). Compare *ibid* 89 (Zekia J).

<sup>382</sup> *ibid* 59 [167] (the Court).

<sup>383</sup> *ibid*.

<sup>384</sup> *ibid* 58 [167] (the Court).

<sup>385</sup> *ibid*.

<sup>386</sup> *ibid* 59 [167].

spectrum of severity. The distinction between them was ‘principally’ a difference in ‘the intensity of the suffering inflicted’.<sup>387</sup> Although no specific legal consequences followed from this difference, the ECtHR apparently considered that a greater degree of moral opprobrium (although undefined) should be reserved for torture.<sup>388</sup> Commentators at the time argued that, since ‘a finding of torture would have been attended by public antipathy towards the perpetrators, the Court allowed its concern with the consequences of its decision to determine its definition of torture’.<sup>389</sup>

The ECtHR’s decision to disagree with the unanimous opinion of the ECommHR with respect to the facts was procedurally questionable and substantively wrong. Delegates of the Commission spent 34 days in total hearing evidence from more than 119 witnesses, and received medical and psychiatric evidence, in highly secretive proceedings at a Norwegian air base.<sup>390</sup> The parties’ submissions on the oral evidence alone lasted a week, with a further three days devoted to oral argument on the law.<sup>391</sup> The transcript of the proceedings, only recently made public, totalled 14 volumes and 4,500 pages.<sup>392</sup> If ever there were a case to defer to the opinion of the first instance tribunal, this would have been it. Commentators remarked at the time that the European Convention on Human Rights gave no guidance on the relationship between the Commission and the Court, so the decision to interfere with the Commission’s determination of the facts was in some respects ground-breaking.<sup>393</sup>

This was a definitive finding by the ECtHR that torture was at the top of a hierarchy of ill-treatment, even within the confines of a single textual provision. It was a crucial—perhaps *the* crucial—part

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<sup>387</sup> *ibid.*

<sup>388</sup> Rodley and Pollard criticise this reasoning as ‘unsatisfactory’: *The Treatment of Prisoners under International Law* (n267) 102.

<sup>389</sup> Spjut RJ, ‘Torture Under the European Convention on Human Rights’ (1979) 73 *American Journal of International Law* 267, 271. Cullen adopts a similar view: see Cullen A, ‘Defining Torture in International Law: A Critique of the Concept Employed by the European Court of Human Rights’ (2003) 34 *California Western International Law Journal* 29, 40. See also Joseph and Castan (n211) 217.

<sup>390</sup> *Ireland v UK* (ECommHR) (n356) 6, 224, 230-4.

<sup>391</sup> *ibid.*

<sup>392</sup> A helpful summary, along with details of later interviews conducted with survivors of the five techniques, is available in Conroy J, *Unspeakable Acts, Ordinary People: The Dynamics of Torture* (University of California Press 2001); see also O’Boyle M, ‘Torture and Emergency Powers Under the European Convention on Human Rights: *Ireland v The United Kingdom*’ (1977) 71 *American Journal of International Law* 674.

<sup>393</sup> See Spjut (n389) 269. A greater degree of deference to the Commission’s fact-finding role was displayed in later cases: see, eg, *Tanrikulu v Turkey* (2000) 30 EHRR 950 (GC) [67], where the Grand Chamber said that, although the Court retains the power to make its own assessment of the facts, it is only very exceptionally that it will exercise that power. See also *Akdivar v Turkey* (1997) 23 EHRR 533 and *Mahmut Kaya v Turkey* (1999) 28 EHRR 1 (*‘Mahmut Kaya v Turkey’*). But cf *Cruz Varas v Sweden* (1992) 14 EHRR 1, [73]-[76], where the ECtHR reached a different conclusion to the ECommHR regarding the credibility of a witness whom they had not themselves heard.

of the reasoning of the Court. The significance of this conclusion in the context of a fledgling international human rights system is difficult to overstate.

In support of the ‘special stigma’ attaching to torture, the ECtHR cited two sources. They were the intentions of the drafters, and the ‘thinking lying behind’ the 1975 UN Declaration Against Torture.<sup>394</sup> The latter point was ultimately self-referential, as the language in the 1975 UN Declaration was taken from *The Greek Case*.<sup>395</sup> Vorhaus aptly observed that ‘confirmation of a distinction together with notification of its purpose does not amount to much of an argument for a hierarchical conception of the three elements’.<sup>396</sup> As for the former, the intentions of the drafters of the European Convention yield little support for a hierarchy between those terms, as was found by Judge Evrigenis in his separate opinion, the only judge to expressly consider the *travaux préparatoires*. Judge Evrigenis stated that the better view was that a hierarchical distinction was actually *contrary* to the drafters’ intent:

‘By adding to the notion of torture the notions of inhuman and degrading treatment, those who drew up the Convention wished, following Article 5 of the Universal Declaration of Human Rights, to **extend** the prohibition in Article 3 of the Convention—in principle directed against torture (*cf* Collected Edition of the ‘Travaux Préparatoires’, volume II, pp 38 *et seq*, 238 *et seq*)—to other categories of acts causing intolerable suffering to individuals or affecting their dignity **rather than to exclude** from the traditional notion of torture certain apparently less serious forms of torture and to place them in the category of inhuman treatment which carries less of a ‘stigma’—to use the word appearing in the judgment. The clear intention of **widening the scope of the prohibition** in Article 3 by adding, alongside torture, other kinds of acts cannot have the effect of restricting the notion of torture’.<sup>397</sup>

Indeed, close study of the *travaux* suggests that the main concern of the drafters was to avoid the terms in Article 3 being interpreted narrowly.<sup>398</sup> The notion of a ‘special stigma’ attaching to torture was not advanced before the ECtHR. Neither party had contested the ECommHR’s decision on the interpretation of Article 3, nor its application to the facts.

The opinion of the ECommHR in *The Greek Case*, and to a lesser extent in *Ireland*, while acknowledging the qualitative differences between the different terms in Article 3, nevertheless emphasised the continuity between the concepts. However, the hierarchical approach preferred

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<sup>394</sup> *Ireland v UK* (ECtHR) (n138) 59 [167].

<sup>395</sup> See discussion above. See also Rodley N, ‘The Definition(s) of Torture in International Law’ (2002) 55 *Current Legal Problems* 467.

<sup>396</sup> Vorhaus J, ‘On Degradation-Part One: Article 3 of the European Convention on Human Rights’ (2002) 31 *Common Law World Review* 374, 378.

<sup>397</sup> *ibid* 123-124 (Evrigenis J) (emphasis added).

<sup>398</sup> ECHR *Travaux Préparatoires* (n190) vol II, 14, 36-40, 238; vol III, 206, 236, 282. Discussion centred on how best to emphasise and to broaden the level of protection against ill-treatment that the Convention would afford. Evans and Morgan observed that although the provision prohibits ‘torture, inhuman or degrading treatment or punishment, the drafting history confirms that there was no clear understanding of what was meant by those terms’: *Preventing Torture* (n51) 73.

by the ECtHR in *Ireland* would later find favour with the drafters of the 1984 UN CAT, as we shall see below.<sup>399</sup>

### 3.5 *Tyrer v United Kingdom, 1978*

Three months after the judgment in *Ireland* was handed down, the ECtHR delivered another important decision in *Tyrer v United Kingdom*.<sup>400</sup> The judgment in *Tyrer* introduced a further gradation of severity within Article 3, differentiating between inhuman treatment or punishment, and degrading treatment or punishment. Where the *Ireland* Court had grouped 'inhuman or degrading' treatment together, the *Tyrer* Court appeared to regard degrading treatment as occupying a lower rung than inhuman treatment on the 'ladder of pain and suffering'.<sup>401</sup>

*Tyrer* concerned a high school student on the Isle of Man, aged 15 years old. The student pleaded guilty before a juvenile court to charges of assault occasioning actual bodily harm, committed against another student at the school. The Manx court sentenced him to punishment by 'three strokes of the birch', to be applied by police officers under medical supervision.<sup>402</sup> Although he appealed the sentence, that appeal was rejected, and on the same day he was detained in a police station to await his penalty. After waiting about an hour and a quarter until a doctor could be found, two policemen held the applicant down, bent him over a table with his trousers removed, while a third applied the birch to his bare backside.<sup>403</sup> At the first stroke part of the birch broke away. 'The birching raised, but did not cut, the applicant's skin[,] and he was sore for about a week and a half afterwards'.<sup>404</sup>

Mr Tyrer appealed to the European Convention organs, contending that judicial corporal punishment violated the prohibition of torture and ill-treatment in Article 3 of the European Convention on Human Rights. In line with the practice at the time, the application was considered first by the ECommHR.<sup>405</sup> At some stage during those proceedings, the applicant apparently changed his mind and attempted to withdraw his claim. However, as had happened in *Zeidler-*

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<sup>399</sup> See section 3.6 below.

<sup>400</sup> *Tyrer v United Kingdom* (1979-80) Series A no 26 ('*Tyrer v UK (ECtHR)*').

<sup>401</sup> This phrase is borrowed from Rodley and Pollard, *The Treatment of Prisoners under International Law* (n267) 97.

<sup>402</sup> *Tyrer v United Kingdom* (ECtHR) (n400) 3-4 [9]-[10] (the Court).

<sup>403</sup> *ibid* 3-4 [9]-[10] (the Court).

<sup>404</sup> *ibid*.

<sup>405</sup> *Tyrer v United Kingdom* App no 5856/72 (ECommHR, December 14, 1976) 2 ('*Tyrer v UK (ECommHR)*').

*Kornmann*, the ECommHR refused to accept this putative withdrawal, holding that the complaint 'raised questions of a general character affecting the observance of the Convention'.<sup>406</sup>

In its assessment of the merits, the ECommHR quickly decided that the treatment inflicted on Mr Tyrer could not be described as 'torture', and nor was it 'inhuman', but that an issue could arise as to whether it was 'degrading'.<sup>407</sup> In relation to torture and inhuman treatment, the ECommHR noted that its previous case law on those terms arose 'out of emergency situations and involved allegations of atrocious ill-treatment such as torture or treatment akin to torture'.<sup>408</sup> By implication, degrading treatment or punishment was capable of encompassing less atrocious conduct: indeed, following *The East African Asians Case*, the ECommHR observed that 'perhaps the simple dictionary definition of degrading is too wide for the purposes of Article 3 of the Convention'.<sup>409</sup>

How broadly, then, should the notion of 'degrading treatment or punishment' be construed? According to the ECommHR, judicial corporal punishment 'humiliates and disgraces the offender and can therefore be said to be degrading treatment or punishment'.<sup>410</sup> In a particularly damning passage, the ECommHR said that 'birching as a punishment ordered by a court and administered as provided for in the Isle of Man is an assault on human dignity which humiliates and disgraces the offender without any redeeming social value'.<sup>411</sup>

One member of the ECommHR, Mr Mangan, dissented from the finding that Article 3 had been violated.<sup>412</sup> Mr Mangan considered that the inclusion of 'degrading' in Article 3 should be interpreted as referring to acts of a similar level of gravity to 'torture' and 'inhuman treatment or punishment', rejecting the further differentiation in severity that the majority opinion embraced.<sup>413</sup> Mr Mangan would have justified this approach by reference to the *ejusdem generis* rule of interpretation, that is, that terms appearing in the same clause should be interpreted as being of the same kind or nature.<sup>414</sup> Further, Mr Mangan considered that the position of the prohibition in the first three articles of the European Convention on Human Rights 'emphasises

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<sup>406</sup> *ibid* 2.

<sup>407</sup> *ibid* 14 [32]-[33].

<sup>408</sup> *ibid* 14 [32]-[33].

<sup>409</sup> *ibid* 14 [34].

<sup>410</sup> *ibid* 14 [34]-[35].

<sup>411</sup> *ibid* 15 [39].

<sup>412</sup> *ibid* 19 [7] (Dissenting opinion of Mr Mangan)

<sup>413</sup> *ibid*.

<sup>414</sup> *ibid*.

the gravity and substance of the inhuman acts against which [Article 3] was directed'.<sup>415</sup> He alone preferred a holistic interpretation of Article 3 to the majority's hierarchical approach.

When the decision came before the ECtHR,<sup>416</sup> the Court confirmed that the reference to 'degrading' in Article 3 should be interpreted as requiring a lower level of suffering than that required by torture and inhuman treatment or punishment.<sup>417</sup> However, 'degradation' should not be interpreted too broadly:

It would be absurd to hold that judicial punishment generally, by reason of its usual and perhaps almost inevitable element of humiliation, is 'degrading' within the meaning of Article 3. Some further criterion must be read into the text. Indeed, Article 3, by expressly prohibiting 'inhuman' and 'degrading' punishment, implies that there is a distinction between such punishment and punishment in general. In the Court's view, in order for a punishment to be 'degrading' and in breach of Article 3, the humiliation or debasement involved must in any event be other than the usual element of humiliation [in punishment generally].<sup>418</sup>

If *Ireland v United Kingdom* had enshrined a distinction between torture and other forms of ill-treatment prohibited by Article 3, then *Tyler* established a further distinction in gravity between inhuman and degrading punishment. This was a definitive rejection of the contention advanced by the United Kingdom in both cases, and accepted by Mr Mangan alone in dissent in the ECommHR, namely that all the terms in Article 3 were of broadly equivalent levels of severity.<sup>419</sup>

At the same time, in *Tyler* the ECtHR explicitly adopted a 'living instrument' approach to interpreting the European Convention on Human Rights. Article 3, like other Articles, 'must be interpreted in the light of present-day conditions'.<sup>420</sup> This conclusion was directly contrary to the position of Mr Mangan in dissent in the ECommHR, that the terms in Article 3 should be interpreted in light of 'the practices and views on punishment of young persons in the various communities involved in the preparation of the Convention, at the time it was concluded, and the really great evils against which it was mainly directed'.<sup>421</sup> The rejection of that submission, and the embrace of what the ECtHR would later term the 'evolutive' approach to interpreting the European Convention on Human Rights, was significant. Its implications for the prohibition of torture and inhuman or degrading treatment will be discussed in Chapter Five below.

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<sup>415</sup> *ibid.*

<sup>416</sup> *Tyler v UK* (ECtHR) (n400). The decision of the ECommHR was not appealed, but rather it was referred to the ECtHR by the Commission 'to obtain a decision from the Court as to whether or not the facts of the case disclose a breach by the respondent State of its obligations under Article 3 of the Convention': *ibid* 2 [2] (the Court).

<sup>417</sup> *ibid* 11 [29] (the Court).

<sup>418</sup> *ibid* 12 [30] (the Court).

<sup>419</sup> See *Tyler v UK* (ECommHR) (n405) 19 [7] (Dissenting opinion of Mr Mangan).

<sup>420</sup> *Tyler v UK* (ECtHR) (n400) 12 [31] (the Court).

<sup>421</sup> *Tyler v UK* (ECommHR) (n405) 21 [18] (Dissenting opinion of Mr Mangan).

A second aspect of the *Tyrer* decision that would prove significant was the clarification by the ECtHR that, 'above all... it is never permissible to have recourse to punishments which are contrary to Article 3, whatever their deterrent effect may be'.<sup>422</sup> This statement was important because the decision of the ECommHR could be read as suggesting, in its reference to the absence of any 'redeeming social value' of judicial corporal punishment, that proven deterrence value could save a provision that might otherwise be regarded as degrading. Indeed, in his dissenting opinion in the ECtHR, Judge Fitzmaurice would have held precisely that. Judge Fitzmaurice considered that 'some gloss has to be put upon the absolute character of the literal terms of Article 3',<sup>423</sup> and that this gloss 'relates not only to what constitutes or amounts to torture, etc, but to what may in certain circumstances justify its infliction'.<sup>424</sup> The emphatic rejection of this approach laid the foundations for a robust interpretation of Article 3 by the ECtHR.

## 3.6 The 1984 UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

### 3.6.1 The drafting process

In 1977, the UN General Assembly asked the Commission on Human Rights to draft a binding Convention 'in light of the principles embodied in the [1975 UN] Declaration', meaning the crafting of prohibitions on both torture and cruel, inhuman or degrading treatment or punishment.<sup>425</sup> The subsequent convention, the 1984 CAT, was drafted with input from sources including Amnesty International, the International Association of Criminal Law, the International Committee of the Red Cross, the International Commission of Jurists, the Swiss Committee Against Torture, and plenary discussions of the representations of many UN member States.

The CAT took as its basic premise that torture and cruel, inhuman or degrading treatment or punishment were already prohibited as a matter of international law, and thus does not expressly prohibit such conduct. The preamble to CAT cites Article 5 of the UDHR, Article 7 of the ICCPR and the 1975 UN Declaration as establishing these prohibitions, and goes on to cite its purpose as being 'to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world'.<sup>426</sup> As such, the CAT *assumes* rather than *provides* that torture is prohibited as a matter of general international law.

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<sup>422</sup> *Tyrer v UK* (ECtHR) (n400) 12 [31] (the Court).

<sup>423</sup> *ibid* 20 [4] (Dissenting opinion of Judge Fitzmaurice)

<sup>424</sup> *ibid* 20-21 [5] (Dissenting opinion of Judge Fitzmaurice).

<sup>425</sup> GA Res 32/62 (December 8, 1977).

<sup>426</sup> CAT (n1) Preamble.

The working group sessions on the drafting of the CAT in the late 1970s and early 1980s featured lengthy debates over whether, and to what extent, torture and cruel, inhuman and degrading treatment were legally and conceptually distinct.<sup>427</sup> There was some debate during the drafting, specifically with reference to the decision of the ECtHR in *Ireland v UK*, as to whether the relationship between the concepts should properly be regarded as hierarchical.<sup>428</sup>

The debates centred around two draft conventions, one proposed by the International Association of Penal Law, and one proposed by Sweden. In important respects, they were diametrically opposed. The Swedish draft convention had dealt with cruel, inhuman or degrading treatment or punishment in similar terms to torture, and with almost identical obligations with respect to each.<sup>429</sup> The identity of obligations in the Swedish draft applied to: the impermissibility of derogation;<sup>430</sup> the obligation to prevent torture and ill-treatment;<sup>431</sup> the obligation not to expel any person when there is a risk of torture or ill-treatment in the receiving state;<sup>432</sup> the obligation to educate relevant personnel and to keep regulations under review;<sup>433</sup> the obligation to investigate allegations of torture or ill-treatment, and to provide remedies to victims;<sup>434</sup> and the obligation to exclude evidence obtained by torture or ill-treatment from legal proceedings.<sup>435</sup> The only practical difference between torture and cruel, inhuman or degrading treatment or punishment in the Swedish draft was that the obligation to criminalise (and associated obligations with respect to establishing jurisdiction, prosecution, and extradition to face charges of torture) did not apply to other ill-treatment.<sup>436</sup> Presumably, this difference was due to the degree of precision required for criminal offences, which had been achieved already with the definition of torture in the UN Declaration, whereas no sustained attempt had yet been made to define cruel, inhuman or degrading treatment in terms which would enable its prosecution as a criminal offence. Indeed, a number of states expressed concern about the ambiguity inherent in the terms 'cruel, inhuman or degrading'.<sup>437</sup> Thus, the view embodied in the Swedish draft was that torture and cruel, inhuman

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<sup>427</sup> Burgers and Danelius (n197) 47-48, 70.

<sup>428</sup> Nowak and McArthur (n238) 37-38.

<sup>429</sup> 'Draft International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment', submitted by Sweden on 18 January 1978, UN Doc E/CN/4/1285, reprinted in Burgers and Danelius (n197) 203-207.

<sup>430</sup> *ibid* art 2.

<sup>431</sup> *ibid* art 3.

<sup>432</sup> *ibid* art 4.

<sup>433</sup> *ibid* arts 5, 6.

<sup>434</sup> *ibid* arts 9, 10, 12.

<sup>435</sup> *ibid* art 13.

<sup>436</sup> *ibid* arts 7, 11, 14, 15.

<sup>437</sup> Burgers and Danelius (n197) [70].

or degrading treatment were legally distinct concepts; equally reprehensible, but only torture ought to be prosecuted *as torture*.

In contrast, the draft submitted by the International Association of Penal Law failed to deal with cruel, inhuman or degrading treatment at all.<sup>438</sup> The latter draft focussed solely on what the organisation clearly considered to be the more important aspect of the prohibition—suggesting that, at least in the view of the International Association of Penal Law, a hierarchy between torture and ill-treatment was already manifest.

These opposing perspectives had to be reconciled.

Further muddying the waters, France argued that there was no distinction between torture and cruel, inhuman or degrading treatment at all.<sup>439</sup> Switzerland appeared to prefer a similar view, proposing that torture be defined *as* cruel, inhuman or degrading treatment or punishment.<sup>440</sup> Ultimately, a majority of states took the view that the treaty should ‘deal primarily with torture, while leaving it open whether some of its provisions could in the end be made applicable also to other cruel, inhuman or degrading treatment or punishment’.<sup>441</sup> A hierarchy between the concepts was confirmed. During these drafting debates, the possibility of a hierarchy between torture and other forms of ill-treatment essentially became a negotiating tool: obligations as to which it was difficult to achieve consensus were excluded from cruel, inhuman or degrading treatment or punishment and applied only to torture, with States drawing comfort from the narrow definition of that term.

### 3.6.2 The concluded treaty

The final text of the CAT enshrined not only a two-tiered prohibition on torture and ill-treatment, but also a two-tiered regime of state obligations in relation to each. ‘Gradually proposals were made regarding which Convention obligations should apply to other cruel, inhuman or degrading treatment... these became fewer and fewer’.<sup>442</sup> Onerous obligations were made more attractive because their scope was limited to torture, narrowly defined. But the decision to adopt inclusive

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<sup>438</sup> ‘Draft Convention for the Prevention and Suppression of Torture’, submitted by the International Association of Penal Law on 15 January 1978, UN Doc E/CN.4/NGO/213, reprinted in Burgers and Danelius, *ibid* 197-202.

<sup>439</sup> *ibid* 47.

<sup>440</sup> *ibid* 47.

<sup>441</sup> *ibid* 70.

<sup>442</sup> Ingelse C, *The UN Committee Against Torture: An Assessment* (Kluwer Law International 2001) 78.

language for the obligations applicable to cruel, inhuman or degrading treatment or punishment kept hope alive for states that favoured a more intrusive set of obligations for the second tier.<sup>443</sup>

The concluded text of the CAT closely follows the Swedish draft, but with one essential difference: the marginalisation of cruel, inhuman or degrading treatment or punishment. The latter is mentioned only twice: once in the title and the second time in Article 16. In respect of torture, the range of obligations for states is extensive, and includes: the obligation to exclude evidence obtained by torture;<sup>444</sup> the non-refoulement obligation;<sup>445</sup> the obligation to criminalise torture;<sup>446</sup> the obligations to establish jurisdiction over torture;<sup>447</sup> the obligation to apprehend and prosecute or extradite suspected torturers;<sup>448</sup> the obligations to train relevant personnel and review relevant rules and procedures to prevent torture;<sup>449</sup> the obligation to conduct a prompt and effective investigation into allegations of torture;<sup>450</sup> and the obligation to provide redress to victims.<sup>451</sup> Indeed, the 'no exceptions or derogations' provision applies only to torture,<sup>452</sup> as does the provision excluding the defence of superior orders to a charge of torture.<sup>453</sup> The failure to extend these obligations to cruel, inhuman or degrading treatment or punishment has cemented the hierarchy between torture and other prohibited ill-treatment, and dramatically extended its consequences.

The CAT contains three different types of provisions and obligations. They are obligations upon States to:

- use repressive measures against perpetrators of torture;
- to recognise the right of victims of torture to secure remedies and reparation; and
- to adopt measures to prevent torture and ill-treatment.<sup>454</sup>

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<sup>443</sup> In part, this was due to the divide between Western and Eastern bloc states, with the former generally favouring strong supervisory mechanisms and the latter favouring a more minimalist convention: *ibid* 75-79.

<sup>444</sup> CAT (n1) art 15.

<sup>445</sup> *ibid* art 3.

<sup>446</sup> *ibid* art 4.

<sup>447</sup> *ibid* art 5.

<sup>448</sup> *ibid* arts 6-9.

<sup>449</sup> *ibid* arts 10-11.

<sup>450</sup> *ibid* art 13.

<sup>451</sup> *ibid* art 14.

<sup>452</sup> *ibid* art 2(2)

<sup>453</sup> *ibid* art 2(3).

<sup>454</sup> Nowak and McArthur (n238) 8.

It is singularly important that under the CAT preventative measures apply equally to torture and other forms of ill-treatment, but remedial and repressive measures apply only to torture.

The obligation in relation to cruel, inhuman or degrading treatment or punishment is to 'undertake to prevent' such acts when they are committed within the state party's jurisdiction, and when they are committed by, or at the instigation of, or with the consent or acquiescence of a public official or other person acting in an official capacity.<sup>455</sup>

The language of 'obligation to undertake to prevent' was first used in the 1948 Genocide Convention.<sup>456</sup> Interpreting this provision in 2007, the International Court of Justice ('ICJ') held that the phrase 'shall undertake to prevent...' created a 'direct obligation to prevent genocide',<sup>457</sup> such that the failure by Serbia and Montenegro to prevent genocide constituted a breach of that provision for which the state was responsible.<sup>458</sup> Further, the ICJ held that 'the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide'.<sup>459</sup>

By the same logic then, Article 16 of CAT should be interpreted as both embodying an implicit prohibition of the commission of cruel, inhuman or degrading treatment or punishment, and as creating a direct obligation to prevent such treatment or punishment.<sup>460</sup> The result of this interpretation is that the Article 16 obligation to prevent ill-treatment has essentially the same legal effect as the Article 1 obligation to prevent torture.

This approach presents a difficulty, however: why would the drafters have adopted different wording for the two provisions, if the obligation were essentially the same for both? And yet, it is difficult to conceive of an alternative interpretation that is preferable. If the 'undertaking to prevent' were merely hortatory or purposive,<sup>461</sup> then it would be essentially empty of legal content. The better view is that the ICJ's interpretation of the obligation to prevent genocide in the

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<sup>455</sup> CAT (n1) art 16(1).

<sup>456</sup> Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277 (opened for signature 9 December 1948, entered into force 12 January 1951).

<sup>457</sup> See *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Merits)* (2007) ICJ Rep 43 [166] (the Court).

<sup>458</sup> *ibid* 61 [162] (the Court), stating that 'the ordinary meaning of the word 'undertake' is to give a formal promise, to bind or engage oneself, to give a pledge or promise, to agree, to accept an obligation.... The undertaking is unqualified... and it is not to be read merely as an introduction...'

<sup>459</sup> *ibid* 63 [166] (the Court).

<sup>460</sup> Making a similar argument in relation to the obligation to prevent acts of terrorism, see Trapp KN, *State Responsibility for International Terrorism: Problems and Prospects* (OUP 2011).

<sup>461</sup> See *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (n457) 61 [162] (the Court), stating that an 'undertaking to prevent' in the Genocide Convention was 'not merely hortatory or purposive'.

1948 Genocide Convention is equally applicable to the CAT. The obligation in Article 16 creates a direct obligation to prevent cruel, inhuman or degrading treatment or punishment.

In their guide to the CAT, published shortly after its conclusion, two of the drafters explained that it was 'impossible to find any satisfactory definition of this general concept [of cruel, inhuman or degrading treatment or punishment], whose application to a specific case must be assessed on the basis of all the particularities of the concrete situation'.<sup>462</sup> On this account, CAT Article 16 was seen as comprising concepts that were fluid and context-specific, suggesting that what might be 'cruel' or 'inhuman' in one situation might be justifiable in another. In contrast, torture could be objectively identified and defined; it did not require the flexibility inherent in a 'context-specific' exception.

In addition to the 'undertaking to prevent' cruel, inhuman or degrading treatment or punishment, Article 16(1) provides that 'in particular, the obligations contained in articles 10, 11, 12 and 13 shall apply' to those concepts as well as to torture.<sup>463</sup> Those Articles oblige states to educate and inform relevant personnel, to keep relevant rules and procedures under review, to conduct a prompt and impartial investigation and to receive and handle appropriately complaints. It is perhaps no surprise that these 'more preventative obligations' apply to all forms of ill-treatment, since measures to prevent torture must surely similarly help to prevent cruel, inhuman or degrading treatment, and the reverse is also true.<sup>464</sup> It is striking nonetheless that none of the criminal law obligations applicable to torture are extended to other forms of ill-treatment, though the phrase 'at least' in Article 16(1) leaves open the possibility that such obligations will develop as a matter of customary international law.

### 3.6.3 Departing from the 1975 UN Declaration Against Torture

The CAT represents a departure from the 1975 UN Declaration in several important respects. Three of these departures *enhance* the protection against torture and ill-treatment. Yet in three other respects the CAT may be considered a *regression* from the position in the 1975 UN Declaration. Of course, the CAT takes the form of a treaty that directly binds States parties, whereas the 1975 UN Declaration was merely adopted by the General Assembly (albeit that resolution was adopted by consensus, indicative a near universal level of support). In that respect the CAT represents a major leap forward. Nevertheless, it was accompanied by a number of small backward steps.

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<sup>462</sup> Burgers and Danelius (n197) 122.

<sup>463</sup> art 16(2) goes on to provide that it operates 'without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion': CAT (n1).

<sup>464</sup> Nowak and McArthur (n238) 535, 539.

The first respect in which the CAT provides *broader* protection than that in the 1975 UN Declaration was the adoption of a broader conception of the notion of a 'public official', extending that concept to include other persons 'acting in an official capacity', and including consent or acquiescence, as well as commission or instigation, as ways of satisfying the requirement for a nexus with the State.<sup>465</sup>

The second respect in which the CAT improves upon the 1975 UN Declaration is in relation to the list of prohibited purposes for torture. Although both the UN Declaration and the CAT contain what appear to be inclusive lists of prohibited purposes, the latter adds ill-treatment inflicted 'for any reason based on discrimination of any kind' to the list of named prohibited purposes.<sup>466</sup> Also gone is the statement from the 1975 UN Declaration that 'torture constitutes an aggravated form of cruel, inhuman or degrading treatment or punishment'. Given the historical longevity of prohibitions on cruelty, especially in comparison to relatively recent prohibitions of torture,<sup>467</sup> it was perhaps surprising that the drafters of both the 1975 UN Declaration and the CAT considered it both more difficult and less important to define the terms 'cruel, inhuman or degrading treatment or punishment'.

The third improvement on the 1975 UN Declaration was the establishment of a Committee Against Torture to aid in the accountability and prevention of ill-treatment by receiving and assessing the reports of States Parties.<sup>468</sup> The provisions establishing the Committee's jurisdiction generally apply to both torture and other ill-treatment, including the power 'to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party [to the CAT]'.<sup>469</sup> And yet, even in this administrative section of the treaty the hierarchy between torture and other ill-treatment is evident: the Committee Against Torture is the full name of the UN treaty body, not, as one might assume, simply its abbreviation. Further, although the Committee Against Torture has the power to commence a *proprio motu* inquiry into practices of ill-treatment in States Parties, that power only arises where there are 'well-founded indications that torture is being systemically practised in the territory of a State Party'.<sup>470</sup> On the terms of the treaty, then, it seems a well-founded indication of a systemic practice

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<sup>465</sup> See further sections 5.5 and 6.5 below.

<sup>466</sup> See further sections 5.4 and 6.4 below.

<sup>467</sup> See sections 2.2 and 2.3 above.

<sup>468</sup> See Part II of the CAT (n1) arts 17-24, establishing the mandate of the Committee and procedures for appointment of its members.

<sup>469</sup> *ibid* art 22. This power only applies where the State Party has accepted the competence of the Committee Against Torture in that regard.

<sup>470</sup> *ibid* art 20.

of cruel, inhuman or degrading treatment would not suffice.<sup>471</sup>

Thus, in contrast to the UDHR and the ICCPR, both of which group torture together with cruel, inhuman or degrading treatment, the structure of the CAT serves to drive those concepts apart.<sup>472</sup>

The CAT represented a retreat from the position taken in the 1975 UN Declaration in three respects. First, the 1975 UN Declaration declared unequivocally that exceptional circumstances could not be invoked to justify *either* torture *or* cruel, inhuman or degrading treatment or punishment.<sup>473</sup> In contrast, the CAT reproduces the ‘no exceptions or justifications’ clause, but applies it only to torture.<sup>474</sup>

Second, the 1975 UN Declaration obliged states to ensure that ‘[a]ny statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment may not be invoked as evidence... in any proceedings’.<sup>475</sup> The CAT narrowed that obligation to apply only to statements made as a result of torture.<sup>476</sup>

Third, the CAT obligation to provide redress to victims applies only to torture, where the equivalent obligation in the 1975 UN Declaration applied equally to cruel, inhuman or degrading treatment or punishment.<sup>477</sup>

The later obligation in the CAT requires states parties to ensure that victims have ‘an enforceable right to fair and adequate compensation’, including ‘as full rehabilitation as possible’ and compensation for dependents if a victim dies as a result of torture. By contrast, the 1975 UN Declaration had provided that the victims of acts of *either* torture *or* cruel, inhuman or degrading

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<sup>471</sup> In practice, once the Committee against Torture commences an inquiry into torture, it would presumably consider evidence of cruel, inhuman or degrading treatment as well (see, eg, Report of the Committee Against Torture on Peru, 56<sup>th</sup> Sess, UN General Assembly, UN Doc A/56/44, 64-65 [169], recommending that detainees ‘be explicitly asked [by judges] whether they have been subjected to torture or other cruel, inhuman or degrading treatment’). However it remains the case that only indications of torture would be sufficient to enliven the inquiry procedure under CAT art 20.

<sup>472</sup> Evans MD ‘Getting to Grips with Torture’ (2002) 51 International & Comparative Law Quarterly 365, 369.

<sup>473</sup> 1975 UN Declaration (n329) art 3.

<sup>474</sup> CAT (n1) art 2(2) provides that ‘No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political stability or any other public emergency, may be invoked as a justification of torture’.

<sup>475</sup> 1975 UN Declaration (n329) art 12.

<sup>476</sup> CAT (n1) art 15, which also includes the clause ‘except against a person accused of torture as evidence that the statement was made’.

<sup>477</sup> *ibid* art 14.

treatment or punishment had the right to 'be afforded redress and compensation in accordance with national law'.

Thus, the CAT makes it incumbent upon states to criminalise torture; to prevent and punish torture; to investigate, prosecute and provide redress in respect of allegations of torture; to exclude from court proceedings evidence obtained by torture; not to derogate from obligations in respect of torture, or to allow defences to a charge of torture; nor to expel, return or *refoule* a person to face torture. State parties have an obligation to prevent torture; to educate law enforcement and other relevant personnel; to keep relevant regulations, such as prison rules, under review; to conduct a prompt and impartial investigation into acts of torture; and to ensure that individuals who allege the commission of torture have the right to complain to a competent authority.

In respect of cruel, inhuman or degrading treatment or punishment, the obligations for states are significantly less onerous. The CAT establishes an obligation to prevent such treatment, including educating relevant personnel and reviewing relevant regulations; to conduct a prompt and impartial investigation; and to ensure that victims have the right to complain. Of course, the existence or development of more extensive obligations—in relation to any tier of the hierarchy—is not precluded by the CAT.

Overall, the CAT—like other multilateral conventions—resulted from a series of compromises. It assumed a hierarchy between torture and other ill-treatment under international law and proceeded to establish a range of obligations for states in the interests of making 'more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment worldwide'.<sup>478</sup> But it was the struggle against torture to which the CAT was really directed; the concepts of cruel, inhuman or degrading treatment were not only more difficult to define, but were also simply seen as less significant. Indeed, when the International Court of Justice considered the CAT in *Belgium v Senegal*, it identified the object and purpose of the treaty as being to make 'more effective the struggle against torture... throughout the world'; omitting the reference to cruel, inhuman or degrading treatment entirely.<sup>479</sup>

Since the conclusion of the CAT, prohibitions of torture and cruel, inhuman or degrading treatment or punishment have been included in a wide range of other conventions, including the 1989 Convention on the Rights of the Child,<sup>480</sup> the 1990 Convention on the Protection of the Rights of All

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<sup>478</sup> *ibid* Preamble.

<sup>479</sup> *Belgium v Senegal* (n7) 26 [68]; 28 [74]; 30 [86]; 36 [115].

<sup>480</sup> 1577 UNTS 3 (adopted 20 November 1989, entered into force 2 September 1990) art 37: 'States Parties shall ensure that (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without

Migrant Workers and Members of their Families,<sup>481</sup> and the Convention on the Rights of Persons with Disabilities.<sup>482</sup> Although these treaties add little to the substance or force of the prohibition upon torture and cruel, inhuman or degrading treatment, they may serve to enhance protection by emphasising the intersectional nature of many claims and by bringing the issue within the jurisdiction of the various other UN treaty bodies.<sup>483</sup> The prohibition of torture and ill-treatment is also supported by a range of soft law instruments such as guidelines for law enforcement officials,<sup>484</sup> medical practitioners<sup>485</sup> and others.<sup>486</sup>

As one of the most widely ratified instruments in the UN treaty library, the CAT has had a defining influence upon the domestic law of many states. Many CAT state parties have enacted legislation criminalising the offence of torture in terms echoing the language of Article 1 of the CAT.<sup>487</sup> In contrast, very few States specifically refer to Article 16, or to the concepts of cruel, inhuman or degrading treatment or punishment, in their implementing legislation.<sup>488</sup> Thus, domestic criminal

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possibility of release shall be imposed for offences committed by persons below eighteen years of age’.

<sup>481</sup> 2220 UNTS 3 (adopted 18 December 1990, entered into force 1 July 2003) art 10, which provides that ‘No migrant worker or member of his family shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’.

<sup>482</sup> 2515 UNTS 3 (adopted 13 December 2006, entered into force 3 May 2008) art 15, which echoes exactly the Universal Declaration on Human Rights (n) art 5.

<sup>483</sup> Rodley and Pollard, *The Treatment of Prisoners under International Law* (n267) 58.

<sup>484</sup> 1979 Code of Conduct for Law Enforcement Officials, adopted by GA Res 34/169, 17 December 1979.

<sup>485</sup> 1982 Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by GA Res 37/194, 18 December 1982.

<sup>486</sup> 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by GA Res 43/173, 9 December 1988; 1990 Basic Principles for the Treatment of Prisoners, adopted by GA Res 45/111 of 14 December 1990; Office of the United Nations High Commissioner for Human Rights, ‘Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (United Nations 2004) (*Istanbul Protocol*)’. The UN established a Voluntary Fund for Victims of Torture in 1981, and the UN Human Rights Commission appointed the first Special Rapporteur for Torture in 1985: United Nations Human Rights Commission Res 1985/33. The Special Rapporteur submits an annual report on torture and cruel, inhuman or degrading treatment or punishment to the Commission.

<sup>487</sup> See, eg, Australia: Crimes (Torture) Act 1988 (Cth), s 2(1); Canada: Criminal Code, RSC 1985, c. C-46, s 269.1; Ireland: Criminal Justice (United Nations Convention Against Torture) Act, 2000, s 1; New Zealand: Crimes of Torture Act 1989, s 2(1); South Africa: The Prevention and Combating of Torture of Persons Act (2013), s 3; Sri Lanka: Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Act, No 22 of 1994; UK: Criminal Justice Act 1988, s 134; . Some states parties are yet to pass implementing legislation, such as: Pakistan (no specific criminal offence of torture); India: (a bill criminalising torture has been pending since 2010); Nepal (the Compensation Relating to Torture Act, 2053 (1996) only partially implements Nepal’s UNCAT obligations, since it provides for compensation for victims of torture but does not specifically criminalise not prosecution of perpetrators).

<sup>488</sup> There are some exceptions: see, eg, Armenia: Penal Code 2003, arts 390, 392 (although these provisions, which are contained in Chapter 33 ‘Crimes against Peace and Security’, refer to

law also implicitly follows a two-tiered structure, in that it tends to refer only to the apex prohibition on torture, leaving other forms of ill-treatment to be addressed through existing offences in the criminal calendar, such as malicious wounding or inflicting grievous bodily harm.<sup>489</sup> The absence of specific criminal offences identifying cruel, inhuman or degrading treatment in terms, together with the almost universal provision in domestic law for criminal offences of torture, supports the hierarchical characterisation of the prohibition on ill-treatment. This tiered structure of the prohibition of torture and other ill-treatment is now likely reflective of customary international law, and thus binding on all States, including those not a party to the CAT.<sup>490</sup>

### 3.7 Torture and other ill-treatment after CAT

As we have seen, the jurisprudence of the ECommHR and the ECtHR was critically important in the development of a hierarchical relationship between torture and other forms of ill-treatment, not only within the European Convention system, but also in the progressive development of general international law. That jurisprudence was referenced implicitly in the form of words adopted in the 1975 UN Declaration, and it was discussed explicitly during the drafting of the CAT in the late 1970s and early 1980s. The definition of torture that was adopted in Article 1(1) CAT would itself feed back into the case law of the European Convention system, and indeed into the Inter-American Convention system, as well as the nascent African human rights system.

The definition of torture in Article 1(1) of the CAT is among the convention's most significant features. It defines torture as including five elements: an intentional act; inflicting severe pain or suffering; for a purpose, such as extracting information or a confession; by or with the consent or acquiescence of a person acting in their official capacity; excluding lawful sanctions.<sup>491</sup> This does not purport to be comprehensive: Article 1(2) states that 'this article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider

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violations of international humanitarian law rather than proscriptions of general criminal law); Nepal: The Compensation Relating to Torture Act, 2053 (1996) defines torture in s 2 as 'physical or mental torture inflicted upon a person in detention in the course of an investigation, inquiry or trial or for any other reason and includes any cruel, inhuman and degrading treatment given to him/her'; Philippines: Anti-Torture Act of 2009, which offers a definition of CIDT in s 3(b) as follows: 'deliberate and aggravated treatment or punishment... inflicted by a person in authority or agent of a person in authority against a person under his/her custody, which attains a level of severity causing suffering, gross humiliation or debasement to the latter'.

<sup>489</sup> See, eg, Australia: Crimes Act 1900 (NSW), ss 33, 35; Pakistan: Penal Code, Act XLV of 1860, s 332; UK: Offences Against the Person Act 1861, ss 18, 20.

<sup>490</sup> Pursuant to the ICJ Statute, art 38(1)(b).

<sup>491</sup> CAT (n1) art 1(1). These elements are discussed in Chapter Four below.

application'.<sup>492</sup> However, it is plainly no longer open to states parties to define torture more narrowly than Article 1(1) CAT.

Despite the fact that Article 1(2) CAT contemplates the possibility of a wider definition of torture than that contained in Article 1(1), it appears to have had the effect of 'freezing' the interpretation of torture as understood and applied in international and regional courts and tribunals. Both the ECtHR and the Inter-American Court of Human Rights (*IACtHR*) interpret their founding documents using the 'living instrument' approach. This allows for evolution in the interpretation of their treaties, keeping pace with developments in society.

Notwithstanding this 'living instrument' interpretive approach, there has not been any significant evolution in the understanding of torture in the case law of either the ECtHR or the IACtHR since the CAT was concluded in 1984. In contrast, there has been more significant evolution in the understanding of the terms '[cruel,] inhuman or degrading treatment or punishment', in both jurisdictions, which evolution continues to the present day.

### 3.7.1 The European Convention on Human Rights

The ECtHR case law does not reflect any significant evolution in the definition of torture in the three decades since the CAT was concluded. The 1996 ECtHR judgment of *Selmouni v France* invoked Articles 1 and 16 of the CAT to buttress its conclusion that there was a moral and legal distinction between torture and other forms of ill-treatment.<sup>493</sup> That case concerned a particularly brutal beating of a Moroccan national by French police, with evidence of racial abuse and sexual assault. In labelling this treatment as torture, the ECtHR said that the 'increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches'.<sup>494</sup> As a result, the Court considered that 'certain acts which were classified in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in future'.<sup>495</sup>

Notwithstanding this statement, a review of the ECtHR's Article 3 jurisprudence shows that the label 'torture' is still only being applied in a very narrow range of factual scenarios. Cases where the ECtHR has found 'torture' include:

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<sup>492</sup> *ibid* art 1(2). The extent to which provisions in other treaties do in fact define torture in broader terms is considered in Chapters Four and Five below.

<sup>493</sup> *Selmouni v France* (2000) 29 EHRR 403, 441 [97]-[98].

<sup>494</sup> *ibid* [101].

<sup>495</sup> *ibid*.

- *Aydin v Turkey*, where the applicant was blindfolded, isolated, raped, stripped naked and swung around inside a tire with icy water fired at her under high pressure;<sup>496</sup>
- *Ilaşcu v Moldova and Russia*, where the applicants were unlawfully arrested, arbitrarily detained, subjected to mock executions, denied food for days at a time, and kept in a freezing cell with no light, heating or medical care;<sup>497</sup>
- *Virabayan v Armenia*, where the applicant was arrested, sworn at, kicked, punched, and finally beaten in the scrotum with a metal object to the extent that it had to be amputated.<sup>498</sup>

Cases in which the ECtHR has declined to find torture are equally illuminating as to the level of severity required to meet that threshold. In *Mahmut Kaya v Turkey*, the victim's body was found with marks from wire bound wrists and prolonged exposure of the feet to water or snow. The Court concluded that he had been subjected to inhuman and degrading treatment, but that the medical evidence was insufficient to show whether the treatment had reached the severity threshold for torture.<sup>499</sup>

In contrast, the ECtHR has applied a much more expansive interpretation to the concepts of inhuman or degrading treatment or punishment than it has applied to torture. Moreover, there is continuing support in the ECtHR case law for a hierarchical distinction between inhuman treatment or punishment on the one hand, and degrading treatment or punishment on the other. The latter concept, it will be remembered, is regarded as the bottom rung on the 'ladder of suffering' embodied in Article 3.<sup>500</sup>

Article 3 may be engaged in numerous ways, such as by the proportionality of sentences with underlying offences;<sup>501</sup> the legitimacy of solitary confinement;<sup>502</sup> or the unfairness of using shackles on a prisoner.<sup>503</sup>

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<sup>496</sup> *Aydin v Turkey* (1998) 25 EHRR 251 (GC); see also *Aksoy v Turkey* (1997) 23 EHRR 533.

<sup>497</sup> *Ilaşcu & Ors v Moldova and Russia* (2005) 40 EHRR 46 (GC).

<sup>498</sup> *Virabayan v Armenia*, App no 40094/05 (ECtHR, 2 October 2012) [157].

<sup>499</sup> *Mahmut Kaya v Turkey* (n393) [118]. The Court also referred to the absence of evidence of the purpose for which the ill-treatment was perpetrated as an obstacle to classifying the treatment as torture.

<sup>500</sup> Rodley and Pollard, *The Treatment of Prisoners under International Law* (n267) 107.

<sup>501</sup> See, eg, *Kafkaris v Cyprus* (2009) 49 EHRR 35 (GC); *Harkins and Edwards v United Kingdom* (2012) 55 EHRR 19; *Vinter & Ors v United Kingdom* (2016) 63 EHRR 1 (GC).

<sup>502</sup> See, eg, *Ramirez Sanchez v France* (2007) 45 EHRR 49 (GC); *Babar Ahmad v United Kingdom* (2013) 56 EHRR 1.

<sup>503</sup> See, eg, *Raninen v Finland* (1998) 26 EHRR 563; *Herczegfalvy v Austria* (1993) 15 EHRR 437; *Henaf v France* (2005) 40 EHRR 44.

The ECtHR has also held that Article 3 could, in principle, apply to more non-conventional complaints, such as the suffering occasioned to a homeless man by his release from prison;<sup>504</sup> to the 'level of financial benefits available under a social assistance scheme'<sup>505</sup> and the extremity of material poverty;<sup>506</sup> to the unreasonable repeated refusal of authorities to provide tests for foetal abnormality to a pregnant woman within the window for a legal abortion;<sup>507</sup> the failure of doctors to obtain informed consent to a sterilisation procedure;<sup>508</sup> 'the absence of an adequate supply of toilet paper in a prison';<sup>509</sup> the forced shaving of a prisoner's head;<sup>510</sup> and to living conditions in a social care home.<sup>511</sup> The second tier of Article 3—inhuman or degrading treatment or punishment—now embodies a cluster of rights and obligations, including both positive duties and negative restraints.

Perhaps the clearest evidence of the expansive approach to the interpretation of inhuman or degrading treatment or punishment appears in *Bouyid v Belgium*.<sup>512</sup> In older cases such as *Ribitsch v Austria* and *Raninen v Finland*, the ECtHR established that for persons deprived of their liberty, any recourse to force which is not made strictly necessary by the prisoner's own conduct

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<sup>504</sup> In *O'Rourke v United Kingdom* App no 39022/97 (ECtHR, 26 June 2001) (Admissibility) [2], where the Court said that the level of suffering experienced by the applicant did not reach 'the requisite level of severity to engage Article 3'. Even had it done so, the authorities had done enough to discharge their responsibility by making arrangements for temporary housing so that '[t]he applicant was therefore largely responsible for his own deterioration following his eviction'.

<sup>505</sup> *Larioshina v Russia*, App no 56869/00 (ECtHR, 25 June 1999) (Admissibility). See also *Budina v Russia*, App no 45603/05 (ECtHR, 18 June 2009) (Admissibility) 5-6, where the applicant complained under art 2 that the amount of her pension was so low that she was unable to live. The ECtHR considered her complaint under art 3, and did not 'exclude that State responsibility could arise for "treatment" where an applicant, in circumstances wholly dependent upon state support, found herself faced with official indifference when in a situation of serious deprivation or want incompatible with human dignity'.

<sup>506</sup> In *MSS v Belgium and Greece* (2011) 53 EHRR 2 (GC) [262] the Court held that the applicant's extreme poverty as an asylum seeker in Greece, with no access to housing or sanitation and constant fear of robbery and violence was degrading, especially when considered in light of the prolonged uncertainty and lack of prospects for future change.

<sup>507</sup> *RR v Poland* (2011) 53 EHRR 31.

<sup>508</sup> *VC v Slovakia* App no 18968/07 (ECtHR, 8 November 2011).

<sup>509</sup> *Valasinas v Lithuania* App no 44558/98 (ECtHR, 24 July 2001).

<sup>510</sup> In *Yankov v Bulgaria* (2005) 40 EHRR 36, [112] the Court appeared to base its finding of degrading treatment on the 'forced change of the person's appearance by the removal of his hair' causing 'a feeling of inferiority'. While the suggestion that head shaving without more could be regarded as degrading is questionable, in fact there was other evidence of poor detention conditions, such as the lack of light, unsanitary toilet facilities, the tiny cell and the lack of medical treatment for thrombosis which he sustained in prison. The Court was arguably influenced by these factors, as well as the fact that he was detained in breach of art 5, in reaching its finding that the treatment was degrading. It is unfortunate that the judgment disproportionately emphasised the head-shaving.

<sup>511</sup> *Stanev v Bulgaria* (2012) 55 EHRR 22 (GC).

<sup>512</sup> *Bouyid v Belgium* (2016) 62 EHRR 32 (GC).

diminishes human dignity and is, in principle, a violation of Article 3.<sup>513</sup> And yet, the early decisions of the ECommHR in cases such as *Zeidler-Kornmann* and the *Greek Case* had identified an intermediate category of rough treatment, which might be unlawful under domestic law but would not necessarily rise to the minimum level of severity to engage Article 3.<sup>514</sup> However, in the recent decision in *Bouyid v Belgium*, the Grand Chamber of the ECtHR held that a single slap in the face of a juvenile in police custody was capable of constituting degrading treatment.<sup>515</sup> In reaching that decision, the Grand Chamber overturned the unanimous judgment of the Chamber, which had rejected the claim in a passage that bears repeating in full:

‘Even supposing that the slapping took place, in both cases it was **an isolated slap inflicted thoughtlessly** by a police officer who was exasperated by the applicants’ disrespectful or provocative conduct, without seeking to make them confess. Moreover, there was apparently an atmosphere of tension between the members of the applicants’ family and police officers in their neighbourhood. In those circumstances, even though one of the applicants was only 17 at the time and whilst it is comprehensible that, if the events really took place as the applicants described, they must have felt deep resentment, the Court cannot ignore the fact that these were one-off occurrences in a situation of nervous tension and without any serious or long-term effect. It takes the view that **acts of this type, though unacceptable, cannot be regarded as generating a sufficient degree of humiliation or debasement for a breach of Article 3** of the Convention to be established. In other words, in any event, the above-mentioned threshold of severity has not been reached in the present case, such that no question of a violation of that provision, under either its substantive or its procedural head, arises’.<sup>516</sup>

Although Judge Power-Fforde wrote separately to express his ‘hesitation and doubt’ regarding the Chamber judgment, he too agreed that ‘not every slap will reach the threshold for a violation of Article 3 to be found’.<sup>517</sup>

By a majority of 14 votes to three, the Grand Chamber in *Bouyid* overturned this result. Stating that ‘any interference with human dignity strikes at the very essence of the Convention’, the Grand Chamber held that ‘any conduct by law-enforcement officers vis-à-vis an individual which diminishes human dignity constitutes a violation of Article 3 of the Convention’.<sup>518</sup> This is so even where the conduct consists of ‘one unpremeditated slap devoid of any serious or long-term effect on the person receiving it’.<sup>519</sup> While it was relevant that one of the applicants was a minor, aged 17 years old, at the time of the incident, the Grand Chamber regarded this as ‘a secondary consideration’.<sup>520</sup> More significant was the fact that ‘a slap to the face affects the part of the

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<sup>513</sup> *Ribitsch v Austria* (1996) 21 EHRR 573; *Raninen v Finland* (n503).

<sup>514</sup> See discussion in Chapter Two above.

<sup>515</sup> *Bouyid v Belgium* (n512).

<sup>516</sup> *ibid* [51] (the Court) (emphasis added).

<sup>517</sup> *ibid* (Concurring Opinion of Judge Power-Fforde).

<sup>518</sup> *ibid* [101].

<sup>519</sup> *ibid* [105].

<sup>520</sup> *ibid* [109].

person's body which expresses his individuality, manifests his social identity and constitutes the centre of his senses—sight, speech and hearing—which are used for communication with others'.<sup>521</sup> Also significant was the relationship of 'superiority and inferiority' that characterises the dynamic between law-enforcement officers and persons under their control.<sup>522</sup>

Three judges dissented on this finding, seeking to preserve a role for what was described above an intermediate category of rough treatment. The joint partly dissenting opinion of Judges De Gaetano, Lemmens and Mahoney stressed that while 'police officers who needlessly strike an individual under their control are committing a breach of professional ethics', as well as an act that could be both tortious and criminal in nature,<sup>523</sup> they were 'unable to find that it attained the minimum level of severity to be classified as "degrading treatment" within the meaning of Article 3 of the Convention'.<sup>524</sup> They considered the majority's conclusion may risk 'trivialising findings of a violation of Article 3'.<sup>525</sup> This has been a continuing concern of dissenting judges through the ages.<sup>526</sup>

After *Bouyid*, then, at least in respect of persons deprived of their liberty, there is no longer an intermediate category of so-called 'rough treatment' that may be domestically unlawful while falling shy of the threshold set by Article 3 of the European Convention on Human Rights. Conduct that the ECommHR had described as mere 'rough handling' in *Zeidler-Kornmann* is now to be regarded as violating Article 3.<sup>527</sup>

### 3.7.2 The Inter-American Court of Human Rights

Like the ECtHR, the IACtHR has continued to insist on a narrow definition of torture, with a high threshold of suffering, while applying a more expansive approach to the concepts of cruel, inhuman or degrading treatment or punishment. The prohibition on torture and ill-treatment derives from Article 5 of the American Convention on Human Rights, and is supplemented by the 1985 Inter-American Convention to Prevent and Punish Torture (*Inter-American Torture Convention*).<sup>528</sup> The latter instrument echoes the structure of the CAT in failing to define cruel, inhuman or degrading

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<sup>521</sup> *ibid* [104].

<sup>522</sup> *ibid* [106]. This echoed the reasoning in *Tyrer v UK* (ECtHR) (n400) regarding the degradation inherent in institutionalised forms of ill-treatment.

<sup>523</sup> *ibid* 38 [3] (Joint Partly Dissenting Opinion of Judges De Gaetano, Lemmens and Mahoney).

<sup>524</sup> *ibid* 40 [6] (Joint Partly Dissenting Opinion of Judges De Gaetano, Lemmens and Mahoney).

<sup>525</sup> *ibid* 41 [7] (Joint Partly Dissenting Opinion of Judges De Gaetano, Lemmens and Mahoney).

<sup>526</sup> See *Ireland v UK* (ECtHR) (n241) (Dissenting Opinion of Judge Fitzmaurice); *Tyrer v UK* (ECtHR) (n400) (Dissenting Opinion of Judge Fitzmaurice).

<sup>527</sup> See *Zeidler-Kornmann (Merits)* (n263) 93.

<sup>528</sup> Inter-American Convention to Prevent and Punish Torture, OAS TS 67 (adopted December 9, 1985, entered into force 28 February 1987) (*Inter-American Torture Convention*).

treatment or punishment, and in creating a bifurcated regime of State obligations, the more onerous of which apply only to torture.

We have seen above that the ECtHR conceives of the prohibition of torture and ill-treatment as a hierarchical prohibition which may be broken down into three tiers. Torture is at the apex, followed by inhuman treatment or punishment, followed by degrading treatment or punishment. The Inter-American system similarly comprises three tiers, conceiving of torture as the gravest form of violation. However, the IACtHR has not drawn a hierarchical distinction between inhuman treatment or punishment and degrading treatment or punishment. Rather, the IACtHR's jurisprudence considers and applies those concepts collectively.<sup>529</sup> The third tier of the hierarchy is occupied by the right to humane treatment, named as such in the chapeau to Article 5 of the American Convention on Human Rights, and embodied in Articles 5(1), which provides that 'every person has the right to have his physical, mental and moral integrity respected', and 5(2), which provides that 'All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person'. The existence of these broader provisions has rendered it unnecessary for the Inter-American Court to stretch the contours of the concept of cruel, inhuman or degrading treatment to the same extent as has the ECtHR, where no such broader right to humane treatment, or treatment in accordance with human dignity, is expressly present in the text.

As such, the IACtHR has held that 'prolonged and coercive isolation is, by nature, cruel and inhuman treatment',<sup>530</sup> and that the suffering of relatives of disappeared persons can be considered cruel, inhuman or degrading treatment.<sup>531</sup> However, in cases such as *Castillo-Páez v Peru*, the IACtHR held that transporting a detained person in the trunk of an official vehicle is simply 'an infringement of Article 5 of the Convention relating to humane treatment, inasmuch as, even if no other physical or other maltreatment occurred, that action alone must clearly be considered to contravene the respect due to the inherent dignity of the person'.<sup>532</sup> Had similar facts

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<sup>529</sup> For discussion, see Burgorgue-Larsen L and Úbeda de Torres A, *The Inter-American Court of Human Rights: Case-Law and Commentary* (OUP 2011) chapter 15.

<sup>530</sup> *Fairén-Garbi and Solís-Corrales v Honduras*, Judgment of March 15, 1989, Merits, IACHR Series C No 6, IHRL 1387, [146]; *Godínez Cruz v Honduras*, Judgment of January 20, 1989, Merits, IACHR Series C No 5, IHRL 1386 [197].

<sup>531</sup> *Case of the Gómez Paquiyauri Brothers v Peru*, Judgment of July 8, 2004, Merits, Reparations and Costs, IACHR Series C No 110, IHRL 1492, [118]-[119]; *Case of Vargas Areco v Paraguay*, Judgment of September 26, 2006, Merits, Reparations and Costs, IACHR Series C No 155, IHRL 1539, [95]-[96].

<sup>532</sup> *Case of Castillo Páez v Peru (Merits)*, Judgment of November 3, 1997, IACHR Series C No 34, IHRL 1417 (IACtHR), [66].

been subject to proceedings in the European Convention system, it is likely that the ECtHR would have classified this as degrading treatment.<sup>533</sup>

Indeed, it has been contended that the American Convention on Human Rights Article 5 right to humane treatment contains an obligation 'to do nothing, in principle, which might prevent people from living their lives as they wish, as responsible individuals'.<sup>534</sup> On that view, Article 5 embodies a positive right to personal autonomy.<sup>535</sup> Although this approach in relation to autonomy has not, to date, been embraced by the Inter-American Court, it is arguable that the jurisprudence is moving in that direction.<sup>536</sup>

The relative stasis in the understanding of torture in the Inter-American system is underlined by the definition of torture in Article 2 of the Inter-American Torture Convention as follows:

'For the purposes of this Convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.

The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this Article'.<sup>537</sup>

This definition of torture was incorporated into the IACtHR's interpretation of the prohibition in Article 5(2) of the American Convention on Human Rights.<sup>538</sup> It differs from the definition in CAT Article 1(2) in three main respects. First, there is no 'state nexus' requirement, as appears in the phrase 'by or with the consent or acquiescence of a public official or other person acting in an official capacity' in Article 1(2) CAT. However, Article 3 of the Inter-American Torture Convention provides that 'the following shall be guilty of the crime of torture', and then proceeds to list two categories of persons, both of which carry a nexus with the state. Those categories are:

'a. A public servant or employee who acting in that capacity orders, instigates or induces the use of torture, or who directly commits it or who, being able to prevent it, fails to do so.

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<sup>533</sup> See, eg, *Svinarenko and Slyadnev v Russia*, Apps no 32541/08 & 43441/08 (ECtHR, July 17, 2014), where the ECtHR held that keeping the applicants in a metal cage during the trial of criminal charges against them amounted to degrading treatment.

<sup>534</sup> See Burgorgue-Larsen and Úbeda de Torres (n529) 370, [15/03] (discussing the extra-judicial writings of Judge Cecilia Medina Quiroga). See also Medina Quiroga C, *The American Convention on Human Rights* (Intersentia 2014).

<sup>535</sup> *ibid.*

<sup>536</sup> See Burgorgue-Larsen and Úbeda de Torres (n529) [15.03].

<sup>537</sup> Inter-American Torture Convention (n528) art 2.

<sup>538</sup> See, eg, *Case of Tibi v Ecuador* (n23) [139], [145] (the Court).

b. A person who at the instigation of a public servant or employee mentioned in subparagraph (a) orders, instigates or induces the use of torture, directly commits it or is an accomplice thereto'.<sup>539</sup>

On its face, Article 3 of the Inter-American Torture Convention does not exclude the possibility that non-state actors could also be guilty of the crime of torture. The wording of the section does not imply that *only* categories (a) and (b) shall be guilty of the crime of torture. Moreover, the objective of the treaty is different to many other human rights treaties, in that it creates obligations for states to render certain conduct criminal as a matter of domestic law. It does not necessarily follow that only acts of torture committed in circumstances where there is a nexus with the state may be subject to claims in human rights or (say) the law of tort.

The second difference between the definition of torture in the Inter-American Torture Convention and that in CAT is the addition of a clause expressly confirming that torture extends to 'the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or moral capacities'.<sup>540</sup> Such techniques will be regarded as torture 'even if they do not cause physical pain or mental anguish'.

The third respect in which Article 2 of the Inter-American Torture Convention departs from Article 1(1) CAT is that the former refers to 'physical or mental suffering' without the adjective 'severe'. In principle, this suggests that there could be a lower threshold for ill-treatment to constitute torture under the Inter-American system than under the CAT. However, the Inter-American Court has consistently read a severity requirement into that Article.<sup>541</sup>

Additionally, the IACtHR has cited the ECtHR decision in *Selmouni* as authority for the proposition that the threshold between torture and cruel, inhuman or degrading treatment can be expected to change over time.<sup>542</sup> The Inter-American Court observed that 'the growing demand for the protection of fundamental rights and freedoms must be accompanied by a more vigorous response in dealing with infractions of the basic values of democratic societies'.<sup>543</sup>

In practice, however, pursuit of these avenues for a more expansive interpretation of the definition of torture in the Inter-American system have not yielded fruit. The IACtHR has cited the definition of torture in Article 1(1) CAT in its case law, interpreting torture as requiring 'severe' suffering,

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<sup>539</sup> Inter-American Torture Convention (n528) art 3.

<sup>540</sup> *ibid* art 2.

<sup>541</sup> See, eg, *Case of Cantoral Benavides v Peru (Merits)* Judgment of 18 August 2000, IACHR Series C No 69, [100].

<sup>542</sup> *ibid* [99], citing *Selmouni v France* (n493) [101].

<sup>543</sup> *ibid*.

whether physical or mental.<sup>544</sup> Moreover, the Court has stressed the involvement of state officials in the cases in which findings of torture have been made.<sup>545</sup> In the more recent case of *Bueno Alves v Argentina*, the IACtHR listed the elements of the definition of torture as threefold: 'a) an intentional act; b) which causes severe physical or mental suffering, c) committed with a given purpose or aim'.<sup>546</sup> This may be read as suggesting that there is no longer a state nexus requirement for torture as defined in the Inter-American system. However, that conclusion would be hasty: *Bueno Alves* itself concerned torture inflicted by police officers, and there have been no cases since in which it has conclusively been held that an act of torture was committed by a non-state actor.<sup>547</sup>

Arguably the closest the IACtHR has come to expressly embracing that position was in the 2009 judgment in *The Cotton Field Case*.<sup>548</sup> The case concerned the abduction, torture and murder of three women whose bodies were found in a Mexican cotton field. The judgment of the IACtHR stopped short of finding that the women had been subjected to torture, because the identity of the perpetrators—whether State or private actors—was unknown.<sup>549</sup> Rather than a violation of the negative obligation, Mexico was responsible for violations of its *positive* obligation to guarantee freedom from torture and ill-treatment under Article 5 of the American Convention on Human Rights.<sup>550</sup> Judge Quiroga, in dissent, considered that 'the three victims suffered serious physical injuries and very probably some type of sexual abuse before they died... therefore the facts should be considered acts of torture'.<sup>551</sup> Judge Quiroga urged the IACtHR to define torture in broader terms than those set out in CAT Article 1(1) or in the Inter-American Torture Convention, arguing that the Court 'does not need to incorporate the participation, by act or omission, of a public official as an element of the concept of torture'.<sup>552</sup> However, this position has not yet been adopted by a majority of the IACtHR.

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<sup>544</sup> See, eg, *Case of Caesar v Trinidad and Tobago (Merits, Reparations and Costs)* Judgment of 11 March 2005, IACHR Series C no 123, 6 [20]; *Tibi v Ecuador* (n23) [139].

<sup>545</sup> See, eg, *Tibi v Ecuador* (n23) [149]; *Godínez Cruz v Honduras* (n530) [192]; *Case of Villagrán-Morales v Guatemala (Merits)*, Judgment of 19 November 1999, IACHR Series C No 63, IHRL 1446 (IACtHR) ('*The Street Children Case*') [157], [169].

<sup>546</sup> *Case of Bueno Alves v Argentina (Merits, Reparations and Costs)* Judgment of May 11, 2007, IACHR Series C No 164, IHRL 3038 (IACtHR) [79].

<sup>547</sup> See also *The Street Children Case* (n545) concerning torture and murder of street children by Guatemalan security forces.

<sup>548</sup> *Case of González et al v Mexico (Preliminary Objection, Merits, Reparations and Costs)* Judgment of 16 November 2009, IACHR Series C No 205 ('*Cotton Field Case*').

<sup>549</sup> *ibid* [242] (the Court).

<sup>550</sup> *ibid* [286] (the Court).

<sup>551</sup> *ibid* [8] (Separate opinion of Judge Cecilia Medina Quiroga).

<sup>552</sup> *ibid* [17] (Separate opinion of Judge Cecilia Medina Quiroga).

Thus, although there is scope for a more liberal approach to the definition of torture in both the European Convention and the Inter-American Convention systems, that possibility has not yet been realised. The ECtHR and the IACtHR have both taken cautious steps towards expanding their respective concepts of torture, holding that a threat of torture may be capable of amounting to torture,<sup>553</sup> and that acts of rape can constitute torture.<sup>554</sup> Both courts have also developed mechanisms to ease the process through which a finding of torture may be made, such as shifting the burden of proof to the respondent state to show that injuries sustained during a period of custody were *not* inflicted by state officials.<sup>555</sup> This reflects the fact that evidence of how the injuries were sustained often cannot be obtained without cooperation by the respondent state.<sup>556</sup>

The result is not only a strongly hierarchical conception of the relationship between torture and other prohibited ill-treatment, but also effectively a two-tiered interpretive approach. The concept of torture is relatively unchanged since 1984, standing in sharp contrast to the dynamic and flexible concepts of cruel, inhuman or degrading treatment or punishment.

### 3.8 Conclusion

Today, torture has become ‘a word with [such] immense ethical, political and cultural power’ that it is seen as symbolising ‘all that is wrong with arbitrary and excessive power’.<sup>557</sup> However, as we saw in Chapter One, it has not always been regarded as such. The prohibitions on torture and cruel, inhuman or degrading treatment or punishment enacted in various instruments after World War II were the product of two parallel but distinct historical trends: first, the transition away from judicial torture and towards its abolition and criminal proscription; and second, a shift away from the imposition of barbarous criminal sentences.

This chapter has sought to explain how the transition to torture as a *jus cogens* norm of international law and a paradigm moral wrong came about. It identified a period of time from the late 1960s to the early 1980s as instrumental in that shift. The early case law of the ECommHR was ambivalent as to whether the relationship between torture and ill-treatment should be understood

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<sup>553</sup> *Cantoral Benavides v Peru* (n541) [102]; *Gäfgen v Germany* (n278) [108] (‘in particular, the fear of physical torture may itself constitute mental torture’).

<sup>554</sup> *Aydin v Turkey* (n496) [83]. Note that in *Case of Loayza Tamayo v Peru (Merits)* Judgment of 17 September 1997, IACHR Series C No 33, the allegation of rape was not substantiated, but the Inter-American Commission on Human Rights has found that rape is a form of torture in *Raquel Martí de Mejía v Peru*, Case 10970, Report No 5/96, March 1, 1996, Inter-Am Comm HR.

<sup>555</sup> In the European Convention system, see, eg, *Salman v Turkey* (2002) 34 EHRR 17 (GC); *Rivas v France*, App no 59584/00 (ECtHR April 1, 2004); *Nevmerzhitsky v Ukraine* (2006) 43 EHRR 32. In the Inter-American system, see, eg, *The Street Children Case* (n545) [170].

<sup>556</sup> See, eg, *Case of Velásquez-Rodríguez v Honduras (Merits)* Judgment of 29 July 1988, IACHR Series C No 4, [135].

<sup>557</sup> Kelly, *This Side of Silence* (n10) 3.

as hierarchical. On the one hand, the ECommHR repeatedly defined the terms ‘torture’ and ‘inhuman’ and ‘degrading’ treatment or punishment, and described torture as ‘an aggravated form of inhuman treatment’. On the other hand, the qualitative differences between the concepts was not necessarily indicative of a different level of gravity or stigma—as demonstrated in the ECommHR’s treatment of Article 3 as a cohesive whole, despite recognition of these differences. Similarly, the 1975 UN Declaration adopted some features of the hierarchical approach—describing torture as an aggravated form of inhuman treatment—but in other respects the Declaration emphasises the commonality between them.

The turning point came with the case of *Ireland v UK*, where a majority of the ECommHR and then the ECtHR held that a distinction in gravity and in stigma applied to torture, over and above inhuman and degrading treatment or punishment. That distinction—though supported by specious reasoning in the case at hand—was adopted and extended in the CAT. The decision to define torture narrowly in Article 1(1) CAT, while consigning the undefined terms ‘cruel, inhuman and degrading treatment or punishment’ to Article 16, would have monumental consequences.

The final part of this chapter considered the developments since the CAT was concluded in 1984, as to how torture and other forms of ill-treatment are understood in the jurisprudence of the ECtHR and the IACtHR. It argued that there has been a surprising consequence of the definition of torture in the CAT: notwithstanding Article 1(2), which provides that the definition is “without prejudice” to broader definitions of torture in other jurisdictions, the understanding of torture has essentially been frozen in time in 1984. In contrast, the ECtHR and IACtHR have applied a more expansive interpretive approach to the concept of inhuman or degrading treatment or punishment in the former court, and the right to humane treatment in the latter.

Torture was defined by the ECommHR in *The Greek Case* as ‘generally an aggravated form of inhuman treatment’ done with ‘a purpose, such as the obtaining of information or confessions, or the infliction of punishment’.<sup>558</sup> That statement was later reproduced in the 1975 UN Declaration, but omitting the qualifier ‘generally’,<sup>559</sup> reinforcing a perceived distinction in gravity between the terms. Notably, the concept of ‘inhuman treatment’ was at the centre of the definition in *The Greek Case*—just as, in both the London Charter at Nuremberg and the Geneva Conventions, the concept of ‘inhumane acts’ had assumed central importance. Torture and degrading treatment were understood by reference to the relation they bore to inhuman treatment or inhumane acts.

At that stage, no legal consequences followed from the distinction between torture and other prohibited ill-treatment. Although it defined the concepts separately, the ECommHR in *The Greek*

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<sup>558</sup> *The Greek Case* (n264) 186.

<sup>559</sup> 1975 UN Declaration (n329) art 1(2).

*Case* grouped them together both in its reasoning and its result, finding that ‘torture and ill-treatment’ had been committed.<sup>560</sup> In contrast, the ECommHR in *Ireland* severed the concepts in its reasoning, but not in the result. And finally, the ECtHR in *Ireland* severed torture from ill-treatment, both in its reasoning and the result. The hierarchy was complete.

The consequences of the severance in *Ireland* were primarily moral and reputational, though with the diffusion and extension of hierarchy, legal consequences would ultimately attach in the CAT. Commentators at the time harboured suspicions that the ECtHR, fresh from a long period of ‘judicial diplomacy’ and anxious to establish the support of member states, had simply shied away from labelling the UK a torturer. But what began as a reputational matter would soon crystallise into differential legal obligations, first for the international community in the form of the 1975 UN Declaration and the CAT, and later, as the case law filtered through, for regional human rights systems and international criminal law.

The result of these developments was the creation of three important thresholds. In the ECtHR, they are the minimum level of severity to engage Article 3, the distinction between ‘degrading’ and ‘inhuman’ treatment, and the threshold separating torture from them both. The CAT did not adopt the third tier of ECtHR case law, namely that of ‘degrading’ treatment or punishment. Rather, it grouped cruel, inhuman and degrading treatment or punishment together; an approach also adopted by the IACtHR. In the latter’s case law, the three thresholds arise from the right to humane treatment in the American Convention on Human Rights. Treatment may be incompatible with the dignity of the subject (the first threshold); it may be inhuman, cruel, or degrading (the second threshold); or it may amount to torture (the final threshold). The distinction in gravity between torture and other forms of treatment, and its theoretical justification, forms the subject of the next chapter.

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<sup>560</sup> *The Greek Case* (n264) 503-505.

# Chapter Three: What's Wrong with Torture?

## 4.1 Introduction

We saw in the previous chapter how it was that a hierarchy between torture and other forms of ill-treatment came to be established. We saw too that torture is positioned at the apex of that hierarchy, and has become a symbol of oppression and arbitrary power. Torture now attracts a 'special stigma'.<sup>561</sup> The prohibition of torture is a *jus cogens* norm, or a rule from which no derogation may be permitted in international law. In domestic systems too, the prohibition of torture has been described as a 'legal archetype', occupying a foundational place in the rule of law, and reflecting the commitment of the law to non-brutality.<sup>562</sup> Torture has become 'the paradigm of moral wrong'.<sup>563</sup> This raises the important question, forming the subject of this chapter, on what basis is torture morally wrong?

All accounts of the moral wrong of torture agree that the deliberate infliction of severe pain or suffering is an element of torture.<sup>564</sup> As Simon explains, 'the infliction of pain lies at the heart of the wrongfulness of torture'.<sup>565</sup> These accounts are equally agreed that, although it is *necessary*, the deliberate infliction of severe pain or suffering is not *sufficient* to constitute torture.<sup>566</sup> If that feature alone were sufficient, then virtually all forms of intentionally inflicted physical and mental injury would fall within the concept of torture, provided the severity requirement was satisfied. And yet most people—and philosophers—would accept that torture requires something more. It is the nature of this further, additional feature, as to which philosophers and lawyers continue to disagree.

There are two predominant accounts of why torture is wrong.

- The first account, described here as '*dignitarian*', is that torture is wrong because it uses the victim as a mere means to other ends, rather than treating that person as an end in herself.

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<sup>561</sup> *Ireland v UK* (ECtHR) (n241) [167].

<sup>562</sup> Waldron J, 'Torture and Positive Law: Jurisprudence for the White House' (2005) 105 *Columbia Law Review* 1681.

<sup>563</sup> Bernstein (n82) 8.

<sup>564</sup> See, eg, Kramer (n18); Luban, 'Human Dignity, Humiliation, and Torture' (n11); Shue, 'Torture' (n25); Miller S, 'Torture' (2011) in Zalta E (ed), *Stanford Encyclopedia of Philosophy* (Summer 2015 edition) available at <<http://plato.stanford.edu/archives/sum2015/entries/torture/>> accessed 7 August 2015.

<sup>565</sup> Simon (n336) 57.

<sup>566</sup> *ibid.*

- The second account, described here as the ‘*defencelessness*’ account, is that torture is wrong because it is deliberate cruelty inflicted in the context of a relationship of defencelessness on the one hand, and power or control on the other.

These accounts are considered in turn below.

## 4.2 The dignitarian account of the moral wrong of torture

The prohibition of torture and ill-treatment is often described as a reflection of the value placed on human dignity. We saw in Chapter Two that as early as 1978 in the case of *Tyrer v UK*, the ECtHR referred to human dignity in interpreting the terms of the prohibition on inhuman or degrading punishment in Article 3 of the European Convention on Human Rights.<sup>567</sup> More recently, in *Bouyid v Belgium*, the Grand Chamber of the ECtHR extrapolated at length on the expression of human dignity in international instruments and domestic legislation, before concluding that ‘the prohibition of torture and inhuman or degrading treatment or punishment is a value of civilisation closely bound up with respect for human dignity’.<sup>568</sup> Outside the European Convention system, the link between human dignity and the prohibition of ill-treatment is made explicit in the references to human dignity in Article 5(2) of the American Convention on Human Rights, and in Article 5 of the African Charter of Human and Peoples’ Rights. In addition, in the decisions in the domestic courts of treaty signatories, ‘dignity-talk’ proliferates.<sup>569</sup>

Notwithstanding this, and despite the widespread and varied legal and philosophical literature on human dignity, the nature and meaning of the concept of dignity remains elusive. In her recent study of human dignity in the European constitutional order, Dupré explains that in spite of its ‘normative prominence’, ‘the precise meaning of human dignity and its full significance... remain to be clarified’.<sup>570</sup>

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<sup>567</sup> *Tyrer v UK* (ECtHR) (n400) 13 [33] (the Court).

<sup>568</sup> *Bouyid v Belgium* (n512) 23 [81] (the Court).

<sup>569</sup> See McCrudden C, ‘Human Dignity and Judicial Interpretation of Human Rights’ (2008) 19 *European Journal of International Law* 655; McCrudden C, ‘In Pursuit of Human Dignity: An Introduction to Current Debates’, in McCrudden C (ed), *Understanding Human Dignity* (OUP 2013) 1-59; Brownsword R, ‘Human Dignity from a Legal Perspective’, in Düwell M and others (eds), *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (CUP 2014) 1-22.

<sup>570</sup> Dupré C, *The Age of Dignity: Human Rights and Constitutionalism in Europe* (Hart 2015) 3. Dupré is referring here to the significance of human dignity for European constitutionalism specifically, but the statement is more generally applicable.

### 4.2.1 Kant on human dignity

Despite this contestation, for many proponents of human dignity, the work of Kant provides a starting point.<sup>571</sup> According to Kant, human dignity is founded on man's capacity for rational thought, which is in turn the basis of autonomy.<sup>572</sup> Rationality allows for the possibility of moral thought, such that man's nature 'obeys no law other than that which at the same time it itself gives'.<sup>573</sup> As such, 'humanity, insofar as it is capable of morality, is that which alone has dignity'.<sup>574</sup> For this reason, rational nature 'exists as an end in itself',<sup>575</sup> is 'raised above all price and admits of no equivalent',<sup>576</sup> and 'no other end can be set in place of it'.<sup>577</sup> This yielded what Kant termed the 'practical imperative': 'act so that you use humanity, as much in your own person as in the person of every other, always at the same time as an end and never merely as means'.<sup>578</sup>

The imperative to treat people as ends in themselves, rather than using them as mere means to other ends—the prohibition on instrumentalisation—has become a common shorthand expression for the Kantian conception of dignity. It is this Kantian philosophy of the pre-eminence of human dignity, and the related prohibition upon using people as mere means to other ends, that is referred to here as the dignitarian account of torture's moral wrong.

The Kantian account of human dignity has a straightforward application to torture. Put simply: torture is wrong because it is the subversion of the will of the subject to serve the purpose of the torturer. Indeed, this is the predominant account of the moral wrong of torture in the legal literature,<sup>579</sup> and it is arguably implicit in many judicial decisions on torture and other forms of ill-treatment. In the 1972 judgment in *Furman v Georgia*, in which a majority of the United States Supreme Court struck down the death penalty as applied to the applicant as incompatible with the Eighth Amendment's 'cruel and unusual punishment' clause, Justice Brennan said:

When we consider why [some punishments] have been condemned, however, we realise that the pain involved is not the only reason. The true significance of these punishments is that they treat members of the human race as nonhumans, **as objects to be toyed with and discarded**. They are thus inconsistent with the fundamental premise of the [cruel and unusual punishment] Clause that **even the vilest criminal remains a human being possessed of common human dignity**.<sup>580</sup>

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<sup>571</sup> See, eg, Hill TE, 'Kantian Perspectives on Human Dignity', in Düwell M and others (eds), *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (CUP 2014) 215-221.

<sup>572</sup> Kant (n34) 4:436, 48.

<sup>573</sup> *ibid* 4:434, *ibid* 46.

<sup>574</sup> *ibid* 4:435, *ibid* 47.

<sup>575</sup> *ibid* 4:429, *ibid* 41.

<sup>576</sup> *ibid* 4:435, *ibid* 46.

<sup>577</sup> *ibid* 4:428, *ibid* 40.

<sup>578</sup> *ibid* 4:429, *ibid* 46-47.

<sup>579</sup> see, eg, Rodley and Pollard, *The Treatment of Prisoners under International Law* (n267) 15.

<sup>580</sup> *Furman v Georgia* [1972] USSC 170; 408 US 238, 272-273 (Justice Brennan) (emphasis added).

Similarly in *Tyrer v UK* in 1978, a majority of the ECtHR said that judicial corporal punishment on the Isle of Man reduced the applicant to ‘an object in the power of the authorities’.<sup>581</sup> His punishment by birching was ‘an assault on precisely that which it is one of the main purposes of Article 3 [of the European Convention on Human Rights] to protect, namely a person’s dignity and physical integrity’.<sup>582</sup>

While many moral wrongs involve the subversion of the subject’s will, torture may be regarded as a particularly egregious wrong on the Kantian account. There are at least three ways that dignitarians may distinguish torture as a unique or special moral wrong. These are:

- Torture as a paradigm case of instrumentalisation;
- Torture as an attack on autonomy; and
- Torture as forced self-betrayal.

#### *4.2.1.1 Torture as a paradigm case of instrumentalisation*

Dignitarians could argue that torture is uniquely or especially wrong because it presents a paradigm case of instrumentalisation. The victim of torture is reduced to a tool at the disposal of the torturer; she is no longer a thinking, autonomous being possessed of human dignity and worthy of respect. As Miller explains, ‘the victim’s body and attendant physical sensations cease to be his own instrument, but rather have become the instrument of the torturer’.<sup>583</sup> While there are many other wrongs that involve using a person as mere means, surely few are as extreme as torture.

The two wrongs that are often compared to torture as paradigmatic examples of instrumentalisation are slavery and rape. In a recent philosophical study, Bernstein contends that torture and rape are paradigm cases of moral injury.<sup>584</sup> And slavery, like torture, treats human beings ‘as objects, as property to be bought, sold, or exchanged like any other commodity’.<sup>585</sup> The slave is valuable precisely because she is ‘*both* able to be held responsible’, as an autonomous human being, *and* because she ‘has no escape from, or redress against ... [her] oppressor’.<sup>586</sup> The same could be said of torture, and of rape.

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<sup>581</sup> *Tyrer v UK* (ECtHR) (n400) 13 [33] (the Court).

<sup>582</sup> *ibid.*

<sup>583</sup> Miller (n564).

<sup>584</sup> See, eg, Bernstein (n82). See also Sussman D, ‘What’s Wrong with Torture?’ (2005) 33 *Philosophy & Public Affairs* 1, 4, describing torture as ‘more akin to rape than other kinds of violence characteristic of warfare or police action’.

<sup>585</sup> Lawson BE, ‘Oppression and Slavery’, in McGary H and Lawson BE, *Between Slavery and Freedom: Philosophy and American Slavery* (Indiana University Press 1992) 1-16, 8.

<sup>586</sup> Hare RM, ‘What is Wrong with Slavery’ (1979) 8 *Philosophy & Public Affairs* 103.

A considerable body of scholarship has sought to demonstrate that rape may be a form of torture,<sup>587</sup> and indeed, this position has been accepted by regional human rights courts as well as by the international criminal tribunals.<sup>588</sup> In contrast, there has been little attempt in the academy to demonstrate that slavery is itself a form of torture.<sup>589</sup> Indeed, the prohibition of slavery in international human rights law predates the prohibition of torture in conventional as well as customary international law.<sup>590</sup> In *Filártiga v Peña-Irala*, the United States Court of Appeals for the Second Circuit famously declared that ‘for purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind’.<sup>591</sup> Many commentators have drawn a connection between the legal wrongs of slavery and torture.<sup>592</sup> In their lengthy and authoritative commentary to the CAT, Nowak and McArthur link torture with slavery on the very first page, as ‘the two most extreme forms of dehumanising human beings by depriving them of human dignity’.<sup>593</sup>

#### 4.2.1.2 Torture as an attack on autonomy

The second reason that torture may be regarded as a particularly egregious wrong on the dignitarian account is that it attacks the very quality—autonomy—on which human dignity is based. As such, torture could be regarded as an attack on humanity itself. Kreimer observes that ‘torture seeks to shatter... autonomy’, and ‘to induce the subject to abandon her own volition and become the instrument of the torturer’.<sup>594</sup> Since the capacity of rational human beings to exercise

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<sup>587</sup> See, eg, Blatt D, ‘Recognising Rape as a Method of Torture’ (1991) 19 NYU Review of Law & Social Change 821; Aswad EM, ‘Torture by Means of Rape’ (1995) 84 Georgetown Law Journal 1913; McGlynn C, ‘Rape as “Torture”? Catharine Mackinnon and Questions of Feminist Strategy’ (2008) 16 Feminist Legal Studies 71; McGlynn C, ‘Rape, Torture and the European Convention on Human Rights’ (2009) 58 International & Comparative Law Quarterly 565.

<sup>588</sup> *Aydin v Turkey* (n496); *Case of Loayza Tamayo v Peru* (n554); *Prosecutor v Akayesu*, ICTR Case No ICTR-96-4-T, Trial Chamber I, 2 September 1998 (*Prosecutor v Akayesu (Trial Chamber Judgment)*); *The Čelebići Prison Camp Case*, Trial Chamber Judgment (n254); *Prosecutor v Kunarac*, ICTY Case no IT-96-23-T, Trial Chamber Judgment, 22 February 2001 (*Prosecutor v Kunarac (Trial Chamber Judgment)*).

<sup>589</sup> Although, on racial discrimination as a purpose of some acts of torture, see, eg, Kramer (n18) 73.

<sup>590</sup> The first human rights treaty ever concluded was the United Nations Slavery Convention, 212 UNTS 17 (opened for signature September 25, 1926, entered into force March 9, 1927).

<sup>591</sup> *Filártiga v Peña-Irala* (n7).

<sup>592</sup> Eg, on the connection between torture and slavery in the antebellum American South, see Kreimer SF, ‘“Torture Lite”, “Full-Bodied” Torture, and the Insulation of Legal Conscience’ (2005) 1 Journal of National Security Law & Policy 187, 210-213.

<sup>593</sup> Nowak and McArthur (n238) 1.

<sup>594</sup> Kreimer SF, ‘Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror’ (2003) 6 University of Pennsylvania Journal of Constitutional Law 278, 298-299.

autonomy, to self-govern, is the very basis of dignity according to Kant,<sup>595</sup> an attack on autonomy on the scale of torture seeks nothing less than the ‘devastation of the human status’.<sup>596</sup> For Scarry, torture is a ‘twofold denial of the human, both the particular human being [...] hurt and the collective human present in the products of civilisation’.<sup>597</sup> Torture dehumanises and destroys.

In this respect, too, torture is comparable to slavery and to rape. Both slavery and rape are only possible because of the autonomous nature of their subjects. The total subversion of that autonomy may be seen as a particularly egregious and deliberate dehumanisation: both send the message that, *because you are human, I am dehumanising you*.<sup>598</sup> Torture, slavery and rape can thus be seen as direct and egregious attacks on the autonomy of their victims.

#### 4.2.1.3 Torture as forced self-betrayal

A third dignitarian justification for singling out torture as a unique or special wrong has been presented by Sussman in his theory of torture as ‘forced self-betrayal’.<sup>599</sup> On this account, part of the special wrong of torture lies in the way the torturer seeks to turn the victim’s autonomous will against *itself*. Sussman explains: torture ‘forces its victim into the position of colluding against himself through his own affects and emotions, so that he experiences himself as simultaneously powerless and yet actively complicit in his own violation’.<sup>600</sup> Scarry expresses a similar idea: the experience of torture is not just ‘my body hurts’, but rather ‘my body hurts *me*’.<sup>601</sup> In other words, if autonomy is the basis of human dignity, then torture forces dignity to betray its bearer. In Kantian terms, not only is the victim of torture used as a mere means to other ends, but she becomes complicit in her own instrumentalisation.

This is a powerful and persuasive account of the moral wrong of torture. It helps to explain the special horror experienced by a person who is forced to choose between continuing unbearable agony, and surrendering some central pillar of their identity or self. As O’Brien says to Winston Smith in Orwell’s 1984:

“By itself,” he said, “pain is not always enough. There are occasions when a human being will stand out against pain, even to the point of death. But for everyone there is something unendurable—something that cannot be contemplated. Courage and cowardice are not involved. If you are falling from a height it is not cowardly to clutch at a rope. If you have

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<sup>595</sup> Kant (n34) 4:435, *ibid* 47.

<sup>596</sup> Bernstein (n82) 16.

<sup>597</sup> Scarry E, *The Body in Pain: The Making and Unmaking of the World* (OUP 1985) 43.

<sup>598</sup> See Livingstone Smith D, *Less Than Human: Why We Demean, Enslave and Exterminate Others* (St Martin’s Press 2012).

<sup>599</sup> Sussman, ‘What’s Wrong with Torture?’ (n584) 4. Sussman’s account draws heavily upon Scarry (n597).

<sup>600</sup> Sussman, ‘What’s Wrong with Torture?’ (n584) 4.

<sup>601</sup> Scarry (n597) 47.

come up from deep water it is not cowardly to fill your lungs with air. It is merely an instinct which cannot be destroyed. It is the same with the rats. For you, they are unendurable. They are a form of pressure that you cannot withstand, even if you wished to. You will do what is required of you.”

[...]

The cage was nearer; it was closing in. Winston heard a succession of shrill cries which appeared to be occurring in the air above his head. But he fought furiously against his panic. To think, to think, even with a split second left--to think was the only hope. Suddenly the foul musty odour of the brutes struck his nostrils. There was a violent convulsion of nausea inside him, and he almost lost consciousness. Everything had gone black. For an instant he was insane, a screaming animal. Yet he came out of the blackness clutching an idea. There was one and only one way to save himself. He must interpose another human being, the BODY of another human being, between himself and the rats'.<sup>602</sup>

In that final moment, Winston succumbs and betrays Julia, and in doing so he betrays himself. In that moment his last remaining shred of autonomy—the remnant of his human dignity—is irreparably shattered. It is this experience, and that of others like it, to which Sussman’s account of the moral wrong of torture as forced-self-betrayal speaks.

However, Sussman’s account of torture as forced-self-betrayal is under-inclusive. While it speaks directly and powerfully to the experience of *interrogational* torture, it is only with great difficulty that it can be extended to other forms of torture. Sussman himself does not purport to apply his theory outside the confines of interrogational torture.<sup>603</sup> And yet the existence of other forms of torture is beyond question.

Let us imagine a person (V1) who is taken into custody and subjected to torture purely because she is a member of a particular ethnic group, and the state of which she is a citizen seeks to quell dissent among that group. She is brutally beaten and is perhaps also raped and abused by a captor (P1), and then released onto the streets to tell her tale. At no point has V1 been interrogated, nor has she been asked to betray herself or others.

Philosophers have labelled this kind of torture ‘terroristic torture’<sup>604</sup> or ‘intimidatory torture’.<sup>605</sup> V1 could be subjected to the most brutal treatment imaginable, but the notion of ‘forced self-betrayal’ does not seem appropriate to convey her experience or the wrongful treatment she has been forced to endure.

Sussman might respond—or a proponent of the self-betrayal account might respond on Sussman’s behalf—that this different form of torture too can be explained in terms of forced self-betrayal. For example, it could be argued that the victim is forced to collaborate with the purpose of the torturer,

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<sup>602</sup> Orwell G, 1984 (Secker & Warburg 1949) chapter 5.

<sup>603</sup> Sussman, ‘What’s Wrong with Torture?’ (n584) 4.

<sup>604</sup> Shue, ‘Torture’ (n25) 132.

<sup>605</sup> Kramer (n18) 49.

insofar as her body is used as a weapon against the ethnic group of which she is a part. Although she is opposed to the purpose of the torturer, her body is used against her will as his tool. In that moment, like Winston Smith in *1984*, her body does the bidding of the torturer and in that way she may be described as complicit in her own violation.

This analysis, however, is unconvincing. The final victory over Winston Smith in *1984* was achieved when, with his autonomous will, he *chose* to betray Julia. As Julia herself explains later:

"Sometimes," she said, "they threaten you with something, something you can't stand up to, can't even think about. And then you say, 'Don't do it to me, do it to somebody else, do it to so-and-so.' And perhaps you might pretend, afterwards, that it was only a trick and that you just said it to make them stop and didn't really mean it. But that isn't true. At the time when it happens you do mean it. You think there's no other way of saving yourself, and you're quite ready to save yourself that way. You WANT it to happen to the other person. You don't give a damn what they suffer. All you care about is yourself." "All you care about is yourself," he echoed. "And after that, you don't feel the same towards the other person any longer." "No," he said, "you don't feel the same."<sup>606</sup>

The victim of terroristic or intimidatory torture does not experience self-betrayal in a sense that is comparable to the victim of interrogational torture. Indeed, the victim may have no notion whatsoever of what it is that the torturer is trying to achieve, either during or after her abuse. In that case she cannot be said to be complicit in the purpose of her own violation; she is oblivious to that purpose.

In Sussman's account of *interrogational* torture as forced self-betrayal, the autonomy of the victim is of central importance. In contrast, the autonomy of the victim of *terroristic* torture is essentially irrelevant. The perpetrator is indifferent to the extent of the victim's suffering, whether or not she cooperates. What is important is that *others* subjectively experience feelings of fear and distress. Indeed, as far as the torturer's aims are concerned, the torturer is indifferent as to whether the victim lives or dies: a mutilated corpse may more effectively instil fear in other members of the victim's ethnic group than a victim who lived to tell the tale.

The fact that the victim's autonomy is largely irrelevant in cases of terroristic torture is telling. It suggests there are serious limitations of autonomy-based accounts of the moral wrong of torture.

Sussman's account of torture as forced self-betrayal also has difficulty accommodating punitive torture within its ambit. A further hypothetical illustrates the point. Imagine a person (V2) is imprisoned upon conviction for a number of child sex offences. A prison officer (P2) wishes to take personal revenge upon V2 for these offences. In an entirely unprovoked attack, P2 brutally beats and kicks V2 while verbally assaulting him. V2 does not fight back and by the end of the attack is lying prone on the floor attempting to shield himself from the blows. Assuming that V2's

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<sup>606</sup> Orwell (*n602*) chapter 6.

experience is of severe pain or suffering, then this should clearly be characterised as torture. And yet V2's experience can hardly be conceptualised as self-betrayal.

Sussman's theory of torture as forced self-betrayal is a powerful account of the moral wrong of *interrogational* torture. But as becomes apparent when we turn to other forms of torture, such as *intimidatory* torture or *punitive* torture, its applicability is limited.

In contrast, the dignitarian account of torture as instrumentalisation does not share the weakness of Sussman's theory. The Kantian account of torture as the use of a person as a mere means to other ends is capable of application to both the scenarios described above. In the first scenario, V1 was reduced to a mere means for the attainment of P1's goal. The objective in that case was to frighten members of V1's ethnic group into submission. In the second scenario, V2 was used as an instrument of P2's retribution. P2 sought to punish V2 and to seek revenge for V2's actions. Both scenarios fall squarely within the dignitarian conception of the moral wrong of torture as impermissible instrumentalisation. On the Kantian account of torture as instrumentalisation, it is immaterial whether the purpose of the torturer is to interrogate, to intimidate, to punish, to discriminate—or indeed any other purpose. What is important is the *existence* of a purpose, not its nature.<sup>607</sup>

#### 4.2.2 Kant on instrumentalisation and consent

We have seen in the previous section that there are three ways in which dignitarians may seek to distinguish torture as a unique or special moral wrong. The second of these—torture as an attack on autonomy—excluded terroristic torture from its ambit. The third—forced self-betrayal—was only applicable to interrogational torture, to the exclusion of both punitive and terroristic torture. For these reasons they are not a complete account of the wrong of torture. In contrast, the Kantian notion of instrumentalisation does not share these weaknesses.

However, the Kantian account of instrumentalisation is arguably over-inclusive. It might be objected to on the basis that many things involve the use of a human being as a mere means. For example, people pay other people to provide all kinds of services and to perform all kinds of tasks (to fix one's laptop or one's plumbing, for example). Indeed, we often ask others to perform tasks for no pay (a neighbour might feed your cat when you are away on holidays, or offer to drive you to the train station if it is raining). In each of these cases, A uses B as a means to reach A's own particular end or objective. But we would not describe these cases as violations of human dignity.

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<sup>607</sup> Provided that the victim is not 'in harmony' with the purpose. This point is returned to in Chapter Four below.

There is an easy rejoinder to this charge. In each of these cases, B has consented to the action. In Kant's words, the subject is 'in harmony' with that action.<sup>608</sup> By consenting to be used in this way (presumably for B's own reasons) that person will 'contain in themselves the end of precisely the same action'.<sup>609</sup> Thus, if A pays B to repair A's laptop or faulty plumbing, that does not amount to instrumentalisation, because the repairer is 'in harmony' with that action. To reflect this qualification, the dignitarian analysis may be modified. It is not *any* instrumentalisation that is prohibited by human dignity; rather, it is the use of a person as *nothing more* than a means to one's end that renders a particular instrumentalisation wrongful.

Let us consider two further scenarios. In one scenario, P3 asks V3 for a lift to the train station, and V3 voluntarily agrees. In the next scenario, P4 holds a gun to V4's head and threatens to shoot V4 unless she drives P4 to the train station. On the basis of this threat, V4 agrees.

In both scenarios, P has used V as a means to her own end. Thus we can say that P has instrumentalised V. In the first scenario however, the instrumentalisation is morally unobjectionable. The Kantian analysis might explain this on the basis that V3 is 'in harmony' with this action. V3 has consented, and that act gives effect to her autonomous wishes. In the second scenario however, we have little difficulty concluding that P4 has *impermissibly* instrumentalised V4. P4 has used V4 as a *mere means* to P4's ends. P4's threat to inflict violence upon V4 if she does not comply has meant that V4 is no longer acting in accordance with her own autonomous wishes.

Kaufmann describes the difference between these two scenarios with the addition of the adjective 'mere'.<sup>610</sup> While both scenarios involve the use of V as a means to P's end, it is only in the second scenario that V is used *merely* as a means to that end, in disregard of P's status as an autonomous being. It is this *disregard* that makes the second instrumentalisation wrongful.

Accordingly, the first dignitarian account of torture as instrumentalisation has been shown to be broader than the second and third variants, each of which faced serious objections. Thus the Kantian iteration will henceforth be referred to as the 'broader dignitarian account of torture'.

The charge of over-inclusivity considered above was easily rebutted. But as we shall see, the broader dignitarian account of torture as instrumentalisation, like its narrower counterpart of torture as forced self-betrayal, is open to the charge of under-inclusivity. There are two important respects in which broader dignitarian account of the moral wrong of torture is under-inclusive.

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<sup>608</sup> Kant (n34) 4:430, *ibid* 48.

<sup>609</sup> *ibid* 4:430, *ibid* 48.

<sup>610</sup> Kaufmann P, 'Instrumentalisation: What Does it Mean to Use a Person', in Kaufmann P and others (eds), *Humiliation, Degradation, Dehumanization* (Springer 2011) 57-65, 61.

#### 4.2.2.1 *The problem of gratuitous infliction*

The first respect in which the dignitarian account of torture is under-inclusive is that it fails to capture torture inflicted gratuitously. Now, it is surely rare that abuse is ever completely gratuitous. But if the defining feature of torture is the subversion of the will of the victim to serve the purpose of the torturer, then the purely gratuitous infliction of ill-treatment is inimical to that account.

Indeed, this was the view taken by the ICTY Trial Chamber in *Prosecutor v Krnojelac*, which said that '[t]orture as a criminal offence is not a gratuitous act of violence; it aims, through the infliction of severe mental or physical pain, to attain a certain result or purpose'.<sup>611</sup> It is also the view taken by Nowak in the Commentary to the ICCPR, who argues that purely sadistic ill-treatment with no other purpose should be classified as cruel treatment rather than torture.<sup>612</sup> For the same reason, an Austrian prisoner who had been forgotten by the authorities was held to have been subjected to cruel, inhuman or degrading treatment but not torture: 'he survived twenty days without food or water in constant fear of slowly starving to death'.<sup>613</sup> Nowak observed that the treatment was neither intentional nor purposeful and as such could not be qualified as torture.<sup>614</sup>

Let us imagine a sadistic perpetrator (P5) who deliberately and cruelly inflicts ill-treatment on a victim (V5) for no reason save that she enjoys watching others suffer. V5 is tied down with wires and subjected to repeated electric shocks. V5's pain or suffering is extreme. Unlike a person who is tortured for the purpose of (say) extracting information, for whom at least there may be some hope the surrender of that information will lead to the cessation of the torture, V5 has no means of stopping the torture. The only limit is that of P5's enjoyment, boredom, or distraction.

The Kantian analysis of torture as impermissible instrumentalisation has difficulty accommodating this scenario. As we have seen, on this view, the special moral wrongness of torture lies in the use of a person as a mere means to another person's ends. But here there is no broader objective, save the perpetrator's own gratification. It cannot be right that P's treatment for that reason alone should escape the label 'torture'. And yet it is difficult to construe this kind of sadistic gratification of the perpetrator as a 'purpose' sufficient to meet the Kantian threshold.

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<sup>611</sup> *Prosecutor v Krnojelac*, ICTY Case no IT-97-25-T, Trial Chamber Judgment of 15 March 2002, 78 [180] (*'Prosecutor v Krnojelac (Trial Chamber Judgment)'*).

<sup>612</sup> Nowak M, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd ed, NP Engel 2005) 161. But *cf* Dinstein 'The Rights to Life, Physical Integrity, and Liberty' in Henkin L, *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia University Press 1981) and Maier A 'Torture: How Denying Moral Standing Violates Human Dignity', in Kaufmann and others (eds) (n610) 108-109, taking a contrary view.

<sup>613</sup> Nowak, *ibid* 161 and note 15.

<sup>614</sup> *ibid*. Nowak considered the absence of an 'active undertaking' to be a further difficulty with classifying this treatment as torture. However *cf* section 5.2.3 below.

It could be argued, however, that the purpose requirement should be construed broadly, so that even the purely gratuitous or sadistic infliction of ill-treatment is a purpose sufficient to satisfy the confines of the Kantian account. But this would be to replace one problem with another. It would effectively impute a purpose to the perpetrator in *all* circumstances where severe pain or suffering is deliberately inflicted. If the purpose requirement is construed so broadly that even senseless cruelty, for no reason at all, falls within it, then the utility of the criterion dissolves. The purpose requirement becomes so broad that it is devoid of meaning. The further factor required to establish torture is effectively abolished and the deliberate infliction of any and all severe pain or suffering would have to attract that label.

The problem of gratuitous infliction of torture therefore presents a serious challenge to all dignitarian accounts of torture. Sadistic ill-treatment is not a peripheral or arguable case; it is a core part of that normative concept of torture. Indeed, while philosophers debate how many lives must be risked by the 'ticking time-bomb' to render it morally justifiable to torture the terrorist who can stop the bomb, sadistic torture lacks any possible countervailing moral purpose. For this reason, Kramer describes sadistic torture as 'one of the most nefarious modes of human conduct imaginable'.<sup>615</sup> For Shklar, it is cruelty 'unmitigated by any compensating virtue. There are no extenuations and no veils'.<sup>616</sup> And as long ago as the 16<sup>th</sup> century, Montaigne conveyed a similar sentiment:

'If I had not seen it I could hardly have made myself believe that you could find souls so monstrous that they would commit murder for the sheer fun of it; would hack at another man's limbs and lop them off and cudgel their brains to invent unusual tortures and new forms of murder, **not from hatred or for gain but for the one sole purpose of enjoying the pleasant spectacle of pitiful gestures and twitchings of a man in agony**, while hearing his screams and groans. For there you have **the farthest point that cruelty can reach**'.<sup>617</sup>

Montaigne, Kramer and Shklar powerfully articulate the special horror of the sadistic infliction of torture inflicted 'for the one sole purpose of enjoying the ... spectacle'. And yet in emphasising the *purpose* of the ill-treatment, the Kantian account denies this reality. Indeed, on the Kantian account, treatment that is arguably the most extreme and abusive imaginable, does not qualify as torture at all. This is a powerful criticism.

#### 4.2.2.2 *The torture of non-autonomous beings*

There is a second important respect in which the dignitarian account of the moral wrong of torture is under-inclusive. This is in the exclusion of non-autonomous beings from its scope. Recall that on

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<sup>615</sup> Kramer (n18) 72.

<sup>616</sup> Shklar, *Ordinary Vices* (n77) 25.

<sup>617</sup> Montaigne (n35) 484 (emphasis added).

the Kantian account, it is the human capacity for rationality that is the ground of autonomy, which in turn is the basis of human dignity.<sup>618</sup> What, then, of beings who lack the capacity for rationality, such as very young children, the mentally disabled, or non-human animals? If the defining feature of torture is the subversion of the autonomous will of the subject, then in the absence of autonomy there can be no torture. However wrong it might be to abuse a severely mentally disabled person, a very young child, or a non-human animal—on the dignitarian account, such abuse cannot properly be described as ‘torture’.

It could of course be argued that we should treat non-autonomous beings *as though* they possessed dignity, even if they in fact lack that status.<sup>619</sup> Moreover, the fact that a particular kind of treatment is not properly classified as torture does not confer a moral or legal license to commit it.<sup>620</sup> But this is not quite the same as saying that the treatment of these beings falls within the normative concept of torture. As we saw in the previous chapter, torture carries a special stigma, and has come to be regarded as a paradigmatic moral wrong. To exclude some forms of ill-treatment from that categorisation by virtue of the status or capacities of the victim requires a strong justification.

More importantly, to exclude the severe pain or suffering of a non-autonomous being is to deny a core component of the normative concept of torture. If one is asked to imagine the wanton and barbaric ill-treatment of a helpless animal—perhaps a kitten or a dog—by a cruel and sadistic child, the word that springs to mind is ‘torture’. If one contemplates deliberate, brutal and sustained attacks on a baby, a very young child, or an incapacitated and mentally retarded person—all of whom are helpless in the power of the perpetrator and yet who lack the quality of autonomy—the word that seems most apt is ‘torture’.

The point can be illustrated with real as well as hypothetical examples. We considered in Chapter Two the 1975 case in which Cyprus brought a claim against Turkey for abuses committed in the course of the Turkish invasion of that island.<sup>621</sup> In one especially tragic case, a mentally disabled woman was raped by 20 soldiers in succession before being hurled from a second-floor window. She sustained spinal injuries in the fall and was permanently paralysed.<sup>622</sup> Despite unimaginable horror of this treatment, on the dignitarian account, it cannot be qualified as torture. This is a powerful reason to reject it as an account of the moral wrong of torture.

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<sup>618</sup> Kant (n34) 4:436, 48

<sup>619</sup> This argument is advanced in Hill (n571). Making a similar point in relation to his theory of normative agency, which also excludes non-autonomous beings from its ambit, see Griffin J, ‘First Steps in an Account of Human Rights’ (2001) 9 *European Journal of Philosophy* 306. See also Griffin J, *On Human Rights* (OUP 2008).

<sup>620</sup> See Kramer (n18) 45-46.

<sup>621</sup> *Cyprus v Turkey* (Admissibility) (n315); *Cyprus v Turkey* (Merits) (n314).

<sup>622</sup> *Cyprus v Turkey* (Merits) (n314) 121 [364] (the Commission).

A number of philosophers concur that sentience, rather than autonomy, is the precondition for torture, accepting the possibility of torture of non-autonomous beings.<sup>623</sup> Indeed, in recognition of that possibility, the penal law of many States proscribes cruelty to animals in terms of torture.<sup>624</sup> This is because ‘the status of a victim as a reflective agent is not decisive for the [classification] of some modes of conduct as torture’.<sup>625</sup> Torture does not require an autonomous victim; rather, all that it presupposes is the ability to suffer.<sup>626</sup>

The above analysis suggests is that the subjective experience of the victim is not, in fact, the paramount concern of the concept of torture. ‘Torture’ seems to speak to something else as well—the despicable nature of the conduct, yes, but also the *relationship* between victim and perpetrator. It is the powerlessness of the mentally disabled Cypriot woman in the face of an army of soldiers; the terror of the helpless kitten in the face of the merciless cruelty of the torturous child; and the pitiful and inescapable dependence of the baby on her barbarous carers, to which the concept of torture is addressed.

On these two grounds—the failure to account for gratuitous torture, and the exclusion of the torture of non-autonomous beings—the dignitarian account of the moral wrong of torture, based as it is on Kantian principles, must be rejected.

That is a bold claim. But it draws support from the fact that, although the prohibition of torture is characterised by a remarkable degree of conformity and consensus among states around the world, the same cannot be said of the concept of human dignity. Contestation around the meaning and role of human dignity in law is deep-seated and pervasive. Is human dignity best described as the sacred inner worth of every human being<sup>627</sup>—a kind of ‘transcendental kernel of value’?<sup>628</sup> Is it ‘the ability to know and love God’;<sup>629</sup> the equal rank of every human being;<sup>630</sup> or is ‘dignity’

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<sup>623</sup> Davis (n25) 167; Kramer (n18) 55.

<sup>624</sup> See, eg: India: Prevention of Cruelty to Animals Act 1960, s 11; UK: Protection of Animals Act 1911, s 1(a); USA: Alabama Criminal Code (1977) s 13A-11-14; California Penal Code 1872, ss596-597; Florida Statute 828.12 (2001); Iowa Penal Code 717B.1 (2003); Texas Penal Code, Title 9, 42.09.

<sup>625</sup> Kramer (n18) 55.

<sup>626</sup> Davis (n25) 161, 163, 167.

<sup>627</sup> Schachter O, ‘Human Dignity as a Normative Concept’ (1983) 77 American Journal of International Law 848

<sup>628</sup> Rosen M, *Dignity: Its History and Meaning* (Harvard University Press 2012).

<sup>629</sup> Hanvey J, ‘Dignity, Person, and *Imago Trinitatis*’, in McCrudden, *Understanding Human Dignity* (n569) 209-228, 220. On *imago Dei*, see further Della Mirandola P, *On the Dignity of Man* (Hackett 1998); Soskice JM, *The Kindness of God: Metaphor, Gender and Religious Language* (OUP 2007), chapter 2.

<sup>630</sup> Waldron J, *Dignity, Rank, and Rights* (OUP 2012).

merely a glorified synonym for 'autonomy'?<sup>631</sup> Or perhaps dignity is merely as a placeholder, marking the empty space where agreement ought to be?<sup>632</sup> Schopenhauer famously condemned the concept of dignity as 'the shibboleth of all the perplexed and empty-headed moralists', and a 'hollow hyperbole, within which there lurks, like a gnawing worm, a contradiction'.<sup>633</sup> As Carozza has observed, '[t]he capaciousness of the word "dignity" allows it to represent an affirmation belonging to a wide array of different traditions, while the generality of the term, standing alone without further elaboration, does not decisively signify any of those traditions'.<sup>634</sup> It is clear that 'the challenge of supplying the concept of dignity with philosophical foundations that are intelligible to believers and nonbelievers alike is still a work in progress'.<sup>635</sup> Thus, offering dignity as an explanation for the moral wrong of torture may raise more questions than it answers.

We do not have to agree on the meaning of human dignity to agree that torture is wrong. The consensus on the latter exists in spite of, rather than because of, the deep divisions in respect of the former. It is therefore necessary to consider whether some other account of torture than one based on human dignity can better explain the special stigma with which that concept has now become imbued.

### 4.3 The defencelessness account of the moral wrong of torture

A second account of the moral wrong of torture derives from Shue's seminal 1978 paper 'Torture'.<sup>636</sup> The author explains:

'At least part of the peculiar disgust which torture evokes may be derived from its apparent failure to satisfy even this weak constraint of being a "fair fight." The supreme reason, of course, is that torture begins only after the fight is—for the victim—finished. Only losers are tortured. A "fair fight" may even in fact have already occurred and led to the capture of the person who is to be tortured. But **now that the torture victim has exhausted all means of defence and is powerless before the victors, a fresh assault begins.** The surrender is followed by new attacks upon the defeated by the now unrestrained conquerors. In this respect torture is indeed not analogous to the killing in battle of a healthy and well-armed foe; **it is a cruel assault upon the defenceless.** In combat the other person one kills is still a threat when killed and is killed in part for the sake of one's own survival. The torturer inflicts pain and damage upon another person

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<sup>631</sup> Macklin R, 'Dignity Is a Useless Concept: It Means No More than Respect for Persons or Their Autonomy' (2003) 327 *British Medical Journal* 1419; Pinker S, 'The Stupidity of Dignity' (2008) 28 *The New Republic*.

<sup>632</sup> McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (n569).

<sup>633</sup> Schopenhauer A, *On the Basis of Morality* (Hackett 1965) 100.

<sup>634</sup> Carozza P, 'Dignity' in Shelton D (ed), *Oxford Handbook of International Human Rights Law* (OUP 2013), 345-360, 349.

<sup>635</sup> Glendon MA, 'The Bearable Lightness of Dignity: A Concept Necessary to Human Decency but Notoriously Resistant to Precise Definition', available at <<http://www.firstthings.com/article/2011/05/the-bearable-lightness-of-dignity>> accessed 12 July 2016.

<sup>636</sup> Shue, 'Torture' (n25).

**who, by virtue of now being within his or her power, is no longer a threat and is entirely at the torturer's mercy'.<sup>637</sup>**

Shue's account of torture emphasises the weakness of the victim vis-à-vis the power and control of the perpetrator. The victim is 'powerless', 'defenceless', and 'entirely at the torturer's mercy'. In that context, there can be no moral justification for the deliberate infliction of pain or suffering; to act in such a way is barbaric. On this view it is the *relationship* between the torturer and the victim that inspires torture's special abhorrence. It is at once a powerful asymmetry, and at the same time a perverted kind of intimacy.

This is the basis of what is termed here the '*defencelessness*' account of torture's moral wrong.

In a later piece focussing on mental torture, Luban and Shue extrapolate that the flip side of the defencelessness of the victim is the mercilessness of the torturer. They argue that 'part of the special wrongfulness of torture lies... in the limitlessness of the extent to which the victim is at the mercy of the torturer'.<sup>638</sup> Such treatment may be inflicted by physical or by psychological means. In the latter case, it constitutes 'the merciless attempt to break down and occupy the personality of the victim'.<sup>639</sup>

Although as discussed in section 4.2.1.3 above, Sussman's theory of interrogational torture as 'forced self-betrayal' was subjected to sustained criticism, he later developed a different and more broadly applicable account of torture, emphasising the defencelessness aspect.<sup>640</sup> In his 2005 paper entitled 'What's Wrong with Torture?' Sussman argues that torture relies upon and requires 'a profoundly asymmetric relationship of dependence and vulnerability between the parties'.<sup>641</sup> This would suggest a movement from the dignitarian account towards the defencelessness account.

Defencelessness, according to Sussman, has two elements: first, 'victims of torture must be, and must realise themselves to be, completely at the mercy of their tormentors',<sup>642</sup> and second, 'the torture victim must see herself as being unable to put up any real moral or legal resistance to her tormentor'.<sup>643</sup>

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<sup>637</sup> *ibid* 130 (emphasis added).

<sup>638</sup> Luban and Shue (n36) 859.

<sup>639</sup> *ibid* 823.

<sup>640</sup> Sussman, 'What's Wrong with Torture?' (n584).

<sup>641</sup> *ibid* 6.

<sup>642</sup> *ibid*.

<sup>643</sup> *ibid* 7.

Two features of the defencelessness account are worthy of mention.

First, on this view, the torturer's purpose is unimportant. It was argued above that Sussman's account (dignitarian or essentially dignity-based) of torture as forced self-betrayal was incapable of applying beyond the context of interrogational torture. In contrast however, the defencelessness account can comfortably accommodate terroristic or penal torture, or indeed torture in the pursuit of any other objective—or none. It is not limited to the paradigmatic case of torture to extract information or a confession. By focussing on the power dynamic between the victim and perpetrator, the torturer's particular objective recedes in importance.

Unlike the dignitarian account, the defencelessness account of torture is therefore capable of accommodating the sadistic or gratuitous infliction of ill-treatment. It was argued above that a serious failing of the dignitarian account was its exclusion of what Montaigne termed 'the farthest point that cruelty can reach'—the senseless, sadistic infliction of suffering.

The second feature of the defencelessness account that is noteworthy is that it is capable of encompassing the torture of non-autonomous beings, such as young children, the mentally disabled, and non-human animals. In that respect, it avoids another weakness of the dignitarian account. It was argued above that the torture of non-autonomous beings, like the sadistic infliction of torture for no purpose at all, is among the gravest moral wrongs of all. Such treatment belongs at the heart of the normative concept of torture. By focussing on the victim's status as an autonomous being, the dignitarian account excludes even the most acute pain, and the most powerful suffering, of certain classes of victim. The defencelessness account does not share that flaw.

Like the dignitarian account, of course, the defencelessness account has its critics. In particular, recent work in moral philosophy has sought to show that there are credibly imaginable circumstances in which the victim of torture has some form of defence or resistance available to her.<sup>644</sup> Kramer explains, 'there can credibly be situations of torture in which the victims are able to defend themselves to a considerable degree'.<sup>645</sup> Such situations 'are strikingly unusual, but they are not unintelligible or utterly fanciful'.<sup>646</sup> If this is indeed the case, then Kramer is correct that the defencelessness account of torture's moral wrong must be rejected.

Three hypothetical scenarios illustrate the argument.

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<sup>644</sup> This argument is advanced in Kramer (n18) chapter 2, and in Kamm (n37) chapter 1.

<sup>645</sup> Kramer (n18) 51.

<sup>646</sup> *ibid* 55-56.

The first is as follows:

‘Someone presents no threat and is given a shield as a physical means of defence against a guard who is trying to cause him continuous severe distress in order to get him to give information. This defence, which could have been successful, fails and the guard succeeds in causing him severe distress’.<sup>647</sup>

According to Kamm, in this situation there is ‘a possible means of physical defence’ available to the victim, but this scenario should nevertheless be categorised as a case of torture. As such, she contends that the defencelessness account is over-inclusive. It wrongly excludes cases such as this from the ambit of torture.

But there is a response to this line of argument. It is that if the shield fails, then the victim is *in fact* defenceless, even though in some alternate universe the shield might have succeeded. In the situation above, where the shield fails and the guard succeeds in causing the victim severe distress, torture has occurred. In the alternate universe where the shield succeeds, then there has been no act of torture. However, the guard’s acts would almost certainly constitute attempted torture, and they could be criminally prosecuted on that basis.

Kamm might reply: but what of the period immediately *before* the shield fails? At that point, the victim has a shield that may work, or may fail. At that point there is a defence, only it is not yet known whether it will work. Let us say that the shield is proven to work 50% of the time, and the victim knows this. Certainly, he is in fear of the guard in the lead up to the administration of the treatment, and part of his terror is no doubt the knowledge that his shield may malfunction. Can we say that the victim has experienced torture?

One answer could be, ‘it depends’. If the shield works, then the intended victim has not experienced severe suffering, despite the guard’s intentions. The guard has attempted torture, but he has not succeeded in torturing. If the shield fails and the victim experiences severe suffering, then clearly torture has occurred. The guard’s conduct is the same in each case, and the only thing that is altered between the two scenarios is the victim’s luck. But ‘moral luck’ is a feature of many wrongs: a trained assassin who fails to successfully execute his intended victim will be prosecuted for attempted murder, even though he wishes he had succeeded. The same is true of torture. This is not necessarily—or at least, not *only*—a failing of the defencelessness account of torture.

A further caveat should be made here. This is that it is entirely possible that, even if the shield succeeds in diverting the guard’s pain device, the victim may experience severe *mental* suffering. The suffering is located in the terror he experiences in anticipation, and the fear that his shield will fail. Although the shield succeeds, and the physical pain sensations are diverted, if his mental suffering has reached the threshold of severity he may nevertheless have experienced torture. In

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<sup>647</sup> Kamm (n37) 7.

any of these scenarios, the availability of a possible defence—in the form of our sometime-functioning shield—does not defeat the defencelessness account of torture.

There is a second scenario in which torture is committed against a victim who is not entirely defenceless.<sup>648</sup> Imagine a robber seeking to persuade a jeweller to reveal the code to a safe, in which many valuable jewels are located. The robber uses a device or technique of some kind to inflict severe pain on the jeweller. Somehow, in the midst of this trauma, the jeweller manages to grab a gun, which she shoots in the direction of the robber. He is forced to take cover and eventually he flees. The victim here is not defenceless, but it would be absurd not to describe her experience as torture.<sup>649</sup>

This scenario, however, like the previous one, is not fatal for the defencelessness account. For defencelessness need not be indefinite. In the period during which the robber is inflicting agony upon his victim, the jeweller has indeed been subjected to torture. However the torture ends at the point where she is able to reach for the gun. From that point onwards she is no longer defenceless, and indeed she succeeds in fighting her aggressor away. Provided that the suffering she experiences up to that time has met the threshold of severity for torture, then there is no difficulty describing her treatment as such. The mistake that both Kamm and Steinhoff make is in contending that the fact that a defence may *later* become available to the victim means she can *never* be said to have been defenceless.

But there is a third and more difficult scenario in which torture could be argued to have been committed as against a victim who is not entirely defenceless. Let us imagine a scenario, akin to one envisaged separately by Steinhoff as well as by Twining and Paskins, in which some sort of laser inflicts suffering on a victim from a distance.<sup>650</sup> With every press of a button, a jet of electricity flashes into the victim, who immediately experiences severe suffering. However, let us imagine that the victim also has a defence. It is a limited defence, but it is a defence nonetheless. She finds she is able to curl her body in just such a way that as it hits her, part of the laser beam rebounds into the perpetrator. Let us call this the 'defensive curl'. By performing the defensive curl, she is able to deflect some of the pain caused by the laser beam—which is still extreme—while also causing the perpetrator to experience a fraction of the pain of the laser himself. The victim here is *almost* helpless, but not quite. Should her suffering be qualified as torture?

It seems absurd to describe her experience as anything other than torture. And yet, it is also true that she is not completely defenceless. There is a mechanism at her disposal by which she can, in

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<sup>648</sup> Steinhoff (n25). This example is also discussed in Kramer (n18) 39-40.

<sup>649</sup> Steinhoff *ibid* 40; Kramer *ibid*.

<sup>650</sup> Steinhoff *ibid*; Twining W and Paskins B, 'Torture and Philosophy' (1978) 52 Proceedings of the Aristotelian Society, Supplementary Volumes 143, 160.

some minimal way, fight back. Unlike the previous two scenarios, this scenario poses a challenge to the defencelessness account.

It could be argued that performing the defensive curl does not confer any real power upon the victim, such that it is still appropriate to regard her as 'defenceless'. It is still true that the victim is powerless to stop the abuse; all she can do is protect herself marginally, while inflicting a small degree of harm in return to her attacker. But the defencelessness accounts described above emphasised *total* and *complete* powerlessness. Indeed it was the utter helplessness of the victim vis-à-vis the perpetrator that was claimed to inspire the special degree of repugnance of torture. And yet here the victim's powerlessness is neither total, nor complete.

The difficulty here is that 'defencelessness' is a binary concept. It is either present or it is absent. In the first two scenarios described above, it is at least arguable that defencelessness is present. But in the third scenario the victim does retain some small element of power. Although what she has experienced is clearly torture properly so-called, it is misleading to regard her as completely defencelessness, or completely at the perpetrator's mercy.

And yet, our compulsion to label this treatment as torture is telling. It suggests that the victim need not be completely incapacitated to be effectively defenceless; just as a person in police custody who threw a single punch at his aggressors in the midst of a brutal and sustained attack, cannot by reason of that single punch escape the categorisation of torture.

Making a similar point in 1978, Shue considered the possibility that the victim of torture may possess information which, if revealed, will bring the torture to an end.<sup>651</sup> In that case, 'the victim retains one last portion of control over his or her fate. Escape is not defence, but it is a manner of protecting oneself'.<sup>652</sup> Shue persuasively dismissed this counterexample on the basis that 'an alternative which is legitimately to count as an escape must not only be preferable but also itself satisfy some minimum standard of moral acceptability. A denial of one's self does not count'.<sup>653</sup>

Kamm's example of the torture victim with the shield shows us that the defencelessness account needs to be modified. It suggests that what is important is not the *total* but rather the *relative* defencelessness of the victim: fundamental asymmetry of power as between the victim and the perpetrator. The relationship must be characterised by what Sussman termed a 'profound

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<sup>651</sup> Shue, 'Torture' (n25).

<sup>652</sup> *ibid* 131.

<sup>653</sup> *ibid* 136.

asymmetry'.<sup>654</sup> On this view, the feature that converts severe pain and suffering into torture is the profoundly asymmetric power relation between victim and perpetrator.

With this modification, the defencelessness account is capable of encompassing Kamm's example of the torture victim with the malfunctioning shield. The victim in that case is under the control or in the power of the guard, and although she has a means of defence available to her, when she attempts to deploy the shield there is only a small chance that it will succeed. If she does in fact experience severe pain or suffering, that suffering will have been inflicted in the context of a profoundly asymmetric power relation. It is straightforwardly torture.

The same is true of the second example of the would-be safe-breaker, and the jeweller who is able, in the ensuing struggle, to shoot at the aggressor. Notwithstanding that the jeweller has been able to scramble to reach the gun—to locate a means of defence—if the jeweller has been subjected to severe pain and suffering during a period where she is under the control or in the power of the perpetrator, she has experienced torture.

The final example was the victim who was able to perform a 'defensive curl' and thereby reflect some of the shockwaves onto the perpetrator. Here too, notwithstanding that she has a defence mechanism, the power relationship between the victim and the perpetrator remains profoundly asymmetrical. On this account, we have no difficulty describing her treatment as torture.

Thus, we have seen that the defencelessness account, in its modified form, avoids the charges of under-inclusivity that were rightly levelled at the dignitarian account. But could it be argued that it is vulnerable to a different criticism—that of *over*-inclusivity?

Kramer contends that not all circumstances where a defenceless person is abused will constitute torture, and that this compels the rejection of the defencelessness account.<sup>655</sup> The example he cites is of punching a stranger in the face in a sudden unprovoked attack, and then running away.<sup>656</sup> The victim here may have experienced severe pain and suffering, and he is defenceless against his attacker. And yet most people would accept that he has not been subjected to torture.

Here, too, the difficulty may be solved by the modified form of the defencelessness account. The victim here is certainly defenceless in the face of his attacker, and, save pursuing his aggressor down the street or contacting the police, there is nothing he can do to protect himself or to fight back. But the ill-treatment has not occurred in the context of a profoundly asymmetric power

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<sup>654</sup> Sussman, 'What's Wrong with Torture?' (n584) 6.

<sup>655</sup> See Kramer (n18) 51, discussing this objection.

<sup>656</sup> *ibid*, citing an example first raised by Sussman, 'What's Wrong with Torture?' (n584) 6.

relation. The victim is not under the control or in the power of the perpetrator. Indeed there is no relationship between them at all; this is a sudden and apparently random act of violence. Although the victim has experienced severe pain or suffering, the defining characteristic of the wrongness of torture is absent: that suffering has not been deliberately inflicted in the context of a relationship of power and control.

This example also illustrates one of the challenges associated with an earlier discussed variation of the dignitarian account. As we have seen, one answer to the problem that sadistic infliction of torture poses for the dignitarian account might be that the purpose requirement should be construed broadly, so as to encompass the gratuitous infliction of ill-treatment within the confines of torture. Applying that logic to the example above, we would be forced to accept that the random violent act of a single punch to the face of a stranger, followed immediately by the perpetrator's escape, is an act of torture. Assuming that the victim's pain is severe, and assuming also that the gratuitous or sadistic infliction of such pain is a purpose sufficient to satisfy the dignitarian account, we are compelled to label the act as torture. This example of torture's false positive neatly illustrates the dangers of construing the purpose requirement too broadly: it collapses into nothingness.

The question of whether it is possible to consent to torture raises a further contrast between the dignitarian and the defencelessness views. The circumstances in which a person could conceivably consent to torture are necessarily limited, but there are two credible possibilities. The first is in context of extreme sadomasochistic acts undertaken for the gratification of both participants. The second is the voluntary agreement to undergo torture, for the purposes of, say, elite special forces training. These examples raise the question as to whether, in circumstances where a person has freely and voluntarily consented to the infliction of severe pain or suffering, such treatment can be qualified as torture?

We saw above that the dignitarian account suggests that the moral wrong of torture lies in its use of the victim as a mere means to some other end. But what if V consents to the deliberate infliction of severe pain or suffering, to serve P's ends? In such a case, on the dignitarian account, 'the used person is not a tool anymore but an end-pursuing person'.<sup>657</sup> Indeed, the correct categorisation would be that V has consented to the deliberate infliction of severe pain or suffering, to serve *the ends of both P and V*. In the first example, P and V share the end of their mutual gratification. In the second example, P and V share the end of training V to serve as a member of special forces. Since the dignitarian account of the moral wrong of torture has autonomy of the individual at its heart, it follows that ill-treatment inflicted with the victim's consent—in both the sadomasochistic case, and the special forces training case—cannot be qualified as torture.

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<sup>657</sup> *ibid* 64.

In contrast, on the modified defencelessness view, the relevant question is not whether the victim's autonomy has been respected, but rather, whether severe pain or suffering has been inflicted in the context of a profoundly asymmetric power relation. The answer in both the sadomasochistic case and the special forces training case depends upon the level of control that the victim retains. If the victim has the power to bring the suffering to an end, for example by using a 'safe word', then this cannot be qualified as torture. If the victim can bring her treatment to a halt at any moment, this is merely a simulation of torture, and not the real thing.<sup>658</sup> Indeed, in both scenarios there may be an explicit or an implicit agreement that certain limits will be respected—presumably at a minimum, that the torture will not lead to the death of the victim.

However, if a person has consented to undergo a training exercise in which she would be subjected to torture and in which she would have no possibility of escape, no 'safe word' to halt the torture, and no explicit or implicit limitations, then on the defencelessness account it is conceptually possible that such treatment could qualify as torture. Of course, if a person consents to be subjected to torture for the purposes of a training exercise, providing that consent is informed and genuinely voluntary, then it is likely that she will have certain parameters in mind. She may be relatively certain that she will not die during the process, albeit there may be some risk that an accident could occur. She may be relatively certain that the ordeal will end after a certain period of time has elapsed, or after a certain threshold of suffering has been reached. She will presumably approach her ordeal with a degree of mental and physical fortitude, having prepared herself to undergo the exercise. These and other factors mean that she is in a very different position to most other victims of torture. However they do not preclude the possibility that, if her suffering reaches the severity threshold, her treatment may be characterised in that way.

In the sadomasochistic example, it is conceivable that a person could consent to the infliction of severe pain or suffering, with no limits and no 'safe word', for their own and others' gratification. While the dignitarian account would exclude that treatment from the ambit of torture—because ultimately the subject is 'in harmony' with the action—the defencelessness account is capable of accommodating such a scenario within the concept of torture. On the defencelessness account, the victim's consent is not a conceptual bar to a finding of torture. That finding is open so long as the treatment is undergone in the context of a profoundly asymmetric power relation.

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<sup>658</sup> See *ibid* 51 for a similar argument.

## 4.4 Severity of pain or suffering

It was asserted in section 4.1 above that there is broad agreement that torture requires the deliberate infliction of severe pain or suffering. Not just any pain or suffering will do; a certain threshold of severity must be reached.

This raises the difficult question of how the severity of ‘pain’ and ‘suffering’ may be measured. Both are necessarily subjective phenomena. In Cassell’s classic text ‘The Nature of Suffering and the Goals of Medicine’ the author writes that ‘suffering must inevitably involve the person—bodies do not suffer, persons suffer’.<sup>659</sup> The social dimension is explored in the growing literature on ‘social pain’<sup>660</sup> and ‘social suffering’.<sup>661</sup> Collectively, doctors and scientists agree that ‘the nature of pain makes objective measurement impossible’, and that ‘memory of pain is not accurate and often coloured by changing context factors’.<sup>662</sup>

Despite these difficulties, medical research has identified three leading methods to approximate an objective measurement of the severity or intensity of physical pain.<sup>663</sup> First, the ‘visual analogue scale’ consists of a single line with one end marked as ‘no pain’ and the other end marked as ‘worst possible pain’. Patients are asked to identify where on the spectrum their pain lies.<sup>664</sup> Secondly, the ‘numeric rating scale’ involves a similar assessment with the addition of evenly spaced numbers. Zero on the scale is marked as ‘no pain’, five is ‘moderate pain’, with ten representing the ‘worst possible pain’. Thirdly and finally, the ‘verbal categorical rating scale’ asks patients to categorise their experience as one of the following: no pain; mild pain; moderate pain; severe pain; very severe pain; or worst possible pain.<sup>665</sup> These scales have different strengths and weaknesses and may be more or less appropriate in different contexts. In particular, pain scales of this nature may

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<sup>659</sup> Cassell EJ, *The Nature of Suffering and the Goals of Medicine* (2nd edn, OUP 2004).

<sup>660</sup> See, eg, Eisenberger NI, Lieberman MD and Williams KD, ‘Does Rejection Hurt? An fMRI Study of Social Exclusion’ (2003) 302 *Science* 290; Biro D, ‘Is There Such a Thing as Psychological Pain? And Why It Matters’ (2010) 34 *Culture, Medicine and Psychiatry* 658. For detailed discussion of these issues, see further: Moscoso J, *Pain: A Cultural History* (Palgrave Macmillan 2012); Bourke, *The Story of Pain* (n14).

<sup>661</sup> See, eg, Kleinman A, Das V and Lock M (eds), *Social Suffering* (University of California Press 1997); Wilkinson I, ‘The Problem of “Social Suffering”: The Challenge to Social Science’ (2004) 13 *Health Sociology Review*.

<sup>662</sup> Breivik H et al, ‘Assessment of Pain’ (2008) 101(1) *British Journal of Anaesthesia* 17-18.

<sup>663</sup> Breivik et al, *ibid.* A fourth method, the Wong-Baker FACES Pain Rating Scale, is often used for young children: see Jensen M, ‘Pain Assessment Scales’ (National Initiative for Pain Control 2003) available at <[http://www.painedu.org/Downloads/NIPC/Pain\\_Assessment\\_Scales.pdf](http://www.painedu.org/Downloads/NIPC/Pain_Assessment_Scales.pdf)> accessed 9 October 2015. The medical literature uses the words ‘severity’ and ‘intensity’ interchangeably. See, eg, Jensen MP, Karoly P and Braver S, ‘The Measurement of Clinical Pain Intensity: a Comparison of Six Methods’ (1986) 27 *Pain* 117.

<sup>664</sup> Jensen *ibid.*

<sup>665</sup> Breivik et al conclude that the verbal categorical rating scale ‘should be used only as a coarse screening instrument’ as it is the least precise: (n662) 18.

not adequately capture the multifaceted experience of pain. Other ways to measure pain, such as by its effect on life and/or function, may better encapsulate the experience of pain (for example, pain that wakes a patient from sleep may be particularly severe). But the existence and common usage of these pain scales in medicine demonstrate that an approximate measurement of the severity of physical pain or suffering can be attempted.<sup>666</sup>

Descartes famously distinguished the body as the purview of science, from the mind and spirit, which remained the purview of the church. But modern medicine has long since shown that there is no bright line separating 'mental' from 'physical' pain or suffering.<sup>667</sup> One commentator has described the Cartesian assumption as propagating 'the myth of two pains'.<sup>668</sup> Mental and physical pain are often closely related, each causing or contributing to the other. Some clinicians contend that 'most of clinical pain falls into the grey area' between mental and physical pain.<sup>669</sup>

Some torture techniques aim solely or primarily at the mind or personality. The Istanbul Protocol on the Effective Investigation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment observes that 'torture is a means of attacking an individual's fundamental modes of psychological and social functioning'.<sup>670</sup> Tardu has observed that 'it is not freedom from suffering only, but the broader ideal of human dignity and its corollary, the integrity of the conscious mind',<sup>671</sup> which lie at the core of the prohibition of torture and ill-treatment.

The assumption that it is possible to assess the relative severity of mental pain is borne out by the scientific evidence. Recent medical research has found that social separation or rejection can trigger a similar brain response to physical pain.<sup>672</sup> The theory of 'social pain' has developed to explain this phenomenon. Scientists have shown that 'social pain is analogous in its neurocognitive function to physical pain, alerting us when we have sustained injury to our social connections,

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<sup>666</sup> But cf Sullivan MD, 'Finding Pain Between Minds and Bodies' (2001) 17 *Clinical Journal of Pain* 146, 154: 'Judgments about exaggerating or faking pain, whether these be about others or about oneself, are not made on the basis of a simple encounter with a sensation. These judgments are made on the basis of social criteria. Pain perception is more akin to theorising than to observing. And the theory we use is a socially derived theory'.

<sup>667</sup> See Strauss EB, 'Intractable Pain' (1949) 2 *British Medical Journal* 411, quoted in Bourke, *The Story of Pain* (n14) 21 and note 52.

<sup>668</sup> Morris DB, *The Culture of Pain* (University of California Press 1991).

<sup>669</sup> Sullivan *ibid* 154.

<sup>670</sup> Istanbul Protocol (n486) 45 [235].

<sup>671</sup> Tardu ME, 'The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (1987) 56 *Nordic Journal of International Law* 303, 304.

<sup>672</sup> Eisenberger NI, Lieberman MD and Williams KD, 'Does Rejection Hurt? An fMRI Study of Social Exclusion' (2003) 302 *Science* 290. The authors hypothesise that 'the importance of social bonds for the survival of most mammalian species' may have lead the 'social attachment system' to adopt the same 'neural computations...involved in pain and conflict detection processes, to promote the goal of social connectedness': 291.

allowing restorative measures to be taken'.<sup>673</sup> There is evidence to suggest that the same parts of the brain are affected, and in the same way, by physical pain and social pain.<sup>674</sup> Other research has shown that individuals with high sensitivity to physical pain may also have a high sensitivity to social pain, with the brain response to social exclusion continuing long after the threat has disappeared.<sup>675</sup> Leading researchers in the field postulate that these findings may help to explain 'why physical and social pain are affected similarly by both social support and neurochemical interventions and why it "hurts" to lose someone we love'.<sup>676</sup> Thus, although it may seem artificial to speak of mental suffering as existing on a threshold from severe to less severe, it is possible to achieve an approximation of that measurement, in the same way that an approximate measurement of the severity of physical pain can be achieved.

This discussion shows that it is both conceptually and practically possible to speak of torture as demanding severe pain or suffering, in addition to the defining feature of the wrongness of torture described above. On the dignitarian view, this feature will be the instrumentalisation of an autonomous human being, who is used as a mere tool to serve some purpose, or towards some end, pursued by the perpetrator. On the modified defencelessness view, the feature is the relationship between the perpetrator and the victim, which is characterised as one of profound asymmetry. The latter view is normatively preferable, for the reasons set out above.

## 4.5 Torture and the state

Neither the dignitarian account nor the defencelessness account of the moral wrong of torture speaks directly to the question of the status of the perpetrator. And yet, many have contended that torture is inherently a state-based crime. In the seminal Amnesty International report on torture in 1973—the very report which inaugurated a hugely successful global advocacy campaign leading ultimately to the CAT in 1984—the authors declared that 'concentrated in the torturer's electrode or syringe is the power and responsibility of the state'.<sup>677</sup> Danner takes a similar line, describing torture as 'the ultimate destruction, by the State, of human autonomy', and 'the embodiment of the

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<sup>673</sup> *ibid* 292.

<sup>674</sup> See also Riva P et al, 'When Pain Does Not Heal: The Common Antecedents and Consequences of Chronic Social and Physical Pain' (2014) 36 *Basic and Applied Social Psychology* 329, 329.

<sup>675</sup> Jensen (n663).

<sup>676</sup> Eisenberger, Lieberman and Williams (n660) 292.

<sup>677</sup> Amnesty International, *Report on Torture* (Duckworth 1973); see also Amnesty International *Torture in the Eighties* (Pitman Press 1984) 4.

totalitarian idea'.<sup>678</sup> For Khan, 'torture is what governments do';<sup>679</sup> it is inherently, and quintessentially, a *political* form of violence.<sup>680</sup>

Almost all legal instruments that define and prohibit torture require a nexus with the state.<sup>681</sup> Indeed, under the CAT, the official who *acquiesces* in torture has, *as a matter of law, committed* torture. The result is that if no public official (or other person acting in an official capacity) instigated, consented to, or acquiesced in, the particular ill-treatment, then the act is not torture at all.

This outcome sits uncomfortably with the moral wrong of torture, whether either the dignitarian or the defencelessness account is preferred. On either account, there is nothing inherent in the concept of torture that means it can only be committed by, say, a person wearing a uniform or acting in connection with some authority of the State.

On the dignitarian account, it must surely be irrelevant whether the perpetrator of torture is a state official or not. The important point is that the torturer inflicts pain and suffering as an attack on the victim's autonomy. Impermissible *instrumentalisation* is the distinctive wrong of torture, whatever the identity of the perpetrator.

It may be arguable on the defencelessness account that the power differential is greatest where the perpetrator is an agent of the state. This may be a reason to say that torture by a public official is *more wrongful*, or morally worse, than the same treatment by a private actor. But even if this holds, it is not a reason to say that the latter is not torture at all.<sup>682</sup>

On the dignitarian account it could be contended that the primary aim of the State is to uphold the dignity of its subjects, so that there is a special wrong involved in the instrumentalisation of the citizen by the State.<sup>683</sup> Torture on this view is a perversion of the relationship between citizen and State, and it represents a rupture of the governmental order. Torture may be described as 'the antithesis of the legitimate relation between the state and those subject to its power'.<sup>684</sup> Further,

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<sup>678</sup> Danner M, 'The Twilight of Responsibility: Torture and the Higher Deniability' (2012) 49 Houston Law Review 71, 73.

<sup>679</sup> Khan (n78) 17.

<sup>680</sup> *ibid* 21.

<sup>681</sup> CAT art 1(1) applies only to acts of torture where they are committed 'by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'; see also Inter-American Torture Convention (n528) art 3.

<sup>682</sup> Taking a similar position, see Luban and Shue (n36) 863.

<sup>683</sup> I am grateful to Fiona de Londras and Dapo Akande for discussion on this point.

<sup>684</sup> Kreimer SF, "'Torture Lite', 'Full-Bodied' Torture, and the Insulation of Legal Conscience' (2005) 1 Journal of National Security Law & Policy 187, 213.

'the pain of torture by design negates the vision of humanity that lies at the core of a liberal democracy'; it is 'government occupation of the self'.<sup>685</sup> For Shklar, 'torture is always part of a judicial and political system. To ignore that is to falsify its character'.<sup>686</sup>

But even if it is accepted that an act of torture committed by a person with a nexus to the State is a particularly grave evil, this does not preclude the possibility that a similarly wrongful act could be committed by a private actor. This may be a justification for especially strident condemnation of acts of torture by the State; but that should not be used to justify the exclusion of ill-treatment by non-state actors from the normative concept of torture.

Moreover, it simply does not follow that all acts of torture perpetrated in circumstances where there is a nexus with the State are necessarily morally worse than other acts of torture. Let us imagine two victims in virtually identical circumstances, both of whom are subjected to the torture technique known as *falaka*, which is characterised by severe beatings on the soles of the feet.<sup>687</sup> The perpetrator in the first case is an army officer of the State. The perpetrator in the second case is a private citizen with no connection to the State. Both perpetrators are motivated by a racial animus. Because of this animus, they see the victim before them as less than human, and they seek to demonstrate their hatred of the victim's ethnic group and to punish the victim by means of this brutal torture.

The dignitarian account and the defencelessness account suggest that the treatment inflicted upon both victims here is torture. And yet, if a nexus with the State is regarded as an additional element of the definition of torture, then only the first victim's treatment could be classified as such. Of course, the second victim's treatment would in any event be wrongful on some other basis—but it could not be qualified as torture.

Modifying the example slightly serves to highlight the problem more starkly. Let us imagine that in the second case, the perpetrator goes much further than the first. While the army officer is content to beat the soles of the feet of his victim, the private citizen next door begins to get carried away in the barbarity of the acts. He decides to suspend his victim by the arms from behind—a technique known as 'Palestinian hanging'.<sup>688</sup> In addition to beating on the soles of the feet, this

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<sup>685</sup> Kreimer SF, 'Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror' (2003) 6 University of Pennsylvania Journal of Constitutional Law 278, 298-299.

<sup>686</sup> Shklar J, 'Torturers' *London Review of Books* (9 October 1986) 26-27.

<sup>687</sup> On the ignominious history of *falaka* as a torture technique, see Rejali (n44) 273-277.

<sup>688</sup> On the inaccuracy of this label, see *ibid* 355-356.

private citizen perpetrator hoses his naked victim with freezing water and pelts him with ice.<sup>689</sup> Though the abuse in this case has far exceeded the brutality of the army-officer next door, and even if the suffering of the victim here is considerably greater than that of the neighbouring victim, it cannot be qualified as torture if that concept requires a nexus with the State.

The view that State-sanctioned torture is necessarily morally worse than other forms of torture does not stand up to scrutiny. The better view is that the question as to whether and to what extent there was a connection between a private act of torture, and agents or authorities of the State, is properly a question for secondary rules of public international law. It is a question about whether and when a State may be responsible for an internationally wrongful act (in contrast to the State's positive duty to prevent, investigate and punish acts of torture committed by private individuals).<sup>690</sup> This question should not be conflated with the question whether the definitional requirements for torture have been satisfied.

If we accept that the law should in some way trace the moral wrong of torture, then states should define torture as the deliberate infliction of pain and suffering, regardless of the status of the perpetrator. This follows from the dignitarian account, because what matters is not whether the torturer is acting under orders, but that she is denying the humanity of her victim. The same follows from the defencelessness account, because individuals may be as powerless in the face of private power as we are helpless before agents of the state.

There is of course another element of torture, in addition to the infliction of severe pain or suffering. That element will *either* be that the abuse was perpetrated for a purpose (if you take the dignitarian view), or that the victim was in the custody or under the control of the accused (if you take the defencelessness view). But neither the dignitarian nor the defencelessness account *requires* a nexus with the State.

## 4.6 Conclusion

This chapter has analysed what it is that makes torture wrong, with a view to assessing the legal definitions of torture examined in the following chapters. The starting point of this chapter was that torture has come to be regarded—by courts and in the public consciousness—as carrying a

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<sup>689</sup> These techniques were commonly deployed in the United States in the 19<sup>th</sup> century, in British prisons in Northern Ireland in the early 20<sup>th</sup> century, and in Nazis concentration camps in the 1930s and early 1940s: see *ibid* 285-287.

<sup>690</sup> See further, ILC Articles on Responsibility of States for Internationally Wrongful Acts, GA Res 56/83, 12 December 2001. I am grateful to Antonios Tzanakopoulos for this point.

special stigma: 'there exists today universal revulsion against torture'.<sup>691</sup> This has led to a 'cluster of treaty and customary rules on torture acquiring a particularly high status in the international normative system'.<sup>692</sup> The task of this chapter was to interrogate the foundations of that stigma.

Two predominant accounts of the moral wrong of torture were described. The first, the *dignitarian account*, based on notions of human dignity and Kantian instrumentalisation, has attracted a reasonably wide level of support and has been implicitly embraced in judicial reasoning in courts around the world. The second, the *defencelessness account*, based on the defencelessness of the victim vis-à-vis the perpetrator and the profound asymmetry of their relationship, is less prevalent in the academic literature and is yet to be embraced by courts. However, the latter account is normatively preferable in key respects. In particular, an account that focuses on the asymmetric relationship between the victim and perpetrator is capable of accommodating the torture of non-autonomous beings, and the gratuitous or sadistic infliction of ill-treatment. It therefore avoids the charges of under-inclusivity and over-inclusivity, both of which were rightly levelled at the dignitarian account.

In contrast, the emphasis on instrumentalisation and autonomy in the dignitarian account excluded forms of ill-treatment that are arguably among the most grave imaginable. The twofold failure of dignitarian accounts to grapple with the torture of non-autonomous beings, and torture perpetrated gratuitously, is a serious failing indeed.

The defencelessness account avoids these pitfalls, but as this chapter showed, it required some modification. The difficulty is that 'defencelessness' is essentially a binary quality, which is either present or lacking in an instant case. In at least some of the credibly possible scenarios outlined here, the victim of torture may have the capacity to resist or defend herself, even if only partially, or in some minor or insignificant way. Preferable to the binary quality of defencelessness is an emphasis on *relative* lack of power and control of the victim; the profound asymmetry of power between the perpetrator and the victim of torture.

Having advanced a modified defencelessness account as the best explanation of the moral wrong of torture, this chapter proceeded to consider the requirement that pain or suffering cross a certain threshold of severity for torture to be established. This criterion has attracted broad support both in judicial consideration of torture, and in the academy, despite the inherent difficulty in measuring and comparing levels of pain and suffering. Notwithstanding those challenges, advancements in medical knowledge do suggest that an assessment of the severity of pain and suffering can be attempted. As such, this criterion can be, and should be, sensibly retained and developed.

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<sup>691</sup> *Prosecutor v Furundžija* (n7) 56 [147].

<sup>692</sup> *ibid* 56 [147].

Finally, the chapter considered the argument that torture is inherently a State-based crime. Although many international treaties, and the domestic law of many States, require that the perpetrator of torture establish a nexus with the State, it was argued here that there is nothing inherent in the concept of torture that excludes it from the purely private realm. Although many instances of State-sanctioned torture are particularly severe, and although torture by State agents represents a profound rupture of the proper relationship between citizen and State, it is conceivable that private citizens may perpetrate acts of torture that are just as grave (and perhaps even more so) than acts of torture by the State.

The foregoing analysis has sought to demonstrate that there are two signal aspects of the concept of torture. They are: first, the deliberate infliction of severe pain or suffering; and second, a deeply asymmetrical power relation between victim and perpetrator. The two chapters that follow assess the extent to which the legal definition of torture accurately reflects those signal aspects. Although neither the dignitarian nor the defencelessness account is explicitly addressed in the legal definition of torture, these chapters will show that each account carries implications for the way that torture should be defined in law.

# Chapter Four: Torture in the Criminal Paradigm

## 5.1 Introduction

### 5.1.1 The criminal paradigm and the human rights paradigm

Chapters Four and Five evaluate the legal definition of torture against the moral wrong of torture. While the literature on the philosophical wrong of torture is extensive, and the literature on the legal proscription of torture is equally, if not more so, there has been little work to date that has sought to bring these two bodies of scholarship together. Doing so yields some important insights. While many philosophers have sought to identify the conceptual parameters of torture, and many lawyers have sought to classify and delineate the legal definition of torture in the fragmented regimes of international law, the different ways in which torture can be regarded as a *legal* wrong have largely gone unremarked.<sup>693</sup>

The preceding chapter sought to identify the core concept of torture, and the nature of its moral wrong. In Chapters Four and Five it is argued that this concept finds expression in the law in two different ways—two Dworkinian ‘conceptions’.<sup>694</sup> These conceptions exist in different legal paradigms.<sup>695</sup> The first paradigm is that of criminal law, and the second is human rights law.

Within the criminal paradigm falls the legal definition of torture in the CAT, the Rome Statute, the Inter-American Torture Convention and the jurisprudence of the international criminal tribunals. These sources are considered in depth in Chapter Four below. The inclusion of the CAT in this list is significant. It is argued here that the CAT is essentially a criminal law treaty. The CAT does not in terms prohibit torture—rather, it establishes an obligation upon States parties to prohibit torture, and sets out a legal definition of the conduct that must be prosecuted as such.<sup>696</sup> The CAT does, in a way, guarantee a human right to be free from torture; but it does so by indirect means, obliging States to criminalise torture in municipal law.

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<sup>693</sup> Although recent scholarship has sought to distinguish different conceptions of torture in different regimes of law: see Maculan E, ‘Judicial Definition of Torture as a Paradigm of Cross-Fertilisation: Combining Harmonisation and Expansion’ (2015) 84 *Nordic Journal of International Law* 456; Farrell M, ‘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.

<sup>694</sup> Dworkin, *Law’s Empire* (n15) chapter 2; see also Rawls (n15) and Hart (n15).

<sup>695</sup> This language is adapted from Cane (n39), who identifies criminal law and civil law as two different paradigms.

<sup>696</sup> CAT (n1) arts 1-2, 4.

The definition of torture in Article 1(1) of the CAT is drafted with a degree of precision that attracts analogies with domestic criminal law,<sup>697</sup> and indeed, it has been transplanted wholesale into the penal laws of many States.<sup>698</sup> The CAT proceeds to establish an obligation to criminalise acts of torture, to investigate, extradite or prosecute such acts, and to assist other states with the conduct of criminal proceedings, among other obligations.<sup>699</sup> The language of criminal law and criminal justice is used throughout. Article 4 is expressly directed to the criminal law framework of State parties; Articles 5, 7 and 8 refer to jurisdiction over 'offences' and 'offenders'; and Articles 6, 8 and 9 to criminal or extradition proceedings.<sup>700</sup> Subsidiary obligations relate to education of relevant personnel, and the keeping of relevant rules and procedures 'under systematic review', but these do not detract from the essentially criminal law nature of the treaty.

In contrast, the prohibition of torture in the Inter-American human rights system defies easy categorisation. The IACtHR does not have a single constitutive instrument. Rather, the IACtHR has jurisdiction to hear claims in relation to various treaties and instruments concluded by the Organisation of American States. These include the 1985 Inter-American Torture Convention, the 1948 American Declaration of the Rights and Duties of Man, and the 1969 Inter-American Convention on Human Rights. The latter two instruments plainly fall within the human rights paradigm, but the Inter-American Torture Convention has more in common with the CAT than with other human rights conventions. In particular, and in an echo of the CAT, the Inter-American Torture Convention establishes: a narrow definition of torture 'for the purposes of this convention';<sup>701</sup> obliges States parties to criminalise torture and to make offences of torture punishable by appropriately severe penalties;<sup>702</sup> precludes the defence of superior orders from operating as a bar to criminal liability for torture;<sup>703</sup> requires States parties to establish universal jurisdiction over the crime of torture;<sup>704</sup> and enshrines an obligation to extradite or prosecute

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<sup>697</sup> Zahar, A 'Issues, Institutions and Personalities: Torture' in Cassese A (ed) *Oxford Companion to International Criminal Justice* (OUP 2009).

<sup>698</sup> See, eg, Australia: Crimes (Torture) Act 1988 (Cth), s 2(1); Canada: Criminal Code, RSC 1985, c. C-46, s 269.1; Ireland: Criminal Justice (United Nations Convention Against Torture) Act, 2000, s 1; New Zealand: Crimes of Torture Act 1989, s 2(1); South Africa: The Prevention and Combating of Torture of Persons Act (2013), s 3; Sri Lanka: Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Act, No 22 of 1994; UK: Criminal Justice Act 1988, s 134; . Some states parties are yet to pass implementing legislation, such as: Pakistan (no specific criminal offence of torture); India: (a bill criminalising torture has been pending since 2010); Nepal (the Compensation Relating to Torture Act, 2053 (1996) only partially implements Nepal's UNCAT obligations, since it provides for compensation for victims of torture but does not specifically criminalise not prosecution of perpetrators).

<sup>699</sup> CAT (n1) arts 4-8.

<sup>700</sup> *ibid.*

<sup>701</sup> Inter-American Torture Convention (n528) art 2.

<sup>702</sup> *ibid* art 6.

<sup>703</sup> *ibid* art 4.

<sup>704</sup> *ibid* art 12.

persons suspected of committing torture.<sup>705</sup> It is therefore strongly arguable that the Inter-American Torture Convention adopts a criminal conception of torture, and falls to be considered within the criminal rather than the human rights paradigm.

Both the Inter-American Torture Convention and the CAT set a *minimum* standard: States parties must criminalise *at least* such conduct as is defined as torture in those treaties. But human rights treaties—of which the American Convention on Human Rights is one—can, and do, set higher standards, as the discussion in Chapter Five will show.

Within the human rights paradigm falls the legal definition of torture in the jurisprudence of the ECtHR, the IACtHR, and under the ICCPR as well as the African Charter on Human and Peoples' Rights. These sources are considered in depth in Chapter Five.

At present, both the criminal and the human rights paradigms broadly reflect the dignitarian account of the moral wrong of torture. This is seen in the requirement that torture be perpetrated for a prohibited purpose, and in the broad construction of the purposive element of the definition of torture. It is argued below that it would be normatively preferable for both the criminal and the human rights paradigms to embrace an account of torture as *the deliberate infliction of severe suffering, in the context of a deeply asymmetric power relation*.

However, as this chapter will explain, there is little prospect of this change occurring within the criminal context. The criminal paradigm is heavily entrenched in legislation—by the CAT on the international plane, and by counterpart implementing legislation on the domestic plane. Wholesale upheaval within those regimes is not only unlikely, but it may risk a profound destabilisation of a well-settled international law norm, to the detriment of legal certainty and the coherent application of established rules of criminal liability.

In contrast, the conception of torture in the human rights paradigm is much more amenable to dynamic interpretation. Indeed, recent developments in the jurisprudence of the ECtHR and the IACtHR may foreshadow the adoption of a broader notion of torture, untethered from the narrow requirements of the CAT.<sup>706</sup> These developments should be welcomed, for reasons expounded in Chapter Five below.

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<sup>705</sup> *ibid* arts 11, 13, 14.

<sup>706</sup> Though note that the IACtHR has held that the Inter-American Torture Convention is 'part of the Inter-American *corpus iuris* that this Court must resort to in establishing the content and scope of the general provision contained in Article 5(2) of the American Convention on Human Rights': *Case of Tibi v Ecuador* (n23) [145].

### 5.1.2 The legal definition of torture in the criminal paradigm

The overarching normative claim of the thesis is that the legal definition of torture should, as far as possible, trace the theoretical conception of torture advanced in Chapter Three.<sup>707</sup> Within the criminal paradigm, however, the extent to which that is possible is limited. At present, the conception of torture in the criminal paradigm broadly reflects the dignitarian account of torture's moral wrong. The dual principles of minimum criminalisation and *nullem crimen sine lege* militate against an evolving definition of the criminal offence of torture.<sup>708</sup> Since the definition of torture in Article 1(1) CAT is well established in customary international law, it is unlikely that this will change in the near or medium term. However, there is nothing to prevent States adopting a broader definition of torture than the international crime in their domestic penal law. Indeed, there is much to recommend such an approach.

The definition of torture in Article 1(1) CAT comprises five elements. They are:

- (i) intentional infliction of
- (ii) severe pain or suffering (whether physical or mental) for
- (iii) a prohibited purpose
- (iv) inflicted by or with the consent or acquiescence of a person acting in their official capacity; and
- (v) excluding pain or suffering that is incidental to lawful sanctions.<sup>709</sup>

These will be considered in turn below.

It is argued here that the putative 'lawful sanctions' exception has no legal effect. Setting this aside for the moment, there remain four elements of the crime of torture under the CAT. Torture in the CAT, then, is the intentional infliction of severe pain and suffering for a prohibited purpose, in circumstances satisfying the state nexus requirement. These four elements are also the elements of the crime of torture as at customary international law.<sup>710</sup>

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<sup>707</sup> On the methodological approach of the thesis, see section 1.1 above.

<sup>708</sup> See Ashworth A and Horder J, *Principles of Criminal Law* (7th edition, OUP 2013).

<sup>709</sup> *ibid.* Art 1(1) provides: 'For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions'.

<sup>710</sup> See, eg, *Prosecutor v Furundžija* (n7) 63 [161], stating that 'the broad convergence of ... international instruments and international jurisprudence demonstrates that there is now general acceptance *Prosecutor v Akayesu* (Trial Chamber Judgment) (n588) [681].

The international criminal tribunals have considered torture in three contexts: as a crime against humanity, as a war crime, and as a grave breach of Common Article 3 to the Geneva Conventions of 1949 (the latter of which is applicable in both international and non-international armed conflicts).<sup>711</sup> The Appeals Chamber of the ICTY held in *Prosecutor v Tadić* that crimes against humanity (including torture) could be committed in peacetime, and that war crimes (including torture) could be committed in non-international armed conflicts.<sup>712</sup> The Rome Statute also confers jurisdiction on the International Criminal Court over the crime of torture as a war crime in both international and non-international armed conflicts, and as a crime against humanity.<sup>713</sup>

The standard of proof in all of these contexts is, of course, ‘beyond a reasonable doubt’.<sup>714</sup> That high standard in criminal proceedings—whether domestic or international—is justified by reference to the severity of criminal sanctions, the inequality of arms between the State prosecution services and an individual defendant, and the degree of stigma attached to a conviction.<sup>715</sup> There are good reasons for drawing the boundaries of the criminal offence narrowly, given the nature of criminal proceedings and the seriousness of the consequences they entail for accused persons. Indeed, ‘of all types of legal liability, criminal liability carries the greatest social stigma’.<sup>716</sup> As we will see in Chapter Five, these constraints do not apply to the definition of torture in the human rights paradigm.

The discussion which follows analyses each part of the legal definition of torture in the criminal paradigm, with a view to assessing the extent to which it reflects the moral wrong expounded in Chapter Three above.

## 5.2 Intentional infliction

Criminal prosecution for torture, like many other criminal offences, requires proof of both *mens rea* and *actus reus*. The *mens rea* requirement reflects the fact that ‘those who offend the criminal law are expected to intend the consequences of their acts’.<sup>717</sup> The question is whether the defendant ‘chose to perpetrate the *actus reus*’, which requirement ‘in turn, serves to ensure that

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<sup>711</sup> See *Military and Paramilitary Activities in and around Nicaragua (Nicaragua v United States) (Merits)* (1986) ICJ Rep 1, 114 [218] (the Court).

<sup>712</sup> *Prosecutor v Tadić*, ICTY Case no IT-94-1, Appeals Judgment of July 15, 1999

<sup>713</sup> Rome Statute (n163) art 7(1)(f); art 8(2)(a)(iii); art 8(2)(b)(vi); art 8(2)(b)(xx); art 8(2)(c).

<sup>714</sup> *ibid* art 66; ICTY Rules of Procedure and Evidence, UN Doc IT/32/Rev.50, July 8, 2015, Rule 87(a); ICTR Rules of Procedure and Evidence, UN Doc ITR/3/REV.1, June 19, 1995

<sup>715</sup> See Heller K and Dubber M (eds), *The Handbook of Comparative Criminal Law* (Stanford University Press 2010).

<sup>716</sup> Cane (n39) 85.

<sup>717</sup> Schabas WA, ‘Mens Rea and the International Criminal Tribunal for the Former Yugoslavia’ (2002) 37 *New England Law Review* 1015, 1015.

[the defendant] had (and rejected) the opportunity to avoid wrongdoing'.<sup>718</sup> Cane explains that 'in its core sense, intention involves "aiming at" [something] as part of a plan'.<sup>719</sup> The requirement in Article 1(1) CAT that an act of torture must be committed intentionally speaks to this *mens rea* requirement.<sup>720</sup>

This raises two questions. First, what exactly does 'intention' require? Is it possible to commit torture recklessly, or will only deliberate commission suffice? Must the consequences (severe pain or suffering) be foreseen or desired? Second, can an omission ever amount to torture?<sup>721</sup>

### 5.2.1 Intention and recklessness

Plainly, a person who deliberately inflicts severe suffering on another person with the intention of torturing them has the requisite *mens rea* for the criminal offence. The more difficult question is whether torture may be committed recklessly. There is little jurisprudence from municipal courts or the international criminal tribunals on this point, but it is argued below that in principle, torture is capable of reckless commission. In contrast, there does not appear to be any jurisdiction, whether international or domestic, in which the crime of torture can be committed negligently.<sup>722</sup> Leading commentators agree that a negligent mental state is not, and should not be, capable of constituting the *mens rea* for torture.<sup>723</sup>

*Mens rea* is analysed differently in common law and civil law municipal systems. Common law systems distinguish between two forms of recklessness: subjective (or advertent) recklessness, and objective (or inadvertent) recklessness. Subjective recklessness is where the perpetrator has adverted to the possibility that her actions will inflict torture, and although she did not subjectively desire or intend that outcome, she proceeded in circumstances where it was unjustifiable to take the risk. In contrast, 'objective recklessness' is where the perpetrator *ought* to have adverted to

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<sup>718</sup> Chan W and Simester A, 'Four Functions of Mens Rea' (2011) 70 Cambridge Law Journal 381, 390 (emphasis added).

<sup>719</sup> Cane (n39) 79.

<sup>720</sup> CAT (n1) art 1(1) defines torture as 'any act... [which] is intentionally inflicted on a person'.

<sup>721</sup> Further questions arise in relation to the purpose of the torturer; these are addressed in section 5.4 below.

<sup>722</sup> See Schabas *ibid* 1033. Indeed, is rare that a negligent mental state will suffice to found criminal liability generally: See, eg, Turner JWC, 'The Mental Element in Crimes at Common Law' (1936) 6 Cambridge Law Journal 31; Hart HLA, 'Negligence, Mens Rea, and Criminal Responsibility' in Hart HLA and Gardner J, *Punishment and Responsibility* (2nd edn, OUP 2008) 136-157; Finkelstein C, 'Responsibility for Unintended Consequences' (2005) 2 Ohio State Journal of Criminal Law 579; Simester A 'Can Negligence be Culpable?' in Horder J (ed) *Oxford Essays in Jurisprudence* (4<sup>th</sup> edn, OUP 2008).

<sup>723</sup> See, eg, Burgers and Danelius (n197) 118; Nowak and McArthur (n238) 39; Hathaway O, Nowlan A and Spiegel J, 'Tortured Reasoning: The Intent to Torture Under International and Domestic Law' (2012) 52 Virginia Journal of International Law 791, 799.

the risk that a particular consequence might occur, regardless of whether she was so aware (perhaps because she proceeded thoughtlessly, without turning her mind to the possible consequences).<sup>724</sup> Objective recklessness does not require proof of the actual state of mind of the defendant, relying instead on the mental state of a reasonable person in the defendant's position.<sup>725</sup> As such, objective recklessness is a less demanding standard than subjective recklessness.

Civil law jurisdictions recognise three forms of *mens rea*. The first, *dolus directus*, is where 'the illegality and/or harmful consequence of the act was foreseen and desired by the perpetrator'.<sup>726</sup> The second, *dolus indirectus*, is where 'certain (secondary) consequences in addition to those desired by the perpetrator of the act were foreseen by the perpetrator *as a certainty*... although the perpetrator did not desire those secondary consequences'.<sup>727</sup> And third, *dolus eventualis* is where 'the perpetrator foresees consequences other than those desired *as a possibility*... and nevertheless went ahead with the act'.<sup>728</sup> There is no exact parallel to *dolus eventualis* in common law systems, but it differs from both negligence, which applies an objective standard, and recklessness, which contemplates different degrees of known risk.<sup>729</sup> It is most akin to subjective recklessness, where the defendant knows that a particular consequence may result from her actions and she nevertheless decides to proceed.

As a general rule, both *dolus directus* and *dolus indirectus* fall within the common law concept of intention.<sup>730</sup> *Dolus indirectus* is more demanding than common law subjective recklessness: where the latter requires foresight of the *possibility* that particular consequences might follow, the former requires foresight of the *certainty* of that result. The distinction finds a parallel in the American Law Institute's Model Penal Code, which distinguishes acting with purpose (*dolus directus*) from

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<sup>724</sup> On the difference between 'subjective' and 'objective' recklessness (also called 'advertent' and 'inadvertent' recklessness), see, eg: Ashworth A and Horder J, *Principles of Criminal Law* (7th edition, OUP 2013) 175-181; Baker DJ, *Glanville Williams Textbook of Criminal Law* (3rd edn, Sweet & Maxwell 2012) 119-133.

<sup>725</sup> See, eg, Baker *ibid*.

<sup>726</sup> Van der Vyver JD, 'The International Criminal Court and the Concept of Mens Rea in International Criminal Law' (2004) 12 *University of Miami International & Comparative Law Review* 57, 62-63; see also Van der Vyver JD, 'Prosecutor v Jean-Pierre Bemba Gombo' (2010) 104 *American Journal of International Law* 241, 242. See further, Badar ME, *The Concept of Mens Rea in International Criminal Law: The Case for a Unified Approach* (Hart 2013).

<sup>727</sup> Van der Vyver *ibid* 63 (original emphasis).

<sup>728</sup> *ibid* (original emphasis).

<sup>729</sup> See, eg *R v G* [2004] 1 AC 1034 (HL). For discussion, see Baker (n724) 119-120. See also Duff A, 'Intention Revisited' in Baker DJ and Horder J (eds), *The Sanctity of Life and the Criminal Law: The Legacy of Glanville Williams* (CUP 2013) 148-177.

<sup>730</sup> See, eg, Duff RA, *Intention, Agency and Criminal Liability - Philosophy of Action and the Criminal Law* (Blackwell 1990) 72; Jackson M, *Complicity in International Law* (OUP 2015) 47-51.

acting with knowledge (*dolus indirectus*).<sup>731</sup> The common law concept of subjective recklessness encompasses aspects of both *dolus indirectus* and *dolus eventualis*.

Returning to international law, it could be argued that the purposive element in the CAT's definition of torture precludes the reckless commission of torture. Certainly, in most cases the requirement to show that the perpetrator acted with a prohibited purpose will involve proof of intention.<sup>732</sup> However, there are credible, albeit limited, circumstances in which torture could be committed with a reckless mental state. It is therefore necessary to consider whether the 'intention' requirement in Article 1(1) CAT extends to reckless conduct. A hypothetical scenario illustrates the point.

Imagine a prisoner who is subjected to constant loud and repetitive music, together with other forms of sensory isolation such as hooding and exposure to extreme temperatures. Official A designs the programme and initiates the treatment, the stated objective of which is to extract information from the subject. Assuming the degree of pain or suffering inflicted is severe, we have little difficulty concluding that Official A has committed torture.<sup>733</sup> However, Official A comes to the end of her shift, and Official B assumes guard. Official B is required only to be present in the vicinity as a guard while the treatment continues to occur. Official B understands the suffering the victim experiences, and though she does not subjectively intend to participate, she does nothing to remedy it. Has she committed the criminal offence of torture?

Assuming for the moment that torture may be committed by omission,<sup>734</sup> the answer is quite possibly yes. Official B knows that the playing of loud repetitive music together with sensory isolation is likely to cause severe suffering, and she has adverted to that fact. Her conduct in assuming her duties is intentional, and her decision to do nothing is deliberate. If Official B shares the purpose of extracting information from the prisoner,<sup>735</sup> and if she is reckless as to the infliction of severe pain or suffering, then the criminal offence is made out.

Importantly, if Official B was not aware of the victim's suffering, then she cannot be considered reckless in the subjective sense. Her mental state would be objectively reckless, but would not satisfy the requirements for subjective recklessness. As a normative matter, then, and having regard to the very high degree of seriousness attached to a conviction for torture, Official B should be convicted of a lesser offence than torture, reflecting her lower degree of culpability. But if

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<sup>731</sup> Model Penal Code §2.02(2)(a)-(b).

<sup>732</sup> On the purposive requirement, see further section 5.4 below.

<sup>733</sup> On the severity requirement, see further section 5.3 below.

<sup>734</sup> As to which, see further section 5.2.2 below.

<sup>735</sup> On the purposive requirement, see further section 5.4 below.

Official B is aware of the possibility that the victim will experience severe pain or suffering, and has proceeded anyway, then subjective recklessness may well be established and Official B will have perpetrated the crime of torture.

While the question as to whether the mental state of Official B corresponds to objective or subjective recklessness may be significant for whether the criminal offence of torture is established, it does not, and should not, matter for claims brought in the human rights paradigm. In civil proceedings, the claimant need only show on the balance of probabilities that the defendant intended her actions, as opposed to the consequences of her actions. An inference to that effect would follow from proof that the defendant performed the act, unless evidence is adduced to the contrary. The evidential burden lies with the defendant to adduce such evidence, at which point the onus would shift to the claimant to disprove it on the balance of probabilities.<sup>736</sup>

In the hypothetical example above, a regime of sensory isolation and loud repetitive music is implemented by Official A, and Official B assumes the shift. Official B is aware, or becomes aware, of the *likelihood* that the prisoner will experience severe pain or suffering, but takes no action to ameliorate it. Official B's mental state probably corresponds to the civil law notion of *dolus eventualis*. If, however, Official B foresaw *as a certainty* that the prisoner would suffer severely, even if and although she did not desire that consequence, then the appropriate categorisation of her conduct in civil law systems would be *dolus indirectus*.<sup>737</sup>

Gewirth constructs a further hypothetical scenario.<sup>738</sup> Imagine a terrorist who threatens a vast nuclear attack, unless a prominent politician publicly tortures his own mother. The politician, should he act as the terrorist demands, will no doubt 'desperately hope that his mother will somehow emerge from the ordeal without having experienced any significant discomfort'.<sup>739</sup> Although he knows this to be extremely unlikely, if not impossible, it cannot be said that he intentionally inflicted severe suffering on his mother, at least if we understand 'intention' as applying to the consequences as well as to the act. The politician's mental state cannot be described as *dolus directus*, since he does not positively *desire* the consequences; but it is *dolus indirectus* or

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<sup>736</sup> On the standard and onus of proof in the human rights paradigm, see further sections 6.1.1 and 6.1.2 below.

<sup>737</sup> For further discussion of civil law forms of *mens rea* see, eg. Ohlin JD, "Targeting and the Concept of "Intent"", available at <<http://opiniojuris.org/2012/02/08/targeting-and-the-concept-of-intent/>> February 8, 2012, accessed 8 October 2015; Ohlin JD, 'Searching for the Hinterman: In Praise of Subjective Theories of Imputation' (2014) 12 Journal of International Criminal Justice 325.

<sup>738</sup> Gewirth A, 'Are There Any Absolute Rights?' (1981) 31 Philosophical Quarterly 1, 8. Gewirth's example is discussed in Kramer (n18) 40-41.

<sup>739</sup> Kramer *ibid* 40-41.

as *dolus eventualis*, depending on whether the infliction of pain and suffering was foreseen as a certainty or as a mere likelihood.

Excluding, for the purposes of argument, the availability of defences,<sup>740</sup> whether the politician has committed torture depends on whether the *mens rea* for torture encompasses recklessness as well as intention. Clearly, the perpetrator has been subjectively (or ‘advertently’) reckless. He has contemplated the likelihood that his mother will experience pain or suffering, and although he does not *desire* that outcome, he proceeds anyway.

From a normative standpoint, the politician’s act should be classified as torture.<sup>741</sup> He acted in a way that was deliberately calculated to, and in the ordinary course of events would, cause severe pain or suffering to his mother. If severe pain or suffering follows, then assuming the other elements are satisfied, and absent any defences, the perpetrator should not be able to evade conviction for torture merely because he did not subjectively desire the consequence.

This result would follow in many common law systems (where ‘intention’ generally encompasses at least advertent recklessness), and in many civil law systems (where the politician’s mental state would be characterised either as *dolus indirectus* or *dolus eventualis*).<sup>742</sup>

As we have seen, the first element of the definition of torture in Article 1(1) CAT is that the conduct must have been perpetrated intentionally. In view of the credible possibility that an act of torture may be committed recklessly, the term ‘intentionally’ in the definition of torture under the CAT should be interpreted to include the reckless commission of acts of torture. This is consistent with municipal law, in that intention and recklessness will ordinarily suffice to satisfy the *mens rea* requirement for criminal liability in common law systems.<sup>743</sup>

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<sup>740</sup> In a domestic criminal prosecution the politician may have a defence of duress or of necessity, or alternatively the context may comprise mitigating factors that could be relevant upon sentencing. In an international criminal prosecution there may be grounds for excluding his criminal responsibility—such as, perhaps, that he was acting in defence of others (see Rome Statute (n163) art 31(1)(c)), or duress (either as a ground in mitigation, or as a defence). On the latter issue, see *Prosecutor v Erdemović*, ICTY Case No IT-96-22, Trial Chamber Judgment, November 29, 1996, saying that duress was, in principle, available as a defence, so long as the requirements were applied strictly. But *cf* *Prosecutor v Erdemović*, ICTY Case No IT-96-22, Appeals Chamber Judgment, October 7, 1997, [19], holding that duress cannot be a complete defence to a war crime or crime against humanity involving the killing of innocents.

<sup>741</sup> See Hathaway *et al* (n723); but *cf* Bell A and Dona J, ‘Torturous Intent: Refoulement of Haitian National and US Obligations under the Convention against Torture’ (2011) 35 *New York University Review of Law & Social Change* 707.

<sup>742</sup> *ibid*; see also Baker (n724)

<sup>743</sup> Baker *ibid*.

However, the Rome Statute of the International Criminal Court adopts a more restrictive regime with respect to *mens rea* than most civil or common law systems, excluding *dolus eventualis* as a basis for liability entirely.<sup>744</sup> Article 30 of the Rome Statute states that ‘unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge’.<sup>745</sup> Intention is defined ‘in relation to conduct, that [the] person means to engage in the conduct’, and ‘in relation to a consequence, that [the] person means to cause that consequence or is aware that it will occur in the ordinary course of events’.<sup>746</sup> Knowledge is defined as ‘awareness that a circumstance exists or a consequence will occur in the ordinary course of events’.<sup>747</sup> The hypothetical example of the politician’s mother set out above would likely still fall within the confines of Article 30, because the politician is aware that ‘in the ordinary course of events’ the conduct he performs will cause his mother pain and suffering.<sup>748</sup>

Where torture is prosecuted as a crime against humanity, the *mens rea* requirement is supplied by the *mens rea* requirements for proof of crimes against humanity more generally. This is that ‘the perpetrator knew that the conduct [torture] was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population’.<sup>749</sup> There is no requirement that the perpetrator intended or was reckless with respect to *severe* pain or suffering; only that she intended or was reckless with respect to pain or suffering. In this respect, the crime against humanity of torture in the Rome Statute is consistent with the position in municipal law and the definition of torture in the CAT.

The definition of torture as a war crime in the Rome Statute is more complex. It includes a purposive element, as well as two additional requirements: (i) that the perpetrator was aware of the factual circumstances that established that the victim was a person with protected status under the four Geneva Conventions of 1949; and (ii) that the perpetrator was aware of the factual circumstances that established the existence of an armed conflict.<sup>750</sup>

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<sup>744</sup> This has been subject to criticism: see, eg, Cassese A, ‘The Statute of the International Criminal Court: Some Preliminary Reflections’ (1999) 10 *European Journal of International Law* 144, 153-154, arguing that ‘at least in the case of war crimes’ recklessness should suffice to found liability. Cf Ohlin, ‘Searching for Hinterman’ (n737).

<sup>745</sup> Rome Statute (n163) art 30(1).

<sup>746</sup> *ibid* art 30(2)(a)-(b).

<sup>747</sup> *ibid* art 30(3).

<sup>748</sup> art 30 of the Rome Statute has been criticised as ‘not only confusing and ambiguous, [but] it is also superfluous’, since judges of the ICC would in any event have understood the mental element of the crimes in the statute: see Schabas, ‘*Mens Rea* and the ICTY’ (n) 1025.

<sup>749</sup> Report of the Preparatory Commission for the International Criminal Court, ‘Finalised Draft Text of the Elements of Crimes’ (2000) UN Doc PCNICC/2000/1/Add.2 (*Elements of Crimes*) 7, art 7(1)(f)(5).

<sup>750</sup> *ibid* 14, art 8(2)(a)(ii)—1.

Where torture is prosecuted as a grave breach of Common Article 3 to the Geneva Conventions (which Article is applicable in both international and non-international armed conflicts) the *mens rea* requirements are broadly similar to torture as a war crime under the Rome Statute.<sup>751</sup> In neither case does the *mens rea* require proof that the perpetrator of torture specifically intended that the victim's suffering should be *severe*. Recklessness with respect to that consequence will suffice.

This position accords with principle. When prosecuted as a criminal offence, torture, surely among the gravest crimes in the criminal lexicon, should require proof that the perpetrator intended or was reckless with respect to both her conduct and its consequences (the infliction of pain or suffering on the victim).

It does not follow, however, that the perpetrator must intend, or be reckless with respect to, the infliction of *severe* pain or suffering. It is conceivable, for example, that a person (Person X) could intend certain conduct to cause pain to another person (Person Y), but X intends that that pain should be only of a *moderate* level. If X accidentally 'overshoots', and Y in fact experiences *severe* pain or suffering, then the criminal offence of torture is made out.<sup>752</sup>

Developing this example, let us imagine detention conditions that are deliberately intended to be harsh. In addition to the ever-present pressures of resource constraints, the governor of the facility seeks to make the living conditions for prisoners punitive, so as to function as a perceived deterrent to criminal behaviour. In addition to the overcrowding, the governor arranges to impose a total absence of light and very low temperatures in the cells. It is intended that prisoners should suffer, but it is not intended that they should experience vast pain or extreme suffering. Nevertheless, one of the prisoners does in fact experience severe suffering. Her health was already poor, and due to the lack of light and air she becomes seriously unwell. Her suffering is such that it can only be described as severe. Has an act of torture been committed?

In this case the prison governor has intended to cause only moderate pain or suffering, but he has accidentally 'overshot'. Normatively, this should be sufficient to constitute torture in the criminal

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<sup>751</sup> *ibid* 32-33, art 8(2)(c)(i)—4. Rather than being aware of the factual circumstances establishing the protected status under the Geneva Conventions, and the factual circumstances establishing the existence of an international armed conflict, the requirements are: (i) that the perpetrator must be aware of the factual circumstances establishing that the victims were *hors de combat*, civilians, medical personnel or religious personnel taking no active part in hostilities; and (ii) that the perpetrator was aware of the factual circumstances that established the existence of an armed conflict.

<sup>752</sup> Assuming that the other elements of the offence are also made out, which in turn depends on whether torture is prosecuted as a 'standalone' crime, as a crime against humanity, war crime, or grave breach of the Geneva Conventions of 1949.

law paradigm. Just as the perpetrator of grievous bodily harm cannot evade conviction on the basis that she only intended a lesser degree of harm, nor can the perpetrator here escape punishment for torture on this basis.

The narrow framing of 'intention' within the Rome Statute forms a stark contrast with the human rights conception of torture, as will be demonstrated in Chapter Five below. The strictures of intention within the criminal context are a reflection of the nature and purpose of criminal proceedings, and the severity of their consequences for accused persons. In contrast, the consequences of a finding that the human rights violation of torture has occurred carry wholly different, and for the most part, less serious consequences.<sup>753</sup> A more flexible construction of the requirement for deliberate infliction is therefore appropriate in the human rights context, though it would be profoundly problematic in the criminal context.<sup>754</sup>

### 5.2.2 Acts and omissions

The third issue raised by the intentionality requirement is whether torture may be committed by omission as well as by a positive act. Article 1(1) CAT provides that 'For the purposes of this Convention, the term "torture" means **any act** by which severe pain or suffering, whether physical or mental, is intentionally inflicted...'.<sup>755</sup> On one reading, this excludes the possibility that torture could be committed by omission. The better view is that torture can be committed by both act *and* omission. This is so for three reasons.

The first reason is that the distinction between acts and omissions does not reflect a necessary distinction in moral culpability. Some omissions—such as, for example, a failure to provide food to a prisoner—are very culpable indeed. By the same token, some acts may be only minimally culpable, such as a person who accidentally flicks a power switch and thereby inadvertently causes another person to experience an electric shock, without knowing that this action bears a risk of causing that result. In both of these examples, what is important is the mental state of the perpetrator (did she knowingly cause the harm?) rather than the classification of the conduct as an act or omission. There is no essential moral difference between an act and an omission.<sup>756</sup>

The second reason is that, in any event, there is no settled distinction between an act and an omission. It is a perennial topic of debate in law and philosophy.<sup>757</sup> Indeed, it is arguable that

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<sup>753</sup> See further sections 6.1 and 6.2 below.

<sup>754</sup> See further section 6.2 below.

<sup>755</sup> Emphasis added.

<sup>756</sup> This view is supported by Ashworth A, 'The Scope of Criminal Liability for Omissions' (1989) 105 *Law Quarterly Review* 424, 438.

<sup>757</sup> See, eg, Bennett J, *The Act Itself* (OUP 1995); Honoré T, 'Are Omissions Less Culpable?', in Honoré T, *Responsibility and Fault* (Hart 1999); Simester AP, 'Why Omissions Are Special' (1995)

virtually all acts may be recast as omissions, and vice versa. A person who drives a vehicle straight through a pedestrian at a zebra crossing may be regarded alternately as performing an act (driving) or as omitting to act (by failing to brake).<sup>758</sup> It seems likely that acts and omissions exist on a continuum, and that no 'bright line' distinction may be drawn between them. It is therefore preferable to use the term 'conduct' to encompass both acts and omissions.

From a normative perspective, then, both acts and omissions should be capable of constituting the crime of torture. It is also true as a descriptive claim that the crime of torture is capable of being perpetrated by omission as well as by act. This was expressly confirmed by the ICTY in *Prosecutor v Furundžija*.<sup>759</sup> In *Prosecutor v Akayesu* the ICTR did not expressly mention the possibility of torture by omission, but in declaring that one of the elements of torture was 'intentional infliction' it left that possibility open.<sup>760</sup>

The UN Committee Against Torture has determined that cruel, inhuman or degrading treatment had been committed by omission in a number of cases.<sup>761</sup> While there have been very few cases involving torture committed by omission, in its 1994 report on Turkey, the UN Committee Against Torture found that isolation cells of less than 8 square metres without light or ventilation were 'in themselves a form of torture'.<sup>762</sup> Moreover, 'the practice of forcing persons under interrogation to spend the night in the interrogation rooms lying handcuffed on the floor ...amounts to torture'.<sup>763</sup> Implicit in this reasoning was a finding that a failure to act to ameliorate extremely poor conditions of detention can constitute torture. In the same report, the UN Committee Against Torture found that 'persistent and unjustified suffering' amounting to 'torture' had been imposed on prisoners detained in total solitary confinement and sensory isolation, with one hour outside each day alone

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1 Legal Theory 311; Fletcher GP, *Rethinking Criminal Law* (2nd edn, OUP 2000) 421-428; Stacy T, 'Acts, Omissions, and the Necessity of Killing Innocents' (2001) 29 *American Journal of Criminal Law* 481; Sunstein CR and Vermeule A, 'Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs' (2005) 58 *Stanford Law Review* 703; Moore MS, *Act and Crime: The Philosophy of Action and Its Implications for Criminal Law* (OUP 2010), especially 24-35.

<sup>758</sup> This example appears in McBride NJ and Bagshaw R, *Tort Law* (5th edn, Pearson Education 2015) 155-167.

<sup>759</sup> *Prosecutor v Furundžija* (n7) 63 [162].

<sup>760</sup> *Prosecutor v Akayesu* (Trial Chamber Judgment) (n588) [594].

<sup>761</sup> See, eg, *Dzemajl et al v Yugoslavia*, Communication No 161/2000, UN Doc CAT/C/29/D/161/2000, adopted 21 November 2002 ('*Dzemajl et al v Yugoslavia*'), where police failed to prevent an anti-Roma pogrom; and in relation to a combination of acts and omissions taken by civil guards vis-à-vis asylum seekers in *Sonko v Spain*, Communication No 368/2008, UN Doc CAT/C/47/D/368/2008, adopted 25 November 2011, [10.4].

<sup>762</sup> UN Committee against Torture, 'Report of the UN Committee against Torture: Twenty-fifth Session (13-24 November 2000) and Twenty-sixth Session (30 April-18 May 2001)', 26 October 2001, UN Doc A/56/44, [42]-[43].

<sup>763</sup> *ibid* [33]-[35].

in a small high-walled yard, and one half hour visit from close family members every month.<sup>764</sup> Whether these circumstances are classified as acts or omissions, or as comprising a combination of both, it is clear that in the view of the UN Committee Against Torture, the intentional imposition of extremely poor conditions of detention is capable of constituting torture, so long as the severity threshold and the purposive element are satisfied.

Opinions of the UN treaty bodies, of which the UN Committee Against Torture is one, are not themselves legally binding upon States.<sup>765</sup> However, the views of the Committee Against Torture have been cited with approval by the International Court of Justice as a relevant source in construing the terms of the CAT.<sup>766</sup> As such, the Committee's work may be of persuasive value to judicial bodies interpreting torture within the criminal paradigm. The same may be said of the work of the UN Special Rapporteurs on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the first of which concluded as early as 1986 that torture could be committed by omission as well as by act.<sup>767</sup>

That torture may be committed by omission as well as by act is also evident in the practice of states, many of which have legislated for the criminal offence of torture in terms that extend to omissions as well as acts.<sup>768</sup> Although it is notoriously difficult to infer *opinio juris* from the practice of states

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<sup>764</sup> *ibid.*

<sup>765</sup> The only sources of law under art 38(1) of the ICJ Statute are treaty, customary international law, the 'general principles of law recognized by civilized nations', and the opinions of the most eminent publicists.

<sup>766</sup> See *Belgium v Senegal* (n7) [101] (the Court). The views of the UN Committee Against Torture could be considered to fall within the category of 'the writings of the most eminent publicists' in art 38(1)(d) of the Statute of the ICJ (n222). If so, they are a subsidiary source of customary international law.

<sup>767</sup> See *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, United Nations Commission on Human Rights, 42<sup>nd</sup> Sess, UN Doc.E/CN.4/1986/15, February 19, 1986 (Koojimans P), 28-30, [119], providing a list of methods of torture which included the following omissions: 'exposure to excessive light or noise'; prolonged denial of sleep, food, hygiene, medical assistance, isolation and 'total abandonment'.

<sup>768</sup> See, eg, Australia: The Criminal Code Act 1995 (as amended by the Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010), s 274.2, the perpetrator of torture 'engages in conduct...'; Bangladesh: Penal Code 1860, s 319, defining the offence of torture in terms of 'whoever voluntarily causes hurt...'; Canada: Criminal Code of Canada, s 269.2, providing that "'torture" means any act or omission...'; Ireland: Criminal Justice (United Nations Convention Against Torture) Act 2000, s 1, providing that "'torture" means any act or omission...'; Jordan: Jordanian Penal Code 1960 (as amended in 2011), Article 208, 'subjecting a person to any kind of torture...'; Malaysia: Penal Code, Act No. 574 of 1997, s 330 'voluntarily causing hurt...'; Mexico: Federal Act to Prevent and Punish Torture, enacted December 27, 1991, arts 3, 5, 'a public servant who... inflicts', or 'who fails to prevent such pain or suffering from being inflicted'; New Zealand: The Crimes of Torture Act 1989, s 2, providing that "'torture" means any act or omission...'; Turkey: Republic of Turkey Criminal Code, Law No. 5237 passed on 26 September 2004 (Official Gazette No. 25611 dated 12 October 2004), art 94, 'any public officer who causes...'; Uganda: The Prevention and Prohibition of Torture Act (Act No. 3 of 2012), s 2, providing that 'torture means any act or omission...'; UK: Criminal Justice Act 1988, s 134(3) that 'it is immaterial

in the implementation of a treaty, the choice of language extending to omissions in these jurisdictions goes beyond what is required by the treaty obligation under the CAT.<sup>769</sup> As such it is strongly arguable that the crime of torture as at customary international law is capable of being perpetrated by omissions as well as acts.<sup>770</sup> Indeed, ‘leading commentators agree that at least some omissions, such as intentional failure to provide a prisoner with food or water, fall within the scope of conduct covered by the word “acts” in [CAT] Article 1’.<sup>771</sup>

Thus, it is both normatively and descriptively true that the criminal offence of torture may be committed by conduct, whether acts or omissions, so long as the conduct was deliberate and done with the intention to cause pain or suffering.

Similarly, it will be seen in Chapter Five below that the human rights violation of torture may be perpetrated by omission as well as by a positive act. Since this holds true for the criminal offence of torture, where the accused must be given the benefit of any doubt and where narrow parameters are essential, it is unsurprising that it also applies in the more dynamic and victim-oriented paradigm of human rights law.

### 5.3 Severe pain or suffering

The second element of the definition of torture in Article 1(1) of the CAT is that the conduct must cause severe pain or suffering. Two aspects of this warrant consideration: first, the meaning of the terms ‘pain’ and ‘suffering’; and second, the assessment of the threshold of severity.

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whether the pain or suffering is physical or mental and whether it is caused by an act or an omission’.

<sup>769</sup> CAT art 4 requires states to criminalise *at least* such conduct as is defined as torture in art 1(1), but states may adopt broader definitions of torture if they wish: see art 1(2) CAT.

<sup>770</sup> A customary international law rule with the meaning of art 31(1)(b) of the ICJ Statute requires widespread and consistent state practice, supported by *opinio juris* (that is, the belief that such conduct is required by law): *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark) (Federal Republic of Germany v Netherlands)* (1969) ICJ Rep 3.

<sup>771</sup> Rodley N and Pollard M, ‘Criminalisation of Torture: State Obligations Under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’ (2006) 2 *European Human Rights Law Review* 115, 120. See also Nowak and McArthur (n238) 66; Burgers and Danelius (n197) 118; Ingelse (n442) 208; Kamenova T, ‘Survey of the Crime of Torture in the Jurisprudence of the ICTY’, in Clucas B, Johnstone G and Ward T (eds), *Torture: Moral Absolutes and Ambiguities* (Nomos 2009) 83-95, 87.

### 5.3.1 Pain or suffering

The terms 'pain' and 'suffering' are 'generally coupled in the medical literature', notwithstanding that 'they are phenomenologically distinct'.<sup>772</sup> Pullman contends that pain is primarily a physical experience, while the experience of suffering is bound up with 'reflective consciousness'.<sup>773</sup> This account relies heavily on Cassell, who has observed that:

'...people in pain frequently report suffering from the pain when they feel out of control, when the pain is overwhelming, when the source of the pain is unknown, when the meaning of the pain is dire, or when the pain is chronic.

In all these situations, persons perceive pain as a threat to their continued existence—not merely to their lives but to their integrity as persons. That this is the relation of pain to suffering is strongly supported by the fact that suffering can be relieved *in the presence of continued pain*, by making the source of the pain known, changing its meaning, and demonstrating that it can be controlled and that an end is in sight'.<sup>774</sup>

In his sociological study of suffering, Wilkinson observes that suffering is 'locked in the realms of personal experience' and to that extent it is 'unshareable'.<sup>775</sup> For Scarry, pain and suffering are unspeakable—and in their destruction of language, they 'unmake the world'.<sup>776</sup>

If 'suffering' is understood as the existential experience of unbearable pain, then it is intrinsically linked with autonomy. It involves a process of conscious appreciation of, and reflection upon, the experience of pain.<sup>777</sup> In contrast, pain is a sensation that may be experienced by all sentient beings, regardless of the degrees of autonomy they possess. If only *persons* are capable of suffering, but all sentient beings may experience pain, then the inclusion of both pain and suffering in the definition of torture in Article 1(1) of the CAT is significant. It may indicate that the concept of torture embodied in the CAT is broad enough to encompass the deliberate infliction of cruelty upon non-autonomous beings. To that extent, it would represent a departure from the dignitarian account of the moral wrong of torture. It would be compatible with the defencelessness account of torture's moral wrong.

Against this, however, recent medical and sociological research has demonstrated that 'the sensation of pain cannot be explained in exclusively physiological terms, to a point where the conceptual dichotomy between pain and suffering is obscured'.<sup>778</sup> It seems likely that the inclusion

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<sup>772</sup> Pullman D, 'Human Dignity and the Ethics and Aesthetics of Pain and Suffering' (2002) 23 *Theoretical Medicine and Bioethics* 75, 77; citing also Cassell (n659) 34.

<sup>773</sup> Pullman *ibid*, 83.

<sup>774</sup> Cassell (n659) 35 (emphasis in original).

<sup>775</sup> Wilkinson I, *Suffering: A Sociological Introduction* (Polity 2005) 16.

<sup>776</sup> Scarry (n597) 4-5.

<sup>777</sup> See further section 4.4 above.

<sup>778</sup> Wilkinson (n779) 22.

of both ‘pain’ and ‘suffering’ in the definition of torture in Article 1(1) of the CAT was intended to cast a broad net, including all aspects of human suffering, rather than deliberately seeking to include the experience of non-autonomous beings. Nevertheless, the capacity of that definition to encompass the pain and/or suffering of non-autonomous beings indicates that this aspect of the definition is compatible with the defencelessness account of torture’s moral wrong.

### 5.3.2 Threshold of severity

The notion that torture must cause suffering of a greater degree or severity than inhuman and degrading treatment derives originally from the opinion of the ECommHR in *The Greek Case*, where torture was defined as ‘an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment’.<sup>779</sup> That statement was repeated in Article 1(2) of the 1975 UN Declaration.<sup>780</sup> The UN Declaration formed the basis for the drafting of the CAT, but interestingly the latter treaty makes no mention of aggravation. The CAT does, however, specify ‘severe pain or suffering, whether physical or mental’ in the definition of torture in Article 1(1).<sup>781</sup> The introduction of a severity threshold in the CAT seems to have replaced the aggravation requirement in the UN Declaration.

The severity threshold was controversial during the drafting of the CAT.<sup>782</sup> On the one hand, both the US and UK governments sought to add an additional qualifier requiring the pain or suffering to be ‘extremely’ severe.<sup>783</sup> On the other hand, the USSR opposed the inclusion of even the ‘severity’ criterion, preferring to stipulate that acts of torture cause pain and suffering only.<sup>784</sup> Ultimately, and perhaps unsurprisingly, the midway point between the two positions was adopted: ‘the phrase “severe pain” was sufficient to convey the idea that only acts of a certain gravity shall be considered to constitute torture’.<sup>785</sup>

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<sup>779</sup> *The Greek Case* (n264) 186 [2] (ECommHR).

<sup>780</sup> 1975 UN Declaration (n329) art 1(2).

<sup>781</sup> Emphasis added.

<sup>782</sup> The report of the secretariat following the Fifth UN Congress for the Prevention of Crime and the Treatment of Offenders (at which the draft UN Declaration was negotiated) observed that ‘[S]everal participants’ would have preferred ‘that the word “severe” be struck from the definition’: see UN Department of Economic and Social Affairs, ‘Fifth UN Congress on the Prevention of Crime and the Treatment of Offenders: Report of the Secretariat, Geneva 1-12 September 1975’, UN Doc A/CONF.56/10, 38 [293], 40 [301].

<sup>783</sup> Nowak and McArthur (n238) 67. See also Burgers and Danelius (n197) 44-45.

<sup>784</sup> Nowak and McArthur *ibid.*

<sup>785</sup> Burgers and Danelius (n197) 117. An excellent summary of the debates over Article 1 of the CAT, including the difference of opinion between Amnesty International, the International Commission of Jurists, and the UK as to whether to preserve the ‘relative intensity of suffering’ may be found in Rodley, ‘The Definition(s) of Torture in International Law’ (n395) 474-575.

The practice of the UN Committee Against Torture, both in its inquiry procedure and in its individual determinations, has consistently emphasised severity of pain or suffering in relation to torture. In its 2001 inquiry into prison conditions in Peru, the UN Committee Against Torture said that, in light of the conditions in certain maximum security facilities, a period of detention of around two weeks would constitute inhuman or degrading treatment, but that 'longer periods of detention in those cells amount to torture'.<sup>786</sup> Since the purpose of the detention presumably remains the same, the basis of this changed categorisation must be that the longer the period of subjection, the greater the suffering experienced.<sup>787</sup>

The absence of particularly severe suffering was a factor in the finding that cruel, inhuman or degrading treatment, rather than torture, had occurred in the decision in *Sonko v Spain*.<sup>788</sup> Regrettably, the UN Committee Against Torture's decision in *Dzemajl v Yugoslavia* gave no indication as to why cruel, inhuman or degrading treatment rather than torture was found to have occurred, stating simply that 'the burning and destruction of houses constitute, in the circumstances, acts of cruel, inhuman or degrading treatment or punishment'.<sup>789</sup> The applicants in *Dzemajl* had invited the Committee to find that the suffering they experienced was severe,<sup>790</sup> but the majority opinion did not address that submission. Two committee members jointly authored a separate opinion indicating that 'the suffering visited upon the victims was severe enough to qualify as "torture"'.<sup>791</sup> That this was the sole basis of their dissent suggests that the reason the majority failed to make a finding of torture was that they did not consider the severity threshold was satisfied. Thus, both *Sonko* and *Dzemajl* provide qualified support for the contention that torture requires more severe suffering than other ill-treatment.

The jurisprudence of the international criminal tribunals has also required a threshold of severity of pain or suffering for a finding of torture. The ICTY Trial Chamber referred in *The Čelebići Prison Camp Case* to the 'threshold level of severity necessary to be characterised as torture'.<sup>792</sup> The ICTY Trial Chamber in *Kvočka* agreed that 'the degree of mental or physical suffering required to prove

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<sup>786</sup> UN Committee Against Torture, 'Report of the Committee against Torture, Twenty-fifth session (13-24 November 2000) and Twenty-sixth session (30 April-18 May 2001)' UN Doc A/56/44, 60-70, [144]-[193], 66 [178].

<sup>787</sup> Although see Nowak and McArthur (n238) 71, criticising 'this surprising and inconsistent legal qualification'.

<sup>788</sup> *Sonko v Spain* (n765) [10.3]-[10.4], noting that 'the Civil Guard officers exercised control' over the applicant and that he was subjected to 'physical and mental suffering prior to his death, [which was] aggravated by his particular vulnerability as a migrant'.

<sup>789</sup> *Dzemajl et al v Yugoslavia* (n765) [9.2].

<sup>790</sup> *ibid* [8.13].

<sup>791</sup> *ibid*, Annex: Individual Opinion by Mr F Mariño and Mr A González Poblete.

<sup>792</sup> *The Čelebići Prison Camp Case*, Trial Chamber Judgment (n254) [468].

cruel treatment is lower than the one required for torture'.<sup>793</sup> The ICTY Trial Chamber in *Furundžija* observed on several occasions that the victim's suffering, both physical and mental, had been severe.<sup>794</sup> And most recently, the requirement for severe pain or suffering was reproduced in the definition of torture as a crime against humanity in the Rome Statute.<sup>795</sup>

It was argued in Chapter Three above that the severity is an important factor distinguishing the moral wrong of torture from other less serious harms. In the absence of a severity requirement, then *any* infliction of suffering—such as a random punch by a passer-by—could be capable of constituting torture, so long as the additional factor (whether defencelessness or instrumentalisation) was present.<sup>796</sup> The severity requirement therefore is, and should remain, a feature of both the criminal and the human rights conceptions of torture.<sup>797</sup>

### 5.3.3 Objective and subjective elements

The assessment of whether the severity threshold has been reached in a particular case depends in part upon subjective factors of the victim, as well as objective characteristics of the conduct that has been perpetrated. This was recognised by the ICTY in the 2001 Trial Chamber judgment in *Prosecutor v Kvočka*, where the tribunal observed that:

'In assessing the seriousness of any mistreatment, the Trial Chamber must first consider the objective severity of the harm inflicted. Subjective criteria, such as the physical or mental effect of the treatment upon the particular victim and, in some cases, factors such as the victim's age, sex, or state of health will also be relevant in assessing the gravity of the harm'.<sup>798</sup>

The *Kvočka* Trial Chamber also observed that this was consistent with the approach to assessing the severity threshold that is followed in the human rights context.<sup>799</sup> Similarly, in *Prosecutor v Brđanin*, the ICTY Trial Chamber affirmed that the victim's physical and mental condition as well as the victim's age, sex and state of health are matters that fall to be considered when determining whether particular treatment constitutes torture.<sup>800</sup> The jurisprudence of the ICTY has also

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<sup>793</sup> *Prosecutor v Kvočka & Ors*, ICTY Case No IT-98-30/1, Trial Chamber Judgment, 2 November 2001, 45 [161] ('*Prosecutor v Kvočka (Trial Chamber Judgment)*').

<sup>794</sup> *Prosecutor v Furundžija* (n7) 48 [126], 49 [129],

<sup>795</sup> Rome Statute (n163) Article 7(2)(e).

<sup>796</sup> See section 4.3 above.

<sup>797</sup> See further section 6.3 below.

<sup>798</sup> *Prosecutor v Kvočka*, Trial Chamber Judgment (n793) 42 [143] (citation omitted).

<sup>799</sup> *ibid* [143] and note 302, referring to *Ireland v UK* (ECtHR) (n241) [162].

<sup>800</sup> *Prosecutor v Brđanin*, ICTY Case no IT-99-36, Trial Chamber Judgment, 1 September 2004, [484].

emphasised that social, cultural and religious factors may be relevant to the assessment of severity.<sup>801</sup>

Interestingly, in *Prosecutor v Brdanin*, the Trial Chamber referred to the victim's 'position of inferiority' as a relevant factor to be considered when assessing the severity threshold.<sup>802</sup> The victim's inferiority was confirmed by the ICTY Trial Chamber as a relevant factor in its 2005 judgment in *Prosecutor v Limaj*.<sup>803</sup> These references in *Brdanin* and *Limaj* to the relative power imbalance between the victim and perpetrator recall the defencelessness account of the moral wrong of torture, as set out in Chapter Three above. They provide an important illustration of the importance of the power relation to the concept of torture, even in the context of a legal definition that more generally reflects the dignitarian account of torture's moral wrong.

## 5.4 Purposive element

Article 1(1) CAT defines torture as the intentional infliction of severe pain or suffering 'for such purposes as obtaining from him or a third person information, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind'.<sup>804</sup>

It was argued in Chapter Three that the inclusion of a purposive element in the definition reflects a dignitarian account of the moral wrong of torture. If torture is viewed as wrong because it is the impermissible instrumentalisation of another human being, then it makes sense to define torture in terms that relate to that instrumentalisation.

The requirement in Article 1(1) CAT that the torture be perpetrated for a purpose may be seen as an echo of the Kantian prohibition on using people as mere means to other ends. During the drafting process, France opposed the inclusion of a purpose requirement altogether, while the US proposed a requirement that acts of torture be done deliberately and maliciously.<sup>805</sup> The majority of States agreed that 'the essential aspect of the *objective* for which someone is subjected to inhuman treatment' was the distinguishing characteristic of torture.<sup>806</sup> Thus, it seems that the drafters of the CAT implicitly adopted the dignitarian account of the moral wrong of torture.

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<sup>801</sup> See, eg, *The Čelebići Prison Camp Case*, Trial Chamber Judgment (n254) [495]; *Prosecutor v Limaj & Ors*, ICTY Case no IT-03-66, Trial Chamber Judgment of November 30, 2005, [237].

<sup>802</sup> *ibid.* The victims' relative vulnerability and inferiority was also referred to at [1106].

<sup>803</sup> *Prosecutor v Limaj* (n803) [237].

<sup>804</sup> CAT (n1) art 1(1) (emphasis added).

<sup>805</sup> See Burgers and Danelius (n197) 46; Nowak and McArthur (n238) 40-41.

<sup>806</sup> Ingelse (n442) 58, 70.

The importance of the purposive element to the concept of torture has been recognised in the jurisprudence of the international criminal tribunals. The ICTY Trial Chamber said in *The Čelebići Prison Camp Case* that the difference between wilfully causing great suffering or serious injury to body or health and torture was ‘primarily’ that ‘the alleged acts or omissions need not be committed for a prohibited purpose such as is required for the offence of torture’.<sup>807</sup> The ICTY Trial Chamber in *Furundžija* considered that the factor which determines whether a person is a perpetrator or co-perpetrator of torture on the one hand, or an aider and abettor of torture on the other hand, is whether the individual ‘partakes of the purpose behind torture’.<sup>808</sup> Leading publicists support the view that the purposive element is the chief distinguishing factor for conduct crossing the torture threshold.<sup>809</sup>

Despite this clarity as to the requirement of a prohibited purpose, four issues arise. The first is whether the prohibited purpose must be the sole or dominant purpose for the crime of torture to be made out. The second issue is whether the list of prohibited purposes is inclusive or exhaustive. The third issue is whether the purely gratuitous or sadistic infliction of ill-treatment can satisfy the requirement for a prohibited purpose. The fourth issue is whether the definition of torture as a crime against humanity in the Rome Statute reflects a different conception of the crime of torture, a conception that reflects the defencelessness rather than the dignitarian account of the moral wrong of torture.

#### 5.4.1 Sole or dominant purpose

It is well established as at customary international law that the ‘prohibited purpose’ need not be the sole motivation of the torturer. As Tardu notes, there may be ‘basic subconscious motivations of torturers, common to many forms of behaviour... [such as] anomie, alienation’, and others.<sup>810</sup> What is required is that a prohibited purpose be *part of* the motivation for the conduct. Indeed, the international criminal tribunals have held that the prohibited purpose need not be the sole or even the predominant purpose for which the conduct is committed.<sup>811</sup> This too is consistent with

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<sup>807</sup> *The Čelebići Prison Camp Case*, Trial Chamber Judgment (n254) [442].

<sup>808</sup> *Prosecutor v Furundžija* (n7) 95 [252] (original emphasis). On this point see also *Prosecutor v Krnojelac*, ICTY Case no IT-97-25-A, Appeals Chamber Judgment of 17 September 2003, 62-63, [155] (*Prosecutor v Krnojelac (Appeals Chamber Judgment)*).

<sup>809</sup> See, eg, Burgers and Danelius (n197) 17; Morgan R and Evans M (eds), *Protecting Prisoners: The Standards of the European Committee for the Prevention of Torture in Context* (OUP 1999) 254; Rodley, ‘The Definition(s) of Torture in International Law’ (n395) 150-151; Nowak M and McArthur E, ‘The Distinction Between Torture and Cruel, Inhuman or Degrading Treatment’ (2006) 16 *Torture* 147 (citing also the relationship of powerless on the one hand and control on the other hand as a further distinguishing factor); Rodley and Pollard, *The Treatment of Prisoners under International Law* (n267) 123-124.

<sup>810</sup> Tardu (n671) 305.

<sup>811</sup> See, eg, *The Čelebići Prison Camp Case*, Trial Chamber Judgment (n254) 170-171, [470]; *Prosecutor v Kvočka*, Trial Chamber Judgment (n793) 44 [153]; *Prosecutor v Krnojelac* (Trial

the dignitarian account of the moral wrong of torture, since it is the fact of impermissible instrumentalisation that matters, rather than the complex range of motivations, dominant and subsidiary, which may be at play in the mind of the torturer.

#### 5.4.2 Inclusive list of prohibited purposes

On the dignitarian account of torture, it is not the *particular* end to which the torture is directed that matters. It is the *existence* of a purpose, and not its *nature*, that is significant; so long as the victim is not in harmony with that purpose. This principle finds expression in Article 1(1) of the CAT, which provides a list of purposes that is indicative rather than exhaustive. Those examples include: obtaining information, as well as ‘punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind’.<sup>812</sup> Article 2 of the Inter-American Torture Convention gives a similarly inclusive list of prohibited purposes, of which the named examples include ‘criminal investigation, as a means of intimidation, as personal punishment, as a preventative measure, as a penalty, or for any other purpose’.<sup>813</sup>

The Trial Chamber in *Prosecutor v Furundžija* said that ‘from the specific viewpoint of international criminal law relating to armed conflicts’,<sup>814</sup> torture ‘must aim at obtaining information or a confession, or at punishing, intimidating, humiliating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person’.<sup>815</sup>

The defendant in the *Čelebići Prison Camp Case* argued that the list of purposes for which torture could be perpetrated was closed.<sup>816</sup> This argument was expressly rejected by the Trial Chamber, which held that customary international law ‘clearly envisages prohibited purposes additional to those suggested by the Commentary’.<sup>817</sup> This emphatic rejection of the argument that only certain purposes will satisfy the definition of torture may also be seen as a reflection of the dignitarian account of torture.

The question whether humiliation is a ‘prohibited purpose’ within the meaning of torture in Article 1(1) CAT is contested. On the one hand, the Trial Chamber of ICTY held in *Prosecutor v Furundžija*

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Chamber Judgment) (n611) 80 [184]. See also Schabas W, *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2010) 167.

<sup>812</sup> CAT (n1) Article 1(1).

<sup>813</sup> Inter-American Torture Convention (n528) art 2.

<sup>814</sup> *Prosecutor v Furundžija* (n7) 63 [162].

<sup>815</sup> *ibid* 63-64 [162].

<sup>816</sup> *The Čelebići Prison Camp Case*, Trial Chamber Judgment (n254) 171 [472].

<sup>817</sup> *ibid*.

that ‘among the possible purposes of torture one must also include that of humiliating the victim’.<sup>818</sup> This view was also shared by the Trial Chamber ICTR in *Prosecutor v Akayesu*.<sup>819</sup> Against this, a differently composed ICTY Trial Chamber said in *Prosecutor v Krnojelac* that, unlike the purposes of obtaining information or confessions, punishing, intimidating, coercing and discriminating, the purpose of ‘humiliating’ the victim had ‘not as yet reached customary status’ so as to satisfy the purposive element for torture.<sup>820</sup> Although ‘there may be a tendency, particularly in the field of human rights, towards the enlargement of the list of prohibited purposes’, the *Krnojelac* Trial Chamber considered itself prevented by the principle of legality from concluding that humiliation was a prohibited purpose as a matter of customary international law.<sup>821</sup> The Appeals Chamber in *Krnojelac* did not comment on this aspect of the Trial Chamber’s reasoning, though it did find that in other respects the purposive element had been construed too narrowly in the Trial Chamber Judgment.<sup>822</sup>

Since the dignitarian account of torture is the prevailing account in the criminal paradigm, the judgment of the ICTY in *Krnojelac* is open to critique on the basis of apparent inconsistency. The position of the ICTY in *Furundžija* and the ICTR in *Akayesu* better reflects the dignitarian account of torture, according to which it is the existence of a purpose, and not its nature, which matters.<sup>823</sup> On the dignitarian account, then, the *Krnojelac* Trial Chamber of the ICTY was mistaken to suggest that each specific purpose to which the torturer aims must be separately established as a matter of customary international law. The better view is that the crime of torture at customary international law requires proof of a purpose, but that the list of possible purposes is open.

### 5.4.3 Gratuitous or sadistic ill-treatment

One problem with the purpose requirement, as discussed in Chapter Three, is that it excludes the sadistic perpetration of ill-treatment from its ambit. This was accepted by the ICTY in the *Čelebići Prison Camp Case*, where the Trial Chamber said:

‘A fundamental distinction regarding the purpose for which torture is inflicted is that between a “prohibited purpose” and one which is purely private. The rationale behind this distinction is that **the prohibition on torture is not concerned with purely private conduct**, which is ordinarily sanctioned under national law. In particular, rape and other

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<sup>818</sup> *Prosecutor v Furundžija* (n7) 64 [162].

<sup>819</sup> *Prosecutor v Akayesu* (Trial Chamber Judgment) (n588) [597].

<sup>820</sup> *Prosecutor v Krnojelac* (Trial Chamber Judgment) (n611) 80-81, [185]-[186].

<sup>821</sup> *ibid* 81 [186].

<sup>822</sup> *Prosecutor v Krnojelac* (Appeals Chamber Judgment) (n808) 72 [171], finding that, contrary to the finding of the Trial Chamber, ‘Krnojelac had reason to know that some of the acts [committed by his subordinates] had been or could have been committed for one of the purposes prohibited by the law on torture’. In essence, the Appeals Chamber held that the Trial Chamber had required an excessively high standard of knowledge of the purpose for which the acts had been committed by Krnojelac’s subordinates.

<sup>823</sup> Provided that the victim is not ‘in harmony’ with that purpose: see further section 4.2.2 above.

sexual assaults have often been classified as “private”, thus precluding them from being punished under national or international law. However, such conduct could meet the purposive requirements of torture as, during armed conflicts, the purposive elements of intimidation, coercion, punishment or discrimination can often be integral components of behaviour, thus bringing the relevant conduct within the definition. Accordingly, **“only in exceptional cases should it therefore be possible to conclude that the infliction of severe pain or suffering by a public official would not constitute torture... on the ground that he acted for purely private reasons”**.<sup>824</sup>

On this account, cruelty inflicted for no reason at all cannot be classified as torture, because although it impugns the dignity and autonomy of the subject, it lacks the instrumentalisation which is the defining characteristic of torture.<sup>825</sup> This was also the view taken by the ICTY Trial Chamber in *Prosecutor v Krnojelac*, which said that ‘torture as a criminal offence is not a gratuitous act of violence; it aims, through the infliction of severe mental or physical pain, to attain a certain result or purpose’.<sup>826</sup>

The exclusion of sadistic or gratuitous ill-treatment from the crime of torture is a further respect in which the prevailing conception of torture in the international criminal tribunals may be described as dignitarian. However, it was argued in Chapter Three above that the purely sadistic infliction of ill-treatment is among the most morally abhorrent forms of torture imaginable. If such ill-treatment is, as Montaigne argued, ‘the farthest point that cruelty can reach’,<sup>827</sup> then it is a significant problem that the dignitarian account excludes it from the ambit of torture. It was partly for this reason that Chapter Three contended that the better view of torture’s moral wrong is that it is *the deliberate infliction of severe suffering in the context of a deeply asymmetric power relation*. It would better reflect that moral wrong if the international criminal tribunals were to include sadistic or gratuitous ill-treatment within the confines of the crime of torture.

#### 5.4.4 The Rome Statute and the defencelessness account

The Rome Statute of the ICC confers jurisdiction over acts of torture in two contexts: when torture is committed as a crime against humanity, and where torture is committed as a war crime.<sup>828</sup>

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<sup>824</sup> *The Čelebići Prison Camp Case*, Trial Chamber Judgment (n254) 171 [471], quoting Burgers and Danelius (n197) 119 (both emphases added).

<sup>825</sup> See further section 4.2 above.

<sup>826</sup> *Prosecutor v Krnojelac*, (n611) [180].

<sup>827</sup> Montaigne (n35) 484.

<sup>828</sup> Rome Statute (n163) art 7(1)(f) (torture as a crime against humanity) and art 8(2)(a)(ii) (torture as a war crime).

The crime against humanity of torture is limited to acts 'committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'.<sup>829</sup>

Torture is defined for the purposes of crimes against humanity as:

'the intentional infliction of severe pain or suffering, whether physical or mental, upon a **person in the custody or under the control of the accused**; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions'.<sup>830</sup>

Notably, this definition does not require proof of a prohibited purpose. The emphasised phrase could be read as a reflection of the defencelessness account of torture, in that it emphasises the relationship of power and control between the victim and the perpetrator of torture. Indeed, the Elements of Crimes of the Rome Statute specifically notes that 'it is understood that no specific purpose need be proved for this crime'.<sup>831</sup> On one reading, this could be seen as a disavowal of the dignitarian account of torture, since instrumentalisation-based analyses of torture emphasised the need for a purposive element. The commentaries on the drafting of the Rome Statute tell us little about why the definition of the crime against humanity of torture was framed in this unusual way.<sup>832</sup>

Against this, however, one of the elements of the crime against humanity of torture is that 'the perpetrator **knew** that the conduct was part of **or intended** the conduct to be part of a widespread or systematic attack directed against a civilian population'.<sup>833</sup> This wording indicates that the perpetrator does not necessarily have to have *shared* the purpose of committing a widespread or systematic attack against a civilian population. It will be sufficient that the perpetrator knew that the conduct 'was committed as part of' that attack.<sup>834</sup> It may be arguable that allowing prosecution based on mere knowledge of the attack, rather than requiring proof of intention in every case, is a dilution of the purposive requirement that is required for torture in other contexts. However, in practice the difference is unlikely to carry great significance. This is because the requirement to show that the act of torture was committed 'as part of a widespread or systematic attack directed

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<sup>829</sup> *ibid* art 7(1).

<sup>830</sup> *ibid* art 7(2)(e) (emphasis added).

<sup>831</sup> Elements of Crimes (n749) 7, art 7(1)(f), note 14. The Elements of Crimes were adopted by a majority of two thirds of the members of the Assembly of States Parties to the Rome Statute, and they 'shall assist the Court in the interpretation of articles 6, 7, and 8': see Rome Statute (n163) art 9(1).

<sup>832</sup> Schabas W, *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2010) 166-167; Cassese A, Gaeta P and Jones JRWD, *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002) 98.

<sup>833</sup> *ibid* art 7(1)(f), [5] (emphasis added).

<sup>834</sup> See *ibid* together with Rome Statute (n163) art 7(1).

against any civilian population, with knowledge of the attack', would in any event have been sufficient to satisfy Article 1(1) CAT.<sup>835</sup>

The Rome Statute does not separately define the war crime of torture. It confers jurisdiction on the ICC in relation to war crimes 'in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes'.<sup>836</sup> War crimes are defined for the purposes of the Rome Statute as:

- 'grave breaches of the Geneva Conventions of 12 August 1949' (and an exhaustive list follows, in which torture is included);<sup>837</sup>
- 'other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law' (and an exhaustive list follows, in which there is no reference to torture, but in which 'outrages upon personal dignity, in particular humiliating and degrading treatment' appears);<sup>838</sup> and
- in the case of non-international armed conflicts, serious violations of common article 3 to the Geneva Conventions (and an exhaustive list follows, in which there is no reference to torture but in which 'outrages upon personal dignity, in particular humiliating and degrading treatment' appears);<sup>839</sup> and
- 'other serious violations of the laws and customs applicable in conflicts not of an international character, within the established framework of international law' (and an exhaustive list of acts follows, in which there is no reference to torture or other inhuman or degrading treatment).<sup>840</sup>

Although there is no definition in the Rome Statute of the war crime of torture, a definition may be gleaned from the Elements of Crimes of the Rome Statute, which provide that the following elements must be proved for the war crime of torture:

1. 'The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.
2. The perpetrator inflicted the pain or suffering **for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind.**

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<sup>835</sup> Recall that the non-exhaustive list of prohibited purposes in art 1(1) includes 'discrimination', and that the prohibited purpose need only be one of the perpetrator's purposes, as opposed to the dominant purpose: see section 5.4.1 above.

<sup>836</sup> Rome Statute (n163) arts 8(1); 8(2)(a)(ii)

<sup>837</sup> *ibid* art 8(2)(a)

<sup>838</sup> *ibid* art 8(2)(b).

<sup>839</sup> *ibid* art 8(2)(c).

<sup>840</sup> *ibid* art 8(2)(e).

3. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
4. The perpetrator was aware of the factual circumstances that established that protected status.
5. The conduct took place in the context of and was associated with an international armed conflict.
6. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.’<sup>841</sup>

Accordingly, although the crime against humanity of torture does not include a purposive element, the war crime of torture does require proof of a purposive element. Like the definition of torture in Article 1(1) CAT, there is a non-exhaustive list of purposes that will suffice to show the war crime of torture. The indicative list of purposes is the same as that in Article 1(1) CAT, and it covers: interrogational torture (‘obtaining information or a confession’); penal torture (‘punishment’); intimidatory torture (‘intimidation or coercion’); and discriminatory torture (‘for any reason based on discrimination of any kind’). In requiring proof of the torturer’s purpose, the war crime of torture may be said to broadly conform to the dignitarian account of what it is that makes torture wrong, in contrast to the crime against humanity of torture, which emphasised the relationship of control on the one hand and helplessness on the other.

Notably, the war crime of torture under the Rome Statute does not make reference to the ‘*in the custody or under the control of*’ requirement that appears in the crime against humanity of torture. By eschewing reference to the power relation between victim and perpetrator, the war crime of torture reflects the dignitarian account of what makes torture wrong. Against this, however, it is clear from the second and third elements in the Elements of Crimes that the conduct will only amount to the war crime of torture where the victim is a protected person under the Geneva Conventions, and where ‘the perpetrator was aware of the factual circumstances’ establishing that protected status.<sup>842</sup> The protected categories of person under the Geneva Conventions include sick, wounded and shipwrecked soldiers, prisoners of war and other detained persons, and civilians. Where an act of torture is committed against a protected person, it is therefore almost certainly the case that there will be a strongly asymmetrical power relation between the victim and torturer. As such, the war crime of torture does conform in some respects to the defencelessness account of torture, in addition to the dignitarian account.

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<sup>841</sup> Elements of Crimes (n749) 14 (emphasis added).

<sup>842</sup> Elements of Crimes (n749) 14.

There is as yet no case law on torture from the ICC, though an outstanding arrest warrant for the President of Sudan, Omar al-Bashir, includes a charge of torture.<sup>843</sup> An arrest warrant issued in 2010 against Mbarushimana, alleged executive secretary of the *Forces Démocratiques pour la Libération du Rwanda*, also included charges of torture,<sup>844</sup> although Pre-Trial Chamber I later declined to confirm the charges and Mbarushimana was released from custody.<sup>845</sup>

Chapter Four has thus far contended that the legal definitions of torture that are found in the criminal paradigm broadly embody a dignitarian account of torture's moral wrong. The three requirements explored thus far—*deliberate infliction of severe pain or suffering for a purpose*—reflect the dignitarian account of torture as instrumentalisation that was advanced in Chapter Three. This is so in three respects: first, the inclusion of a purposive element; second, in the broad construction of the purposive element; and third, in the debate over whether sadistic or gratuitous ill-treatment falls within the parameters crime of torture.

However, there are two features of the various legal definitions explored above which may appear better suited to the defencelessness account of the moral wrong of torture. The first is the inclusion of 'pain or suffering' in the definition of torture, both in the CAT and in international criminal law. The inclusion of both terms may suggest that the definition is capable of applying to non-autonomous beings, which arguably experience 'pain' but not 'suffering' so-called.<sup>846</sup> The second feature is the definition of torture as a crime against humanity in the Rome Statute, which omits a requirement to prove the perpetrator's purpose, defining torture in this context as *the deliberate infliction of severe pain or suffering 'upon a person in the custody or under the control of the accused'*.<sup>847</sup> This passage bears a strong resemblance to the modified defencelessness account advanced in Chapter Three, according to which torture is *the deliberate infliction of severe pain or suffering in the context of a profoundly asymmetric power relation*.<sup>848</sup> That the victim of torture is 'in the custody or under the control of the accused' clearly suggests that the relationship between the victim and perpetrator is profoundly asymmetric.

There are of course additional *mens rea* requirements that would need to be satisfied in the context of a prosecution for torture *as a crime against humanity*, and some of these requirements (particularly, the need to show awareness or intention that the acts of torture would form part of a widespread and systematic attack against a civilian population) in any event will require

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<sup>843</sup> See *Bashir*, (ICC-02/05-01/09), Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, [102]-[104].

<sup>844</sup> *Prosecutor v Callixte Mbarushimana* (ICC-01/04-01/10) 28 September 2010 (ICC).

<sup>845</sup> *Prosecutor v Callixte Mbarushimana*, (ICC-01/04-01/10) 16 December 2011 (ICC).

<sup>846</sup> See section 5.3.1 above.

<sup>847</sup> Rome Statute (n163) art 7(2)(e), emphasis added.

<sup>848</sup> See section 4.3 above.

reference to the perpetrator's purpose. Nevertheless, the framing of the definition of torture as a crime against humanity in the Rome Statute demonstrates one possible way that a legal definition reflecting the defenceless account may be achieved in the criminal paradigm.

It was argued above that the legal definition of torture should reflect, as far as possible, torture's moral wrong.<sup>849</sup> On this basis, it would be normatively preferable if the definition of torture in the criminal paradigm—whether in international treaties or in domestic legislation—followed the Rome Statute formulation rather than that in Article 1(1) CAT. Defining torture as the deliberate infliction of severe pain or suffering 'upon a person in the custody or under the control of the accused' broadly corresponds to the defencelessness account that was advanced in Chapter Three.

Despite that normative preference, such radical change on the international plane is extremely unlikely to say the least. It is, however, open to States to define torture along those lines in their domestic penal laws, and the logical consequence of the foregoing analysis is that States should follow that approach. This point is explored further below.

## 5.5 Nexus with the State

Article 1(1) of the CAT provides that 'for the purposes of this Convention', torture covers only acts that are 'inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'. According to CAT Article 1(2), that definition 'is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application'.<sup>850</sup>

It was argued in Chapter Three above that neither the dignitarian nor the defencelessness account of the moral wrong of torture suggests that a nexus with the state is or should be an element of the definition. However, the decision to include a public official nexus as an element of the definition of torture reflects the State-centric foundations of international law.<sup>851</sup> In this context, the drafters of the CAT considered the purpose of that treaty was 'to provide protection against acts committed on behalf of, or at least tolerated by, the public authorities'; on the other hand, 'the State could normally be expected to take action according to its criminal law against private persons having committed acts of torture against other persons'.<sup>852</sup>

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<sup>849</sup> On the relationship between moral wrongs and the criminal law, see further Duff, 'Legal and Moral Responsibility' (n20).

<sup>850</sup> CAT (n1).

<sup>851</sup> On the drafting of the state nexus requirement in CAT Article 1(1), see Burgers and Danelius (n197) 45-47; Nowak and McArthur (n238) 77-79.

<sup>852</sup> Burgers and Danelius (n197) 45.

However, in the years since the CAT was drafted, the State-centric nature of international law has been subjected to challenge. Current debates in international law concern the role of non-State actors, the scope of individual criminal responsibility, and the horizontal application of human rights.<sup>853</sup> These developments raise the possibility that the customary law crime of torture will evolve so as to eliminate the State nexus requirement.<sup>854</sup>

Three aspects of the State nexus requirement are worthy of note. They are: the nexus with the State as a constitutive element of the crime of torture; the broadening of the ways in which a State may be complicit in torture under the CAT; and the imputation of the principal's wrong to the accomplice, where the accomplice is an agent of the State.

### 5.5.1 The State nexus element as constitutive of the crime of torture

Under the CAT regime, the nexus with the State appears to be *constitutive* of the act of torture itself. This is a departure from the general structure of international law, which would ordinarily ask, first, whether an internationally wrongful act has occurred, and second, whether the State was responsible for that act. But Article 1(1) of the CAT seems to mean that torture is only internationally wrongful where there is a nexus with the State. To that extent, it represents a blurring of primary and secondary rules of international law. By including instigation, consent or acquiescence in the substantive definition of the offence of torture, rather than dealing with them separately as modes of participation in wrongdoing, the CAT adopts a conception of torture as inherently and necessarily a State-based crime.

A hypothetical example illustrates the point. Let us imagine that a State authority employs a private contractor to administer a detention centre. The contractor's employees at the detention centre deliberately inflict severe pain or suffering on a number of the inmates, in circumstances that would normally amount to torture. Although the contractor's employees would not necessarily be considered 'public officials', they may well fall within the CAT Article 1(1) notion of 'other person acting in an official capacity'. As such, assuming that the treatment was deliberately inflicted, caused severe pain or suffering, and was inflicted in pursuance of a purpose (such as punishment or discrimination), the crime of torture will be made out.

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<sup>853</sup> The literature on these topics is vast. See, eg, Alston P (ed), *Non-State Actors and Human Rights* (OUP 2005); Clapham A, *Human Rights Obligations of Non-State Actors* (OUP 2006); Fredman S, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008); Parlett K, *The Individual in the International Legal System: Continuity and Change in International Law* (CUP 2011); Urueña R, *No Citizens Here: Global Subjects and Participation in International Law* (Martinus Nijhoff 2012); Tonkin H, *State Control over Private Military and Security Companies in Armed Conflict* (CUP 2013).

<sup>854</sup> See, eg, Sifris (n4).

Now, let us imagine the same scenario transplanted to a purely private context. Perhaps the warden in charge of a private residential boarding house severely ill-treats the residents, whose passports she has confiscated and whose movements she has restricted. Although the perpetrator in this example has deliberately inflicted severe pain or suffering for the same purpose as in the previous example (say, punishment or discrimination), here there is no nexus with the State. The warden is neither a public official nor a person acting in an official capacity. Has she committed the crime of torture?

Applying the CAT, the answer is no. The definition of torture in Article 1(1) of the CAT renders the *status of the perpetrator an element of the offence*. If there is no nexus with the State, there is no torture.

The inclusion of the State nexus requirement as an element of the legal definition of the offence effectively conflates primary and secondary rules of international law. Ordinarily there would be two questions: first, is there an internationally wrongful act?; and second, if so, is it attributable to the State?<sup>855</sup>

Separating the question of attribution from the question of whether the act is internationally wrongful would have yielded different results in the hypothetical cases considered above. Had torture been defined in the CAT simply in terms of *'the deliberate infliction of severe pain or suffering for a purpose'*, then the question of whether the act of torture could be attributed to the State would have been left to be determined by customary international law.<sup>856</sup>

On that approach, it would have been arguable that the conduct of the contractor at the detention centre would be attributable to the State, either on the basis that they were 'exercising elements of governmental authority', or on the basis that they were acting under the 'direction of control of the State'.<sup>857</sup> Analysis would then turn to consideration of the question whether the elements of the crime of torture were made out, and if so, whether they were internationally wrongful. In contrast, in the second example it would not be arguable that the conduct of the warden was attributable to the State, and as such the question of whether the act of torture was internationally wrongful would not arise. Importantly, however, even in the absence of State responsibility, if the State nexus element was excised from the definition of torture, then the warden could be held

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<sup>855</sup> See the ILC's Articles on State Responsibility and the Commentary to those Articles (n690). See further Crawford J, *State Responsibility: The General Part* (CUP 2013).

<sup>856</sup> Though there would always, of course, be the question of whether this conduct is an obligation on the State: see (n460) above and accompanying text.

<sup>857</sup> See ILC Articles on State Responsibility (n690) arts 5, 8, respectively.

*individually* responsible for her acts of torture in international criminal law.<sup>858</sup> By making the State nexus element a constitutive element of the definition of torture, CAT Article 1(1) excludes that possibility as a matter of conventional law.<sup>859</sup>

This result represents a further departure from the conception of torture set out in Chapter Three. It was argued above that neither the dignitarian nor the defencelessness accounts of torture supported the inclusion of a State nexus requirement. On the dignitarian account, it is the instrumentalisation of the victim, and not the status of the perpetrator as an agent of the State, which explains the special wrong of torture. On the defencelessness account, it is the power imbalance between the victim and the perpetrator which is the gravamen of torture's moral wrong. Such an imbalance may *often* characterise the relationship between State agents and private citizens—but that is neither *necessarily* nor *exclusively* so. It may be arguable that State involvement is an *aggravating* circumstance, but normatively it ought not to be *constitutive*. To the extent that Article 1(1) CAT compels that conclusion, States ought not to follow it in their domestic penal laws. The better approach would be to define the crime of torture as the deliberate infliction of severe suffering upon a person in the custody or under the control of the accused.<sup>860</sup>

### 5.5.2 Complicity in torture

The second noteworthy feature of the State nexus element in Article 1(1) of the CAT is that it broadens the scope of State complicity in torture. The CAT includes the 'instigation, consent or acquiescence' of a public official or other person acting in an official capacity in the legal definition of torture.

As a matter of customary international law, a State that aids or assists the commission of an internationally wrongful act may be held responsible through the doctrine of complicity. Complicity may be defined as participation in the wrongdoing of another.<sup>861</sup> Complicity ordinarily requires that the aider and abettor knows or is aware that his conduct assists in the commission of the principal's crime.<sup>862</sup> There are various modes of participation in the wrongful conduct of another, including aiding, abetting, counselling or procuring to name a few.<sup>863</sup> Collectively these modes 'are best thought of as comprising two kinds of action: intentionally *helping* the principal to

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<sup>858</sup> For example, by a domestic court in the exercise of universal jurisdiction to prosecute the crime of torture: see CAT (n1) arts 5-8, considered in *Belgium v Senegal* (n7) [75] (the Court).

<sup>859</sup> Of course, a customary international law rule could develop according to which an act of torture perpetrated by non-State actors in peacetime is a crime subject to universal jurisdiction.

<sup>860</sup> See (n847) above and accompanying text.

<sup>861</sup> Jackson (n730) 10.

<sup>862</sup> *ibid* 75-81.

<sup>863</sup> *ibid* 10-12.

commit wrongdoing and intentionally *influencing* the decision of the principal to commit the wrong'.<sup>864</sup>

While the 'instigation' of an act of torture by an individual would likely fall within the customary international complicity rules, the addition of the 'consent or acquiescence' clause in Article 1(1) of the CAT introduces two new ways in which a State could be complicit in an act of torture committed by another. Absent the express inclusion of that clause, it is difficult to conceive of ways that mere consent or acquiescence could constitute 'the provision of aid or assistance' so as to engage the responsibility of the State pursuant to customary international law.

Thus, the inclusion of consent or acquiescence in Article 1(1) of the CAT represents a deliberate broadening of the circumstances in which a State may be complicit in torture. In addition to aiding and assisting, it will be enough under the CAT that the State official (or other person acting in an official capacity) merely 'consented' or 'acquiesced' in an act of torture by another.

The point may be illustrated by example. Let us imagine a detention centre in State A, which is jointly operated by agents of States A and B. They have in their custody an individual, known as 'Prisoner C'. Agents of State A interrogate Prisoner C, using brutal methods including pumping water down C's throat to simulate choking and drowning.<sup>865</sup> Agents of State B are aware that State A uses 'tough' interrogation techniques, and that some detainees have claimed to have sustained injury during interrogations. The agents of State B are not, however, aware of the details of State A's interrogation practices, and State B does not condone torture in its legal or policy framework. Assuming that the other elements of torture are made out, is State B complicit in the acts of torture perpetrated by State A?

Absent the 'consent or acquiescence' clause in Article 1(1), and assuming attribution is made out, the question would be whether State B 'provided aid or assistance' to State A in the commission of torture.<sup>866</sup> This in turn would require that the agents of State B *knew* that their conduct assisted State A in their acts of torture, though *intention* to assist would not be required.<sup>867</sup>

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<sup>864</sup> *ibid* 11, citing Kadish SH, 'Complicity, Cause and Blame: A Study in the Interpretation of Doctrine' (1985) 73 California Law Review 323, 342.

<sup>865</sup> This variant of the more well-known technique of 'waterboarding' was popular during the medieval Inquisitions and was revived by United States forces for use during the insurgency in the Philippines at the turn of the 20<sup>th</sup> century: see Rejali (n44) 280-281; see also Danner (n678) 76-78.

<sup>866</sup> ILC Articles on State Responsibility (n690), art 16.

<sup>867</sup> See *Prosecutor v Blaškić*, (IT-95-14-A) ICTY Appeals Chamber Judgment, 19 July 2004, [49] (emphasis added), and discussion in Jackson (n730) 75-81.

On these facts, it is unlikely that agents of State B ‘provided aid or assistance’ to State B in a manner sufficient to attract liability for aiding or assisting under customary international law. It is possible, but unlikely, that their shared control of the detention facility could be construed as ‘aid or assistance’. However, in the absence of evidence to suggest that State B helped or influenced State A in committing the torture against C, then State B cannot be said to have been complicit in that wrong.<sup>868</sup>

However, with the addition of the ‘consent or acquiescence’ clause in Article 1(1) of the CAT, that outcome is reversed. Although State B may not have provided affirmative *assistance* to the agents of State A in their commission of torture, it is arguable that by sharing responsibility for the facility’s operation they have consented or acquiesced in those acts, particularly in circumstances where agents of State B are aware that detainees have claimed to have sustained injuries during interrogation.

The definition of torture in the CAT therefore broadens the scope of State complicity in torture. It creates a more demanding set of rules of State responsibility in respect of torture than that which is applicable in general international law. To the general international law complicity rules of ‘aiding and abetting’, the CAT adds two new modes of complicity: namely, consent and acquiescence.

Thus, in addition to the obligation not to perpetrate torture or to aid or abet the commission of torture, the CAT obliges States *not to consent to*, and *not to acquiesce in*, acts of torture committed by another.<sup>869</sup> The virtually universal acceptance of these rules (evidenced by the widespread ratification of the CAT) reflects the significant normative force that prohibition of torture has acquired in the international legal system.

### 5.5.3 Imputing the principal’s wrong to the accomplice

The third feature of the State nexus requirement follows from the first two. We have seen that CAT Article 1(1) broadens the ways in which a State may be complicit in torture, and renders State involvement constitutive of the act of torture itself. It is further the case that, where a State is complicit in torture, CAT Article 1(1) effectively imputes the *principal’s* wrong to the *accomplice*. The State official who has consented or acquiesced in torture is not liable for aiding and abetting torture; the State official has *herself* committed torture.

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<sup>868</sup> Though questions may arise in relation to joint responsibility, and/or violation of an obligation of prevention.

<sup>869</sup> This is thus a *lex specialis* regime of State responsibility. The adoption of *lex specialis* rules of State responsibility in particular treaties is contemplated in the ILC Articles on State Responsibility (n690) art 55.

This imputation of the principal's wrong to the accomplice applies *only* where the accomplice is a public official or other person acting in an official capacity. As we saw in the example of the private residential home in section 5.5.1 above, if no State official is involved in the ill-treatment, then no act of torture has occurred. There is no question of the State being complicit in torture; because absent State involvement, there is nothing in which to be complicit.

It may be argued that the fact 'the consequences of State involvement [in torture] may be more pernicious' than with torture perpetrated by non-State actors.<sup>870</sup> This is because torture by a public official creates a rupture between citizen and State which warrants, or even demands, special condemnation.<sup>871</sup> Indeed, the *travaux préparatoires* to the CAT show that, in including modes of participation as elements of the substantive definition of torture, the drafters were seeking to convey the highest possible opprobrium for State complicity in torture.<sup>872</sup> However, whether this is best achieved by conflating the issue of State involvement in torture with the definition of torture is open to question.

This conflation of modes of participation of wrongdoing with the definition of the offence of torture in CAT is different to the structure of most domestic criminal offences,<sup>873</sup> and as we have seen, it is different to the structure of primary and secondary rules of international law.<sup>874</sup> To that extent it lacks conceptual rigour and clarity. It may have been preferable to include a separate obligation in the treaty prohibiting States from instigating, consenting or acquiescing in torture committed by another State or individual. Such an approach would be consistent with that which was later adopted by the International Law Commission in Article 16 of the Articles on the Responsibility of States for Internationally Wrongful Acts.<sup>875</sup>

These concerns militate against extending that approach to other contexts in which it is not explicitly demanded. Jackson has argued persuasively that holding an accomplice responsible for

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<sup>870</sup> See McGlynn, 'Rape, Torture and the European Convention on Human Rights' (n587) 574, noting that torture by State agents carries 'the possibility that the investigation, prosecution and punishment of the perpetrator may be compromised, if not entirely impeded'.

<sup>871</sup> I am grateful to Fiona de Londras for this point.

<sup>872</sup> Nowak and McArthur (n238); Burgers and Danelius (n197).

<sup>873</sup> See Heller and Dubber (n715).

<sup>874</sup> The secondary rules are now largely codified in the ILC Articles on State Responsibility (n690). For discussion, see Crawford (n855); in relation to complicity, see Jackson (n730).

<sup>875</sup> ILC Articles on State Responsibility, *ibid* art 16, providing that: 'a State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State'.

the principal's wrong conflicts with the principle of fair labelling.<sup>876</sup> It would be more consistent with that principle to hold the State that assists or facilitates acts of torture liable for those acts of assistance through the framework of complicity in public international law, and the individual liable for her acts of assistance through the doctrine of complicity in international criminal law.<sup>877</sup>

The elements of infliction,<sup>878</sup> instigation,<sup>879</sup> consent<sup>880</sup> and acquiescence<sup>881</sup> have all been addressed by the UN Committee Against Torture in its decisions on individual communications. The limb of 'other person acting an official capacity' was the subject of a claim in *Elmi v Australia*, where a Somali applicant challenged his proposed deportation from Australia on the basis that he faced a risk of torture at the hands of a powerful clan in Somalia.<sup>882</sup> The Committee Against Torture held that, since Somalia lacked a functioning government, and the clan in question exercised some quasi-governmental powers, the public official requirement for torture was satisfied.<sup>883</sup>

The jurisprudence of the international criminal tribunals also confirms that quasi-governmental, or State-like, exercises of power will suffice to satisfy the State nexus requirement for torture. The ICTY Trial Chamber explained in the *Čelebići Prison Camp Case* that, although:

'Traditionally, an act of torture must be committed by, or at the instigation of, or with the consent or acquiescence of, a public official or person acting in an official capacity. In the context of international humanitarian law, **this requirement must be interpreted to include officials of non-State parties to a conflict [emphasis added]**, in order for the

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<sup>876</sup> Jackson (n730). See further Chalmers J and Leverick F, 'Fair Labelling in Criminal Law' (2008) 71 *Modern Law Review* 217.

<sup>877</sup> On which, see further Jackson (n730) Chapter 3.

<sup>878</sup> *Danilo Dimitrijevic v Serbia and Montenegro*, Communication No 172/2000, UN Doc CAT/C/35/D/172/2000, adopted 16 November 2005; *Dragan Dimitrijevic v Serbia and Montenegro*, Communication No 207/2002, UN Doc CAT/C/33/D/207/2002, adopted 24 November 2004; *Dimitrov v Serbia and Montenegro*, Communication 171/2000, UN Doc CAT/C/34/D/171/2000, adopted 3 May 2005 (all three cases involved the torture of Roma men by Serbian and Montenegrin police).

<sup>879</sup> I am not aware of any cases in which the Committee against Torture has specifically found that ill-treatment was *instigated*, but not *perpetrated*, by a public official.

<sup>880</sup> 'Consent' is generally grouped with 'acquiescence' in decisions of the Committee Against Torture and the two are usually treated together: see section 6.5 below.

<sup>881</sup> *Agiza v Sweden*, Communication No 233/2003, UN Doc CAT C/34/D/233/2003, adopted 20 May 2005 (Swedish police held to have acquiesced in the applicant's ill-treatment by US authorities in the course of his deportation to Egypt); see also *Dzemajl et al v Yugoslavia* (n765) (Yugoslav police held to have consented or acquiesced in a pogrom in the local Roma settlement by virtue of their presence at the scene and inaction in the face of the violence).

<sup>882</sup> *Elmi v Australia (Merits)* Communication No 120/1998, UN Doc CAT/C/22/D/120/1998, adopted 14 May 1999.

<sup>883</sup> *ibid* [6.5]. But *cf HMHI v Australia, Merits*, Communication No 177/2001, UN Doc CAT/C/28/D/177/2001, adopted 1 May 2002, holding that since there was now a transitional government in Somalia (however limited its control), the acts of clan groups will now fall outside the bounds of CAT: [6.4].

prohibition to retain significance in situations of internal armed conflicts or international conflicts involving some non-State entities'.<sup>884</sup>

While torture under the CAT unquestionably requires a nexus with the State, the same is not necessarily true in all parts of international criminal law. The definition of the crime against humanity of torture in the Rome Statute has no 'public official' requirement.<sup>885</sup> Nor does the war crime of torture in the Rome Statute require a State nexus, whether committed in an international or a non-international armed conflict,<sup>886</sup> and the same is true of the crime against humanity of torture.<sup>887</sup> Thus, prosecution for an act of torture under the Rome Statute is possible regardless of the status of the perpetrator.

On the other hand, the jurisprudence of the international criminal tribunals is mixed as to whether a nexus with the State is required for the crime of torture. On the one hand, the ICTY Trial Chamber said in *Furundžija* that 'at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, e.g. as a de facto organ of a State or any other authority-wielding entity'.<sup>888</sup> Similarly, the ICTR in *Akayesu* considered the State nexus to be an element of the crime against humanity of torture,<sup>889</sup> and emphasised the 'conceptual framework of state-sanctioned violence' in the CAT.<sup>890</sup>

A differently constituted ICTY Trial Chamber said in *Prosecutor v Kunarac* that 'the presence of a state official or of any other authority-wielding person in the torture process is not necessary for the offence to be regarded as torture under international humanitarian law'.<sup>891</sup> The *Kunarac* Trial Chamber reasoned that 'the characteristic trait' of the offence of torture when committed as a crime against humanity or war crime or grave breach was '**found in the nature of the act committed rather than in the status of the person who committed it**'.<sup>892</sup> A differently constituted ICTY Trial Chamber in *Kvočka* described the reasoning in *Kunarac* as persuasive, and

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<sup>884</sup> *The Čelebići Prison Camp Case*, Trial Chamber Judgment (n254) 171 [473] (emphasis added).

<sup>885</sup> Rome Statute (n163) art 7(2)(e). Though note that the definition includes an additional criterion that torture be committed 'upon a person in the custody or under the control of the accused'.

<sup>886</sup> *ibid* arts 8(2)(a)(ii)-1; 8(2)(c)(i)-4. See also *Elements of Crimes* (n749) 14, 32.

<sup>887</sup> Rome Statute (n163) art 7(1)(f).

<sup>888</sup> *Prosecutor v Furundžija* (n7) 63-64 [162].

<sup>889</sup> *Prosecutor v Akayesu* (Trial Chamber Judgment) (n588) [594], [597], [681].

<sup>890</sup> *ibid* [687].

<sup>891</sup> *Prosecutor v Kunarac*, (Trial Chamber Judgment) (n588) 170 [496].

<sup>892</sup> *ibid* 169 [495] (emphasis added). See also *Prosecutor v Brđanin* (n802) [489].

rejected the contention that a State nexus was an element of the definition of torture as a crime against humanity, war crime or grave breach.<sup>893</sup>

The position of the ICTY in *Kvočka* and *Kunarac* should be preferred on this point to the position of the ICTY in *Furundžija* and the ICTR in *Akayesu*. The requirement of a nexus with the State does not accord with either the dignitarian or the defencelessness accounts of the moral wrong of torture. The theoretical foundations of the concept of torture do not support a definitional requirement relating to the official or other status of the perpetrator. What is important is the quality of the treatment inflicted, and not the office (or lack thereof) commanded by the perpetrator. The view that State-sanctioned torture is necessarily morally worse than other forms of torture does not stand up to scrutiny, but in any event, that view would be capable of being accommodated if the State nexus element were considered an aggravating factor of the offence, rather than a constitutive element of its definition.

## 5.6 Lawful sanctions

The definition of torture in Article 1(1) CAT includes a caveat that it does not apply to pain or suffering which is 'inherent in or incidental to lawful sanctions'.<sup>894</sup> This was among the most controversial issues during the drafting of the CAT.<sup>895</sup> Some States considered this to be 'too far-reaching an exception';<sup>896</sup> some thought the clause should be interpreted as demanding compliance with international law rather than national law;<sup>897</sup> still others, that the clause was necessary 'to stop encroachment into national criminal law'.<sup>898</sup> The inclusion of the clause is a classic example of an incompletely theorised agreement:<sup>899</sup> that is, the participants in the drafting agreed on the result, but for a variety of different reasons, and in spite of, not because of, their disagreement as to the fundamental principle behind it.

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<sup>893</sup> *Prosecutor v Kvočka* (Trial Chamber Judgment) (n793) [139], citing *Prosecutor v Akayesu* (Trial Chamber Judgment) (n588) [594] and *Prosecutor v Furundžija* (n7) [162].

<sup>894</sup> A similar clause appears in the Inter-American Torture Convention (n528) Article 2, which provides that '[t]he concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this Article'.

<sup>895</sup> See Nowak and McArthur (n238) 79, 46-49; Burgers and Danelius (n197) 121-122; Coracini CEF, 'The Lawful Sanctions Clause in the State Reporting Procedure before the Committee against Torture' (2006) 24 *Netherlands Quarterly of Human Rights* 305.

<sup>896</sup> Eg, Belgium: see Nowak and McArthur *ibid* 46.

<sup>897</sup> Eg, Netherlands, UK, US, Italy: *ibid* 48-49.

<sup>898</sup> Eg, some Islamic states were concerned about the legality of Sharia punishments: *ibid* 46; see also Burgers and Danelius (n197) 121.

<sup>899</sup> Sunstein CR, 'Incompletely Theorised Agreements' (1995) 108 *Harvard Law Review* 1733; see further Sunstein CR, 'Incompletely Theorised Agreements in Constitutional Law' (2007) 74 *Social Research* 1.

How, then, should the 'lawful sanctions' clause be interpreted? The Vienna Convention on the Law of Treaties provides that terms in a treaty should be interpreted 'in good faith in accordance with the ordinary meaning... in their context and in light of [the treaty's] object and purpose'.<sup>900</sup> On their ordinary meaning, standing alone, the phrase appears to mean treatment inflicted for the purposes of lawful criminal sanction should not be qualified as torture. However, this interpretation is difficult to reconcile with the object and purpose of the treaty, which is stated in the preamble to the CAT, and was confirmed by the ICJ in *Belgium v Senegal* as being, 'to make more effective the struggle against torture... throughout the world'.<sup>901</sup> If ill-treatment satisfying the other criteria in CAT Article 1(1) could be authorised by a domestic statute, then this would deprive the prohibition of torture of its practical effect.

An alternative approach, supported in the secondary literature, is to read the clause as requiring compliance not with national law, but with international law.<sup>902</sup> This is compatible with the object and purpose of the CAT, but it would effectively deprive the clause of all meaning. Torture is prohibited with the 'exception' that it will not apply to sanctions that are legal under international law; but torture is illegal under international law. This interpretation would render the clause effectively redundant—albeit by adopting circular logic.

The UN Committee against Torture has largely avoided the issue by referring to CAT Article 16 rather than Article 1 in cases where particular treatment has a basis in domestic law.<sup>903</sup> However, one high profile exception occurred during its consideration of the 2002 report of Saudi Arabia. The Saudi delegation contended that 'specific sanctions such as amputation, flogging (whipping) and stoning for certain crimes... emanated from God'<sup>904</sup> and were justified under the 'lawful sanctions' clause, being part of 'the law of the land'.<sup>905</sup> Although the UN Committee against Torture greeted this assertion with concern, it avoided expressing strident criticisms, apparently for fear of provoking Saudi Arabia's withdrawal from the CAT reporting procedure.<sup>906</sup>

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<sup>900</sup> As per the VCLT (n226) art 31(1)

<sup>901</sup> *Belgium v Senegal* (n7) [68] (the Court).

<sup>902</sup> See, eg, Nowak and McArthur (n238) 84; Burgers and Danelius (n197); Coracini (n895); Joseph S and others, *Seeking Remedies for Torture Victims: A Handbook on the Individual Complaints Procedures of the UN Treaty Bodies* (World Organisation Against Torture 2006) 213-214.

<sup>903</sup> Coracini (n895) 313-314.

<sup>904</sup> UN Committee against Torture, 'Consideration of Reports Submitted by States Parties under Article 19 of the Convention', 28<sup>th</sup> Sess, UN Doc CAT/C/SR.510, 17 May 2002, [29] (Mr Al-Hogail, Saudi Arabia).

<sup>905</sup> *ibid* [30] (Mr Al-Hogail, Saudi Arabia).

<sup>906</sup> *ibid* [48]-[61] (Mr Mariño Menéndez; Mr Yakovlev; Mr Mavrommatis; Mr El-Masry; Ms Gaer; Mr Rasmussen).

The Rome Statute similarly provides in the definition of torture as a crime against humanity that 'torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions'.<sup>907</sup> There is no equivalent clause in the definition of torture as a war crime or grave breach in the Rome Statute, but it is difficult to see how a war crime or grave breach could ever be associated with a lawful sanction.<sup>908</sup> The clause has not yet arisen for determination by the International Criminal Court, and although the international criminal tribunals have frequently quoted the definition of torture in CAT Article 1(1), in no case has the clause been substantively discussed.

From a normative standpoint the preferable view is that the 'lawful sanctions' clause requires compliance with international law. Although this effectively renders the clause meaningless, this is preferable to the view that a State could order the perpetration of torture pursuant to a lawful domestic sanction, and thereby escape liability for torture as a matter of international law. The choice is between reading the 'lawful sanctions' clause as meaningless, and undermining the complex architecture of the prohibition of torture in international law.

## 5.7 Conclusion

It has been contended above that there are two distinct conceptions of torture in international law, and that they operate in quite different paradigms. The conception of torture in the CAT falls squarely within the criminal paradigm, as is evident from the nature and structure of the treaty, and the content of the obligations therein. As such, the legal definition of torture in the CAT has rightly proved influential in the jurisprudence of the international criminal tribunals and in the drafting of the crime against humanity of torture, the war crime and grave breach of torture in the Rome Statute.

Although the legal definitions of torture in each of those contexts differ from one another in a number of respects, for the most part they reflect a dignitarian account of torture's moral wrong. This implicit preference for the dignitarian account is reflected in the emphasis on proof that the perpetrator of torture acted in pursuit of a purpose, and in the inclusive nature of the list of purposes that will suffice. The purposive element in the legal definitions of torture considered herein correlates with the dignitarian notion of instrumentalisation that was advanced in Chapter Three.

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<sup>907</sup> Rome Statute (n163) art 7(2)(e).

<sup>908</sup> *ibid* art 8(2)(a)(ii); art 8(2)(c)(i).

To some extent, however, the legal definition of torture as a crime against humanity in the Rome Statute reflects the defencelessness rather than the dignitarian account of the moral wrong of torture. In place of a purposive element, it is an element of the crime against humanity of torture that the victim must have been in the custody or under the control of the accused. This element of the offence bears a similarity to the modified defencelessness account that was advanced in Chapter Three: that is, that torture should be understood as *the deliberate infliction of severe pain or suffering in the context of a profoundly asymmetric power relation*. The definition of the crime against humanity of torture in the Rome provides an illustrative example of how the legal definition of torture within the criminal paradigm could be drafted so as to reflect this view of the moral wrong of torture. The requirement to show that the victim of the crime against humanity of torture was 'in the custody or under the control of the accused' would be substantively the same as requiring 'a profoundly asymmetric power relation'. It is difficult to imagine circumstances in which one person could be in the custody or under the control of another, but where the power relationship is anything other than profoundly asymmetric.

In two respects the international criminal tribunals have been divided on the constitutive elements of torture. First, differently composed tribunals have taken different views as to whether the list of prohibited purposes for the crime of torture is open or closed, indicative or exhaustive. A closed list of prohibited purposes runs contrary to the dignitarian account of torture, and is criticised on that basis in Chapter Four.

The second point of division concerns whether the crime of torture as a matter of customary international law includes a State nexus requirement. It is clear, at least, that in the absence of governmental authority or control, a nexus with a quasi-State or State-like entity will suffice. However, the chapter argues from a normative standpoint that the status of the perpetrator should be a factor relevant to State responsibility rather than a constitutive element of torture itself. This approach would accord with both the dignitarian and defencelessness accounts of the moral wrong of torture.

Nor does the defencelessness account support a closed list of prohibited purposes (indeed, on the latter account, there ought not to be a purposive element at all). The abolition of the State nexus requirement would also be compatible with the defencelessness account of torture.

Finally, this chapter turned to a consideration of the State nexus requirement in the definition of torture in the CAT. Recalling that neither the dignitarian nor the defencelessness accounts of the moral wrong of torture is addressed to the status of the perpetrator, it was argued that the inclusion of a State nexus element in the legal definition of the offence was contrary to the structure of domestic criminal law as well as international law, and should be abandoned. The circumstances in which an act of torture may be attributed to the State would be better left to be resolved by reference to secondary rules of international law.

# Chapter Five: Torture in the Human Rights Paradigm

## 6.1 Introduction

This chapter analyses and evaluates the conception of torture in the human rights paradigm, arguing that a broader conception of torture pertains in that context than in the criminal law paradigm. In doing so, this chapter focuses on the legal definitions of torture in the regional human rights systems in Europe, the Americas and Africa, as well as in the decisions of the UN Human Rights Committee. The chapter distinguishes the conception of torture in the criminal paradigm from the conception of torture in the human rights paradigm. It then critically analyses each part of the definition of torture in the human rights paradigm, with a view to assessing the extent to which it reflects the moral wrong set out in Chapter Three above.

It was argued in Chapter Four that the conception of torture in the CAT falls squarely within the criminal paradigm, and thus the work of the UN Committee Against Torture in interpreting the CAT treaty was considered in that context. The ICCPR, in contrast, is plainly a human rights treaty, and so the work of the UN Human Rights Committee in assessing claims of torture and ill-treatment under the ICCPR is considered below.

None of the human rights treaties considered here—the European Convention on Human Rights, the Inter-American Convention on Human Rights, the African Charter of Human and Peoples' Rights, or the ICCPR—purport to define torture. The bodies charged with interpreting those respective instruments have all referenced the definition of torture in CAT Article 1(1). However, as the CAT itself indeed observes, they need not be constrained by that definition.<sup>909</sup> As such, while the conception of torture in the criminal paradigm inevitably *influences* the conception of torture in the human rights context (and vice versa), it is not, and should not be, determinative. Indeed, unthinking transplantation or cross-fertilisation between the criminal and human rights paradigms—without regard to the different conceptions of torture operating in each paradigm—has led to doctrinal confusion.<sup>910</sup>

This chapter comprises both descriptive and normative arguments. Descriptively, the chapter contends that the human rights paradigm is capable of supporting a broader conception of torture than may be appropriate in the criminal context. Put simply, 'rights are different from crimes'.<sup>911</sup> The principles militating in favour of a narrow construction of the crime of torture do not pertain

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<sup>909</sup> CAT (n1) art 1(2).

<sup>910</sup> This doctrinal confusion has been the subject of recent scholarship: see Maculan (n693); Farrell, 'Just How Ill-Treated Were You?' (n693).

<sup>911</sup> Farrell *ibid* 483.

in the context of the victim-oriented and vindicatory nature of human rights proceedings. Moreover, the dynamic interpretive approach adopted in the human rights context differs markedly from the narrow construction that is appropriate in the criminal context.<sup>912</sup> In consequence, a person could be the victim of torture as a human rights violation in circumstances where the criminal offence of torture may not be made out. In this respect, torture is no different from many other kinds of conduct that are both civil and criminal wrongs.<sup>913</sup>

A further descriptive claim that the chapter advances is that the conception of torture in the human rights paradigm to date broadly reflects the dignitarian rather than the defencelessness account of the moral wrong of torture.

This chapter advances two normative arguments, linked to the conclusions of Chapter Three that the conception of torture in the human rights paradigm ought to reflect, as far as possible, the moral wrong of torture. The first argument is that the conception of torture in the human rights paradigm should move beyond the dignitarian model. Human rights courts should embrace a conception of torture based on the *deliberate infliction of severe pain or suffering in the context of a profoundly asymmetric power relation*, regardless of the status of the perpetrator.

The second normative argument is that even if the dignitarian account of torture is preferred, conception of torture in the human rights paradigm fails to reflect that account in important respects. To better reflect the dignitarian account, the human rights conception of torture should abandon the requirement that the perpetrator of torture must have a nexus with the State.

### 6.1.1 Standard of proof

We saw in Chapter Four that the standard of proof for torture in the criminal context is 'beyond reasonable doubt'. However, in the human rights paradigm, different considerations pertain. In contrast to criminal proceedings, the objective of human rights claims is to vindicate the rights of victims and to prevent recurrence of rights violations. Where criminal proceedings are perpetrator-oriented, human rights proceedings are victim-oriented. Unlike criminal courts, courts adjudicating human rights claims lack the power to impose coercive punishments upon the perpetrators, with the primary sanction available to them the ordering of compensation and the

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<sup>912</sup> See, eg, Mowbray AR, 'The Creativity of the European Court of Human Rights' (2005) 5 Human Rights Law Review 57; Barak A, *Purposive Interpretation in Law* (Princeton University Press 2007); Burgogue-Larsen and Úbeda de Torres (n529); Dzehtsiarou K, 'European Consensus and the Evolutive Interpretation of the European Convention on Human Rights' (2011) 12 German Law Journal 1730.

<sup>913</sup> On the different paradigms of legal responsibility in civil and criminal law, see Cane (n39). On torture as a civil wrong specifically, see Scott CM (ed), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Hart 2001).

provision of declaratory relief. Human rights claims are litigated in a context of civil rather than criminal justice. As such, and by contrast with the criminal law paradigm, 'civil law exists primarily to protect rights and to compensate for harms',<sup>914</sup> and 'sanctions typically take the form of victim-oriented remedies, not agent-oriented penalties'.<sup>915</sup> In view of these considerations, it is appropriate that the standard of proof applied in the human rights paradigm should be the balance of probabilities, rather than the more onerous criminal standard of 'beyond reasonable doubt'.

Similar concerns were noted by the IACtHR in *Velásquez-Rodríguez v Honduras*:

'The international protection of human rights should not be confused with criminal justice. **States do not appear before the Court as defendants in a criminal action.** The objective of international human rights law is not to punish those individuals who are guilty of violations, but rather **to protect the victims and to provide for the reparation of damages** resulting from the acts of the States responsible'.<sup>916</sup>

Legal proceedings in the human rights context are more akin to civil claims in the law of tort than to criminal proceedings.<sup>917</sup> The usual standard for the adjudication of such claims is proof on the 'balance of probabilities', as opposed to the criminal law standard 'beyond reasonable doubt'.<sup>918</sup> Following this principle, the Alien Tort Statute in the United States allows civil claims in tort to be made on the basis of serious violations of 'the law of nations', including acts of torture.<sup>919</sup> In applying that statute, US courts have applied the same standard of proof for claims as they have adopted in other claims in tort: namely, proof on the balance of probabilities.<sup>920</sup>

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<sup>914</sup> Cane (n39) 87.

<sup>915</sup> *ibid* 77.

<sup>916</sup> *Case of Velásquez-Rodríguez v Honduras* (n556) [134]-[135] (emphasis added).

<sup>917</sup> See, eg Steele J, 'Damages in Tort and Under the Human Rights Act: Remedial or Functional Separation?' (2008) 67 Cambridge Law Journal 606, 614 arguing that the 'decisive separation between remedies in tort and under the [Human Rights Act 1998]' is unjustified. See also Stevens R, *Torts and Rights* (OUP 2007) 289, arguing that the Human Rights Act 1998 is 'possibly the most important "tort statute" ever enacted'. For discussion of the relationship between tort claims and human rights in the United Kingdom, see, eg, *R (Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14; [2005] 1 WLR 673, [19] (Lord Bingham); *Van Colle & Ors v Chief Constable of the Hertfordshire Police* [2008] UKHL 50; [2009] 1 AC 225, [138]-[139] (Lord Brown).

<sup>918</sup> See Cane (n39).

<sup>919</sup> Alien Tort Statute, 28 USC §1350. Although it seems likely that the decision of the United States Supreme Court in *Kiobel v Royal Dutch Petroleum Co* (2013) 133 S Ct 1659, 1669 will operate as a serious constraint on the statute's extraterritorial effect. For discussion, see Young EA, 'Universal Jurisdiction, the Alien Tort Statute, and Transnational Public Law Litigation after *Kiobel*' 64 Duke Law Journal 1023.

<sup>920</sup> See, eg: *Filártiga v Peña-Irala* (n7); *Sosa v Alvarez-Machain* (2004) 542 US 692; 124 S Ct 2739 (SC). For discussion, see Scott CM (ed), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Hart 2001); Fletcher GP, *Tort Liability for Human Rights Abuses* (Hart 2008).

The African Court on Human and Peoples' Rights has not expressly considered the standard of proof, and their rules of evidence and procedure are silent on the matter.<sup>921</sup> However in *Civil Liberties Organisation v Nigeria*, the African Commission on Human and Peoples' Rights held that in the absence of 'the details of the specific elements that constitute such claims [of violations of Articles 5 and 6 of the Charter]', it was precluded from finding a violation.<sup>922</sup>

Beyond these examples, there is little guidance from the African Charter institutions on the standard of proof to be adopted.<sup>923</sup> Presumably then, the standard of proof is the general civil standard of balance of probabilities in this context.

That being said, there is some support for the contention that an enhanced civil standard should be applied in cases of torture and ill-treatment, in view of the seriousness of such allegations and the reputational consequences for the states concerned. The ECtHR said in *Ireland v UK* that, in view of the seriousness of the allegations at issue under Article 3 of European Convention on Human Rights in that case (a systematic practice of ill-treatment during the policy of internment in Northern Ireland), the appropriate standard of proof was 'beyond reasonable doubt'.<sup>924</sup> However, the ECtHR immediately qualified that statement with the observation that 'such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact'.<sup>925</sup> The 'beyond reasonable doubt' standard has made no further appearance in the Article 3 case law of the European Court of Human Rights, and it is not reflected in its practice.<sup>926</sup> As such, this statement should be regarded as an anomaly.

The 'beyond reasonable doubt' standard is appropriate in criminal proceedings, where courts have far more extensive fact-finding powers and capacities than do regional human rights courts. The limited capacity of regional courts to compel the production of evidence, to call witnesses or empanel juries, militates against the application of the criminal standard in this context. The civil standard of proof better accords with both the nature of human rights proceedings, and their objective to provide restitution to the victims of rights violations.

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<sup>921</sup> African Court on Human and Peoples' Rights, Rules of Court, June 2, 2010.

<sup>922</sup> *Civil Liberties Organisation & Ors v Nigeria*, Communication 218/98, May 7, 2001 (African Comm HR)

<sup>923</sup> See further Viljoen F and Odinkalu AC, *The Prohibition of Torture and Ill-Treatment in the African Human Rights System: A Handbook for Victims and Their Advocates* (Boris Wijkstrom 2006) 79-80, adding little by way of explanation of the standard of proof for claims of torture under the African Charter.

<sup>924</sup> *Ireland v UK* (ECtHR) (n241) 57 [161] (the Court).

<sup>925</sup> *ibid.*

<sup>926</sup> See, eg, *Becciev v Moldova* (2007) 45 EHRR 11, [31]-[32], [47]-[48]; *Nevmerzhitsky v Ukraine* (n555) [86].

There is, however, an intermediate position between the criminal standard of 'beyond reasonable doubt' and the civil standard of 'balance of probabilities'. In *DH & Ors v Czech Republic*, the ECtHR said that 'the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake'.<sup>927</sup> It is arguable that the appropriate standard in claims relating to torture and ill-treatment is an enhanced civil standard, according to which courts should approach such serious allegations with particular care. In *Velásquez-Rodríguez v Honduras*, the IACtHR applied 'a standard of proof which considers the seriousness of the charge [of forced disappearances] and which... is capable of establishing the truth of the allegations in a convincing manner'.<sup>928</sup>

A similar principle is followed in certain domestic proceedings in relation to civil claims carrying particularly serious consequences. Examples in the UK include anti-social behaviour orders (civil preventative orders, the breach of which is a criminal offence),<sup>929</sup> banning orders,<sup>930</sup> and sex offender orders.<sup>931</sup> In such cases, UK courts have applied the civil standard, but with heightened scrutiny, as is appropriate to the severity of the consequences and the inherent inequality between individuals and the prosecuting state authorities. A similar 'intermediate', or 'heightened' civil standard, can be, and on occasion is, applied in regional human rights courts to adjudicate claims of torture and ill-treatment.

Because the standard of proof is different depending on whether torture is alleged in the criminal paradigm or in the human rights paradigm, a court could conceivably find a human rights violation of torture even where the criminal offence of torture cannot be made out. This is no different to a domestic court concluding that (say) the civil wrong of assault had, on the balance of probabilities, been committed, but that the offence of assault could not be established to the criminal standard. In such circumstances the court could award compensation in the law of tort notwithstanding that a criminal prosecution would lead to an acquittal. Similarly, courts operating within the human rights paradigm need not be, and are not, constrained by the criminal conception of torture.

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<sup>927</sup> *DH & Ors v Czech Republic* (2007) 43 EHRR 923 (GC) [178]. For discussion, see Harris D and others, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights* (2nd edn, OUP 2009) 147, 809-810.

<sup>928</sup> *ibid* [129], applying See also *Fairén-Garbi and Solís-Corrales v Honduras (Merits)*, Judgment of 15 March 1989, IACHR Series C No 6, IHRL 1387, [131]-[132].

<sup>929</sup> See *Clingham v Kensington and Chelsea Royal London Borough Council* [2002] UKHL 39; [2003] 1 AC 787 (HL).

<sup>930</sup> See *Gough v Chief Constable of Derbyshire* [2002] 3 WLR 289 (Court of Appeal of England and Wales).

<sup>931</sup> See *B v Chief Constable of Avon and Somerset* [2001] 1 WLR 340 (Divisional Court of England and Wales).

### 6.1.2 Onus of proof

In criminal proceedings the prosecution bears the onus of proving all the elements of the offence to the criminal standard. Ordinarily, the onus is on the claimant in civil proceedings to prove the elements of her claim to the satisfaction of the civil standard. But in the human rights paradigm, courts have developed a degree of flexibility in applying that principle. In particular, where there is evidence that a previously healthy individual has emerged from a period of detention suffering from injuries, the onus shifts to the respondent State 'to provide a plausible explanation as to the causing of the injury'.<sup>932</sup> Thus, the onus is initially on the claimant to show that there is some evidence of ill-treatment and that this has coincided with a period of time spent in the custody of State authorities. At that point, the onus shifts to the respondent State to *disprove* the allegations: that is, to show that there was some other source of the injury.

This flexibility with respect to the onus of proof is appropriate in the human rights paradigm where it is often the case that 'the events in issue lie wholly, or in a large part, within the exclusive knowledge of the authorities'.<sup>933</sup> Such principles have been adopted with respect to the prohibition of torture and ill-treatment in the jurisprudence of the ECtHR as well as the IACtHR and the African Commission of Human Rights.<sup>934</sup> They represent an important innovation in the conduct of human rights proceedings. Unlike claims of torture in the criminal paradigm, where all the elements of the offence must generally be established by the prosecution beyond reasonable doubt, the victim-oriented and vindicatory nature of human rights proceedings permits a more flexible approach to the onus of proof, even in respect of serious allegations of torture.

These principles have gone largely unremarked in the academic literature, though they are an important mechanism for preventing injustice.<sup>935</sup> Cane has observed that the 'allocation of the onus of proof provides a technique by which the law can express and give effect to value judgments about the strength of the various interests to which the responsibility judgments relate'.<sup>936</sup> The implicit value judgment underlying the human rights paradigm is that remedying the violation vis-à-vis the victim that is most important consideration, and the respondent state that should bear the risk of evidential deficiencies. This flexible approach to the onus of proof in the human rights

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<sup>932</sup> See, eg, *Aksoy v Turkey* (n496) [61]. It has since been repeated in many cases, including: *Selmouni v France* (n493) [87]; *Salman v Turkey* (n555) [100]; *Kişmir v Turkey* (App No 27306/95) (ECtHR, 31 May 2005) [89].

<sup>933</sup> *DH & Ors v Czech Republic* (n927) [179].

<sup>934</sup> See, eg, *Media Rights Agenda v Nigeria*, Communication no 224/98, 6 November 2000 (African Comm HR); *Juan Humberto Sánchez v Honduras*, Judgment of June 2003, Series C No 99 (IACtHR).

<sup>935</sup> Though there is some such discussion in practitioners' handbooks: see, eg, Giffard C and Rodley NS, 'The Approach of International Tribunals to Medical Evidence in Cases Involving Allegations of Torture', in Peel M and Iacopino V (eds), *The Medical Documentation of Torture* (Greenwich Medical Media Ltd 2002), 19-44.

<sup>936</sup> Cane (n39) 91.

context is appropriate to the object and nature of human rights litigation. A similarly flexible approach should be adopted with respect to the standard of proof more generally, which should be that of the civil rather than the criminal justice paradigm.

### 6.1.3 Torture in the European Convention on Human Rights

The jurisprudence of the ECtHR in relation to torture and ill-treatment is the most developed among regional human rights institutions, and is often drawn on by other institutions and judicial bodies.<sup>937</sup> It is therefore a useful starting point for a critical assessment of legal definition of torture in the human rights paradigm.

Torture is prohibited in Article 3 of the European Convention on Human Rights along with 'inhuman or degrading treatment or punishment'. By virtue of Article 15, that provision in its entirety is non-derogable, even in times of war or public emergency threatening the life of the nation. The European Convention on Human Rights is supplemented by the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ('*European Torture Convention*').<sup>938</sup> However, neither of these treaties contains a definition of torture. For this, it is to the jurisprudence of the ECtHR that we must turn.

In its first decision under Article 3, *Ireland v UK*, the ECtHR attributed the distinction between torture and inhuman or degrading treatment 'principally [to] a difference in the intensity of the suffering inflicted',<sup>939</sup> and went on to identify the following four characteristics of torture:

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<sup>937</sup> The European Court of Human Rights' case law on torture and ill-treatment has been referenced with approval by the Inter-American Court of Human Rights in, inter alia: *Case of Loayza Tamayo v Peru* (n554); *Case of Bámaca Velásquez v Guatemala (Merits)*, Judgment of 25 November 2000, IACHR Series C no 70; *Case of Bayarri v Argentina (Preliminary Objections, Merits, Reparations and Costs)*, Judgment of 30 October 2008, IACHR Series C no 187 ('*Case of Bayarri v Argentina*'). It has also been cited by the African Commission on Human and Peoples' Rights in, inter alia: *Doebbler v Sudan*, Communication No 236/2000, 29 May 2003 ('*Doebbler v Sudan*'); *Sudan Human Rights Organisation and Centre for Housing Rights and Evictions v Sudan*, Communications no 279/03-296/05, 27 May 2009 ('*Sudan Human Rights Organisation and Centre for Housing Rights and Evictions v Sudan*'); *Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt*, Communication no 323/06, 12 October 2013. The European Court of Human Rights' case law on torture and ill-treatment has also been cited with approval by the International Criminal Tribunal for the Former Yugoslavia, in, inter alia: *Prosecutor v Furundžija* (n7); *The Čelebići Prison Camp Case*, Trial Chamber Judgment (n254); *Prosecutor v Kvočka*, Trial Chamber Judgment (n793).

<sup>938</sup> European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, ETS 126 (opened for signature November 26, 1987, entered into force February 1, 1989) ('*European Torture Convention*'). The purpose of this treaty was to establish a preventative monitoring body—the European Committee for the Prevention of Torture—to inspect detention facilities in the territory of Council of Europe member states. Because its focus is prevention rather than remedying individual violations, its work is beyond the scope of this thesis. For detailed study, see Morgan and Evans, *Protecting Prisoners* (n809); Morgan R and Evans M, *Combating Torture in Europe: The Work and Standards of the European Committee for the Prevention of Torture* (Council of Europe 2001).

<sup>939</sup> *Ireland v UK* (ECtHR) (n241) 59 [167] (the Court).

- (i) 'deliberate infliction' of
- (ii) 'suffering of... particular intensity and cruelty';
- (iii) an 'object', here 'the extraction of confessions, the naming of others and/or information'; and
- (iv) systematic infliction.<sup>940</sup>

To the extent that systematic infliction was ever an element of the ECtHR's definition of torture, it has been abandoned in the ECtHR's later case law.

Aside from the exclusion of the systematic infliction element, the most significant difference between the ECtHR's definition of torture and that in the CAT is the express state nexus element in the latter. As has been explored above, the definition of torture in CAT Article 1(1) requires that the act must have been perpetrated, instigated, or done with the consent or acquiescence of a public official or other person acting in an official capacity. Article 1(1) CAT has been cited with approval by the ECtHR, but without substantive discussion.<sup>941</sup> This leaves a degree of ambiguity as to whether or not a nexus with the State is an element of torture under the European Convention on Human Rights. This is important because, unlike the narrow and detailed definition of torture in the CAT, it is open to the ECtHR to define torture as encompassing conduct by private actors. It will be argued below that the ECtHR should embrace that opportunity and adopt a broader conception of torture than the criminal law conception which finds expression in the CAT.

#### 6.1.4 Torture in the Inter-American human rights system

The prohibition of torture and other ill-treatment in the Inter-American system derives from two sources. The first is Article 5 of the American Convention on Human Rights, which prohibits torture and cruel, inhuman or degrading treatment or punishment collectively under the *chapeau* of a 'right to humane treatment'. The second source is the Inter-American Torture Convention, which defines torture in Article 2 in the following terms:

- (i) 'any act intentionally performed', causing
- (ii) 'physical or mental pain or suffering', inflicted
- (iii) 'for the purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventative measure, as a penalty, or for any other purpose';

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<sup>940</sup> *ibid*: 'although the five techniques, as applied in combination, undoubtedly amounted to inhuman and degrading treatment, although their object was the extraction of confessions, the naming of others and/or information and although they were used systematically, they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood'.

<sup>941</sup> See, eg, *Selmouni v France* (n493) 441 [97]-[98].

- (iv) save that it 'shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article'.<sup>942</sup>

An additional clause provides that 'torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish'.<sup>943</sup>

This detailed definition differs on its face from the definition of torture in Article 1(1) of the CAT in several respects. In particular, the terms 'pain or suffering' are not qualified with the adjective 'severe', and there is no requirement for a nexus with the State. In those two respects, the definition of torture in the Inter-American Torture Convention is considerably broader than the definition in the CAT. However, that potential breadth has been qualified to some extent by the jurisprudence of the IACtHR, as the discussion that follows will show.

### 6.1.5 Torture in the African Charter on Human and Peoples' Rights

The prohibition of torture in the African Charter takes a different form to the prohibition in all other human rights treaties. It is found in Article 5, which provides that:

'Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited'.

The African Commission on Human and Peoples' Rights has observed that 'the prohibition of torture, cruel, inhuman, or degrading treatment or punishment is to be interpreted as widely as possible to encompass the widest possible array of physical and mental abuses'.<sup>944</sup>

Against this, however, and without reference to the different conceptions of torture pertaining in the criminal and the human rights paradigms, the African Commission on Human and Peoples' Rights has also held that the definition of torture in Article 1(1) of the CAT was applicable under the African Charter.<sup>945</sup> Further, the Commission has said that 'the spirit of the UN Convention Against Torture shall apply even in the context of the African Charter'.<sup>946</sup> It remains to be seen

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<sup>942</sup> Inter-American Torture Convention (n528) art2.

<sup>943</sup> *ibid.*

<sup>944</sup> See, eg, *Doebbler v Sudan* (n937) [37]; *Media Rights Agenda v Nigeria*, Communication no 224/98, November 6, 2000 (African Comm HR) [71]; *Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt*, Communication no 323/06, October 12, 2013 (African Comm HR) ('*Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt*') [188].

<sup>945</sup> *Elgak & Ors v Sudan*, Communication 379/09, March 14, 2014 (African Comm HR) 19 [98].

<sup>946</sup> *Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt* (n944) [192].

whether the African Court on Human and Peoples' Rights—soon to be replaced by the African Court of Justice and Human Rights—will adopt a more expansive interpretation of the prohibition on torture under the African Charter.<sup>947</sup>

### 6.1.6 Torture in the International Covenant on Civil and Political Rights

The prohibition of torture and other ill-treatment in the ICCPR appears in Article 7, which provides that 'no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'. An additional clause in the same Article provides that, 'in particular, no one shall be subjected without his free consent to medical or scientific experimentation'.

The UN Human Rights Committee has the power to adjudicate upon 'individual communications' relating to torture and ill-treatment where those complaints arise in the context of the ICCPR. The ICCPR groups torture together with cruel, inhuman or degrading treatment or punishment in the same provision.<sup>948</sup> The Human Rights Committee said in General Comment 20 that it did not consider it necessary 'to establish sharp distinctions between the different kinds of punishment or treatment'.<sup>949</sup> However in *Giri (On behalf of Giri & Ors)* the Human Rights Committee observed that it was 'nevertheless... appropriate to identify treatment as torture if the facts so warrant', and that in doing so it would be guided by the definition of torture in Article 1(1) CAT.<sup>950</sup>

The human rights treaties described above are not constrained by the narrow and prescriptive definition of torture in the CAT. Rather, prohibitions of torture and other ill-treatment in human rights treaties are capable of expansive interpretation. Judicial interpretation of human rights is frequently characterised by cross-jurisdictional dialogue.<sup>951</sup> The prohibition of torture is no exception.<sup>952</sup> However, that dialogue rarely acknowledges the differences between the criminal and the human rights conceptions of torture. Those differences are explored in depth below.

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<sup>947</sup> The African Court on Human and Peoples' Rights was established pursuant to the Organisation of African States, Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (adopted June 10, 1998, entered into force January 25, 2004). It will be replaced by the Organisation of African Unity, Protocol on the Statute of the African Court of Justice and Human Rights (adopted July 1, 2008, not yet in force). The Protocol, if and when it enters into force, will eventually merge the Court of Justice of the African Union with the African Court on Human and Peoples' Rights.

<sup>948</sup> ICCPR (n198) art 7.

<sup>949</sup> United Nations Human Rights Committee, General Comment 20 on Article 7 of the ICCPR, UN Doc E/CN/4/2006/6/Add.5, January 9, 2006, [4].

<sup>950</sup> *Giri (on behalf of Giri & Ors) v Nepal*, Communication No 1761/2008, UN Doc CCPR/C/101/D/1761/2008, adopted 24 March 2011 (HRC) ('*Giri (on behalf of Giri & Ors) v Nepal*'), [7.5].

<sup>951</sup> McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (n569).

<sup>952</sup> See Farrell, 'Just How Ill-Treated Were You?' (n693).

## 6.2 Intentional infliction

As has been shown, the definition of torture in CAT Article 1(1) requires that the conduct must have been done intentionally. The same requirement has effectively been imported into Article 3 of the European Convention on Human Rights through the jurisprudence of the ECommHR and the ECtHR. In the 1969 *Greek Case*, the ECommHR defined torture as inhuman treatment which ‘deliberately causes severe suffering’.<sup>953</sup> The reference to deliberate infliction appears to require intentional commission. Similarly, the ECtHR said in *Ireland v UK* that torture should be understood as ‘deliberate inhuman treatment causing very serious and cruel suffering’.<sup>954</sup> The same language appears in countless cases on Article 3 of the European Convention on Human Rights.<sup>955</sup>

### 6.2.1 Intention and recklessness

We saw in Chapter Four that to establish torture in the criminal paradigm the prosecution needs to show that the conduct causing the suffering was intentional or reckless, and that the perpetrator intended or was reckless with respect to the consequence (pain or suffering). It need not be established that this pain or suffering was intended to be severe.<sup>956</sup>

In contrast, proceedings in the human rights paradigm do not generally require proof of specific intent.<sup>957</sup> It is sufficient to show that the conduct causing the suffering was intentional or reckless, even if it cannot be proven that pain or suffering was intended. In practice, the issue will only rarely arise. In most cases, proof of the purposive element will entail proof that pain or suffering were intended.<sup>958</sup> Notably, in the human rights context, the defendant is a State rather than an individual, the claim being brought either for breach of the State’s positive obligation to protect against ill-treatment, or the State’s negative obligation not to perpetrate (through its agents) acts of ill-treatment.

There are at least two circumstances where a finding of torture may be made within the human rights paradigm in circumstances where the criminal offence would not be established because of the absence of specific intent. The first is in relation to poor detention conditions, and the second is in relation to a victim with a so-called ‘eggshell skull’ (an unusual and unforeseeable vulnerability).

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<sup>953</sup> See *The Greek Case* (n264) 186 [2] (the Commission).

<sup>954</sup> *Ireland v UK* (ECtHR) (n241) 59 [167] (the Court).

<sup>955</sup> See, eg, *Selmouni v France* (n493) [96]; *Aksoy v Turkey* (n496) [63].

<sup>956</sup> See section 5.2.2 above.

<sup>957</sup> See Rogers WVH, *Winfield and Jolowicz on Tort* (18th edn, Sweet & Maxwell 2010) 106.

<sup>958</sup> On the purposive element in the human rights paradigm, see section 6.4 below.

In relation to poor detention conditions: let us imagine a gaol in which the rations provided to prisoners are manifestly inadequate, conditions are dreadfully overcrowded, and health and sanitation is poor. These conditions are the product of resource constraints rather than any specific intention to increase the inmates' suffering. Nonetheless, some of the prisoners suffer from medical conditions for which appropriate treatment is not provided, and others suffer the effects of malnourishment. The prison authorities are aware of these deficiencies and fail to direct resources to their amelioration. Has the human rights violation of torture occurred?

The answer here is arguably yes. The conduct causing the suffering is deliberate, in the sense that the prison authorities were aware of the deficiency and chose not to take steps to mitigate that suffering. This assumes that the purposive element is satisfied—for example, because the authorities intended harsh conditions as a deterrent or punishment to the inmates.<sup>959</sup> On the balance of probabilities, it is at least arguable that the prisoners who experience severe pain or suffering are victims of torture. This is so notwithstanding that criminal proceedings against the relevant prison authorities would be unlikely to succeed, because it could not be shown beyond reasonable doubt that the prison authorities *intended* the conduct to cause severe suffering.

The second example involves a hypothetical victim with an eggshell skull. Imagine a person with a rare genetic condition, the corollary of which is a radically reduced pain threshold. She is taken into custody on suspicion of committing a criminal offence, and is lightly slapped during the course of her interrogation.<sup>960</sup> The slapping is deliberate, is intended to intimidate the victim, though not to hurt her. The prevailing purpose is to extract information from her about the alleged offence. However, as a result of the victim's rare genetic condition—a fact unknown to the perpetrator—the victim experiences severe suffering.

If it can be established on the balance of probabilities that the severity threshold is satisfied,<sup>961</sup> then a finding of torture is open in the human rights paradigm, notwithstanding that a criminal prosecution for torture is unlikely to succeed. Criminal prosecution for torture would require proof that the perpetrator intended both the slap itself, and to cause pain or suffering. That may be arguable, but it is more likely that some other lesser criminal charge would be substituted. In such circumstances, the human rights violation of torture has occurred notwithstanding that the criminal offence is not made out.

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<sup>959</sup> On the purposive element, see section 6.4 below.

<sup>960</sup> The conduct here is similar to that in *Bouyid*, although the applicants in that case did not suffer from a genetic vulnerability or other form of 'eggshell skull': see *Bouyid v Belgium* (n512).

<sup>961</sup> On the severity threshold, see further section 6.3 below.

It is right that civil liability should attach in these circumstances, though criminal liability should not. The priority of compensation in such proceedings, together with the objective of preventing human rights violations, favour the application of the civil standard (whether applied with enhanced scrutiny, as in *Ireland v UK*,<sup>962</sup> or on the balance of probabilities standard, as in claims under the Alien Tort Statute in the US).<sup>963</sup>

### 6.2.2 Acts and omissions

Almost overwhelmingly, torture is committed by act rather than omission.<sup>964</sup> However, an omission may be enough to constitute torture.<sup>965</sup> The Grand Chamber of the ECtHR, which found that a combination of acts (beating and kicking) together with omissions (failure to take the applicant to hospital, despite his obvious injuries, until some 36 hours later) constituted torture in *Ilhan v Turkey*.<sup>966</sup> Similarly in *Levinta v Moldova* the ECtHR found that failure of prison authorities to transfer the applicants, who had been tortured in custody, 'to a safe place... must be considered as a continuation of ill-treatment to which they were subjected'.<sup>967</sup>

It is similarly well established in the Inter-American human rights system that torture may be perpetrated by omission. The IACtHR found the cumulative conditions of detention to be torture in *Miguel Castro Castro Prison v Peru*.<sup>968</sup> The conditions included separation of mothers from their babies, lack of medical attention for injured and ill prisoners, overcrowded accommodation in freezing temperatures, as well as beatings and electric shocks, 'constituted physical and psychological torture'.<sup>969</sup>

It remains the case that poor conditions of detention will generally be classified as inhuman and/or degrading treatment or punishment rather than torture.<sup>970</sup> The European Committee for the Prevention of Torture regularly raises concerns with contracting States about many aspects of

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<sup>962</sup> *Ireland v UK* (ECtHR) (n241) 57 [161] (the Court).

<sup>963</sup> *Filártiga v Peña-Irala* (n7); *Sosa v Alvarez-Machain* (n920).

<sup>964</sup> See, eg, *Selmouni v France* (n493) [102]-[103] (severe beating, sexual abuse, dragged by his hair along the floor); *Aksoy v Turkey* (n496) [64] (beatings, electric shocks and 'Palestinian hanging'); *Aydin v Turkey* (n496) [63], [73] (rape, beating, blasted by a hose and spun in a tyre).

<sup>965</sup> On the distinction between acts and omissions, see further Bennett (n757).

<sup>966</sup> *Ilhan v Turkey* (2002) 34 EHRR 869, 931 [86]-[67] (GC).

<sup>967</sup> *Levinta v Moldova*, App no 17332/03 (ECtHR December 16, 2008), 16 [75].

<sup>968</sup> *Case of Miguel Castro Castro Prison v Peru*, Judgment of 25 November 2006, IACHR Series C No 160 ('*Case of Miguel Castro Castro Prison v Peru*').

<sup>969</sup> *ibid* [333].

<sup>970</sup> See, eg, *GB v Bulgaria*, App no 42346/98 (ECtHR, 11 March 2004), [87] (the Court); *Iorgov v Bulgaria*, App no 40653/98 (ECtHR, 11 March 2004), 17 [85] (the Court); *Aleksanyan v Russia* (2011) 52 EHRR 18, 31 [158].

prison conditions such as overcrowding, inadequate ventilation, inadequate or absent facilities for outdoor exercise, while stopping short of making findings of torture.<sup>971</sup> On some occasions the ECtHR has simply observed that prison conditions violate Article 3 without specifying which limb.<sup>972</sup> The case law is clear that resource constraints cannot justify or excuse such treatment.<sup>973</sup>

Thus, the conception of torture pertaining in both the human rights paradigm and in the criminal paradigm encompasses omissions as well as acts. Where the human rights conception differs from the criminal conception, however, is in relation to intention. Where torture is prosecuted in the criminal paradigm, specific intent will be required: it must be shown that the perpetrator *intended* to inflict pain or suffering, though it need not be shown that the pain or suffering was intended to be *severe*.<sup>974</sup> In contrast, where an individual brings a claim of torture in the human rights context, the intention element merely requires proof that the conduct perpetrated was deliberate.

It follows that the conception of torture in the human rights paradigm is considerably broader than the conception in the criminal paradigm. Not only is this descriptively true, but it is also normatively desirable in view of the different nature and objectives of human rights and criminal proceedings. It is one respect in which uncritical transplanatation between the criminal and human rights contexts is inappropriate.

### 6.3 Severe pain or suffering

As noted in Chapter Four, the inclusion of a severity threshold in the definition of torture in the CAT was controversial. Although the UK and the US favoured specifying 'extremely severe' pain or suffering, the USSR wanted 'pain or suffering' only, with no reference to extremity or severity.<sup>975</sup> One year after the CAT was concluded, the Inter-American Convention to Prevent and Punish Torture followed the approach that had been favoured by the USSR during the CAT negotiations,

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<sup>971</sup> See, eg, Council of Europe, 'Report to the Turkish Government on the visit to Turkey carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 9 – 21 June 2013', CPT/Inf (2015) 6, 15 January 2015. Note that it may exceed the mandate of the European Committee for the Prevention of Torture to make an affirmative finding of torture, given that its system of periodic visits to places of detention is designed 'to create an on-going relationship between the Committee and the State party in question' as opposed to '[focusing] on particular instances of alleged mistreatment': Evans M and Morgan R, 'The European Convention for the Prevention of Torture: Operational Practice' (1992) 41 *International & Comparative Law Quarterly* 590, 592.

<sup>972</sup> See, eg, *Poltoratskiy v Ukraine*, App No 38812/97 (ECtHR, 29 April 2003), [149]; *Alver v Estonia*, App no 64812/01 (ECtHR, 8 November 2005), [56]-[57].

<sup>973</sup> See, eg, *Poltoratskiy v Ukraine* *ibid* [148]; *Stanev v Bulgaria* (n511) [210]; *Neshkov & Ors v Bulgaria*, App no 36925/10 (ECtHR, 27 January 2015), [229].

<sup>974</sup> See section 5.2 above.

<sup>975</sup> Nowak and McArthur (n238) 67; Burgers and Danelius (n197) 44-45.

that is, the deletion of the severity requirement from the definition of torture.<sup>976</sup> However, the Inter-American Court of Human Rights continues to reference the severity of suffering criterion as an element in the definition of torture under both the American Convention on Human Rights and the Inter-American Convention to Prevent and Punish Torture.<sup>977</sup>

The existence of a threshold of severity for pain or suffering to be classed as torture is similarly well established in the case law of the ECtHR.<sup>978</sup> However, the suggestion that the severity of suffering was incorrectly assessed in *Ireland v UK* is one of the factors in contention in Ireland's pending application to Strasbourg to re-open the judgment in that case.<sup>979</sup> The later judgment of the ECtHR in *Selmouni v France* hints at the fact that the *Ireland* decision may have set the severity threshold too high.<sup>980</sup> In *Selmouni*, the Court observed that 'certain acts which were classified in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in future'.<sup>981</sup>

The UN Human Rights Committee has not expressly held that pain or suffering must attain a threshold of severity in order to constitute torture under the ICCPR. However, it has cited with approval the definition of torture in CAT Article 1(1), and has adopted a narrow conception of torture that is broadly consistent with the CAT. This unnecessarily restrictive approach fails to take into account the fact that the conception of torture in the CAT falls within the criminal paradigm, while the conception of torture in the ICCPR may be susceptible to a broader interpretation, consistent with the human rights context in which it appears. As Farrell has argued, 'rights are different from crimes'.<sup>982</sup>

In *Vuolanne v Finland*, the UN Human Rights Committee found that the suffering associated with 10 days' solitary confinement was insufficiently severe to constitute torture.<sup>983</sup> In contrast, in *de Bazzano v Uruguay*, the UN Human Rights Committee made a finding of torture in circumstances

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<sup>976</sup> Inter-American Torture Convention (n528) art 2.

<sup>977</sup> See, eg, *Case of Loayza Tamayo v Peru* (n554) [57]; *Case of Caesar v Trinidad and Tobago* (n544) [67]; *Case of Bueno Alves v Argentina* (n546) [79], [83]-[85]; *Case of Bayarri v Argentina*, (n937) [81].

<sup>978</sup> Severity of suffering was the decisive factor in *Ireland*, where all other requirements of the definition of torture (intentional infliction, purpose, official capacity) were clearly present: *Ireland v UK* (ECtHR) (n241) 59, [167]. See also *Tyrer v UK* (ECtHR) (n400) 11 [29].

<sup>979</sup> See McKay S, 'The Torture Centre: Northern Ireland's "Hooded Men"' (*The Irish Times*, 25 July 2015) available at <<http://www.irishtimes.com/news/crime-and-law/the-torture-centre-northern-ireland-s-hooded-men-1.2296152>> accessed 9 October 2015.

<sup>980</sup> *Selmouni v France* (n493).

<sup>981</sup> *ibid* [101].

<sup>982</sup> Farrell, 'Just How Ill-Treated Were You?' (n693) 483.

<sup>983</sup> *Vuolanne v Finland*, Communication No 265/1987, UN Doc CCPR/C/35/D/265/1987, adopted 7 April 1989 (HRC).

where Uruguayan police had hooded a political prisoner, forced him to remain standing for ‘long hours’, and failed to provide prompt medical treatment when he fell and broke his leg.<sup>984</sup> Although there was no express reference to severity in the UN Human Rights Committee’s determination, it appeared to be significant that the prisoner had suffered permanent damage to his leg, which was ‘several centimetres shorter than the other one’.<sup>985</sup> Although the allegations in *de Bazzano* related to three individuals who had suffered incommunicado detention and ill-treatment, the Human Rights Committee used the term ‘torture’ only in respect of the prisoner who had suffered permanent physical injury.<sup>986</sup> In relation to the other prisoners, the Human Rights Committee found violations of ICCPR Articles 7 (prohibition of torture and cruel, inhuman or degrading treatment or punishment) and 10 (right to humane treatment for persons deprived of their liberty), without specifying which limb of those provisions had been violated.<sup>987</sup>

In *Giri (on behalf of Giri & Ors) v Nepal*, the UN Human Rights Committee made findings of torture in relation to the repeated interrogation of a military detainee over a period of 13 months.<sup>988</sup> The allegations including ‘beatings on the shoulders, the back and legs with a plastic pipe and a hard wooden stick’, slapping, punching and kicking in the face, head, ears and back, ‘rubbing his body against ice blocks, and piercing with needles of his back, his chest near his nipples and underneath his toenails’.<sup>989</sup> He was also verbally abused, threatened with death, and imprisoned in filthy conditions with his hands continually cuffed in front of him for a period of many months.<sup>990</sup> The UN Human Rights Committee did not expressly emphasise the severity of the suffering the prisoner experienced, but in reaching its decision that he had been tortured they cited with approval the definition in Article 1(1) of the CAT, which does of course include a severity requirement.<sup>991</sup>

In *El Hagog Jumaa v Libya*, the UN Human Rights Committee found that Libyan police had committed torture against the applicant in circumstances where there were ‘traces of rape and use of electrical equipment’ on his body.<sup>992</sup> Other allegations included electric shocks, beatings on the soles of his feet and elsewhere on his body, being hung by the arms, suffocation, strangulation,

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<sup>984</sup> *de Bazzano v Uruguay*, Communication No 5/1977, UN Doc CCPR/C/7/D/5/1977, adopted 17 August 1979 (HRC), [2]. The state party failed to respond to the merits of the claim, though it did dispute the admissibility of the communication: [9]. As a result the Human Rights Committee made its determination on the basis of the applicant’s uncontradicted claims: see [2], [10].

<sup>985</sup> *ibid* [2], [10].

<sup>986</sup> *ibid* [2], [10].

<sup>987</sup> *ibid* [10].

<sup>988</sup> *Giri (on behalf of Giri & Ors) v Nepal*, (n950) (HRC).

<sup>989</sup> *ibid* [2.5], [7.5]-[7.6].

<sup>990</sup> *ibid* [2.4]-[2.4].

<sup>991</sup> *ibid* [7.5]-[7.6].

<sup>992</sup> *El Hagog Jumaa v Libya*, Communication No 1755/2008, UN Doc CCPR/C/104/D/1755/2008, adopted 19 March 2012, [8.2], [8.6].

'being threatened of attack by dogs while blindfolded', being injected with drugs, sensory isolation, and other methods.<sup>993</sup> Again, although the UN Human Rights Committee did not expressly emphasise the severity of the suffering he experienced, there is no question that this treatment would have met the severity threshold in Article 1(1) of the CAT.

In the jurisprudence of the ECtHR, the IACtHR and the UN Human Rights Committee, there is a requirement that pain or suffering must meet a threshold of severity to constitute torture. In contrast, the case law of the African Commission on Human and Peoples' Rights is ambivalent as to the inclusion of a severity threshold. In *Sudan Human Rights Organisation v Sudan* the African Commission quoted CAT Article 1(1), including its reference to severe pain or suffering, but then omitted further reference to that criterion in its statement that 'torture thus constitutes the intentional and systematic infliction of physical or psychological pain and suffering in order to punish, intimidate or gather information'.<sup>994</sup> Other cases before the African Commission have referred to 'serious physical or psychological suffering', which phrase would appear to have the same effect as a requirement for severity of pain or suffering.<sup>995</sup> On balance, then, it seems likely that a severity threshold is also required for torture in the African Charter system.

The requirement that pain or suffering must reach a threshold of severity for ill-treatment to constitute torture has a strong grounding in principle. In the absence of such a threshold, *any* pain or suffering that was deliberately inflicted, however minor, would necessarily constitute torture—so long as the purposive element was also satisfied. Not only would this risk trivialising findings of torture, but it would also carry potentially significant consequences for the scope of other State obligations, such as the prohibition of *refoulement* and the exclusionary rule for evidence obtained by torture.<sup>996</sup>

While both the criminal and human rights conceptions of torture require the pain or suffering to be severe, there are differences in the interpretive approach to that standard of severity and in the level of proof that is required. It is right that in the criminal context, the benefit of any doubt should be given to the accused, and if the severity of the victim's suffering cannot be established then it is appropriate to convict of a lesser offence than torture. In contrast, in the human rights paradigm,

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<sup>993</sup> *ibid* [2.3].

<sup>994</sup> *Sudan Human Rights Organisation and Centre for Housing Rights and Evictions v Sudan*, (n937), [155]-[156] (African Comm HR).

<sup>995</sup> See, eg, *International Pen, Constitutional Rights Project, Interights (on behalf of Ken Saro-Wiwa) v Nigeria*, Communication nos 137/94, 139/94, 154/96 and 161/97, 31 October 1998 ('*International Pen, Constitutional Rights Project, Interights (on behalf of Ken Saro-Wiwa) v Nigeria*') [79] (African CommHR); *Ditshwanelo v Botswana*, Communication no 277/2003, 16 December 2001 (African CommHR) [163].

<sup>996</sup> See CAT (n1) arts 3, 15; Inter-American Torture Convention (n528) arts 10, 13.

courts have repeatedly affirmed that there should be a 'greater firmness in assessing breaches' and that standards can be expected to rise over time.<sup>997</sup>

### 6.3.1 Objective and subjective elements

The case law of the ECtHR suggests that assessment of the severity of pain or suffering has both objective and subjective elements. In *Ireland v UK*, the Court acknowledged that the assessment of the threshold 'depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim'.<sup>998</sup> A similar position is adopted in the jurisprudence of the Inter-American Court of Human Rights.<sup>999</sup>

In addition to the nature and context of the treatment and its duration, the presence or absence of long-term consequences of the treatment is an objective element that has been cited in a number of cases to support a finding of torture.<sup>1000</sup> In other cases subjective factors have been decisive. In *Eremia v Moldova*, the ECtHR held that repeated assaults upon a woman by her husband, who was a police officer, in the privacy of their own home, meant that the applicant was 'particularly vulnerable'.<sup>1001</sup> Similarly, the applicant in *Aydin v Turkey* was a minor in police custody who was thus both vulnerable and unable to resist.<sup>1002</sup> It is axiomatic that infliction of the same treatment on people of different ages and in different states of health is likely to have a different effect. This was discussed above in relation to victims with so-called 'eggshell skulls'.<sup>1003</sup> The assessment of the severity threshold must be sufficiently flexible to acknowledge those differences, particularly in the human rights paradigm where the proceedings are victim-oriented in nature, and their objective is vindicatory.

### 6.3.2 Mental suffering

The jurisprudence of the ECtHR assumes that mental suffering, like physical suffering, admits of degrees of severity. In *Gäfgen v Germany* the Court observed that classification of threats as either torture or inhuman or degrading treatment 'depends upon all the circumstances of a given case, including, notably, the severity of the pressure exerted and the intensity of the mental suffering

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<sup>997</sup> *Selmouni v France* (n493) 442 [101]; *Cantoral Benavides v Peru* (n541) [99].

<sup>998</sup> *Ireland v UK* (ECtHR) (n241)58, [162].

<sup>999</sup> *Case of Miguel Castro Castro Prison v Peru* (n968) [316].

<sup>1000</sup> See Mavronicola, 'Delimiting the Absolute' (n11) 130, citing *Denizci v Cyprus* (2001) 34 EHRR 753 [385]; *Egmez v Cyprus* (2002) 34 EHRR 29 [78]; *Aksoy v Turkey* (n496) [64].

<sup>1001</sup> *Eremia v Moldova* (2014) 58 EHRR 2, 30 [61].

<sup>1002</sup> *Aydin v Turkey* (n496) [83].

<sup>1003</sup> See section 6.2.1 above.

caused'.<sup>1004</sup> The ECtHR has also identified mental suffering that is less severe: for example, the judgment in *Campbell and Cosans v United Kingdom* accepted that the threat of torture could in principle be at least inhuman treatment,<sup>1005</sup> but that feelings of 'apprehension or disquiet', 'group tension' and/or 'a sense of alienation' would not suffice.<sup>1006</sup> In contrast, the combination of physical ill-treatment and psychological pressure in *Akkoç v Turkey*, 'in particular the threats made concerning the ill-treatment of her children', was sufficiently severe that it was characterised by the ECtHR as torture.<sup>1007</sup>

Similarly, the IACtHR has recognised that the exposure of prisoners to the grave suffering and death of fellow inmates can lead to psychological suffering so severe that it must be qualified as torture.<sup>1008</sup> Indeed, as we saw in section 6.1.4 above, the Inter-American Torture Convention includes an additional clause in its provision defining torture to the effect that 'torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish'.<sup>1009</sup> This may be seen as a recognition of the 'special evil of breaking the resistance of a prisoner by breaking his mind'.<sup>1010</sup>

Neither the UN Human Rights Committee nor the African Charter institutions have yet had occasion to consider purely mental torture. However, General Comment 20 of the UN Human Rights Committee emphasised that the prohibition of torture and ill-treatment in Article 7 of the ICCPR aims 'to protect both the dignity and the physical and mental integrity of the individual', and that it covers 'acts that cause mental suffering to the victim'.<sup>1011</sup>

Although the African Charter does not make specific reference to mental suffering, the African Commission on Human and Peoples' Rights has held that the prohibition of torture and ill-

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<sup>1004</sup> *Gäfgen v Germany* (n278) [108]. See also *Al-Nashiri v Poland* (2015) 60 EHRR 16, [501]; *Husayn v Poland* (2015) 60 EHRR 16, [501], where the European Court of Human Rights held that the threat of torture could constitute inhuman treatment, 'provided it is sufficiently real and immediate'; and *DF v Latvia*, App no 11160/07 (ECtHR, 29 October 2013) [85]. A similar statement was made *Prosecutor v Kvočka*, Trial Chamber Judgment (n793) [149].

<sup>1005</sup> *Campbell and Cosans v United Kingdom* (1982) 4 EHRR 293, [26]. In *Gäfgen v Germany* (n278), the European Court of Human Rights went further, stating that 'the fear of physical torture may itself constitute mental torture': [108].

<sup>1006</sup> *ibid* [30].

<sup>1007</sup> *Akkoç v Turkey* (2002) 34 EHRR 51, 1241 [116].

<sup>1008</sup> *Case of Miguel Castro Castro Prison v Peru*, (n968) [279], [288], [293]. In that case, inmates had 'witnessed the death of their prison mates and saw injured pregnant women crawling on the floor' and they 'felt they were going to die': [291].

<sup>1009</sup> Inter-American Torture Convention (n528) art 2.

<sup>1010</sup> Luban and Shue (n36) 827.

<sup>1011</sup> United Nations Human Rights Committee, 'General Comment 20 on Article 7 of the ICCPR', UN Doc E/CN/4/2006/6/Add.5, January 9, 2006, [2], [5].

treatment should 'be interpreted as widely as possible to encompass the widest possible array of physical and mental abuses'.<sup>1012</sup>

### 6.3.3 Dynamic threshold

The 'living instrument' approach that is applied to the interpretation of human rights treaties suggests that the threshold of severity required to establish an act of torture is capable of changing over time. In *Selmouni v France* the ECtHR observed that, in view of the 'the increasingly high standard being required in the area of the protection of human rights and fundamental liberties', 'certain acts which were classified in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in future'.<sup>1013</sup> The ECtHR has repeatedly invoked the living instrument interpretive approach to justify a 'greater firmness in assessing breaches' under the European Convention on Human Rights, and similar statements can be found in the case law of the IACtHR.<sup>1014</sup> The dynamism of the threshold is perhaps most apparent in the recent case of *Bouyid v Belgium*, where the Grand Chamber of the ECtHR held that a single slap to the face of a juvenile by police could amount to inhuman or degrading treatment or punishment.<sup>1015</sup> The application of a similarly dynamic threshold in the criminal context would raise the spectre of retroactive criminalisation, and be therefore normatively undesirable.<sup>1016</sup> This is a further respect in which the human rights conception of torture has diverged, and should continue to do so, from the prevailing conception of torture in the criminal paradigm.

### 6.3.4 Destruction of property

Moreover, the ECtHR has held in a number of cases that the burning and destruction of homes and property can give rise to a violation of Article 3 of the European Convention on Human Rights and a finding of inhuman treatment.<sup>1017</sup> In *Ayder & Ors v Turkey*, the applicants and their families were forced out of their homes during a security operation in a Kurdish-majority area in Turkey, and stood watching as their homes and possessions were burned down.<sup>1018</sup> The ECtHR said that 'destruction of the applicants' homes and possessions, as well as the anguish and distress suffered

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<sup>1012</sup> *Doebbler v Sudan* (n937) [37].

<sup>1013</sup> *Selmouni v France* (n493) 442 [101].

<sup>1014</sup> *ibid*; *Cantoral Benavides v Peru* (n541) [99].

<sup>1015</sup> *Bouyid v Belgium* (n512). For an excellent analysis, see Mavronicola N, 'Bouyid v Belgium: The "Minimum Level of Severity" and Human Dignity's Role in Article 3 ECHR' *Cyprus Human Rights Law Review* (forthcoming 2016).

<sup>1016</sup> See further Juratowitch B, *Retroactivity and the Common Law* (Hart 2008).

<sup>1017</sup> See, eg, *Akdivar v Turkey* (1997) 23 EHRR 533 (GC), where a majority appeared to accept in principle that destruction of homes could violate Article 3, but that 'the absence of precise evidence concerning the specific circumstances' precluded a full examination of the issue: [89]-[91].

<sup>1018</sup> *Ayder & Ors v Turkey*, App no 23656/94 (ECtHR, January 8, 2004).

by members of their family, must have caused them suffering of sufficient severity for the acts of the security forces to be categorised as inhuman treatment within the meaning of Article 3'.<sup>1019</sup> Applying *Selmouni*, it may even be possible that, in the future, such treatment could be characterised as torture.

As we saw in Chapter Four above, the UN Committee Against Torture has also recognised that the burning and destruction of houses was capable of causing a very high level of mental suffering in *Dzemajl v Yugoslavia*.<sup>1020</sup> In that case, two committee members dissented from the conclusion that the victims had experienced cruel, inhuman or degrading treatment or punishment. The dissenters would have held that 'the suffering visited upon the victims was severe enough to qualify as "torture"'.<sup>1021</sup>

Once it is accepted that the criminal and the human rights conceptions of torture differ, there is no difficulty in concluding that forcing people to witness the destruction of their homes and property could constitute torture in one context but not the other. The UN Committee Against Torture must assess whether the elements of the definition of torture in Article 1(1) CAT—essentially a criminal statute<sup>1022</sup>—are established on the facts. In that context, a majority of the Committee in *Dzemajl* was not persuaded to the requisite standard, on the evidence available to them, that the victims' suffering was sufficiently severe. It is appropriate in such cases that a lesser offence be charged. In contrast, in cases such as *Ayder*, human rights courts are asked to consider torture as a human rights violation. This requires an assessment of the severity of the victims' suffering measured against the dynamic threshold applied in human rights adjudication, and it would be no surprise to find that the torture threshold had been reached.

## 6.4 Purposive element

The inclusion of a purposive element in the human rights conception of torture, as in the criminal paradigm, may be seen as a reflection of the dignitarian account of the moral wrong of torture. The definition of torture in Article 2 of the Inter-American Torture Convention includes a requirement that torture must be perpetrated for a purpose.<sup>1023</sup> Like the definition in Article 1(1) of the CAT, the Inter-American Torture Convention identifies an inclusive list of purposes that will be sufficient to establish that criterion. This may be read as a reflection of the fact that on the dignitarian account, it is the existence of a purpose that is significant, and not its nature.

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<sup>1019</sup> *ibid* 26 [110]. See also *Selçuk and Asker v Turkey*, Apps no 12/1997/796/998-999 (ECtHR, April 24, 1998).

<sup>1020</sup> *Dzemajl et al v Yugoslavia* (n765) [9.2]; see further section 5.3.2 above.

<sup>1021</sup> *ibid*, Annex: Individual Opinion by Mr F Mariño and Mr A González Poblete.

<sup>1022</sup> See section 5.1 above.

<sup>1023</sup> Inter-American Torture Convention (n528).

Similarly, in *Giri (on behalf of Giri & Ors) v Nepal*, the Human Rights Committee observed that its ‘general approach’ was ‘that the critical distinction between torture on the one hand, and other cruel, inhuman or degrading treatment or punishment, on the other, will be the presence or otherwise of a relevant purposive element’.<sup>1024</sup> Like the IACtHR, this suggests that the Human Rights Committee has implicitly adopted the dignitarian account of the moral wrong of torture.

The ECommHR considered the purposive element to be central to the definition of torture in the 1969 *Greek Case*, stating 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’.<sup>1025</sup> As the first international judicial body to consider the definition of torture, this description was highly influential. Almost a decade later, the ECtHR said in *Ireland v UK* that the distinction between torture and inhuman treatment was also derived ‘from a difference in the intensity of the suffering inflicted’.<sup>1026</sup> The judgment in *Ireland v UK* thus required both severity of suffering, and a purpose, in that case ‘the extraction of confessions, the naming of others and/or information’.<sup>1027</sup> Notwithstanding the purpose, however, the ECtHR said in *Ireland* that the ‘five techniques’ ‘did not occasion suffering of the particular intensity and cruelty’ required for a finding of torture.<sup>1028</sup>

These dual requirements—severity of pain or suffering, and a purpose—have been continually emphasised in the ECtHR’s case law. In *Aydin v Turkey*<sup>1029</sup> and *Aksoy v Turkey*,<sup>1030</sup> the first cases to find that torture had been committed, the Court repeated its statement from *Ireland v UK* that Article 3 contained a distinction between torture and inhuman or degrading treatment ‘to allow the special stigma of “torture” to attach only to deliberate inhuman treatment causing very serious and cruel suffering’.<sup>1031</sup> The decisive nature of the purpose, as well as the severity of the treatment, was confirmed in *Selmouni v France*.<sup>1032</sup> This was the first ECtHR case to cite the definition of torture in CAT Article 1.<sup>1033</sup> It concerned the intentional infliction of severe suffering by police

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<sup>1024</sup> *Giri (on behalf of Giri & Ors) v Nepal* (n950) [7.5].

<sup>1025</sup> *The Greek Case* (n264) 186 [2] (the Commission).

<sup>1026</sup> *Ireland v UK* (ECtHR) (n241) 59 [167] (the Court).

<sup>1027</sup> *ibid.*

<sup>1028</sup> *ibid.* The ‘five techniques’ were hooding, wall-standing, deprivation of food and water; sleep deprivation and subjection to noise.

<sup>1029</sup> *Aydin v Turkey* (n496).

<sup>1030</sup> *Aksoy v Turkey* (n496).

<sup>1031</sup> *ibid* 585 [63]; *Aydin v Turkey* (n496) 295 [82].

<sup>1032</sup> *Selmouni v France* (n493).

<sup>1033</sup> *ibid* 441 [97]-[98].

officers in the conduct of their duties, for the purpose of procuring a confession, and the ECtHR found that torture had been established.<sup>1034</sup>

The following year in *Mahmut Kaya v Turkey* the ECtHR cited Article 1(1) of the CAT in support of its statement that the definition of torture ‘in addition to the severity of the treatment’, required ‘a purposive element’.<sup>1035</sup> A lack of evidence as to how the applicant’s brother had died in *Mahmut Kaya* prevented the Court from reaching the conclusion that he had been tortured, since there was no evidence of either the severity of his suffering, or its purpose.<sup>1036</sup> Similarly, in *Denizci v Cyprus* the absence of evidence as to the severity of the suffering and the reason for its infliction precluded a finding of torture.<sup>1037</sup> In the latter case, although it was clear that ‘police officers had intentionally subjected [the applicants] to ill-treatment of varying degrees of severity... it [had] not been established that the police officers’ aim was to extract a confession’.<sup>1038</sup> As a result, the treatment was classified as inhuman but not torture.<sup>1039</sup> In *Krastanov v Bulgaria*, acts of violence inflicted upon the applicant by police officers were not inflicted ‘intentionally for the purpose of, for instance, making him confess to a crime or breaking his physical or moral resistance’ and as such they constituted inhuman treatment but not torture.<sup>1040</sup>

Where the purposive element is especially blatant, ill-treatment has earned particular condemnation. This is a further indication that the conception of torture in the human rights paradigm reflects the dignitarian account of torture’s moral wrong. In *Al-Nashiri v Poland*, the ECtHR observed that the interrogation techniques to which so-called ‘high value detainees’ were subjected at a secret CIA ‘detention centre in Poland were ‘applied in a premeditated and organised manner, on the basis of a formalised, clinical procedure...specifically designed to elicit information or confessions or to obtain intelligence from captured terrorist suspects’.<sup>1041</sup> The ECtHR observed that the interrogation techniques were applied with the explicitly declared aim ‘to psychologically “dislocate” the detainee, maximise his feeling of vulnerability and helplessness, and reduce or eliminate his will to resist’ as well as ‘to create a state of learned helplessness and dependence’ and

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<sup>1034</sup> *ibid* 441 [98].

<sup>1035</sup> *Mahmut Kaya v Turkey* (n393) [117]. This statement was repeated in *Ilhan v Turkey* (2002) 34 EHRR 869, 930-931, [85] (GC); *Akkoç v Turkey* (2002) 34 EHRR 51, 1241 [115]; *Salman v Turkey* (n555) 485 [114].

<sup>1036</sup> *Mahmut Kaya* *ibid* [118]: though ‘the binding of Hasan Kaya’s wrists with wire in such a manner as to cut the skin and the prolonged exposure of his feet to water or snow, whether caused intentionally or otherwise, may be regarded as inflicting inhuman and degrading treatment’. Judge Gölcüklü dissented from this finding.

<sup>1037</sup> *Denizci & Ors v Cyprus*, App no 2531/94 (ECtHR, 23 May 2001), [384].

<sup>1038</sup> *ibid*.

<sup>1039</sup> *ibid* [386].

<sup>1040</sup> *Krastanov v Bulgaria*, App no 50222/99 (ECtHR, 30 September 2004), [53].

<sup>1041</sup> *Al-Nashiri v Poland; Husayn v Poland* (2015) 60 EHRR 16, [515].

to combine ‘physical and psychological pressures in a comprehensive, systematic and cumulative manner... to overcome a detainee’s resistance posture’.<sup>1042</sup> The fact that the purpose of the ill-treatment was so blatant, and that the relevant authorities were prepared to expressly acknowledge it, evokes a special abhorrence. It is thus apparent that, on the present state of the law, the purposive element is considered to be a defining characteristic of torture in the human rights paradigm.

This result is regrettable. One problem with emphasising the purposive element of torture is that it excludes gratuitous or sadistic ill-treatment from its ambit. The response to that criticism may be that the purposive element should be broadly construed, so as to encompass such meaningless cruelty. But on that approach, the purposive element becomes so broad that it collapses into nothingness and ceases to act as a defining element at all. It would be normatively preferable for human rights courts to adopt a conception of torture as ‘*the deliberate infliction of severe suffering in the context of a profoundly asymmetric power relation*’, thereby avoiding this problem.

#### 6.4.1 Inclusive list of purposes

Chapter Three sought to demonstrate that, on the dignitarian account of the moral wrong of torture, it is the existence of a purpose and not its nature that is significant. In pursuing *any* objective, the torturer seeks to use the mind or the body of the victim as a mere means to her own ends. On this view, the reference to ‘purpose’, or ‘prohibited purpose’, is but a convenient label. Any purposes—all purposes—are prohibited; indeed the term ‘prohibited purpose’ reduces to a tautology.

The dignitarian account of torture finds expression in the human rights paradigm. It is reflected in both the requirement that the torture be perpetrated for a purpose, and in the inclusive nature of the list of prohibited purposes. This is true of torture in the criminal paradigm as well as in the human rights paradigm. The ECtHR has not adopted a closed or even an indicative list of purposes, and nor has the African Commission on Human and Peoples’ Rights.<sup>1043</sup> The Inter-American Torture Convention includes an indicative list of purposes, similar in nature to the CAT.<sup>1044</sup>

The UN Human Rights Committee has referenced the purposive element of the definition of torture without specifying whether that list is inclusive or exhaustive.<sup>1045</sup> If the dignitarian account is to be preferred, then the UN Human Rights Committee ought to expressly embrace an inclusive list

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<sup>1042</sup> *ibid* [511].

<sup>1043</sup> See, eg, *Elgak & Ors v Sudan*, Communication 379/09, March 14, 2014 (African Comm HR), [98], referring to the inclusive list of purposes in the CAT.

<sup>1044</sup> Inter-American Torture Convention (n528) art 2.

<sup>1045</sup> See, eg, *Giri (on behalf of Giri & Ors) v Nepal* (n950) [7.5].

of purposes. However, as argued in Chapter Four, it would be normatively preferable to substitute the purposive element of torture for a requirement that the victim be ‘in the custody or under the control of’ the perpetrator. This would better reflect the moral wrong of torture, as advanced in Chapter Three above.

#### 6.4.2 Inference as to purpose

We saw in section 6.1.2 that human rights courts have been prepared to adopt a degree of flexibility with respect to the onus of proof for claims of torture and ill-treatment.<sup>1046</sup> The ECtHR has now applied a similar flexibility to proof of the purposive element of the definition of torture. In *Virabyan v Armenia* the ECtHR drew ‘strong inferences’ that injuries suffered by a detainee in police custody, which caused (inter alia) his left testicle to have to be removed, had been ‘inflicted on the applicant intentionally in order either to punish or to intimidate him or both’.<sup>1047</sup> This inference was drawn despite the fact that it had not been ‘established beyond reasonable doubt that political motives played a role in the applicant’s ill-treatment by police’.<sup>1048</sup>

While this is appropriate in the context of human rights claims, where the information required to conclusively prove the allegations is often only in the possession of the State party, it would not be appropriate in criminal proceedings for torture, where the coercive penalties available are considerably greater. This is another respect in which the conception of torture in the human rights paradigm is susceptible to a more expansive and flexible interpretation than its criminal counterpart.

#### 6.4.3 Sole or dominant purpose

It will be recalled that, in order to constitute torture, the prohibited purpose need not be the sole or even the dominant purpose for the infliction of ill-treatment. Since this has been accepted by international criminal courts when applying the criminal standard of proof and with the consequence of serious sanction, it is safe to assume that the same principle would be followed in civil proceedings, whether in tort or human rights.<sup>1049</sup>

#### 6.4.4 Gratuitous or sadistic infliction

Although the defencelessness account has not yet been expressly embraced in either the human rights or the criminal paradigm, two recent ECtHR cases may signal an important shift in that

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<sup>1046</sup> See section 6.1.2 above.

<sup>1047</sup> *Virabyan v Armenia* (n498) [157].

<sup>1048</sup> *ibid* [216].

<sup>1049</sup> See section 5.4.1 above.

direction. The 2006 case of *Nevmerzhitsky v Ukraine* and the 2011 case of *Dedovskiy & Ors v Russia* arguably represent a shift away from the dignitarian account of the moral wrong of torture, towards an account based on defencelessness.<sup>1050</sup> The significance of these cases is therefore difficult to understate.

In the 2006 case of *Nevmerzhitsky v Ukraine* the ECtHR concluded that the gratuitous infliction of severe pain and suffering did, in fact, constitute torture.<sup>1051</sup> That case concerned a prisoner on hunger strike who was subjected to force-feeding. The applicant was handcuffed, had a mouth-widener inserted and then a rubber tube forced down his throat in order for the procedure to occur.<sup>1052</sup> The ECtHR unanimously upheld this claim, finding that in the circumstances, the treatment to which the prisoner was subjected 'constituted treatment of such a severe character' that it warranted 'the characterization of torture'.<sup>1053</sup> The respondent state had failed to demonstrate the medical necessity of force-feeding a prisoner on a hunger strike.<sup>1054</sup> From this, the Court 'assumed that the force-feeding was arbitrary' and found that 'it cannot be said that the authorities acted in the applicant's best interests'.<sup>1055</sup> Importantly, there was no finding as to the purpose of this ill-treatment. The ECtHR's silence on this point is particularly significant in light of the fact that the applicant alleged a purpose to humiliate and punish him. There is no suggestion that the force-feeding was punitive or discriminatory; rather, it was the absence of a medical justification that the ECtHR considered significant in reaching its conclusion that the treatment should be characterised as torture.

In the 2011 case of *Dedovskiy & Ors v Russia* the ECtHR described the beating of a prisoner with rubber truncheons as 'gratuitous', but nevertheless concluded it was torture.<sup>1056</sup> Although the ECtHR in that case was prepared to assume that the violence was 'intended to arouse in the applicants feelings of fear and humiliation and to break their physical or moral resistance',<sup>1057</sup> elsewhere in the judgment the ECtHR acknowledged that it could not be ruled out 'that the applicant was subjected to ill-treatment as a revenge for the injury that he had inflicted on [another police officer]... [or] that the violent behaviour of the police officers was triggered by the

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<sup>1050</sup> *Nevmerzhitsky v Ukraine* (n555); *Dedovskiy & Ors v Russia* (2011) 52 EHRR 30.

<sup>1051</sup> *Nevmerzhitsky v Ukraine* (n555).

<sup>1052</sup> *ibid* [82].

<sup>1053</sup> *ibid* [98].

<sup>1054</sup> *ibid* [96]. The respondent government's failure to provide the medical evidence of the examination which it had claimed took place formed the basis of a further violation of Article 38(1) of the Convention: *ibid* [77].

<sup>1055</sup> *ibid*.

<sup>1056</sup> *Dedovskiy & Ors v Russia* (n1050) [85].

<sup>1057</sup> *ibid*.

confrontation between them and the applicant'.<sup>1058</sup> The ECtHR also considered it possible that the conduct occurred 'for reasons of police brutality which are beyond any explanation'.<sup>1059</sup>

This reasoning in both *Nevmerzhitsky v Ukraine* and *Dedovskiy & Ors v Russia* is inconsistent with the dignitarian view of the moral wrong of torture, according to which the gratuitous or sadistic infliction of ill-treatment is inimical to the concept of torture.<sup>1060</sup> From a normative perspective however, the inclusion of gratuitous or sadistic ill-treatment within the concept of torture should be welcomed. It was argued in Chapter Three above that gratuitous cruelty should not only be regarded as torture, but that it is among the worst forms of torture imaginable. Its exclusion from the dignitarian account was an important factor compelling the rejection of that view. It is to be hoped that the judgments in *Nevmerzhitsky* and *Dedovskiy* mark the beginnings of a recognition by the ECtHR that the basis of the moral wrong of torture is *the deliberate infliction of severe pain or suffering in the context of a profoundly asymmetric power relation*. To that extent, this shift should be welcomed, and it is to be hoped it will find echoes in the case law of the IACtHR, the UN Human Rights Committee and under the African Charter of Human and Peoples' Rights.

## 6.5 Nexus with the state

### 6.5.1 European Convention on Human Rights

Unlike the CAT, there is no requirement of commission by a public official in the definition of torture in the jurisprudence of the ECtHR. The case law of the ECtHR is clear that treatment contrary to Article 3 may be committed by private individuals and non-state actors, and there is no requirement for infliction, instigation, consent or acquiescence by a public official or other person acting in an official capacity.<sup>1061</sup>

There have been a number of instances where the ECtHR has found that inhuman or degrading treatment was committed by a private party.<sup>1062</sup> However, in no case thus far has the ECtHR held that a non-state actor has committed torture. This is not precluded by Article 3 of the European Convention, but it has not yet arisen, no doubt in part because claims relating to ill-treatment by

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<sup>1058</sup> *ibid* [214].

<sup>1059</sup> *ibid* [214].

<sup>1060</sup> See also section 4.4.3 above.

<sup>1061</sup> See, eg, *MC v Bulgaria* (2005) 40 EHRR 20; *Z & Ors v United Kingdom* (2002) 34 EHRR 3; *E & Ors v United Kingdom* (2003) 36 EHRR 31; *97 Members of the Gldani Congregation of Jehovah's Witnesses v Georgia* (2008) 46 EHRR 30.

<sup>1062</sup> *ibid*.

non-state actors would only arise for decision in the context of the State's positive obligation to protect against ill-treatment by private parties, unless the conduct was attributable to the State.<sup>1063</sup>

The public official nexus is the most significant difference between torture as defined in CAT Article 1(1) and torture as defined in Article 3 of the European Convention on Human Rights. Applying the definition of torture in CAT, if an MI6 official who was present in the room as a terrorist suspect who was (say) beaten and water-boarded, the official would not merely be complicit in torture, but would have herself perpetrated torture (assuming that she intended that the victim experience severe pain or suffering and that the purposive element was also satisfied).<sup>1064</sup> In contrast, under Article 3 of the European Convention there would be two questions: first, whether torture had been committed, and second, whether the UK was responsible for, or complicit in, the torture..

### 6.5.2 Inter-American Human Rights System

The Inter-American Torture Convention does not require a nexus with the State for an act to constitute torture. However, immediately following the definition of torture in Article 2 of that convention, Article 3 provides that 'the following shall be guilty of the crime of torture':

- (a) A public servant or employee who acting in that capacity orders, instigates or induces the use of torture, or who directly commits it or who, being able to prevent it, fails to do so.
- (b) A person who at the instigation of a public servant or employee mentioned in subparagraph (a) orders, instigates or induces the use of torture, directly commits it or is an accomplice thereto.<sup>1065</sup>

By separating the definition of torture, and the circumstances in which a 'public servant or employee' may be guilty of torture, the Inter-American Torture Convention contemplates the possibility that an act of torture could be committed by a non-State actor. Indeed, in the 2007 case of *Buena Alves v Argentina*, the IACtHR defined the elements of torture as threefold: 'a) an intentional act; b) which causes severe physical or mental suffering, c) committed with a given purpose or aim'.<sup>1066</sup> Notably missing was any requirement for a nexus with the State.<sup>1067</sup> In that case, however, the perpetrators were police officers, so the State nexus element did not technically arise for consideration.

In *González v Mexico* (the 'Cotton Field' case), the IACtHR found violations of the preventative and procedural obligations deriving from the prohibition of torture and cruel, inhuman or degrading

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<sup>1063</sup> ILC Articles on State Responsibility (n690) Chapter II.

<sup>1064</sup> See further section 4.5 above.

<sup>1065</sup> Inter-American Torture Convention (n528) art 3.

<sup>1066</sup> *Case of Bueno Alves v Argentina* (n546) [79] and note 45.

<sup>1067</sup> For discussion, see Burgorgue-Larsen and Úbeda de Torres (n529) [15.15].

treatment or punishment.<sup>1068</sup> The bodies of a number of women had been found in a cotton field with signs showing that they had been ‘raped and abused with extreme cruelty’.<sup>1069</sup> It was not possible given the state of the evidence to conclude that the ill-treatment and murders were themselves perpetrated by State agents, and therefore no finding of torture was made.<sup>1070</sup>

Importantly, in a separate concurring opinion, Judge Quiroga considered that the Inter-American Court *should* have made a finding of torture, on the basis of acquiescence by public officials in the ill-treatment.<sup>1071</sup> She observed that, although Article 3 of the Inter-American Convention to Prevent and Punish Torture does not afford liability on the basis of consent or acquiescence by a public official, the Inter-American Court should apply the definition of torture existing at customary international law since it had acquired the status of a *jus cogens* norm.<sup>1072</sup> The majority judgment did not address this issue, and in any event decided the case under the American Convention on Human Rights rather than the Inter-American Convention to Prevent and Punish Torture (only the latter makes express provision for the State nexus requirement for torture).

There is clearly scope in the Inter-American system for excision of the State nexus requirement for torture. That possibility is arguably foreshadowed by the Inter-American Torture Convention, which separates the elements of the offence of torture from the questions of attribution, responsibility and complicity for torture.<sup>1073</sup> In its 2007 judgment in *Bueno Alves v Argentina*, the IACtHR purported to define torture, excluding the State nexus requirement from that definition.<sup>1074</sup> Finally, Judge Quiroga launched a powerful argument in her dissenting opinion in *The Cotton Field Case* in 2009 against the State nexus requirement.<sup>1075</sup> It is therefore arguable that the Inter-American human rights system is moving towards a position where a nexus with the State is no longer regarded as an element of torture.

### 6.5.3 African Charter of Human and Peoples’ Rights

Although there is as yet no jurisprudence from the African Court of Human and Peoples’ Rights on torture, the African Commission had cause to consider the State nexus element in its 2006 decision

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<sup>1068</sup> *The Cotton Field Case* (n548).

<sup>1069</sup> *ibid* [210].

<sup>1070</sup> *ibid* [242].

<sup>1071</sup> *ibid*, concurring opinion of Judge Quiroga, [1]-[20].

<sup>1072</sup> *ibid* [15]-[16] (concurring opinion of Judge Quiroga).

<sup>1073</sup> Inter-American Torture Convention (n528) arts 2, 3.

<sup>1074</sup> *Case of Bueno Alves v Argentina* (n546) [79] and note 45.

<sup>1075</sup> *The Cotton Field Case* (n548) concurring opinion of Judge Quiroga.

in *Zimbabwe Human Rights NGO Forum v Zimbabwe*.<sup>1076</sup> That case concerned allegations of acts of torture committed by the ruling political party ZANU (PF) and an organisation called the Zimbabwe Liberation War Veterans Association. The African Commission on Human and Peoples' Rights held that there was 'a very thin line to be drawn between the Government and the ZANU (PF) and the War Veterans'.<sup>1077</sup> The three institutions had overlapping membership, but 'however thin the line of distinction may seem', neither the ZANU (PF) nor the War Veterans Association could be considered to be organs of the State.<sup>1078</sup> As such, the allegations fell to be considered under the State's positive obligations to protect its citizens from ill-treatment by non-State actors, rather than under the negative obligation not to commit torture.<sup>1079</sup> On one view, this may be read as confirmation that torture is only capable of commission in circumstances where there is a nexus with the State; at least two commentators appear to have read the decision in this way.<sup>1080</sup> However, the decision need not be read in that way. It was arguably open to the African Commission to hold that torture had been perpetrated by the ZANU (PF) and the War Veterans Association, but that those acts could not be attributed to the State, and as such the case only raised issues in relation to the State's positive obligations to prevent torture. On this view, the decision of the African Commission on Human and Peoples' Rights does not necessarily require a nexus with the State.

To the extent that the conception of torture in each of these human rights jurisdictions is moving away from the State nexus requirement, this marks a further departure from the criminal conception of torture discussed in Chapter Four above. This should be commended, as neither the dignitarian nor the defencelessness accounts of torture suggest that the status of the perpetrator was of defining import. The State nexus requirement was included in the CAT by virtue of the State-centric structure of international law, rather than because torture is inherently a State-based moral wrong. It is appropriate and normatively desirable that the human rights conception of torture should evolve towards the abolition of the State nexus requirement.

## 6.6 Systematic infliction

A further element that has been mooted as a criterion for the definition of torture is systematic infliction. The ECtHR said in *Ireland v UK* that, 'although [the five techniques] were used systematically', and although the other criteria for torture were met, they ought not to be classified

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<sup>1076</sup> *Zimbabwe Human Rights NGO Forum v Zimbabwe*, Communication no 245/02, May 15, 2006 (African Comm HR).

<sup>1077</sup> *ibid* [139].

<sup>1078</sup> *ibid*.

<sup>1079</sup> *ibid* [141].

<sup>1080</sup> See Weissbrodt D and Heilman C, 'Defining Torture and Cruel, Inhuman, and Degrading Treatment' (2011) 29 *Law and Inequality: A Journal of Theory and Practice* 343, 389.

as torture because the suffering they inflicted was insufficiently severe.<sup>1081</sup> Judge Matscher said in his separate opinion that ‘the distinguishing feature of the notion of torture is the systematic, calculated (hence deliberate) and prolonged application of treatment’.<sup>1082</sup> He agreed with the majority that severity or intensity of suffering was important, but thought that ‘the element of intensity [was] complementary to the systematic element: the more sophisticated and refined the method, the less acute will be the pain... which it has to cause to achieve its purpose.’<sup>1083</sup>

This difference of opinion between the majority and the minority judges reflected an extra-judicial debate at that time concerning the possible inclusion of a requirement of systematic infliction in the definition of torture in the CAT. Discussions of the Working Group of the UN Commission on Human Rights—the group responsible for drafting the CAT—had already commenced in 1978, and at the meetings in 1979 the UK proposed an amendment to the draft definition of torture which would have made it ‘more restrictive: *systematic and intentional* infliction of *extreme* pain or suffering rather than *intentional* infliction of *severe* pain or suffering’.<sup>1084</sup> It is unsurprising that the UK made a similar submission to the European Court of Human Rights in the hearings for the *Ireland* case, which were happening at around the same time.

Although the judgment of the ECtHR in *Ireland v UK* mentioned systematic infliction, perhaps impliedly as a further criterion for torture, that argument met with less favour among the drafters of the CAT. It is not entirely clear however what that rejection signifies. The Oxford English Dictionary defines ‘systematic’ as ‘arranged or conducted according to a system, plan, or organised method; involving or observing a system’.<sup>1085</sup> This includes two elements: an element of planning and organisation, and an implication of multiple or successive events. Burgers and Danelius refer only to this latter meaning, contending that the rejection of a requirement of systematic infliction in CAT Article 1(1) meant that ‘even a single, isolated act can be considered to constitute torture’.<sup>1086</sup> Since Burgers and Danelius were both involved in the drafting of the CAT their views on the reasons for that term’s rejection carry some weight.

In any event, it is now clear that there is no requirement of systematic infliction in the case law of the European Court of Human Rights or in general international law. The ECtHR has concluded in

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<sup>1081</sup> *Ireland v UK* (ECtHR) (n241) 59 [167].

<sup>1082</sup> *ibid* 126 [1] (Judge Matscher).

<sup>1083</sup> *ibid*.

<sup>1084</sup> Burgers and Danelius (n197) 45 (emphasis in original).

<sup>1085</sup> OED Online (n22) ‘Systematic, *adj* and *n*’. On the systematicity requirement of crimes against humanity in international criminal law, see further Schabas W, *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2010) chapter 7; Schabas W, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (CUP 2006) chapter 7.

<sup>1086</sup> *ibid* 118.

a number of cases that a single act constituted torture,<sup>1087</sup> and the UN Committee against Torture has found torture in individual cases while declining to consider allegations of systemic practices of torture and ill-treatment.<sup>1088</sup> The IACtHR found that a single act of vaginal penetration using the finger of the perpetrator ‘constituted sexual rape that due to its effects constituted torture’.<sup>1089</sup>

There is no evidence of a requirement for an enhanced degree of preparation or calculation in the ECtHR’s case law, since torture has been found in cases where the violence inflicted was sudden and unpremeditated.<sup>1090</sup> The same is true of the African Commission on Human and Peoples’ Rights<sup>1091</sup> and the Inter-American Court of Human Rights.<sup>1092</sup> There have also been prosecutions for isolated acts of torture not involving special planning or calculation in the international criminal tribunals.<sup>1093</sup> Thus, it may be doubted whether ‘systematic infliction’ was ever an element of the legal definition of torture in the human rights paradigm. To the extent that it may have been, it is plainly not now reflected in the case law.

Neither the criminal nor the human rights conceptions of torture require systematicity for an act of torture. This accords with both the dignitarian and the defencelessness accounts of the moral wrong of torture, both of which are capable of applying to single as well as to systematic acts.

## 6.7 Lawful sanctions

Whether or not there is a valid exception for lawful sanctions under the CAT (a proposition which, at the very least, is open to serious doubt), it is abundantly clear that there is no such exception for lawful sanctions in the human rights paradigm.<sup>1094</sup>

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<sup>1087</sup> See, eg, *Aydin v Turkey* (n496), where the Grand Chamber of the ECtHR observed that ‘the accumulation of acts of physical and mental violence inflicted on the applicant and especially the cruel act of rape to which she was subjected amounted to torture... [and further] the Court would have reached this conclusion on either of these grounds taken separately’: 296 [86]. See also *Nevmerzhitsky v Ukraine* (n555) (force-feeding a prisoner).

<sup>1088</sup> See, eg, *Ali v Tunisia*, Communication no 291/2006, UN Doc CAT/C/41/D/291/2006, 21 November 2008, [15.6]; *Dragan Dimitrijevic v Serbia and Montenegro*, Communication No 207/2002, UN Doc CAT/C/33/D/207/2002, adopted 24 November 2004.

<sup>1089</sup> *Case of Miguel Castro Castro Prison v Peru*, (n968) [312].

<sup>1090</sup> See *Dedovskiy & Ors v Russia* (n1045) [85].

<sup>1091</sup> See *International Pen, Constitutional Rights Project, Interights (on behalf of Ken Saro-Wiwa) v Nigeria*, (n994).

<sup>1092</sup> See *Case of Loayza Tamayo v Peru* (n554); *Case of Caesar v Trinidad and Tobago* (n544).

<sup>1093</sup> See, eg, *Prosecutor v Furundžija* (n7).

<sup>1094</sup> See also section 5.6 above.

The ECtHR has held that inhuman or degrading treatment could in principle arise from lawful rules or policies, such as: discrimination in laws and policies regarding access to citizenship;<sup>1095</sup> discriminatory requirements for membership of the armed forces;<sup>1096</sup> the mental suffering involved in the imposition of the death penalty following an unfair trial;<sup>1097</sup> or the legally prescribed use of corporal punishment for juvenile offenders,<sup>1098</sup> or in schools.<sup>1099</sup> Although these cases have all involved inhuman or degrading treatment rather than torture, there is no reason why the ECtHR would approach lawfully sanctioned torture any differently. If a particular sanction happened to comply with national law but involved the intentional infliction of severe pain and suffering for a purpose, then it would surely be classified as torture.<sup>1100</sup> The same is true of the jurisprudence of the Human Rights Committee in its decisions taken under the prohibition of torture and ill-treatment in the ICCPR, and in the jurisprudence under the African Charter of Human and Peoples' Rights.<sup>1101</sup>

Nor is the 'lawful sanctions' exception given effect in the Inter-American human rights system. This is perhaps surprising, since the Inter-American Torture Convention provides in Article 2 that 'the concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this Article'.<sup>1102</sup> And yet, in spite of Article 2, the IACtHR held in *Caesar v Trinidad and Tobago* that the lawful sanction of flogging could constitute torture or cruel, inhuman or degrading treatment or punishment.<sup>1103</sup>

There is no equivalent to the putative 'lawful sanctions' exception in the ICCPR or the African Charter of Human and Peoples' Rights. Indeed, in the 2000 case of *Doebbler v Sudan*, the African Commission on Human and Peoples' Rights rejected the contention by Sudan that because public

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<sup>1095</sup> *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 433, 506 [91] (the Court).

<sup>1096</sup> *Smith and Grady v United Kingdom* (2000) 29 EHRR 493, [112].

<sup>1097</sup> *Öcalan v Turkey* (2005) 41 EHRR 45 (GC).

<sup>1098</sup> *Tyrer v UK* (ECtHR) (n400) [33].

<sup>1099</sup> *Costello-Roberts v UK* (1993) 19 EHRR 112 [30]-[31].

<sup>1100</sup> Indeed, the *Ireland* case itself concerned the use of interrogation techniques which, 'although never authorized in writing in any official document... were taught orally by the English Intelligence Centre to members of the [Royal Ulster Constabulary]': *Ireland v UK* (ECtHR) (n241) 58 [166].

<sup>1101</sup> The African Commission on Human and Peoples' Rights has held that the lawfully administered sanction of public lashing violated the prohibition on torture and cruel, inhuman or degrading treatment or punishment: *Doebbler v Sudan* (n937) [2]. The 'immoral' acts were alleged to be 'girls kissing, wearing trousers, dancing with men, crossing legs with men, sitting with boys and sitting and talking with boys...' [3].

<sup>1102</sup> Inter-American Torture Convention (n528) art 2.

<sup>1103</sup> *Case of Caesar v Trinidad and Tobago* (n544). The applicant had been 'forced to lie "spread-eagled and naked" on a metal contraption before at least six persons, completely immobilized, while the strokes were delivered' with a cat-o-nine tails: [79].

lashing was a lawful penalty in Sudanese criminal law, its imposition could not be qualified as a violation of the prohibition on torture and ill-treatment.<sup>1104</sup> The Commission observed that, if accepted, Sudan's submission would have been 'tantamount to sanctioning State sponsored torture under the [African] Charter and contrary to the very nature of this human rights treaty'.<sup>1105</sup>

Despite the controversy that the 'lawful sanctions' clause invoked during the drafting of the CAT, there is thus now a consensus that the clause has no effect. The fact that a penalty is authorised pursuant to a domestic statute is irrelevant to whether that penalty constitutes torture. Were it otherwise, the prohibition of torture would be deprived of meaning. Thus, the exclusion of the 'lawful sanctions' exception from both the criminal and the human rights conceptions of torture is consistent with torture's moral wrong.

## 6.6 Conclusion

This chapter has sought to distinguish the conception of torture in the criminal paradigm from the conception of torture in the human rights paradigm through a close doctrinal analysis of the elements of each. It identified at the outset the ways that the context of human rights claims affects the nature, object and conduct of legal proceedings, and explained the significance of that distinction for the way that torture is defined. The chapter then proceeded to a detailed examination of each element of the legal definition of torture, and a point-by-point comparison of the criminal and human rights conceptions.

The discussion has drawn upon the case law of the ECtHR, the IACtHR, the Human Rights Committee and, to a lesser extent, the embryonic body of jurisprudence under the African Charter on Human and Peoples' Rights. In all of these contexts, the definition of torture in Article 1(1) of the CAT has been referenced, and in some respects the importation of this narrow definition from the criminal paradigm has constrained the possibilities for an otherwise expansive approach to torture in the human rights paradigm.

The conception of torture in the human rights paradigm at present reflects the dignitarian account of the moral wrong of torture. This is evident both from the emphasis on the purposive element of the legal definition of torture, and in the inclusive nature of the list of purposes that are capable of satisfying that element. However, the dignitarian account of torture is open to criticism on the bases set out in Chapter Three. In particular, dignitarian accounts have difficulty encompassing the gratuitous ill-treatment, and of accounting for the suffering of non-autonomous beings. It would therefore be preferable to expressly adopt a conception of torture as '*the deliberate infliction of*

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<sup>1104</sup> *Doebbler v Sudan* (n937) [34].

<sup>1105</sup> *ibid* [42].

*severe pain or suffering in the context of a profoundly asymmetric power relation*'. One example of a legal definition of torture that broadly embodies that norm is the definition of torture as a crime against humanity in the Rome Statute, which provides that the victim of torture must be 'in the custody or under the control of the accused'.<sup>1106</sup> That necessarily imports a profound asymmetry of power in the relationship between the parties.

Although there is a strong interest in the criminal paradigm in maintaining a narrow definition of torture, it has been argued here that those concerns do not necessarily apply in the human rights paradigm. The dynamic 'living instrument' interpretative approach has already been applied by human rights courts in the torture context, and indeed the victim-oriented, compensatory nature and objectives of human rights proceedings is capable of supporting a more expansive interpretation of the torture norm than might be appropriate in the criminal context. As such, it is open to human rights courts to embrace a conception of torture that reflects the defencelessness rather than the dignitarian account.

Indeed, two recent judgments of the ECtHR may provide support for such an approach. In *Nevmerzhitsky v Ukraine* and *Dedovskiy v Russia* the ECtHR made findings of torture in circumstances where the ill-treatment was inflicted for no apparent purpose.<sup>1107</sup> This represents a departure from the dignitarian account and its correlative emphasis on the purpose of the ill-treatment. To that extent, this shift should be welcomed, and indeed, it is to be hoped that it will find echoes in other jurisdictions.

The above discussion has also demonstrated that the conception of torture in the human rights paradigm is moving away from the State nexus requirement. This marks a departure from the criminal conception of torture in the CAT (now widely reflected in domestic legislation). In the human rights paradigm we are moving towards a position where torture is capable of commission by non-State actors as well as by State agents. This shift too should be welcomed, as neither the dignitarian nor the defencelessness accounts of the moral wrong of torture require such a nexus.

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<sup>1106</sup> See section 4.4.4 above.

<sup>1107</sup> *Nevmerzhitsky v Ukraine* (n555); *Dedovskiy & Ors v Russia* (n1050).

# Conclusion

## 7.1 Key findings

Rethinking torture in international law is an ambitious exercise. We began this endeavour by delving into history, seeking to understand from whence the prohibition of torture and cruel, inhuman or degrading treatment came. The historical study in Chapter One showed that the normative force attached to the prohibition of torture in international law belies its recent origin. Prohibitions on cruelty, inhumanity and degradation have a longer historical pedigree than the prohibition of torture. Notwithstanding this, the prohibition of torture has attained a position at the apex of a hierarchy of wrongs. The privileged position it occupies in the international legal order is on a par perhaps only with slavery and genocide. Torture is a symbol of arbitrary power; of oppression and of unrivalled cruelty. But how did it come to achieve that special status?

The answer given in this thesis was, 'more by accident than by design'. Although the early Hague and Geneva Conventions were silent on torture; although the International Military Tribunals at Nuremberg and Tokyo after World War II all but ignored the crime of torture; although the early drafts of the Universal Declaration of Human Rights failed to mention torture at all; by the 1970s and 1980s, the torturer had become 'the enemy of all mankind'.<sup>1108</sup>

There were two critical influences in achieving this transition, without which torture might never have come to attract the 'special stigma' with which it is today imbued. They were, first, the institutions of the European Convention on Human Rights, and second, the non-governmental organisation Amnesty International. These influences were explored in Chapter Two, using a combination of historical research and doctrinal analysis. As the first international judicial bodies charged with interpreting a legal prohibition of torture and ill-treatment, the influence of the early decisions of the ECommHR and ECtHR would inevitably be great. But it was the global campaign against torture for which Amnesty International would later win the Nobel Peace Prize which turned 'torture' into a topic of household discussion, and which ignited a new global consciousness of torture in the modern State.

At the centre of this historical narrative was the 1978 judgment of the ECtHR in *Ireland v United Kingdom*. That case arose at a pivotal moment in both the emergence of the European Convention system, and in the development of the torture norm in international law. In the highly charged context of the conflict over the status of Northern Ireland, a majority of the ECtHR overruled the unanimous ECommHR to find that interrogation techniques deployed by British-trained forces in

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<sup>1108</sup> *Filártiga v Peña-Irala* (n7).

Northern Ireland were inhuman or degrading, but not torture. The effects wrought by that decision are difficult to underestimate. The judgment was discussed by the Working Group of the CAT in the drafting process for that treaty, and the possibility of a two-tiered regime of State obligations, with only the most onerous applying to torture, became an important mechanism by which compromise was achieved. Obligations to which it was difficult to secure State consent became more attractive when they were applied 'only' to torture, with torture defined narrowly in terms reminiscent of a domestic criminal statute.

In 1975, the UN Declaration Against Torture had described torture and cruel, inhuman or degrading treatment or punishment *together* as violations of the purposes and principles of the UN Charter. Just nine years later, cruel, inhuman or degrading treatment or punishment had been all but excised from the CAT. The hierarchy was complete—and torture occupied its apex.

Since torture is now at the pinnacle of a hierarchy of wrongs, it is imperative to understand the nature of that wrong. On the assumption that efforts to define a legal concept are enriched by inquiry as to its philosophical essence, the thesis turned in Chapter Three to a consideration of the moral wrong of torture. Following Dworkin, the thesis distinguished between the abstract concept of torture on the one hand—its essential features, and its moral wrong—and on the other hand, the concrete conceptions of torture in particular regimes of law.

Two concepts of torture were identified in Chapter Three. The first, described here as the 'dignitarian' account, centred on the Kantian notion of impermissible instrumentalisation; of using people as mere means to other ends. The second, described here as the 'defencelessness' account, centred on the cruelty of deliberately inflicting suffering on a helpless being. Though those accounts differ as to the basis of torture as a moral wrong, they concur with respect to the requirement of deliberately inflicted severe pain or suffering for torture. By the same token, neither account speaks to the official status of the perpetrator. On both the dignitarian and the defencelessness accounts of the moral wrong of torture, it is the quality of the conduct, and not the (official or other) status of the perpetrator, which matters.

The thesis contended in Chapter Three that the defencelessness account should be preferred to the dignitarian account, because the latter was incapable of including both the torture of non-autonomous beings, and the gratuitous infliction of ill-treatment. Both the gratuitous or sadistic infliction of ill-treatment and the deliberate ill-treatment of a non-autonomous being are especially grave moral wrongs. They belong at the heart of torture.

The defencelessness account, however, struggled to accommodate situations where the victim is not completely helpless. In response to this criticism, the thesis suggested a modification to the defencelessness account that would emphasise the *relative* imbalance of power between the victim and the perpetrator, as distinct from the *absolute* helplessness of the victim. It was contended here

that the essence of the moral wrong of torture was *the deliberate infliction of severe pain or suffering in the context of a profoundly asymmetric power relation*.

The thesis moved in Chapters Four and Five to a detailed consideration of the elements of the legal definition of torture in international law. It was argued that there are two different conceptions of torture operating within different paradigms, and that the failure to distinguish between those paradigms has been a source of doctrinal confusion. The first paradigm was the criminal paradigm, within which the CAT, the Rome Statute, the Inter-American Torture Convention and the jurisprudence of the international criminal tribunals squarely fall. The second paradigm was the human rights paradigm, within which the ECtHR, the IACtHR, the African Court of Human and Peoples' Rights and the work of the UN Human Rights Committee fall to be assessed.

Chapters Four and Five argued that, in both the criminal and the human rights paradigms, the legal definition of torture broadly reflects the dignitarian account of torture's moral wrong. This was evident in the emphasis on the purposive element of the definition of torture, and in the breadth with which that purposive element is generally interpreted. However, it was argued that it would be normatively preferable for the legal definition of torture to evolve to reflect the defencelessness account.

The thesis identified a number of 'overarching legal, ideological and structural distinction[s]' between torture in the criminal paradigm and the human rights paradigm.<sup>1109</sup> In particular, the criminal conception of torture differs from the human rights conception in relation to the onus of proof, the standard of proof, the mental element of the wrong, and the role of the State nexus requirement. Establishing torture in the criminal paradigm requires proof of specific intent, that the pain or suffering attained a threshold of severity, and that the ill-treatment was inflicted for a prohibited purpose. Additionally, the CAT requires that acts of torture must be perpetrated by individuals with a nexus to the State. The State nexus requirement is not however required under the Rome Statute, and debate persists as to whether it is a necessary element of torture in the jurisprudence of the international criminal tribunals. Regardless, all the elements of torture must be established to the criminal standard, and it is right that the accused should be given the benefit of any doubt on any of those elements.

In contrast, there are a number of features of the human rights paradigm which are capable of supporting an evolution towards the defencelessness account of torture's moral wrong. In particular, the victim-oriented, compensatory objectives of human rights proceedings, and the so-called 'evolutive' (or 'living instrument') interpretive approach, provide scope for the embrace of defencelessness as the basis of the moral wrong of torture. In particular, recent developments in

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<sup>1109</sup> Farrell, 'Just How Ill-Treated Were You?' (n693) 513.

the jurisprudence of the ECtHR may support the inclusion of gratuitous or sadistic ill-treatment within the notion of torture. This may reflect a turn away from the dignitarian account of torture's moral wrong. Further, recent jurisprudence of the IACtHR may presage the abandonment of the State nexus requirement from the human rights conception of torture. Accordingly, it was argued that a recognition of the distinct conception of torture in the human rights paradigm offers the potential for evolution in the case law that will better reflect the basis of the moral wrong of torture.

## 7.2 Future directions

This research opens a number of further lines of enquiry. Four in particular are considered here.

First, there is considerable scope for a further exploration of the different conceptions of torture in the human rights paradigm and the criminal paradigm. Recent scholarship has studied 'cross-fertilisation' in respect of torture in the jurisprudence of the ECtHR and the international criminal tribunals.<sup>1110</sup> However, this cross-fertilisation is also a feature of the torture jurisprudence of the IACtHR, the UN treaty bodies and the African Charter institutions. In all of these contexts, courts have invoked comparisons across different bodies of law, with little regard to the differences in the nature of the proceedings and the different conceptions of torture at stake. Unreflexive 'cross-fertilisation' and 'transplantation' can lead to considerable doctrinal confusion. Applying the framework of this thesis to further doctrinal analysis may prove to be a fruitful avenue for research.

Second, much work remains to be done on the ways that the criminal conception and the human rights conception of torture differ from one another, and the implications each carry with respect to the obligations of States. One pertinent example is the prohibition of *refoulement* where there is a real risk of torture in the receiving State. The obligation not to *refouler* in such circumstances is enshrined in Article 3 of the CAT and Article 13 of the Inter-American Torture Convention, both of which treaties adopt a criminal conception of torture.<sup>1111</sup> However, the *non-refoulement* obligation also has an echo in the human rights paradigm, both in Article 33 of the 1951 UN Refugee Convention,<sup>1112</sup> (which is widely regarded as reflective of customary international law<sup>1113</sup>), and implicitly in the prohibitions of torture found in many human rights treaties. The IACtHR, the

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<sup>1110</sup> Maculan (n693); Farrell, 'Just How Ill-Treated Were You?' (n693).

<sup>1111</sup> See section 5.1 above.

<sup>1112</sup> United Nations Convention Relating to the Status of Refugees, 189 UNTS 137 (opened for signature 28 July 1951, entered into force 22 April 1954).

<sup>1113</sup> For discussion see, eg, Allain J, 'The Jus Cogens Nature of Non-Refoulement' (2001) 13 *International Journal of Refugee Law* 533; Goodwin-Gill GS and McAdam J, *The Refugee in International Law* (3rd edn, OUP 2007) 201-232; Duffy A, 'Expulsion to Face Torture? Non-Refoulement in International Law' (2008) 20 *International Journal of Refugee Law* 373.

ECtHR and the UN Human Rights Committee have all held that the absolute nature of the prohibition of torture and cruel, inhuman or degrading treatment implies an obligation on States not to *refoule* where there is a real risk of torture or *other ill-treatment* in the receiving State.<sup>1114</sup> Clearly, the conception of the *non-refoulement* obligation in the human rights paradigm is broader than the equivalent provision in the CAT. Questions arise as to how, if at all, the different conceptions of torture in the criminal paradigm and in the human rights paradigm impact upon the *non-refoulement* obligation.

Third, the contrast drawn in this thesis between the criminal conception of torture and the human rights conception of torture may raise interesting questions around the nature, scope and classification of positive obligations. The Vice-President of the ECtHR, writing extra-judicially, has observed that, although 'it is self-evident that there is a close relationship between human rights and criminal law', the 'obvious nature of this relationship' should not be permitted to 'obscure its complex and paradoxical character'.<sup>1115</sup> For example, the obligation to criminalise torture and to ensure that offences of torture are subject to appropriately severe penalties—an obligation found in both Article 4 of the CAT and in Article 6 of the Inter-American Torture Convention—plainly relates to the criminal conception of torture. On the other hand, both the ECtHR and the IACtHR have held that the prohibition of torture in their respective human rights conventions entails a positive obligation to protect individuals within their jurisdiction from acts of torture by third parties. Presumably, this obligation relates to the broader human rights conception of torture, than to the narrower conception of torture that prevails in the criminal paradigm. Indeed, the very notion that an individual could be at risk of an act of torture by a third party presupposes that a non-state actor is capable of committing an act of torture.<sup>1116</sup> This is an assumption that does not, at least at present, hold true in the criminal paradigm.<sup>1117</sup> At first blush, then, it seems clear that the nature and scope of positive obligations in relation to torture will vary depending on whether the conception of torture to which they refer is the criminal or the human rights conception.

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<sup>1114</sup> The IACCommHR has held that the right to security in art 1 of the American Convention on Human Rights impliedly prohibits *refoulement*: see *The Haitian Centre for Human Rights & Ors v United States*, Case 10657, Report No 51/96, March 13, 1997 (IACCommHR). The *non-refoulement* obligation is well established in the European Convention system: see, eg, *Soering v United Kingdom* (n299); *Chahal v United Kingdom* (n24); *Saadi v Italy* (n24). The *non-refoulement* obligation in the ICCPR was considered by the UN Human Rights Committee in *Agiza v Sweden* (n881); and in United Nations Human Rights Committee, 'General Comment 20 on Article 7 of the ICCPR', UN Doc E/CN/4/2006/6/Add.5, January 9, 2006, [9]. For discussion, see Fabbriotti A, 'The Concept of Inhuman or Degrading Treatment in International Law and Its Application in Asylum Cases' (1998) 10 International Journal of Refugee Law 637.

<sup>1115</sup> Tulkens F, 'The Paradoxical Relationship between Criminal Law and Human Rights' (2011) 9 Journal of International Criminal Justice 577, 578.

<sup>1116</sup> Although conceivably the third party could be a State (I am grateful to Miles Jackson for this point).

<sup>1117</sup> See further section 5.5 above.

Further research and analysis of those differences and their implications may prove valuable in the future.<sup>1118</sup>

Fourth and finally, it became apparent in the course of this study that there is relatively little work in human rights law that invokes comparisons across the Inter-American, European and African human rights systems.<sup>1119</sup> Torture is, in that regard, no exception. Although the system of human rights adjudication under the African Charter of Human and Peoples' Rights is more recent in origin, and thus under-developed in comparison to its European and Inter-American counterparts, the lack of research comparing the approach of the IACtHR and the ECtHR is surprising.<sup>1120</sup> The present study has sought to demonstrate some of the promise that such comparative work holds for efforts to conceptualise and define the scope of particular human rights, such as the right to freedom from torture. Though a comprehensive exegesis of the torture jurisprudence in all three contexts was beyond the scope of this work, the focus on definitional aspects of the prohibition of torture, together with the philosophical analysis of the gravamen of torture as a moral wrong, will contribute to such a cross-jurisdictional dialogue.

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<sup>1118</sup> On positive obligations more generally, see Mowbray A, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart 2004). On positive obligations in relation to the prohibition of torture and ill-treatment in the European Convention on Human Rights, see Mavronicola, 'Delimiting the Absolute' (n11) chapter 5.

<sup>1119</sup> There are notable exceptions, though none specifically addressed to the prohibition of torture: see, eg, Buergenthal T, 'The American and European Conventions on Human Rights: Similarities and Differences' (1980) 30 *American University Law Review* 155; Bertoni E, 'The Inter-American Court of Human Rights and the European Court of Human Rights: A Dialogue on Freedom of Expression Standards' 3 *European Human Rights Law Review* 332; Burbano Herrera C and Haeck Y, 'Letting States Off the Hook? The Paradox of the Legal Consequences Following State Non-Compliance with Provisional Measures in the Inter-American and European Human Rights Systems' (2010) 28 *Netherlands Quarterly of Human Rights* 332; Ebert FC and Sijniensky RI, 'Preventing Violations of the Right to Life in the European and the Inter-American Human Rights Systems: From the Osman Test to a Coherent Doctrine on Risk Prevention?' (2015) 15 *Human Rights Law Review* 343; Dembour M-B, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (OUP 2015).

<sup>1120</sup> Two genuinely cross-cutting, but somewhat outdated, contributions are as follows: Mohamed AA, 'Individual and NGO Participation in Human Rights Litigation before the African Court of Human and Peoples' Rights: Lessons from the European and Inter-American Courts of Human Rights' (1999) 43 *Journal of African Law* 201; Murray R, 'Serious or Massive Violations under the African Charter on Human and Peoples' Rights: A Comparison with the Inter-American and European Mechanisms' (1999) 17 *Netherlands Quarterly of Human Rights* 109. More recently, see Okere BO, 'The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American Systems' (1984) 6 *Human Rights Quarterly* 141. Additionally, a wide range of comparative resources is accessible in Shelton D and Carozza P, *Regional Protection of Human Rights* (2nd ed., OUP 2013).

### 7.3 Closing remarks

The prohibition of torture has been described as a legal archetype;<sup>1121</sup> a foundation stone in the architecture of the modern liberal State. To be sure of that foundation, it is imperative to understand the nature of the conduct that the label 'torture' seeks to proscribe, its moral underpinning, and the precise contours of its legal prohibition. While the prohibition of torture is variously described as 'absolute', 'non-derogable', 'fundamental' and 'peremptory', recent history powerfully illustrates that the practice of torture is far from a thing of the past. Indeed, 'despite the claim that there is no place for torture in a legitimate political practice, over and over we confront practices of torture. What is more, today we find tentative efforts to justify the practice'.<sup>1122</sup> These debates should not obscure the meaning or moral significance of the prohibition of torture. Rethinking torture in international law is an ongoing imperative of our age.

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<sup>1121</sup> Waldron J, *Torture, Terror, and Trade-Offs* (n258).

<sup>1122</sup> Khan (n78) 5.

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