The Association for the Prevention of Torture (APT) is an international non-governmental organisation based in Geneva, Switzerland, committed to working worldwide to prevent torture and other forms of ill-treatment. In particular the APT monitors and provides advice on the implementation of the UN Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (UNCAT) and works closely with the UN Committee against Torture towards this aim. In November 2001, in response to deliberations within the Committee against Torture to consider drafting a General Comment on the definition of torture as contained in Article 1 of the UNCAT, the APT held an expert seminar to examine the interpretation of the definition of torture under international law and consequences of a conclusive commentary on this issue. This publication contains a summary of the seminar proceedings and the concluding observations as well as various background papers that were presented as a basis for further discussion.

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by Jean-Jacques Gautier

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The Definition of Torture Proceedings of an Expert Seminar

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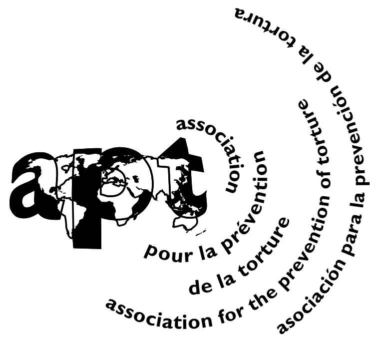

The Definition of Torture

Proceedings of an Expert Seminar

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TABLE OF CONTENTS

FOREWORD 5

INTRODUCTION 9

I. SUMMARY OF PROCEEDINGS 13

1. Key note presentations 15

2. Panel Discussion One: Threshold of Severity or Purpose? 17

3. Panel Discussion Two: Prohibition of Torture versus Lawful Sanctions? 19

4. Panel Discussion Three: Public or Private Spheres – A Duty to Abstain or Protect? 21

II. CONCLUDING OBSERVATIONS 25

ANNEXES 31

Background Paper 1: 33
"Getting to Grips with Torture"
Prof. Malcolm Evans

Background Paper 2: 51
"Aspects of the Definition of Torture in the Regional Human Rights Jurisdictions and the International Criminal Tribunals of the Former Yugoslavia and Rwanda"
Ms. Debra Long

Background Paper 3: 79
"How does the Current Definition of Torture apply to Children?"
Ms. Aida Nejad

Background Paper 4: 111
"References to Torture under International Law – A compilation"
Mr. Georg Stein

FOREWORD

Founded in 1977 by Jean-Jacques Gautier and based in Geneva, Switzerland, the Association for the Prevention of Torture (APT) is an independent, non-governmental organisation committed to preventing torture and other forms of ill-treatment. To achieve this objective, amongst its main activities, the APT works with a variety of actors and within different international, regional and national contexts to pursue respect for standards that prevent torture and other forms of ill-treatment. In particular, the APT monitors and provides advice on developments within international law on this issue.

The UN Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (UNCAT) is the only legally binding convention at the universal level concerned exclusively with the eradication of torture.[1] Under the UNCAT, the UN Committee against Torture (CAT) has been established. This treaty body is the only international mechanism that is solely mandated to consider the implementation of the UNCAT by States Parties. Accordingly, the APT has for many years worked closely with the members of the CAT to assist with the effective implementation of the UNCAT at the national level.

In 2000, the CAT began deliberations on whether or not to draft a General Comment on the definition of torture. In light of the specific mandate of the APT it was considered to be important to encourage a discussion on this topic through an expert seminar. Accordingly a variety of experts were gathered together in Geneva for a two day seminar, which was held between 10-11 November 2001.

Whilst the initial objectives of the seminar were quite specific, it is interesting in the current climate to look back at the expert discussions and to realise that the issue of the definition of torture and the implications of definitively interpreting Article 1 of UNCAT are just as relevant now as at the time of the seminar.

The APT wishes to acknowledge the input provided by the keynote speakers and the panellists, the analyses of all the leading experts who made the time and the effort to attend the seminar, the contributions of the participants to the discussions, the advice by the APT Board and the participation of the members of the APT staff in the realisation of this project. The APT would also like to recognise the work of its former members of staff, Mr. Georg Stein and

Ms. Cecilia Jimenez, who made contributions to the finalisation of this publication.

The APT also gives its appreciation for the assistance given by the Swiss Federal Ministry of Foreign Affairs, the German Ministry of Foreign Affairs and the Permanent Mission to the United Nations of the Netherlands, to this process.

Debra Long
APT UN & Legal Programme Officer
Geneva, Switzerland
June 2003

INTRODUCTION

Article 1 of UNCAT provides a definition of torture which reads as follows:

> *"Article 1.*
>
> 1. *For 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.*
>
> 2. *This article is without prejudice to any international or national legislation which does or may contain provisions of wider application."*

The proposed General Comment by the CAT on this Article was perceived to give rise to implications not only for the UNCAT itself, but also for interpretations and definitions contained in other international and regional instruments as well as the case law of the respective control bodies.

Thus, the APT Seminar on the Definition of Torture, held on 10 and 11 November 2001 in Geneva, had the following objectives:

a. To exchange views on the different interpretations of the definition of torture under the various instruments and their relation to Article 1 of UNCAT;

b. To raise awareness on the impact of opening or closing issues by definitively interpreting Article 1 of UNCAT;

c. To analyse the consequences of including or excluding certain elements in the interpretation of the definition of Article 1 of UNCAT;

d. To provide advice as to the feasibility and appropriateness of the drafting of a General Comment on Article 1 of UNCAT.

Seminar Proceedings and Results:

The APT Seminar gathered a variety of experts on the topic to discuss the issues regarding the definition of torture in its broadest scope. [2] The participants were given the opportunity to discuss the definition of torture under three main aspects, all of which were introduced by panellists:

1. The relevance of the issues of severity and purpose as distinguishing thresholds;

2. The question of lawful sanctions;

3. Developments concerning the public and private divide, in particular in relation to the nature of the duty of governments to abstain or to protect.

After further discussions, the Seminar conclusions were elaborated, which also included recommendations concerning the drafting of a general comment by the CAT on Article 1 of the UNCAT.

This publication contains a summary of the seminar proceedings, the concluding observations and the APT background materials that had been made available to all the participants.

I
SUMMARY OF PROCEEDINGS

I. SUMMARY OF PROCEEDINGS

1. KEYNOTE PRESENTATIONS

Prior to the main panel discussions, two keynote speakers, Professor Malcolm Evans (Professor of International Law, Bristol University) and Mr. Erik Prokosch (Legal Advisor, Amnesty International) presented some initial issues for consideration by the expert participants and to provide food for thought during the seminar.

1.1 "Getting to grips with Torture"
Professor Malcolm Evans

Within his presentation, Professor Evans emphasised the fact that different approaches to the definition of torture can be identified amongst the international and regional bodies. Amongst these, two main definitional approaches can be evidenced, one based on the criminalisation of torture and the other emphasising its prevention.

Professor Evans recalled that the principle focus of the UNCAT lies in the criminalisation of torture; as such it takes a criminal definitional approach under Article 1, setting out the elements of the specific offence of torture. This criminal definitional approach, it was suggested, could be considered reactive and somewhat rigid. Furthermore, Professor Evans asserted that this criminal definition tended to place an undue focus upon the elements of the offence. This approach, it was stated, potentially forces a move away from a more flexible "preventive" approach, which seeks to minimise the risk of torture and other forms of ill-treatment without necessarily formalising a distinction between all of these prohibited acts. Professor Evans noted that in fact the UNCAT contains provisions not only for the criminalisation of torture but also measures for its prevention, and consequently there should not be any tension between these two objectives.

Professor Evans also asserted that even within the regional systems a difference of approach can be evidenced between the judicial and preventive bodies. By way of example, it was recalled that the European Court of Human Rights traditionally places an emphasis upon the level of severity required for acts of torture, whereas the European Committee for the Prevention of Torture, a non-judicial

preventive visiting body, has been reluctant to formalise any distinction, although it is arguable that it has tended to imply a threshold based upon the purposive act behind torture, i.e. an act requiring some form of "preparation". Professor Evans raised a possible explanation for these differing approaches as, in part, arising from the different requirements for adjudicative purposes, i.e. to identify a crime, and a preventive approach, i.e. to identify possible causes and areas for improvement.

Yet despite these different approaches within the European System, Professor Evans argued that certain trends to re-evaluate the perceived thresholds between torture and other forms of ill-treatment can be seen. There is also a growing trend to give greater significance to the issue of State responsibility. Professor Evans argued that these developments within the European system could have been difficult if they worked strictly within the framework of the "confinements" of the definition of torture in Article 1 of UNCAT. To sum up Professor Evans stated that the different approaches taken both internationally and regionally are healthy and were products of their specific contexts. It was emphasised strongly that a broad approach to the definition of torture should be maintained to ensure not only its criminalisation but also its prevention.

1.2 "Beyond a definition of torture"
Mr Eric Prokosch

The second keynote speaker, Mr Eric Prokosch, considered the use of the definition of torture from a campaign prospective. He highlighted the various approaches to the definition of torture taken by the UN and regional bodies in this respect, which he stated was also mirrored by different requirements and approaches by human rights campaigners.

By way of example, Mr Prokosch highlighted the fact that female genital mutilation (FGM) whilst sufficiently severe and even purposive so as to amount to torture or ill-treatment, nevertheless human rights campaigners have traditionally not used this language when looking at means to eradicate the practice. At the domestic level human rights campaigners have considered that the best way to eliminate FGM is through persuasion, particularly rights awareness, rather than to attach the stigma and offence of torture to the practice. Mirroring this approach, Mr Prokosch recalled that the UN

Committee on the Elimination of Discrimination against Women (CEDAW), in its General Recommendations 14 and 19, addresses the issue as discrimination, not as torture or ill-treatment.[3] Furthermore, CEDAW, whilst condemning violence against women, does not attach the label of torture to such practices.

By contrast, the UN Human Rights Committee (HRC) has, under its jurisprudence, considered FGM under Article 7 of the International Covenant on Civil and Political Rights, which prohibits torture and other forms of cruel, inhuman or degrading treatment or punishment.[4] The question remains, why has the HRC taken a different approach? Mr Prokosch argued that the HRC considered that it is important to identify the criminal aspect of FGM as this was the best way, under its own specific mandate, to try and achieve co-operation with the State and to work towards its eradication.

Mr Prokosch stated that, whilst the inconsistent approaches can be confusing, they were also potentially helpful, allowing the possibility for development. He agreed with Professor Evans that it was essential to understand the different approaches to the definition of torture with regard to their specific context and uses.

2. PANEL DISCUSSION ONE: THRESHOLD OF SEVERITY OR PURPOSE?

The first panel discussion followed on from the keynote presentations and focussed upon the various approaches taken at the international and regional levels to distinguish between acts of torture and other forms of ill-treatment and whether such approaches were expedient.

Participants agreed that very distinct understandings of torture within different contexts existed namely: as an offence under criminal law; a human rights violation; a crime against humanity and as a violation of International humanitarian law. Whilst it was proposed that a very specific concept of torture was required within the context of criminal law, it was noted that this should be differentiated from a human rights based approach, which does not concern individual criminal responsibility but rather the State responsibility to the individual.

It was noted that attempts had been made, within the framework of human rights, to distinguish between torture on the one hand and

other forms of ill-treatment on the other, partly due to a consideration that a special stigma attaches to torture and also due to the criminal law obligations flowing from an act of torture, e.g. the possible exercise of universal jurisdiction.

Thus participants recalled that attempts have been made by various bodies to differentiate the prohibited acts by considering a distinguishing threshold based either on severity or purpose. Throughout the discussions it was generally considered that both approaches are problematic and that creating a hierarchy between torture and other forms of ill-treatment should be avoided.

With regard to the threshold of severity it was agreed that this has been established largely through the jurisprudence of the European system. The traditional understanding being that torture was an aggravated form of cruel, inhuman or degrading treatment or punishment.[5] Whilst this perception may now be changing within the European system, it was noted that it has, nevertheless, greatly influenced other bodies and instruments defining torture.

However, it was agreed that it is difficult to establish the level of severity through an objective criteria. It was proposed that the level of severity will be different from each victim's point of view. One participant claimed, as an example, that the existence of impunity could aggravate the suffering of an individual or even amount to psychological torture, or the trauma suffered by an asylum seeker from an act of torture could be increased because of his/her displacement.

Looking at the second threshold assessment, it was generally regarded that the purpose behind the act could be understood as being a more objective threshold because, in order to assess the purpose, it is necessary to look at the context. For instance rape, even if carried out with the final goal of sexual satisfaction, if it happens in the context of an interrogation, then the purposive threshold would be met. Furthermore, it was proposed by one participant that rape automatically involves intimidation and coercion and therefore would fulfil the purposive element so as to be defined as torture. Whilst this point of view was not upheld by all participants, it was generally considered that even if rape occurs outside the context of interrogation, the failure of the State to take appropriate measures to rectify an act of a State official could be deemed to be sufficient so as to amount to a violation in certain contexts.

It was also generally considered to be advantageous that an emphasis upon a threshold of purpose necessitates a shift in focus and burden of proof to the perpetrator in contrast to that of severity, which focuses upon the victim.

However it was also noted that a threshold of purpose, whilst prima facie more attractive than that of severity of suffering, is not without its difficulties. The determination of purpose can be difficult and lead to assumptions as to what was on the mind of the perpetrator. It was unanimously stressed that further enumerating the purposes under Article 1 of the UNCAT would not assist in this process and should be avoided. Otherwise, this could lead to certain acts falling outside the scope of the prohibition of torture for the difficulties discussed above. Thus it was concluded that "purpose" should remain an open concept.

It was also stressed by the majority of participants that it is important to bear in mind that definitions establishing thresholds may not be helpful when applied in different contexts. For example, a definition of torture used for the purposes of a medical assessment might substantially differ from the legal definition. The same applies for work carried out in preventive contexts, such as the work carried out by the International Committee of the Red Cross or the European Committee for the Prevention of Torture. In these cases, a specific definition might even be harmful.

By not elaborating a definition and therefore a distinction between torture and other forms of ill-treatment i.e. all prohibited acts, lengthy and distorting discussions regarding thresholds are avoided in the preventive context. This permits swift and often effective access to those most at risk of being tortured or otherwise ill-treated. It was therefore considered that very often, definitions prove limiting in a preventive framework, where it is not always necessary to categorise the act but instead to indicate the existence of a problem.

3. PANEL DISCUSSION TWO: PROHIBITION OF TORTURE VERSUS LAWFUL SANCTIONS

The second panel discussion concerned the ambiguities and problems raised by an express reference within the UNCAT to exclude suffering resulting from lawful sanctions. It was recalled that Article

1 (1) of UNCAT excludes from the definition of torture, *"pain or suffering arising only from, inherent in or incidental to lawful sanctions"*.

Questions were therefore raised as to current interpretations of lawful sanctions; where does one draw the line? Does "lawful" mean under international or national law? Is cultural relativity a factor?

It was unanimously agreed amongst participants that it could not be inferred from the language of the UNCAT that the intention was to give States Parties carte blanche to interpret what is meant by "lawful sanctions". It was recalled that the exception of lawful sanctions was included in Article 1 of UNCAT at the insistence of the Arabic Countries. One participant recalled that at the time of drafting, Amnesty International national sections were requested to check that "lawful sanctions" meant lawful in accordance with international norms.

Therefore it was considered that an act can not be justified as lawful merely because it is approved by national law. Some acts that are authorised at the national level clearly violate international law.

It was observed that a review of national jurisdictions revealed some interesting legislation. One participant recalled that the United Kingdom has defended a law providing for "lawful authority" as a "justifiable excuse" in meting out punishment and has considered that this should be interpreted under the law of the place where punishment is inflicted.[6] This stance, it was recalled, has been criticised by the CAT.[7]

Other examples relating to Shari'a law were also discussed. Controversially, Shari'a law provides that corporal punishment is not only permitted but at times mandatory for certain offences. Furthermore, in other States not subject to Shari'a law, corporal punishment is also permissible under national law. Whilst, under regional and international bodies, such practices have been condemned as being incompatible with international law, they are nevertheless defended by Governments as lawful sanctions. It was uncontested by participants that this stance was incompatible with international norms.

Yet, it was proposed by a number of participants that whilst it was no doubt correct to use international norms as the measuring stick for the lawfulness of the sanction, it was pointed out that sanctions

outlawed under international law are not that well defined or agreed upon. By way of example, capital punishment was raised as an obvious contentious sanction, which highlights certain differences in approach both under international, regional and national law. One participant noted that within Europe there was a clear move towards an outright ban on the imposition of the death penalty within the region.[8] It was also remarked that the UN Human Rights Committee has also taken a clear position on capital punishment.[9]

Prison conditions were also cited as a problematic issue in so far as defining lawful sanctions. Whilst detaining someone following due process of law would prime facie be considered a lawful sanction, what if the subsequent conditions of detention are poor? In these instances it was agreed that an obvious starting point would be the UN Standard Minimum Rules on the Treatment of Prisoners.[10] Different participants also cited numerous examples whereby prison conditions themselves have been considered by the regional judicial bodies as so poor that they amounted to a violation.[11]

In conclusion it was felt by the participants that the concept of lawful sanctions does not give States an unfettered right to assess the lawfulness of their own sanctions. This must, as matter of course, fall under the realm of international and *not* national law.

4. PANEL DISCUSSION THREE: PUBLIC OR PRIVATE SPHERES – A DUTY TO ABSTAIN OR PROTECT?

The discussions on the third and final panel centred around how far State obligations under the UNCAT extended to a duty to protect, thereby including violations conducted in the private sphere.

One expert emphasised that the “travaux preparatoires” of the UNCAT reveal that the Convention is not supposed to extend beyond the public context. Nevertheless, the language used in Article 1 concerning the “instigation” and “acquiescence” of a state in a violation opens the door for an extension of State obligations into the private sphere in certain circumstances.

By way of example, a participant returning to the issue of rape suggested that it would obviously be considered by the CAT to constitute an act of torture if it is committed during an interrogation. It

was also proposed, although not supported unanimously, that an arguable case of torture could be presented for an act of rape committed by a public official whilst off-duty and without a uniform, so long as the offender was known to the victim as a public official. In this instance it would be the capacity of the offender as a public official that could engage the States' responsibility.

It was argued however that the extension of States' responsibilities into the private sphere is problematic for the criminalisation of torture at the national level, as required by Article 4 of UNCAT[12]. It was noted by a few participants that in the example cited above of rape committed by an off-duty public official, the purposive element of the definition of torture under Article 1 of UNCAT would not be met.

However, it was agreed that a growing trend to consider an intrinsic duty to protect under the UNCAT can be noted from the jurisprudence of the international and regional bodies. In its General Comment No. 20[13], the UN Human Rights Committee has determined that acts of torture carried out by private individuals could engage the State's responsibility if it fails to grant appropriate protection. It was observed that a similar trend could be seen in the jurisprudence of the regional bodies.[14]

Further, in the European system, States have been found to be in violation of Article 3 of the European Convention for Human Rights and Fundamental Freedoms, for failing to carry out an effective investigation.[15] It was recalled by one participant that it must be borne in mind that these cases involved a finding of inhuman or degrading treatment and not torture. A further example was cited in the African system, where the African Commission on Human Rights has held that the State has the responsibility to protect citizens from all serious human rights. This will include acts committed by non-state actors where a State can be considered to have acquiesced in the act by failing to provide adequate protection.[16]

Thus it was concurred by the participants that there is strong evidence to suggest that the nature of States Parties' obligations does extend to a duty to protect and thereby into the public sphere in certain circumstances. Yet in many ways the debate about the public and private sphere was considered to be an artificial one. It was regarded that the duty to protect is directly linked with the State

obligation to set up adequate measures, including safeguards against torture and ill-treatment as expressly set out under Article 2(1) of the UNCAT.[17]

II
CONCLUDING OBSERVATIONS

II. CONCLUDING OBSERVATIONS

Based on the panel discussions, the following concluding observations were made:

1. The definition of torture is relevant for inter alia: (1) individual responsibility for the crime of torture; (2) State responsibility for violations of the prohibition of torture; (3) the prevention of torture; and (4) reparation for and rehabilitation of torture victims. Despite there being a common core meaning, there are differences as to how this definition of torture is used and understood in these different contexts. There is a need for caution when using approaches developed in one context as compared to an other. Moreover, the obligation under international human rights law prohibits torture and other forms of cruel or degrading treatment or punishment; and the relationship between these concepts needs to be borne in mind.

2. Although preventive mechanisms need a point of reference, a clear-cut definition may be limiting to their work. At the same time, their experiences can and should inform those whose work benefits from having clarifications of the different definitional elements of torture.

3. In a non-legal sense, acts generally considered to be torture can be distinguished from other acts including cruel, inhuman and degrading treatment or punishment, by having regard to the following elements: the infliction of serious pain and suffering with the intention to do harm for a specific purpose, carried out in the context of an abuse of power. This non-legal core meaning may usefully inform legal discussions about the different elements of the definition of torture.

4. Clarifying the different elements of the definition of torture as contained in Article 1 of UNCAT could have a narrowing or widening effect. Likewise, the thresholds of application could be raised or lowered. Such discussions should take into account the absolute and non-derogable nature of the prohibition of torture. Whilst the notion of torture is not to be diluted, there is, however, a need to preserve flexibility in understanding what constitutes treatment that falls within the scope of definitional elements, such as new forms of infliction

of intense pain or suffering, or new knowledge about the traumatic effect of certain acts previously not considered torture.

5. As regards the different elements of the definition of torture in Article 1 of UNCAT, the issues of severity, purpose, lawful sanctions and limitations to acts attributable to the State were discussed:

   a. Severity should be assessed from an objective perspective that looks at each specific situation and each particular victim and his / her vulnerability. The severity of pain and suffering is relative, i.e. it has to be evaluated in the specific context. Attempts to list exhaustively certain acts as torture should be avoided.

   b. Purpose as contained in Article 1 of UNCAT is an important element that distinguishes torture from other acts of ill-treatment. It recalls that torture is a severe, personalised act attempting to destroy the victim's identity, thus normally distinguishing it from the traumatic effect of more generalised and accidental acts.

   c. The lawfulness of sanctions is determined by standards of international law, rather than automatically under domestic law.

   d. The need to attribute intentional and purposive infliction of severe pain or suffering to the State raises complex issues regarding the relevance of torture in the private sphere. When considering this question outside of the realm of UNCAT, it should be noted that acts of torture by non-state agents can amount to war crimes (violations of common article 3 of the 1949 Geneva Conventions) and crimes against humanity. However, even in these cases, a link to an organisation (to a party to the conflict, to a group carrying out attacks on the civilian population as part of a policy) is necessary if there is to be individual criminal responsibility.

6. As regards State responsibility, the notions of "consent" and of "acquiescence" in Article 1 of UNCAT cover situations where responsibility is denied on the grounds that perpetrators have no official connection with the State when they are

in fact operating with its connivance (e.g. in situations of disappearances). These notions cover also the failure of States to enact necessary legislation and procedural safeguards to ensure that individuals are protected against ill-treatment by private actors.

7. To clarify the definition of torture in a General Comment on Article 1 of UNCAT, in a way that goes beyond restating the obvious and provides detailed guidance, would be a very complex and difficult endeavour. These difficulties are further exacerbated by the fact that Article 1 of UNCAT is applicable to all of the areas mentioned above (individual criminal responsibility, State responsibility, prevention, reparation and rehabilitation). Therefore a General Comment would have to take into account all the specificities of these different areas. For these reasons, it may not be opportune for the Committee against Torture (CAT) to take up the definition of torture in a General Comment.

ANNEXES

ANNEXES

BACKGROUND PAPER 1

Getting to grips with torture

Prof. Malcolm D. Evans
Professor of International Law at the University of Bristol (UK)
and Member of the APT Board.

Introduction[18]

In February 2001 the 9th session of the Working Group of the United Nations Commission on Human Rights met to discuss the latest drafts of an Optional Protocol to the United Nations Convention against Torture (UNCAT). The Working Group is expected to be meeting again in January 2002.[19] The primary purpose of this Optional Protocol is to create a new international mechanism that will have a preventive role and which would operate by conducting visits to states and to places of detention within states and, in the light of such visits, enter into a "dialogue" with the state concerned in order to help them ensure that torture does not occur.

The origins of this initiative lie in a proposal formally tabled in the early 1980s during the negotiations that led to the adoption of the UNCAT itself but at that time it was clear that so radical a move as the establishment of an international body with an automatic right of entry into any place of detention would be unacceptable within the broader international community.[20] However, the idea was first taken up on a regional level within Europe and in 1987, the Council of Europe adopted the European Convention for the Prevention of Torture, Inhuman or Degrading Treatment or Punishment which established the European Committee of the same name (better known by its shortened acronym: CPT), very much by way of an example to the rest of the world, or so it was thought.[21]

The CPT now operates within 41 of the 43 member states of the Council of Europe[22] and has produced a large number of reports which have done much to deflate any smugness that there might have been at the time of its creation.[23] The CPT is not a judicial body

and it is not able to "apply" Article 3 of the European Convention on Human Rights (ECHR) – on the prohibition of torture, inhuman or degrading treatment or punishment – in the sense of determining whether a state is in breach of that provision. That is the task of the European Court of Human Rights.[24] Rather, it is premised on the belief that *"the protection of persons deprived of their liberty against torture and inhuman or degrading treatment or punishment could be strengthened by non-judicial means of a preventive character based on visits"*.[25] The work of the CPT has shown both the need for such a mechanism and that it can play a useful role in the prevention of torture at the European level.[26] At the UN level, however, there is still considerable controversy surrounding the creation of such an intrusive and powerful mechanism and it remains to be seen whether it is possible to make any progress on this.[27]

If it ever comes into being, the body established will form a subcommittee of "the CAT". The CAT, or the Committee against Torture, is the body established under the 1984 UN Convention against Torture[28] and exercises a range of functions. It monitors the compliance of states with their obligations under the UNCAT by receiving and examining state reports[29] and is also able to receive and consider communications under the optional individual[30] and inter-state communication procedures.[31] It also has the capacity to initiate inquiries and produce reports on the situation in states party to the Convention.[32] Along with the other similar treaty monitoring bodies established by other UN human rights treaties, it is generally seen as acting in a "quasi-judicial" capacity in that it is empowered to express its views as to whether states are complying with their obligations but it is not able to make legally binding findings that this is the case. All these bodies have developed the practice of making "General Comments", these being statements of what these bodies consider is required of states by the various articles of the Convention in question. The CAT has been particularly slow to take advantage of this opportunity and has so far adopted only one General Comment[33]. However, in May 2000, members appear to have accepted the wisdom of moving towards formulating a series of general recommendations[34] and, in particular, to take forward the idea of moving towards drafting a General Comment on Article 1 of the UNCAT, which concerns the definition of torture.[35]

Thus at the moment developments are taking place on two separate fronts – the drafting of an optional protocol to establish a preventive mechanism and an attempt to elaborate in detail upon what torture

is taken to be for the purposes of the Convention. One might think that these are complementary activities and that one should be pleased to see this. However, such happiness as there might be may be misplaced since there is a very real danger that the work of elaborating upon the definition of torture found in the UN Convention may have potentially detrimental consequences for whatever practical use a visiting mechanism at the UN level might ever actually have. There are fundamental differences between the approaches to torture and ill-treatment found in the European system from those which are found in the UNCAT. The approaches found in the European system are better suited to a preventive function than those in the UNCAT and further elaboration of Article 1 in a general comment might exacerbate this problem.

The purpose of this comment is to outline – albeit briefly – a number of different approaches to the prohibition of torture and ill-treatment[36] but, in summary, the argument is as follows: the ECHR (as well as Article 5 of the Universal Declaration on Human Rights and Article 7 of the International Covenant on Civil and Political Rights, although these will not be expressly considered here) does not provide any definition of torture but it does have what might be called an "approach" and this involves it being linked with the notions of "inhuman" and "degrading" treatment. The UNCAT, however, does provide a definition of torture with very clearly marked elements. Although it does not define "inhuman" and "degrading" treatment directly, it does so indirectly and in a potentially restrictive fashion. More importantly, it formalises a distinction between torture on the one hand and inhuman and degrading treatment on the other by attributing different legal consequences to them. In other words, whilst the ECHR draws these concepts together, the UNCAT tends to drive them apart. Whilst either of these approaches is acceptable in a judicial or quasi-judicial context, when one is determining whether or not there is compliance with a given article of a convention, they are not equally useful in the preventive context.[37] The experience of the European system is that its relatively flexible and an open-textured approach can work well in the preventive context since it makes it easier to "ground" preventive recommendations. The linkage and potential for cross-fertilisation between the notions of torture and "inhuman and degrading" treatment is very important in this process (even if, as will be suggested below, the manner in which the CPT uses these terms has, perhaps unwittingly, hampered this creative potential). However, such benefits as this provides in the European system may well be lost in the UN context because of the relative inflexibility of the definitions, and

refining the definition of torture in Article 1 even further is unlikely to help. Recent judgements by the European Court of Human Rights are "Janus faced" in this respect because they provide helpful examples that the UNCAT might draw on but they also – and unnecessarily – emphasise the very divisions which need to be overcome by the CAT in order to enhance its potential preventive dimension. The remainder of this comment will add some flesh to this summary.

■ I. Approaches to Article 3 in the European System

▬ 1. The European Court of Human Rights

Article 3 of the ECHR provides that:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

In the *Greek* case in 1969 the European Commission on Human Rights expressed the view that:

"It is plain that there may be treatment to which all these descriptions apply, for all torture must be inhuman and degrading treatment, and all inhuman treatment also degrading."[38]

Building on this, the ECHR organs have adopted what can best be described as a "vertical" approach to Article 3, which is seen as comprising three separate elements, each representing a progression of seriousness, in which one moves progressively from forms of ill-treatment which are "degrading" to those which are "inhuman" and then to "torture". The distinction between them is based on the severity of suffering involved, with "torture" at the apex. This inevitably leads to a quest for the "thresholds" between the various "heads" of ill-treatment contained in Article 3.

The torture threshold

It is notoriously difficult to determine at what point ill-treatment moves from being *inhuman* and becomes *torture,* most famously

illustrated by the case brought by Ireland against the UK in which the Commission concluded that the interrogation techniques employed by the British security forces in Northern Ireland in the early 1970s – wall standing, hooding, restricted diets, subjection to noise and sleep deprivation – amounted to acts of torture[39], whereas the European Court of Human Rights subsequently concluded that they fell short of the seriousness required and so amounted to "only" inhuman and degrading treatment.[40]

In Israel in the late 1990s the argument was still being run before the Supreme Court (unsuccessfully, it should be said) that the interrogation techniques used by the Israeli Security forces were "inhuman and degrading" rather than torture, and so Israel was not in breach of its international obligation to refrain from acts of torture.[41]

The precise placing of the thresholds might change over time, but the basic approach itself remains and in the first case in which the European Court found acts to comprise torture, *Aksoy v. Turkey*, the Court stressed that:

"This distinction would appear to have been embodied in the Convention to allow the special stigma of «torture» to attach only to deliberate inhuman treatment causing very serious and cruel suffering."[42]

However, in the recent past the Court seems to have shifted its position significantly. In *Selmouni v. France* (1999) the Court said that:

"certain acts which were classified in the past as «inhuman and degrading» as opposed to «torture» could be classified differently in future. [T]he increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies".[43]

Selmouni v. France is clearly a very significant case because it suggests that the Court is willing to open previous Convention case law and re-evaluate its findings. This is a major contribution to the development of *torture* prevention but, as has already been said, it is possibly a mistake to focus too much on the label attached to a form of ill-treatment. The *Selmouni* case has a more general significance, which will be considered later.

The entry threshold

A further problem with this approach lies in determining where the "entry threshold" into Article 3 lies – that is, are there any forms of ill-treatment which are too trivial to be classified as "degrading" – and the related problem of determining the thresholds of seriousness between the three elements. If the deliberate infliction of physical or mental pain is involved, then it is likely to amount to at least degrading treatment, unless it is exceedingly trivial. A standard example is *Costello-Roberts v. UK* (1991) in which the Court did indeed conclude that such a threshold had not been passed in the case of a 7 year old boy being whacked 3 times with a slipper by a headmaster in a private school.[44] Other acts not involving the deliberate infliction of physical or mental suffering can also be deemed degrading, but these need to be assessed on different criteria. In deciding a case concerning the handcuffing of a detainee in public under Article 3, *Raninen v. Finland*, the Court said that test was *"whether or not the treatment in question denotes contempt or lack of respect for the personality of the person subjected to it and whether it was designed to humiliate or debase him instead or, or in addition to, achieving other aims"*.[45] Clearly, this is a subjective approach and this immediately casts doubt on the idea that Article 3 really is based on a "severity of suffering" at all.[46]

Is it really true that Article 3 is a "ladder" which any form of ill-treatment may potentially climb? It is difficult to believe, for example, that cases such as *Raninen*, concerning the wearing of handcuffs in public and which have been considered to raise potential issues under Article 3 as a form of degrading treatment, have within them the possibility of being equated with acts of "torture"; nor, indeed, does this seem possible as regards the cases in which it has been found that the imposition of corporal punishment in schools could be so classified. Degrading or even inhuman, yes; but torture?

The physical conditions in which a person is held also can be inhuman or degrading. This was established by the European Commission on Human Rights in the *Greek* case (1969) in which a combination of overcrowding, incommunicado detention, no access to open air, limited light, no exercise and prolonged detention whilst in police custody was considered to violate Article 3.[47] This has been confirmed and illustrated in many subsequent

cases.[48] It is also well established that returning persons to a country where they will face a real risk of being subjected to torture or inhuman or degrading treatment is itself inhuman or degrading.[49] This is so even if the threat comes from private forces in lawless societies rather than from the organs of state authorities themselves.[50] It may also be a breach of Article 3 to return a person in circumstances where the result of the expulsion will have consequences of an inhuman or degrading nature for the person concerned, irrespective of whether the particular situation to which the person is being returned do not in themselves either engage the responsibility of the state or infringe the standards of Article 3.[51] But it again might be wondered if any of these practices could ever amount to torture?

In short, the variegated nature of ECHR jurisprudence appears to defy practical application of the approach, which is most commonly associated with it. Indeed, if one scratches beneath the surface of most of the cases, it becomes apparent that the Commission and Court have never fully subscribed to the severity of suffering approach, despite their mantra-like espousal of it over the years. Indeed, this has been the case from the outset. In an equally talismanic passage, the Court said in *Ireland v. UK* that:

"Ill-treatment must attain a certain minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc".[52]

This has always meant that the Court has had considerable flexibility in the application of its approach[53] and what seems to have happened is that as the range of situations that fall within the ambit of Article 3 has enlarged, then the need to take a more nuanced approach to its application has increased. This is now made manifest in the recent case of *Keenan v. UK* where the Court accepts openly that the severity of suffering is only one element of an increasingly complex matrix, saying:

"While it is true that the severity of suffering, physical or mental, attributable to a particular measure has been a significant consideration in many of the cases decided by the Court under Article 3, there are circumstances where proof of the actual effect on the person may not be a major factor".[54]

2. The European Committee for the Prevention of Torture (CPT)

The CPT has adopted a rather different approach to that of the European Court. The CPT works in a preventive, non-judicial context and its approach to the language of Article 3 is doubtless influenced by a variety of factors which have nothing to do with formal legal definition – though this is apparently sometimes lost on the Court when CPT Reports have been referred to in cases brought before it.[55] To oversimplify a complex practice, the reports of the CPT which are currently in the public domain suggest that their approach is largely as follows: the term "torture" has been chiefly reserved for forms of physical or mental ill-treatment which are severe, is inflicted for a particular purpose and, at least hitherto, has required some form of "preparation", such as the use of electric shock, falaka, suffocation with bags over heads, beating prisoners in tethered positions, etc. – what have elsewhere been called "exotic" methods, for the want of any better description. This contrasts with their use of the terms "inhuman" and "degrading", which are not used to describe forms of physical or mental ill-treatment which simply "fall short" of torture for whatever reason, but are used to describe what might be called "custodial conditions" of detention or hybrid areas of organisational practice which bear upon the treatment of detainees either in general or in a particular instance.[56] In short, they describe different phenomena and so are not part of a hierarchy based on "suffering", although it is clearly understood that "inhuman and degrading" conditions of detention or practices are likely to generate the environment in which acts of torture can flourish. For the moment, the CPT's use of terms is such that "inhuman" and "degrading" does not blur into "torture" – there is no scale to climb: they are parallel paths.

The practice of holding remand prisoners in solitary confinement might be taken as an example. The ECHR might describe such a practice as "inhuman" or "degrading" but whether it would categorise it as "torture" should in theory depend upon how "severe" the suffering was (whether objectively or subjectively is an interesting point, but need not detain us here). But one suspects it would have difficulty climbing over that threshold. The CPT appears willing to describe this as "inhuman and degrading" but, in current CPT parlance, this all but precludes the possibility of its being described as torture.[57] One might take the view that if it is an "inhuman and degrading" practice, then in those instances where there is the req-

uisite purpose, such as encouraging a confession or extracting other information, then there would be no reason at all not to view it as an act of torture.

Neither the approach of the European Court nor that of the CPT is free of difficulty. The Court's "vertical" approach tends to hide the true nature of issues affecting the classification. The CPT's version of a horizontal or parallel approach creates a problem for those examples of ill-treatment which fall below the "severity" threshold. Thus in the case of acts of physical ill-treatment falling short of torture, it describes them as "ill-treatment", but not "inhuman or degrading" treatment. This is apt to confuse. For example, it might, paradoxically, be considered encouraging if the CPT were to consider examples of solitary confinement on remand to be "ill-treatment" rather than "inhuman or degrading" treatment since this would suggest that in an appropriate case it might be prepared to consider it to amount to torture. ECHR watchers might, however, read this as suggesting it was not even "inhuman or degrading". The CPT, on the other hand, tends to use the word "unacceptable" to describe conditions falling under that threshold. No one ever claimed that the relationship between these strands of European practice would be simple, but it does seem to have become over complex.

■ II. The UNCAT and the definition of torture

Against this background, it is almost a relief to turn to the UNCAT, Article 1 which provides a definition:

"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 or discrimination or 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 sanction."

Thus according to the convention, for an act to "qualify" as torture it must (a) cause severe physical or mental suffering (b) be inflicted for a purpose and (c) be inflicted by, or with the acquiescence of, an official (that is to say, it can be attributed to the state). But what of "inhuman or degrading" treatment or punishment? The 1984 Convention does not define this in so precise a manner. Rather, Article 16 of the UN Convention describes it as comprising:

"Acts... which do not amount to torture as defined in article 1, when such acts 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".

In other words, such acts fail to qualify as acts of torture for the purposes of the Convention either because they did not involve a sufficiently severe degree of pain or suffering or because they were not inflicted for a purpose. It follows from this that an act, which does cause severe pain but is entirely without purpose (if this is possible) would be "inhuman" or "degrading" rather than an act of torture for the purposes of the UN Convention. This distinction is critical because under the UNCAT the state is obliged to establish its jurisdiction over acts of torture and either prosecute or extradite those suspected of committing such acts.[58] This obligation does not apply to those who have committed acts, which are "inhuman" or "degrading".[59] Similarly, whilst there is an obligation to ensure that victims of torture have a right of redress and compensation[60], and that evidence obtained by the use of torture is inadmissible[61], these do not apply to "inhuman" or "degrading" acts.[62]

The most important points to note about this definition is that it is very closely tied to the idea of torture – and inhuman and degrading treatment – being a purposive official act.[63] The reason why the official nature of the act is so important under the UN Torture Convention is that its primary purpose is to require and facilitate the assertion of jurisdiction by states over acts of torture, including instances involving non-nationals in third states – that is, on the basis of a form of universal jurisdiction.[64] The justification for this is, ultimately, states are unlikely to take effective measures against their own agents someone else should be able to do so in order that torturers do not enjoy de facto impunity. Although a "human rights instrument" the UNCAT definition embraces an approach that is clearly different to that of the ECHR and, it should be said, to other UN human rights instruments.

The primary purpose of the UNCAT is, then, to require states to assert jurisdiction over acts of torture, not to outlaw torture as a practice as a matter of international human rights protection, though it certainly reinforces this pre-existing outlawry as well. There is nothing inevitable about the definition of torture in Article 1 of the UNCAT being taken as the model in other contexts. Indeed, it increasingly widely recognised that the definition in Article 1 is not necessarily applicable in its totality in other spheres of international law [65] and, armed with that caveat, its dominance within the human rights sphere itself should not be taken for granted.

It is, then, at first sight surprising to see the European Court endorsing the UNCAT definitions in its most recent case law. In 1999 in *Selmouni v. France* the Court explicitly draws on the UNCAT definition and, having determined that the acts in question occasioned "pain and suffering, and were inflicted by police officers in the course of their duties", went on to consider whether they were sufficiently severe to justify a finding of torture.[66] This approach has recently been followed by the Grand Chamber of the Court in for example, *Ilhan v. Turkey* and *Salman v. Turkey* in which cases the Court expressly endorsed the purposive component of the UNCAT definition and stressed its relevance in distinguishing between "torture" on the one hand and "inhuman and degrading" treatment on the other.[67] Indeed, in subsequent cases, the Chambers of the Court have concluded that ill-treatment which would seem to qualify as torture on the *Selmouni* approach to the threshold is to be categorised as inhuman and degrading treatment because of the nature of the purpose underlying its infliction was not sufficiently closely linked to extracting a confession.[68] It is almost as if it is suddenly trying to drive a wedge between the categories. This is all very perplexing.

Is the European Court about to abandon its entire conceptual approach in favour of the UNCAT definition? It may well be that the idea of "purpose" has always been present within the Court's thinking but that the close proximity between the ideas of "purpose" and "legitimate" purpose and "justification" have encouraged the Court to suppress this element of its thinking.[69] The use of the UNCAT definition of torture, with its express inclusion of purpose – certainly facilitates this being brought out into the open, but it does need to be recalled that under UNCAT Article 16 other forms of ill-treatment are not subject to the purposive element, whereas this has become an increasingly important element of at least the European Court's approach to *degrading* treatment.

But whatever the case – and it must be accepted that the picture is confusing – the Court is certainly expanding the scope of Article 3 – and it is therefore to be hoped that when the UN Committee against Torture comes to consider its own definition of torture, it will play very close attention to the innovations which the Court has made in recent cases and recall that these have been achieved expressly against the background of the UNCAT definition. If the European Court can understand the UNCAT definition in as latitudinous a fashion as appears to be the case, then it should be equally possible for the CAT to do likewise.

■ III. Recent Trends

It is beyond the scope of this comment to review these recent developments in detail and for current purposes it is merely necessary to give a flavour of what has been done by the European Court and thus of what might be done by the CAT.

The first concerns a dramatic broadening of what falls within the scope of an "act of a public official". This certainly includes being ill-treated by a police officer or prison warden but rather than focus on what officials of the state have "done", there is an increased tendency to focus on what the state can legitimately be held responsible for and to present its reasoning through the lens of "state responsibility".[70] Some still cling to the notion that in order to amount to a violation of Article 3 of the ECHR, ill-treatment must have been meted out by state actors themselves, but it is now quite clear that a state may in certain circumstances be in breach of Article 3 when it fails to prevent forms of ill-treatment that attain the requisite degree of seriousness from occurring. This has long been recognised in cases concerning extradition or expulsion, in which the state is in breach if it knowingly exposes a person to a real risk of ill-treatment and the cases concerning corporal punishment in schools, but these can no longer be seen as exceptional categories.

The switch towards conceptualising and articulating the approach in the language of state responsibility means that the Court has been able to find a breach of Article 3 where a state fails to protect an individual from a *known risk* of ill-treatment by a non-state

agent. Thus in *Mahmut Kaya v. Turkey* the state was considered responsible for its failure to prevent the ill-treatment – and death – of the applicant's brother by unknown persons, when the authorities had been informed of the risk by the deceased himself.[71] Against this background, the finding of a violation of Article 3 in *Z v. UK*, concerning the failure of a local authority to take steps to protect children known to be at risk from ill-treatment by their parents, is unsurprising, though its ramifications potentially far-reaching: the Court saying that states are required *"to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals"*.[72] This seems to be the most far-reaching pronouncement yet on the scope of state responsibility under Article 3.

Where the state is, or is considered to be, unaware that there is a risk of ill-treatment by a non-state actor, it can hardly be held responsible for not preventing it. But it can be held responsible for failing to make adequate investigations in cases where allegations of ill-treatment by unknown parties are brought to its attention. This is now a well established form of responsibility under Article 2 of the Convention[73] and the Court is now prepared to see in Article 3 a "procedural obligation" to take steps to examine the truth of a credible allegations, at least in those cases in which it is unable to find on the facts that ill-treatment did in fact occur.[74] However, it seems that in cases where the Court is unable to conclude that there is evidence of treatment for which the state is responsible, but that treatment which crosses the "threshold" of ill-treatment for the purposes of Article 3 did none the less occur, it is inclined towards finding a breach of a "procedural obligation" of that article as being "the next best thing", registering higher in the scale of violations than other pertinent articles of the Convention. Thus in *Ilhan v. Turkey* (2000), the Court says that procedural obligations in respect of allegations of torture should be considered under Article 13 rather than Article 3 but *"whether it is appropriate or necessary to find a procedural breach of Article 3 will therefore depend on the circumstances of the particular case"*.[75] It is difficult to avoid the suspicion that it will be the inability to find a substantive breach that may make such a finding "appropriate or necessary".[76]

In a further line of development, the Court has expanded the categories of who is to count as a victim for the purposes of a violation in a series of cases flowing from *Kurt v. Turkey*.[77] The applicant in *Kurt*

not only claimed that her son's right had been violated but that she herself was the victim of inhuman and degrading treatment on account of the anguish caused by the authorities' complacency in the face of her claims concerning her son's disappearance. The Court noted that she had witnessed the abduction herself and that the public prosecutor gave her claims no credence and that, in consequence, *"she has been left with the anguish of knowing that her son had been detained, that there is a complete absence of official information as to his subsequent fate. This anguish has endured over a long period of time."*[78] It therefore concluded that the mother was *herself* a victim of a violation of Article 3 *"having regard to the circumstances... as well as to the fact that the complainant was the mother of the victim of a human rights violation and herself the victim of the authorities' complacency in the face of her anguish and distress"*.[79]

The precise scope of this approach is matter of some controversy, but tort lawyers familiar with "nervous shock" cases would find the tenor of subsequent cases very familiar, as shown by the comments of the Court in *Cikici v. Turkey* that: *"the Kurt case does not... establish any general principle that a family member of a 'disappeared person' is thereby a victim of treatment contrary to Article 3"*.[80] Rather, it stated at length a set of factors, which will influence its consideration. These being:

"Whether a family member is such a victim will depend on the existence of special factors which gives the suffering of the applicant a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human rights violation. Relevant elements will include the proximity of the family tie – in that context, a certain weight will attach to the parent-child bond –, the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, the involvement of the family member in the attempts to obtain information about the disappeared person and the way in which the authorities responded to those enquiries. The Court would further emphasise that the essence of such a violation does not so much lie in the fact of the 'disappearance' of the family member but rather concerns the authorities' reactions and attitudes to the situation when it is brought to their attention. It is especially in respect of the latter that a relative may claim to be a victim of the authorities' conduct".[81]

Subsequent cases have added further detail to the outworking of this principle[82], some of which may seem difficult to reconcile and the

potential range of the principle seems to have been diminished in *Tanli v. Turkey* where the Court stresses that it only operates in the particular context of disappearances.[83] Nevertheless, it remains a potent example of the potential for creative jurisprudential development and its final parameters remain undetermined.

It is beyond the scope of this comment to examine these trends and cases in any detail but taken as a whole, it is evident that the general trajectory of development is towards an expansive understanding of the prohibition of torture, inhuman and degrading treatment or punishment. Its reach is already immense and is still expanding. And this is being achieved at the same time as the Court is endorsing a definition of torture, which is comparatively narrow.

■ IV. Conclusion – and a modest suggestion

Just as the ECHR seems to be drifting towards the language of the UNCAT, the UNCAT through the Draft Optional Protocol may be moving towards a preventive function. The experience of the CPT suggests that in order to enhance the prevention of torture (whatever that may be) it is important to be able to focus on measures that prevent not just torture but "ill-treatment" as an all-embracing concept. If the UNCAT can learn lessons from the European Court (ECtHR) regarding the potential scope of Article 3 in the judicial sphere, it should also note the importance of emphasising the link between torture, inhuman and degrading treatment or punishment when it comes to prevention. It is, then, most unfortunate that the ECtHR is currently emphasising the differences between them and that the CPT also accentuates the difference in its linguistic usage. The Court can afford to take that link for granted since it is in their governing text – Article 3 – and cannot be disposed of.

For the CAT, these terms are not only distinct, but have distinct legal consequences. It needs all the help and encouragement it can get to overcome this problem if it is to forge an approach – not a definition – that will assist it in developing a preventive function. It could help itself by deciding to draft a General Comment jointly on UNCAT Articles 1 (torture) and 16 (inhuman and degrading treatment).

It might also be worthwhile to dwell upon a modest suggestion for completely reconceptualising the approach to the prohibition of torture, inhuman or degrading treatment or punishment. If we return to the origins of the *Greek* case, the Commission said that:

"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 conscience."[84]

This seems to me to suggest an entirely different approach, which is not based on the "severity of suffering" at all. Why not abandon all thoughts of a "vertical model" and replace it with a "horizontal model", in which "Torture" and "Inhuman" and "Degrading" treatment and punishment all stand alongside each other. The first question to be asked would be whether the form of ill-treatment or punishment is sufficiently serious to be deemed "inhuman". If that threshold is met, then the next question is whether the ill-treatment was purposive (in the sense of Article 1 of the UN Convention). If it was, then it should be characterised as "torture". It should not be necessary for the "suffering" to be of a greater severity as well. It is the very fact of its purposive use that is the "aggravating factor". "Degrading" treatment should be reserved for those forms of ill-treatment, the gist of which lies in the humiliation that is felt by the victim. Under this approach, "torture" and "degrading" treatment are species of inhuman treatment. If we choose to place a greater stigma on the purposive ill-treatment of individuals than of the non-purposive humiliation of individuals, then that is a moral and not a legal judgement.

Although there is not the slightest direct support for this approach in the jurisprudence, it is an approach that is entirely consistent with its underlying ethos. It would also address the problem posed by the multitude of claims that currently can be plausibly located at the lower or lowest end of the inhuman or degrading spectrum. It would inevitably raise the starting point for a finding of a violation, but this might not be a bad thing and it certainly need not have any negative

impact upon the preventive context. It would also eliminate the rarely remarked upon linguistic nonsense of having to determine what is “more severe” in terms of suffering than “inhuman treatment”. Moreover, we should not again have to concern ourselves with the argument that “It is not so bad: it is not torture, it is only inhuman...”.

I have no great hopes that this approach will find favour but the very least that can be said of it is that it is no less problematic than the other approaches outlined previously. What is certain is that the outcome of the deliberations currently taking place in Geneva and elsewhere on these seemingly arcane and academic points will have a significant impact on the capacity of the international community to “get to grips with torture”, the need for which is something which it is to be hoped we can all agree on.

BACKGROUND PAPER 2

Aspects of the Definition of Torture In the Regional Human Rights Jurisdictions and the International Criminal Tribunals of the Former Yugoslavia and Rwanda

Ms. Debra Long[85]

Introduction

The aim of this paper is to consider how certain substantive issues regarding the definition of torture have been dealt with by the regional human rights mechanisms (in particular the case law emanating from these systems) and the ad hoc International Criminal Tribunals.[86] The paper does not seek to provide an exhaustive overview of the case law, but rather to provide some food for thought and to provoke debate. The first chapter of the paper is concerned with the establishment of thresholds in order to distinguish between acts of torture and acts of inhuman or degrading treatment or punishment.[87] The second chapter concerns the nature of State responsibility and whether this encompasses a duty to abstain or protect. The third chapter examines the dichotomy between the prohibition of torture and the existence of lawful sanctions.

I. Distinguishing Acts of Torture – Threshold of Severity or Purpose?

1. The European Human Rights System – A Threshold of Severity?

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) is not a defining instrument and accordingly a body of jurisprudence has been developed within the European human rights system, seeking to determine a threshold for distinguishing acts of torture from acts of inhuman and degrading treatment or punishment.

There are two leading cases in this jurisdiction, for establishing a distinction between various forms of acts namely; *The Greek Case (1969)*[88] and *Ireland v. UK (1979)*[89].

The first of these cases, the *Greek Case*, was considered by the European Commission on Human Rights, and involved the conduct of Greek Security forces following the military coup in 1967. This case is instructive because the European Commission adopted a general definitional framework which distinguished between the three prohibited acts i.e. "torture" "inhuman" and "degrading" treatment or punishment.

In their decision, the European Commission held that the defining characteristic of torture was not necessarily the nature and severity of the act committed but the *purpose* for which the act was perpetrated:

"[A]ll 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... Torture... 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."[90]

In other words, whilst torture was often an "aggravated form of inhuman treatment", this was not the distinguishing element of an act of torture. Torture was rather the "purposive use of inhuman treatment".[91]

This distinction has however been refined in subsequent decisions and it is arguable that this refinement has meant that the purposive element of the definition of torture, whilst still important, has been marginalised in favour of a threshold based upon a sliding scale of severity between the three acts.

This threshold based upon a level of severity, was considered in the second leading case mentioned above, *Ireland v. UK*. The facts of this case are well known and concerned the treatment of IRA suspects by UK troops in Northern Ireland. The case was brought by the Irish Government against the UK alleging, inter alia, that the methods of interrogation using the "five techniques" (sleep depriva-

tion, stress positions, deprivation of food and drink, subjection to noise and hooding), constituted a breach of article 3 of the European Convention on Human Rights.

On appeal, the European Court followed the European Commission's earlier emphasis that in order to fall within the scope of article 3 an act of ill-treatment must attain a "minimum level of severity."[92] The assessment of this "entry level" threshold of severity is relative and the Court can take note of the following:

- The duration of the treatment
- The physical effects of the treatment
- The mental effects of the treatment
- The sex, age and state of health of the victim

It must be noted that this "entry level threshold" applies to all acts coming within the scope of article 3, thus acts of inhuman and degrading treatment must attain this "minimum level of severity" to be considered. Yet, the Court went on to draw a distinction between inhuman and degrading treatment and torture. It was held that such a distinction was necessary because a "*special stigma*" attaches to torture[93]. Accordingly, the Court held that in order to be classified as torture, the treatment must cause "*serious and cruel suffering*". Therefore, the Court decided that the "measuring stick" for assessing whether an act amounts to torture, is similar to the minimum entry level threshold required for article 3 (outlined above), i.e. a subjective decision based upon the severity of pain and suffering occasioned by the act. [94]

In this instance, the Court held, that the five techniques used by the UK troops, caused *"if not actual bodily injury, at least intense physical and mental suffering... and also led to psychiatric disturbances during the interrogation"*, and therefore fell into the category of inhuman treatment, but the practices did not *"occasion suffering of the particular intensity and cruelty implied by the word torture"*.[95] (Thereby, overturning the earlier decision by the Commission that the practices did amount to torture).[96]

This ruling created a precedent for drawing a distinction between torture, inhuman and degrading treatment or punishment based

upon a progression of severity. Thus, arguably under such a threshold of severity, degrading treatment when it reaches a certain severity can be re-classified as inhuman treatment, which in turn, if particularly serious can be classified as torture.[97]

This threshold of severity has been reiterated and followed in subsequent decisions of the Court.[98] In recent developments, for example, the Court has held that in certain circumstances rape causes physical and mental suffering sufficiently severe so as to amount to torture. This was considered in *Aydin v. Turkey*[99], which involved a young woman, who was held in detention by the Turkish police on suspicion of involvement with the Workers' Party of Kurdistan (The PKK). Whilst in detention she was stripped of her clothes, beaten, sprayed with cold water from high pressure jets, blindfolded and raped.

The Court having been satisfied that the allegation met the minimum threshold of severity to come within the scope of article 3 (discussed above) held that;

"The rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of the victim. Furthermore, rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence... against this background the Court is satisfied that the accumulation of acts of physical and mental violence... especially the cruel act of rape to which she was subjected amounted to torture in breach of Article 3 of the Convention".[100]

The Court therefore, held that the level of suffering occasioned by the rape and the other acts, met the threshold of severity for them to be classified to torture. Furthermore the Court's decision is instructive because the Court held that they would have "reached this conclusion on either of the grounds taken separately". Accordingly, it is arguable that in certain circumstances an act of rape alone can amount to torture.

Yet, the European system has refrained from drawing up a list of acts which will automatically be considered severe "enough" to be classified torture and those which will not. The Court has been insightful enough to conclude that the Convention should be regarded as a *"living instrument which must be interpreted in the light of present-day conditions"*.[101] Thus, in *Selmouni v. France* it was held that:

"Certain acts which were classified in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in the future. It takes the view 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 of the fundamental values of democratic societies".[102]

Consequently, the Court is free to adjudicate on acts which previously had not been regarded as torture but in the light of present day conditions and values could be considered as such.[103] In *Selmouni v. France*, however, the Court did not revise the basis of the threshold of torture i.e. a level of severity, but came to their decision having regard for whether the acts complained of could in "present day conditions" be considered as a whole "particularly serious and cruel" and therefore regarded as acts of torture.[104]

2. The Inter-American System – A Threshold of Intent?

Unlike the ECHR, the Inter-American Convention to Prevent and Punish Torture (The Inter-American Convention), is a defining instrument. Article 2 of this Convention provides:

"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 the 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 or mental anguish".

The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequences of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article.

It is therefore arguable that the Inter-American Convention provides a broader definition of torture than the definition developed by the European system[105], because it does not specify a threshold of pain and suffering and in fact explicitly removes the requirement for any actual physical or mental suffering if the *intention* of the perpetrator is *"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". Does this necessarily mean therefore, that the threshold distinguishing torture in this system is therefore based upon intentionality or purpose rather than severity?

Unfortunately, the answer to this question is not clear because neither the Inter-American Commission or the Court on Human Rights have attempted to differentiate, as distinctly as the European system, between the terms torture, inhuman and degrading treatment. Whilst article 2 of the Inter-American Convention, does not specify a level of suffering, the Court, rather confusingly held in the case of *Loayza Tamayo v. Peru*:

"The violation to the right to physical and psychological integrity of persons is a category of violation that has several gradations and embraces treatment ranging from torture to other types of humiliation or cruel, inhuman or degrading treatment with varying degrees of physical and psychological effects caused by endogenous and exogenous factors which must be proven in each specific situation".[106]

This statement however falls far short of establishing any sort of threshold based on severity. Rather, it would appear that Inter-American Court (and Commission), considers each of the various elements of torture in turn, limiting itself to conclude whether there has been a violation generally of article 5 of the American Convention on Human Rights (the right to humane treatment).

By way of example, in *Mejia v. Peru*[107], the Inter-American Commission considered the allegation of rape amounting to torture. The applicant in this instance was a young woman, who had been detained, along with her husband, by Peruvian Security Forces on suspicion of being involved with an "opposition" or "terrorist" organisation.

In making their decision, the Commission followed the definition of torture as contained in article 2 of the Inter-American Convention. Firstly, the Commission considered that the rape was an intentional act of physical and mental abuse. Second, the Commission held that rape is considered to be a method of psychological torture because its objective, in many cases, is not just to humiliate the victim but also her family or community:

"Rape causes physical and mental suffering in the victim. In addition to the violence suffered at the time it is committed, the victims are commonly

hurt or, in some cases, are even made pregnant. The fact of being made the subject of abuse of this nature also causes a psychological trauma that results, on the one hand, from having been humiliated and victimised, and on the other, from suffering the condemnation of the members of their community if they report what has been done to them."

The Inter-American Convention includes amongst the possible purposes of torture, personal punishment and intimidation. The Commission held that Raquel Mejía was raped with the aim of punishing her personally and intimidating her. According to her testimony, the man who raped her, told her that she was wanted as a subversive along with her husband. He also told her that her name was on a list of persons connected with terrorism. Raquel Mejía was afraid not only for her own safety but also for that of her daughter and for the life of her husband. Consequently the Inter-American Commission held that her rape was not only an intentional act of violence but also had a purpose.

Thirdly, pursuant to article 2 of the Inter-American Convention, for an act to amount to torture, it must also have been perpetrated by a public official or by a private individual at the instigation of the former. The man who raped Raquel Mejía was member of the security forces and was also accompanied by a large group of soldiers.

Accordingly, it can be seen that the Commission considered each of the various elements of torture in turn and held that the Peruvian State was responsible for a violation of article 5 of the American Convention for Human Rights. There was however, no consideration of the threshold for determining what acts amount to torture. This appears to be a common approach taken by the Commission and Court. It is arguable therefore, that they attach less importance to the "special stigma" of torture, as stated by the European system, and a finding of a violation generally of article 5 for acts of torture, is no worse therefore than a finding of a violation due to the inhuman or degrading treatment.

3. The International Criminal Tribunals – A Threshold of Purpose?

Compared to the regional systems discussed above, only limited jurisprudence has emanated from the International Criminal Tribunals (ICTY and ICTR), thereby making it difficult to state a

certain practice which is followed in the judgements. Further, the judgements must also be distinguished from the jurisprudence of the regional systems because they naturally involve aspects of international humanitarian law rather than international human rights law. They are concerned therefore, with individual criminal responsibility rather than state responsibility. Yet, the judgements which have been handed down, are instructive for the purposes of this paper, because the international humanitarian instruments do not contain a definition of torture. Accordingly, the Tribunals have had to look to other jurisdictions, as well as UN treaty body comments and recommendations of the Special Rapporteur on Torture, in order to develop an applicable definition.

The question remains therefore, whether and if so on what basis the Tribunals have distinguished acts of torture from other acts causing physical and mental suffering?

Looking first at the ICTY, in the case of *Prosecutor v. Zenjil Delalic et al*[108], the Trial Chamber stated:

"Torture is the most specific of those offences of mistreatment constituting "grave breaches" and entails acts or omission, by or at the instigation of, or with the consent or acquiescence of an official, which are committed for a particular prohibited purpose and cause a severe level of mental or physical pain or suffering. The offence of wilfully causing great suffering or serious injury to body or health is distinguished from torture primarily on the basis that the alleged acts or omissions need not be committed for a prohibited purpose such as is required for the offence of torture... all acts or omissions found to constitute torture or wilfully causing great suffering or serious injury to body or health would also constitute inhuman treatment."[109]

It can be established from the statement *"the offence of wilfully causing great suffering or serious injury to body or health is **distinguished** from torture primarily on the basis that the alleged acts or omissions **need not be committed for a prohibited purpose such as is required for the offence of torture**"* (emphasis added), that the threshold for the distinction between torture and other offences, is the purpose, if any, for which the suffering or serious injury was caused. Therefore, the Trial Chamber would seem to be following the reasoning of the European Commission in *The Greek Case* (discussed above). In other words, all acts of serious suffering or injury will come under the offence of wilfully causing great suffering or

serious injury, however, if such acts were committed for a purpose then this "reclassifies" them as torture.

However, the Tribunal noted that it was unwise to establish an exhaustive list of prohibited purposes, and also noted that there is no requirement that *"the conduct be* ***solely*** *perpetrated for a prohibited purpose"*[110] (emphasis added). Yet, they noted that a distinction must be drawn between a "prohibited purpose" and one which is purely private and which is ordinarily sanctioned under national law.[111]

This therefore gives the ICTY some flexibility when making its decisions. This case for example, involved charges of rape and other sexual assaults, not only as a separate offence but also as acts of torture. In their judgement, Trial Chamber held that rape could meet the purposive requirement 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"*.[112] The Chamber continued stating that it considered:

"Rape of any person to be a despicable act which strikes at the very core of human dignity and physical integrity... The condemnation and punishment of rape becomes all the more urgent where it is committed by, or at the instigation of, a public official, or with the consent or acquiescence of such an official. Rape causes severe pain and suffering, both physical and psychological."[113]

The Chamber continued;

"Furthermore, it is difficult to envisage circumstances in which rape, by, or at the instigation of a public official, or with the consent or acquiescence of such an official, could be considered for a purpose that does not, in some way, involve punishment, coercion, discrimination or intimidation. In the view of this Trial Chamber this is inherent in situations of armed conflict".[114]

Whilst the composite elements of the definition of torture (i.e. an intentional act, for a purpose amounting to serious psychological or physical suffering), as well as the over reliance upon aspects of international human rights, as stated in the Delalic Case, have been revisited and questioned in subsequent cases[115], the threshold for distinguishing torture based upon a purposive element appears to have been followed, albeit sometimes impliedly.[116]

For example, following closely on the heels of the Delalic Case, was the case of the *Prosecutor v. Furundija*.[117] This case also involved instances of rape. Whilst the Trial Chamber considered in detail the various elements of torture, it did not revisit the issue of a threshold of torture, it only reconsidered whether rape could be considered an act of torture as well as a separate offence. The Trial Chamber held that rape could amount to torture because, amongst the possible purposes of torture, was the purpose of humiliating the victim.[118]

In the case of the *Prosecutor v. Kunarac and others*, the issue of a threshold did arise, albeit indirectly. Once again, like the previous two cases, this case involved acts of rape, however it also included charges of the separate offence of outrages upon personal dignity (stated as a form of inhuman treatment)[119]. In their consideration of the elements of the offence of outrages upon personal dignity, the Trial Chamber reiterated the decision in the Delalic case that inhuman treatment constituted:

"an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity."[120]

It will be noted that the only difference between the various definitional elements of torture and inhuman treatment is the absence of the requirement for a purpose in the definition of inhuman treatment. Thus, it can be inferred that there is currently tacit approval in the ICTY for a threshold of torture based upon purpose.

Unfortunately, the position of the ICTR regarding the threshold of torture is even less clear than that of the trial chambers of the ICTY. Whilst the ICTR, in the case of *Prosecutor v. Jean-Paul Akayesu*[121], confirmed that it considered that torture can be defined pursuant to article 1 of the United Nations Convention Against Torture, it so far has not elaborated as to whether and if so, on what basis, a distinction is or should be drawn between other offences causing serious suffering.

Within the ICTR, the offence of torture is often considered along side other inhumane acts such as murder, rape, deportation and enslavement. However, in order for these acts to be classified as "inhumane", they must all cause serious bodily or mental suffering.[122] It can therefore be inferred that the threshold distinguishing torture from these other "inhumane" acts must be based on something other than severity.

The Trial Chamber in the case of the *Prosecutor v. Jean-Paul Akayesu,* held that rape could constitute torture because; *"like torture, rape could be used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when 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."*[123]

It can tentatively be suggested therefore, that the ICTR considers that torture can be distinguished from other inhumane acts due to the purpose behind the act and the person committing the act. However, it is by no means clear within the ICTR, what the threshold of torture encompasses or whether such a threshold is even necessary.

■ II. The Nature of State Obligation – a Duty to Abstain or Protect?

Traditionally, the prohibition on torture has focused upon the duty of the State and its officials to abstain from committing acts of torture. This emphasis is reflected in the historical notion that torture is an act committed by a public official or someone acting at the instigation, consent or acquiescence of a public official. This emphasis is recognised in article 1 of the United Nations Convention Against Torture (UNCAT) and article 3 of the Inter-American Convention Against Torture.

As noted earlier, the European Convention for Human Rights is not a defining instrument and therefore does not contain such language, however in order to engage the responsibility of the State for acts of torture, it has traditionally been considered, by the European Court and Commission, that a public official or person acting in an official capacity will be implicated in the act.

Yet, the notion that States have a responsibility not only to abstain but also to protect individuals from human rights violations is not a new one and is enshrined in various international and regional instruments, for example, article 2 of UNCAT, article 3(3) of the ECHR, the preamble to the ECPT, article 1 of the American Convention on

Human Rights and articles 1 and 6 of the Inter-American Convention. These all contain references to a State's duty to prevent acts of torture. The nature of a State's obligation is therefore twofold a duty to abstain and a duty to protect; the former being a negative obligation, to refrain from a certain action, and the latter a positive obligation to ensure individuals are not subjected to a violation.

Recently, it is arguable that there has been a growing emphasis placed upon the positive obligation of States to protect individuals. Consequently, State responsibility for acts of torture has been engaged, even though the act has been committed by a private actor or because there was a real risk of a future violation, or because there has been a lack of an effective investigation.[124]

1. **The private sphere**.

In 1988, the Inter-American Court considered the case of *Velasquez Rodriguez v. Honduras*[125]. This case involved the detention and eventual disappearance of Mr. Velasquez allegedly at the hands of members of the armed forces of Honduras. The question of a State's responsibility in relation to disappearances shall be considered later on in this chapter, however this case is worthy of attention here, because of its consideration of a State's responsibility for acts committed in the private sphere. In its judgement the Court held that a State was responsible for *"acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside of the sphere of their authority or violate international law."*[126]

The Court even went a step further and took the view that the State can also be responsible for acts by private persons:

"an illegal act which violates human rights and which is initially not directly imputable to a State (for example because it is an act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as is required by the Convention".[127]

The Court in *Velasquez Rodriguez v. Honduras* concluded that the test for establishing whether a State has carried out its duties responsibly is whether the State has acted with "due diligence", either to prevent or to investigate violations by State and private

actors. Accordingly, whilst the State will be responsible for acts by its own officials or agents and fails in its duty to prevent and to investigate violations, the Court held that the *"same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognised by the Convention"*.[128]

Similar conclusions regarding a State's duty to protect and the extent of a State's responsibility for acts of private actors have been reached by the European Court and Commission. One of the first cases in this jurisdiction to examine this issue was *HLR v. France*.[129] In this instance, H.L.R was a Colombian national, who had been imprisoned for a drugs offence and was the subject of an order for deportation from France back to Colombia. H.L.R claimed that if he were to be deported back to Colombia he would be exposed to acts of vengeance from drug traffickers who had recruited him. Therefore, it was claimed that France would be in violation of article 3 by virtue of the positive obligations incumbent on States to protect individuals.

Whilst the source of the risk of ill-treatment to H.L.R was from private actors and not the public authorities themselves, the Court nevertheless held that:

"Owing to the absolute character of the right guaranteed, the Court does not rule out the possibility that Article 3 of the Convention may also apply where the danger emanates from persons or groups of persons who are not public officials."[130]

The issue of State responsibility in cases involving expulsion or extradition shall be considered in more detail later on in this chapter. The assertion that States have a duty to protect individuals from torture (and other forms of ill-treatment), even if that risk emanates from a private sphere, was revisited in *A v. UK*[131], which involved the caning of a boy by his stepfather. Following *H.L.R v. France*, the Court held:

"The Court considers that the obligations on High Contracting Parties under article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals".[132]

This is not to say that a State will be responsible for all acts of torture committed in the private sphere, a State's responsibility still has to be engaged in someway. In the case of *A v. UK,* the UK's responsibility was engaged because it was considered that the UK had failed to provide an adequate protection to the applicant against treatment or punishment contrary to article 3, for whilst the child had been *"subjected to treatment of sufficient severity to fall within article 3, the English jury acquitted his stepfather, who had administered the treatment".*[133]

Turning to the jurisprudence of the International Criminal Tribunals, historically, it has been considered that an act will be an offence under international humanitarian law if it is linked to a conflict and can be distinguished from one which is purely private and which is ordinarily sanctioned under national law.

This view was re-examined in the case of *Prosecutor v. Delalic*[134], where the Trial Chamber still held that *"traditionally, an act of torture must be committed by, or at the instigation of, or with the consent or the acquiescence of an official or other person acting in an official capacity".* Yet, the Chamber considered that, in the context of international humanitarian law, this *"requirement must be interpreted to include officials of non-state parties to a conflict, in order for the prohibition to retain some significance in situations of internal armed conflicts or international conflicts involving some non-state actors."*[135]

Accordingly, whilst it was held that in order to be classified as torture, an act must have been committed by State officials, they widened the sphere within which officials were to be held responsible, so as to include officials of States who were not parties to a conflict. Similarly, in the case of *Prosecutor v. Furundija*[136], it was held that the definition of torture under humanitarian law required that at least one of the persons involved must be a public official or must at any rate act in a non-private capacity, e.g. as a de facto organ of the State or any other authority-wielding entity.[137]

Conversely, the Trial Chamber in *Prosecutor v. Kunarac*[138], noted that the *"definition of an offence is largely a function of the environment in which it develops".*[139] The Chamber therefore, noted a difference between the role and position of a State as an actor under human rights and humanitarian law. It held that under human rights law, violations are generally borne out of the abuses of the State over its citizens, whereas in humanitarian law, criminal responsibility for violations does not *"depend on the participation of the State and con-*

versely, its participation in the commission of the offence is no defence to the perpetrator".[140] The Trial Chamber also made reference to the recent developments within the European jurisprudence which have held that a violation of article 3 of the European Convention may also apply in situations where organs or agents of the State are not involved in the violation of the rights protected under article 3 (as discussed above).[141]

In conclusion, the Trial Chamber considered that the characteristic of the offence of torture was *"to be found in the nature of the act committed, rather than in the status of the person who committed it"*.[142] Citing article 12 of the 1949 Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, which *"applies to all combatants in an army, whoever they maybe, and also to a non-combatant. It applies also to civilians"*[143], the Trial Chamber was of the view that *"the presence of a state official or any other authority-wielding person in the torture process is not necessary for the offence to be regarded as torture under international humanitarian law"*.[144]

2. **Duty to protect from a possible violation.**

As stated above, the State's duty to protect also extends to a duty to protect individuals from possible future violations. This duty not only encompasses an obligation by States to prevent torture from occurring, but also a duty not to return an individual to a situation where they face a real risk of being tortured. This aspect of a State's obligation has been codified in various instruments, such as article 3 of UNCAT, article 3 (3) of the ECHR and article 13 of the Inter-American Convention.[145] The exact nature of this obligation has been examined mainly in the jurisprudence of the European Court and Commission in respect of expulsion and extradition cases.

One of the leading cases involving the nature of a State's obligation to protect individuals from a potential violation is *Soering v. UK*.[146] This case involved the extradition application by the USA of a German national residing in the UK, on a charge of murder. The applicant, Soering, claimed that the UK would violate, inter alia, article 3 if they allowed the extradition to take place. Whilst the European Convention on Human Rights does not prohibit the imposition of the death penalty per se, it was claimed that the violation would arise because the conditions on death row amounted to a violation of article 3.

The issue of the death penalty and the exact findings of the Court on this matter will be consider later in Chapter three, for the moment therefore, it is suffice to say, that the Court held that the UK would violate article 3 if Soering were to be extradited because he would be exposed to a "real risk" of being subjected to inhuman or degrading treatment.[147] In other words the finding of a violation attaches not to a third state because of what it might do, but to the State Party in question, for exposing the individual to ill-treatment. Thus, a State owes individuals a duty to ensure that they are not going to be exposed to ill-treatment upon extradition or expulsion.

The reasoning in *Soering v. UK* has been revisited in subsequent cases and an expansive jurisprudence on this issue has arisen.[148] One of the most influential and much cited cases in this body of jurisprudence is *Cruz Varas v. Sweden.*[149] This case involved the potential expulsion of two Chilean applicants for political asylum on the grounds that they had not invoked sufficiently strong political reasons to be considered refugees. The applicants claimed that if they were expelled to Chile, where they claimed to have been tortured previously, they faced a real risk of being tortured again.

The Court held that it must be shown that there are "substantial grounds" for believing in the existence of a real risk of treatment contrary to article 3.[150] The Court stated that this would be assessed primarily with reference to those facts which were known or ought to have been known at the time of the expulsion, although this would not preclude the Court from considering other information which comes to light subsequent to the expulsion. In this instance the Court concluded that there were no substantial grounds for believing in the existence of a real risk.

This guide for assessing the "level of risk" was upheld in the case of *Vilvarajah v. UK*[151], which noted that; *"the Court's examination of the existence of a risk of ill-treatment... at the relevant time must necessarily be a rigorous one in view of the absolute character of this provision and the fact that it enshrines one of the fundamental values of the democratic societies."*[152]

This case concerned an expulsion which had already occurred, thus the "relevant time" for assessing the level of risk was the time when the expulsion occurred. If an expulsion has not yet occurred, it was held in *Chahal v. UK*[153] that the relevant time for assessing the risk would be the date on which the Court considers the case, therefore

it could take into consideration evidence which has come to light since the case was first reviewed.[154]

The case of *Chahal v. UK* is also instructive, as Mr. Chahal was being expelled because he was suspected of being involved in acts of terrorism. Whilst the Court stated that it was aware of difficulties facing States in protecting communities from acts of terrorism, nevertheless it confirmed that the Convention prohibits in absolute terms torture (and inhuman or degrading treatment or punishment) irrespective of the victim's conduct. Accordingly, national interests could not override the interests of the individual where substantial grounds have been shown for believing that he would be subjected to ill-treatment if expelled.[155]

Recently, as discussed above, in *H.L.R v. France,* the Court has also confirmed that the absolute nature of the prohibition and the duty to protect individuals can engage State responsibility in contexts where the risk emanates from sources other than the State's authorities. This was restated in strong terms recently, in *D v. UK*[156]*,* in which the Court held that:

"Aside from (these) situations and given the fundamental importance of article 3... the Court must reserve itself sufficient flexibility to address the application of that article in other contexts which might arise. It is not therefore prevented from scrutinising an applicant's claim... where the source of the risk of proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities, or which, taken alone, do not themselves infringe the standards of that article. To limit the application of article 3 in this manner would be to undermine the case to a rigorous scrutiny, especially the applicant's personal situation in the expelling State."[157]

■ 3. Lack of an effective investigation.

It has been argued therefore that a State has a duty not only to abstain, but also to protect against violations. Developments over the years have also extended the nature of a State's responsibility so as to include a duty to investigate and, more recently, the category of persons to whom duties are owed has also been expanded.

Recent judgments in the European system have developed clear and unambiguous obligations of the State to investigate violations.

Following the decision in *Ribitsch v. Austria,* when an individual is taken into custody in good health, but is subsequently found to be injured at the time of release, it is incumbent upon the State to provide a plausible explanation of how the injuries were caused, failing which an issue arises under article 3.[158] Therefore, in order to provide a plausible explanation of how the injuries were caused, the State must conduct an effective investigation into allegations of ill-treatment.

The importance of this duty to investigate was emphasised by the Court in *Assenov v. Bulgaria*.[159] This case involved an allegation of ill-treatment made by Mr. Assenov, who was 14 years old at the time of the incident and his father, allegedly at the hands of police officers. The Court, whilst finding it impossible to determine the exact cause of Mr. Assenov's injuries because there was some confusion as to whether the injuries were caused by the police officers or Mr. Assenov's father, the Court nevertheless held the State in violation of article 3 for failing to conduct an effective investigation. The Court, in its judgement, reiterated the nature of a State's duty to investigate as stated in *Ribitsch v. Austria*. The Court held that:

"Where an individual raises an arguable claim that he has been seriously ill-treated by the police of other such agents of the State unlawfully and in breach of article 3, that provision, read in conjunction with the State's general duty under article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in... (the) Convention", requires by implication that there should be an effective official investigation".[160]

The Court considered that such an investigation, as with article 2 of the Convention, should *"be capable of leading to the identification and punishment of those responsible"*.[161] Without such a duty to investigate the Court noted that *"the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance, would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity"*.[162]

This duty to investigate has also been a central issue in many cases relating to disappearances.[163] The jurisprudence on disappearances has increased considerably in recent years and the European and Inter-American human rights systems have developed cohesive practices for dealing with this issue.

Looking first at the Inter-American Court and Commission, these have considered a variety of cases concerning the disappeared and their relatives.[164] One of the leading cases on this issue is *Velasquez Rodriguez v. Honduras* [165] (outlined above). This case was brought before the Court by the father and sister of a disappeared man on his behalf (they did not claim a violation in respect of themselves). In its judgement the Court held inter alia that; *"the forced disappearance of human beings is a multiple and continuous violation of many rights under the Convention that the State Parties are obligated to respect and guarantee... prolonged isolation and deprivation are themselves cruel and inhuman treatment, harmful to the psychological and moral integrity of the person... such treatment therefore violates article 5 of the Convention..."*[166]

The Court further considered that States are obligated to investigate every situation involving a violation. Therefore the *"State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at it disposal to carry out a serious investigation of violations within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation"*.[167]

The Court was mindful that in certain circumstances it may be difficult to investigate acts that violate individual rights, consequently a State's duty was to take "reasonable steps". This means that an investigation must be; *"undertaken in a serious manner and not as mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government"*.[168] As noted above, this duty will also extend to acts of private parties that violate the Convention.

The reasoning in *Velasquez Rodriguez v. Honduras,* was followed by the Court in *Godinez Cruz v. Honduras.*[169] In this instance the Court went further and defined the period during which the duty to investigate remains, it held; *"the duty to investigate facts of this type continues as long as there is uncertainty about the fate of the person who has disappeared. Even in the hypothetical case that those individually responsible for crimes of this type can not be legally punished under certain circumstances, the State is obligated to use the means as its disposal to inform the relatives of the fate of the victims and, if they have been killed, the location of their remains"*.[170]

More recently, in the case of *Villagran Morales et al v. Guatemala*, the Court has considered a claim made not only on behalf of the disappeared persons but also on behalf of their relatives.[171] This case involved claims of a violation in respect of the ill-treatment of four young boys whilst in detention, their "disappearance" and the eventual discovery of bodies. The Court, having considered the treatment administered to the children by members of the Guatemalan National Police Force, went on to consider the effect upon the relatives of the circumstances of the deaths of the children and the lack of action taken by the State.

In its judgement, the Court upheld the Commission's earlier decision that the circumstances of the death together with the inaction of the State had "caused the victims' next of kin anxiety and also considerable fear". The Court considered that it had been established that *"the authorities did not take any measures to establish the identity of the victims... to locate the victims' immediate next of kin, notify them of their death, deliver the bodies to them and provide them with information on the development of the investigations"*.[172] Further, the bodies of the boys were found abandoned in an uninhabited spot, exposed to the elements and animals. Given these circumstances the Court concluded that the failure to investigate and punish those responsible added to the relatives' feeling of insecurity and increased their suffering, and the treatment of the bodies "constituted cruel and inhuman treatment".[173]

In the European system, there has been a similar development within the jurisprudence on the issue of the duty to investigate and to whom a duty is owed. One of the leading cases in this jurisdiction is *Kurt v. Turkey*[174]. This case involved an application made on behalf of a disappeared person and his mother.

In respect of the disappeared man, the Court held that *"the authorities have failed to offer any credible and substantiated explanation for the whereabouts and fate of the applicant's son... They have failed to discharge their responsibility to account for him.. accordingly the Court... finds that there has been a particularly grave violation..."*.[175]

Further, as regards the violation in respect of the mother, the Court noted that the mother had been *"left with the anguish of knowing that her son had been detained and there is a complete absence of official information as to his subsequent fate. This anguish has endured over a prolonged period of time"*.[176] Her suffering was there-

fore sufficiently severe so as to find the State in breach of article 3 in respect of the mother.

In subsequent cases, the Court has been careful to avoid creating a "floodgate" situation of claims from relatives. In *Cakici v. Turkey*, the Court clarified the judgement of *Kurt v. Turkey*. Thus, in order for claims by relatives to succeed, not only must their claim satisfy the minimum threshold of severity (discussed in Chapter One) but the Court held that "special factors" must be established which *"gives the suffering of the applicant a dimension and character distinct from the emotional distress which may be regarded as inevitably caused by serious human rights violations"*.[177] These "special factors" include the following:

- Proximity in time and space to the alleged violation
- Proximity in relationship (certain weight will attach to the parent-child bond)
- The nature of the relatives involvement with the attempts to obtain information
- The way in which the authorities respond to the inquiries[178]

In this instance, the applicant was the brother of the disappeared person. Unlike the mother in *Kurt v. Turkey*, the applicant was not present when the security forces took his brother and whilst he was involved in making various inquiries, he did not bear the brunt of the task. They also concluded that there had been no aggravating circumstances arising from the response of the authorities. Accordingly, there had been no violation in respect of the applicant. This restrictive interpretation of the category and circumstances within which relatives can claim has been followed in subsequent cases brought before the European Court. In *Akdeniz and others v. Turkey*, the Court held that *"the decision in the Kurt case does not however establish any general principle that a family member of a 'disappeared person' is thereby a victim of treatment contrary to article 3"*.[179]

Nevertheless, what is clear from these cases is that a State owes a duty to investigate to relatives. The finding of a violation therefore arising, not so much in the fact of the disappearance, but *"rather concerns the authorities reactions and attitudes to the situation when it is brought to their attention."*[180]

■ III. Prohibition of Torture versus Lawful Sanctions

Common article 3 of the Geneva Convention prohibits the use of corporal punishment. Accordingly, so far, the issue of lawful sanctions has not arisen within the International Criminal Tribunals. No such safeguard or prohibition exists however, in the regional human rights instruments. In fact, article 2 of the Inter-American Convention in the same breath as prohibiting acts of torture, adds a proviso, *"the concept of torture shall not include physical or mental pain and suffering that is **inherent in** or **solely the consequences of lawful measures,** provided that they do not include the performance of the acts or use of methods referred to in this article."*[181] (emphasis added)

Whilst the European Convention on Human Rights does not contain any similar language, from its jurisprudence it can be inferred that it is generally considered that a distinction will be drawn between treatment and punishment which is inherent in lawful sanctions and that which is not.[182]

This proviso can be seen as an attempt to draw a distinction between treatment and punishment which can be said to be a "reasonable" or an unavoidable part of a penal system, for example handcuffing in public, and acts which unreasonably violate a persons physical or mental integrity. Clearly, the tolerance of some lawful sanctions does not give "carte blanche" to States to simply create sanctions within their legislation, permitting acts of torture and other forms of ill-treatment. Lawful sanctions must not be inconsistent with the spirit of the norms prohibiting acts of torture (and other ill-treatment).[183] Yet, the existence of a proviso creates a grey area and is open to abuse by States, because the qualification of "lawful sanctions" can be subjective and encompass many elements of a State's society i.e. cultural, political and religious thinking. It therefore raises many ambiguities and questions, such as, can torture ever be justified as a means to an end? An example which is often used in this argument is whether the ill-treatment of an individual in order to save lives, would or could be a lawful sanction or justified?

In the *Greek Case* (discussed earlier), the European Commission held that torture comprises inhuman treatment. In defining inhuman treatment, it held that this covered *"at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation is **unjustifiable**"*.[184] (emphasis added)

Thus, despite the non-derogable nature of torture as stated in article 15 of the ECHR, the Commission appears to have left the door open for it to be argued that there are circumstances within which inhuman treatment and therefore torture could be justified. This controversial point was revisited in *Ireland v. UK.*[185] The European Commission considered whether the prohibition was absolute or whether *"there may be special circumstances... in which treatment contrary to article 3 may be justified or excused"*.[186] With reference to the non-derogable nature of the article 3, the Commission held that the prohibition was *"an absolute one and that there can never be under the Convention or under international law, a justification for acts in breach of the provision prohibiting torture or other ill-treatment"*.[187]

The reasoning in *Ireland v. UK* seems clear and unambiguous; if an act satisfies the thresholds set for determining whether an act is torture (or other forms of ill-treatment), then there can be no justification for it. Furthermore, the conduct of the victim can not be raised as a defence based upon justifiability. For example, in the case of *Tomasi v. France,* the Government advanced a justification for Mr. Tomasi's treatment because he was held on suspicion of being involved in a terrorist attack. The Court rejected this defence stating; *"The requirements of the investigation and the undeniable difficulties inherent in the fight against crime, particularly with regard to terrorism, cannot result in limits being placed on the protection to be afforded in respect of the physical integrity of individuals".*[188]

This judgement follows the reasoning in *Chahal v. UK* (discussed in Chapter Two), where the Court held that the conduct of the applicant or "victim" is irrelevant to the provision of protection afforded by the Convention. The Court reiterated that *"article 3... makes no provision for exceptions and no derogation from it is permissible under article 15... even in the event of a public emergency threatening the life of the nation"*.[189] (emphasis added)

However, despite the absolute prohibition on torture, the European Court and Commission have had to consider whether acts which are claimed to be "lawful sanctions", do in fact violate article 3 of the ECHR. This issue has arisen primarily in respect of questions of the imposition of corporal punishment and the death penalty.

The European Court has developed substantial jurisprudence on the issue of corporal punishment in general.[190] One of the leading cases which established a guideline is *Tyrer v. UK.* In the consideration of

this case, the Court considered that, whilst the form of punishment did not meet the threshold of severity for it to amount to torture; *"the very nature of judicial corporal punishment is that it involves one human being inflicting physical violence on another human being. Furthermore it is institutionalised violence... (his) punishment constituted an assault on precisely that which it is one of the main purposes of article 3 to protect, namely a person's dignity and physical integrity".*[191]

However, this has not imposed an absolute prohibition on all forms of corporal punishment. Some forms have been considered to have been insufficiently severe so as to come within the scope of article 3.[192]

Yet, corporal punishment can encompass many forms of punishment and treatment and recently, this issue was re-examined in the case of *Jabari v. Turkey*.[193] In this instance, Mrs. Jabari alleged that if she were to be expelled from Turkey to Iran, she would face the real risk of torture due to the nature of the penal sanctions imposed upon women for adultery. In support of her application Mrs Jabari submitted that in Iran, women still faced the possibility of stoning as a form of punishment for adultery. As noted in Chapter Two, a State has a duty to protect individuals from acts contrary to article 3 when returning that individual to another state, even when the third state imposes a sanction which is considered a "lawful" under its domestic law. In this instance, in light of the nature of the punishment which Mrs Jabari faced on her return to Iran, the Court held that she faced a real risk of treatment contrary to article 3, if she were to be returned.[194]

The dichotomy between, on the one hand, establishing a prohibition of torture and, on the other, allowing lawful sanctions, has also arisen in relation to the imposition of the death penalty. This is a controversial area, and whilst the European and Inter-American human rights mechanisms restrict the imposition of the death penalty, there is, as yet, no absolute prohibition.

Yet, whilst there is no absolute prohibition, certain factors can bring the death penalty within the scope of a violation of the prohibition on torture (and other acts of ill-treatment). One of the leading cases on the issue of the death penalty is the case of *Soering v. UK*. This case concerned Soering, who was a West German national accused of committing a multiple murder in the United States. He was found in the United Kingdom and a request was made by the United

States government for his extradition to stand trial on charges of murder. If sentenced, Soering faced the prospect of the death penalty. An application was made on Soering's behalf to stay the extradition on the ground that, by sending him to face the possibility of the death sentence, the United Kingdom would be in violation of article 3 of the Convention. It was argued that the finding of a violation would arise not because of the actual imposition of the death penalty, but rather the conditions within which he would be held whilst waiting on death row.

The Court noted that *"for any prisoner condemned to death, some elements of delay between imposition and execution of the sentence and the experience of severe stress in conditions necessary for strict incarceration are inevitable"*.[195] Yet, they held that certain factors could bring this sanction within the scope of article 3[196]:

"having regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by article 3."[197]

In other words, whilst the death penalty was a lawful sanction, in certain circumstances the *"manner in which (the death penalty) is imposed or executed, the personal circumstances of the condemned person and a disproportionality to the gravity of the crime committed, as well as conditions of detention awaiting execution"* could be a violation of article 3.[198] This reasoning has been followed in subsequent cases both within the European system and the Inter-American system.[199]

The Inter-American Court and Commission of Human Rights have developed a standard practice to be applied when considering death penalty cases. This standard of review was recently restated by the Commission, in the cases of *McKenzie, Downer, Tracey, Baker, Fletcher and Rose v. Jamaica.*[200] The Commission stated that when considering death penalty cases a *"heightened level of scrutiny must be applied"* as the Inter-American Court has concluded that the American Convention has *"adopted an approach in respect of the death penalty, that is incremental in character, whereby... the Convention imposes restrictions designed to delimit strictly its application and scope,*

in order to reduce the application of the penalty and bring about its gradual disappearance".[201]

The cases of *McKenzie, Downer, Tracey, Baker, Fletcher and Rose v. Jamaica* concerned the mandatory imposition of the death penalty for a certain category of offences. The petitioners alleged that the imposition of the mandatory sentencing of the death penalty, the delay in the criminal proceedings and the conditions within which they were being held, violated, inter alia, Article 5 of the American Convention.

The Commission in their consideration of the cases held that *"it is (also) of the view that imposing the death penalty through mandatory sentencing is not consistent with the terms of Article 5 of the Convention".*[202] The Commission held that the mandatory imposition has both *"the intent and the effect of depriving a person of their right to life based solely upon the category of crime... without regard for the offender's personal circumstances or the circumstances of the particular offence."* Accordingly, the Commission could not reconcile the *"essential respect for the dignity of the individual that underlies Article 5(1) and 5(2) of the Convention, with a system that deprives an individual of the most fundamental of rights".*[203]

In this instance, the Commission, upon finding that the imposition of a mandatory death penalty was "unlawful", did not then consider it necessary to determine whether the delay in the criminal proceedings and the conditions of detention constituted a violation of, inter alia, article 5. However, the Commission reiterated the standard approach to be followed in these respects. First, as regards the delay in the criminal proceedings, the Commission noted that the Inter-American Court *"shared the view of the European Court of Human Rights that three points must be taken into account: (a) the complexity of the case; (b) the procedural activity of the interested party; and (c) the conduct of the judicial authorities".*[204] If, on consideration of these points an unreasonable delay has been found to have occurred, then this will be in violation of article 5.

Second, as for the conditions of detention, the petitioners claimed that they suffered conditions of overcrowding, poor sanitation, poor ventilation and light, as well as long periods spent locked in the cells (23 hours or more a day), which constituted a violation of article 5. The Commission, in its decision, made reference to the *Suarez Rosero Case*[205], where the conditions in which Mr Rosero was held

(which were similar to the petitioners in this instance) were considered to be in violation of article 5. [206]

In light of the above, it can be inferred that both jurisdictions, whilst currently unable to abolish the death penalty, seek to restrict the way it is imposed, with the eventual aim of abolishing the sanction altogether.

The examples outlined above regarding corporal and capital punishment, are illustrative of the problems encountered by the existence of the proviso for "lawful sanctions". It is clear that lawful sanctions can not be evoked by States in order to escape their various duties owed in respect of the prohibition on torture (as outlined in Chapter Two). In other words, the sanction must fall below the thresholds established in the various jurisdictions relating to the classification of acts amounting to torture, inhuman or degrading treatment or punishment.[207]

■ Conclusion

It can be seen from the above that each jurisdiction influences and is influenced by the others. Accordingly, some common approaches to the definition of torture can be identified. In all of the jurisdictions considered in this paper, for an act to amount to torture, the act must be; intentional, sufficiently severe, and committed for a purpose.[208]

Yet, beyond these common elements, there is no consensus as to where to "draw the line" between acts of torture and other forms of ill-treatment. The European system, whilst having the most clearly defined threshold, nevertheless appears to be somewhat on its own in drawing a distinction largely based upon the severity of the act. Such a distinction is naturally subjective and it is uncomfortable to have to consider whether an individual has suffered with "sufficient" severity for the act to be classified as torture. A distinction based upon a threshold of purpose would appear to be a less subjective distinction, however it is unclear whether the Inter-American system and the International Criminal Tribunals consider this to be the distinguishing feature of torture.

There is more consensus however, as regards the nature of a State's duty. This encompasses a two-fold obligation to abstain and to protect. Each jurisdiction has responded to new forms and manifestations of abuse and each has been sufficiently flexible so as to adapt to changing social conditions, thereby arguably extending the scope of a State's duty to encompass acts committed in the private sphere and potential violations in other States. Furthermore, as well as extending the sphere of a State's responsibility, the nature of a State's duties has also expanded to include a duty to investigate. Correspondingly, the categories of individuals to whom a State owes a duty has also expanded so as to include in certain circumstances relatives of the "primary victim".

Lastly, as regards the existence of a proviso for treatment which is inherent in "lawful sanctions", the regional jurisdictions, mindful of the possibility of abuse, have been careful to apply the proviso restrictively. Accordingly, in order for a sanction to be "lawful" it must conform with the international and regional standards which protect individuals from torture or other forms of ill-treatment.

BACKGROUND PAPER 3

How does the Current Definition of Torture apply to Children?

Ms. Aida Nejad[209]

Introduction

Children should be granted greater or, at least, equal protection against torture and ill-treatment as their adult counterparts. Within this paper, the problem of applying the present definition of torture to children will be highlighted before exploring the regional and international provisions and their interpretations within three themes of concern, namely; threshold of severity, lawful sanctions and the public/private divide under international law. Throughout this paper, the different contexts in which children could benefit from a wider interpretation of torture with the objective of increasing their protection will be emphasised. By using examples of various punishments and treatments commonly inflicted on children, this paper seeks to examine how the problems with the definition of torture in relation to child victims of torture have been tackled.

I. Present Context in International Human Rights Law

1. Problems relating to Definition

The act of Torture, to date, is textually defined in only a few instruments such as; the Declaration on the Protection of all Persons from Being subjected to Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment[210], in the Inter-American Convention to Prevent and Punish Torture[211] and in the UN Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment[212] (UNCAT). However, it is generally accepted that the definition of torture found in article 1 of the UNCAT, sets out the minimal rules for States.

This definition stipulates that 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 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."[213]

This definition, therefore, comprises the following four elements;

- Severe pain or suffering
- An act or omission committed by an individual acting in an official capacity or an individual acting with the acquiescence of the State
- Intent on the part of the perpetrator to cause the act of torture
- Purpose for the infliction of torture

For the following reasons, these requirements may pose difficulties in relation to children:

1.1. Degree of Pain or Suffering

It is generally acknowledged that for an act to amount to torture, the treatment must attain a relatively high threshold of severity. As an example of this interpretation, the European Court of Human Rights has stated that in order for an act to amount to torture, it must cause "serious and cruel suffering" to the victim[214]. Yet, as the Special Rapporteur on Torture, Sir Nigel Rodley, has noted however, *"children are more vulnerable to the effects of torture; they are in the critical stages of physical and psychological development where they may suffer graver consequences than similarly ill-treated adults"*[215].

The child's physical and mental vulnerability needs to be taken into consideration when interpreting the definition of torture. A 10-year-old, as opposed to an adult, for example, will experience solitary confinement differently and perhaps more traumatically. Torture and

ill-treatment inflicted on a child can also leave more long-lasting effects than on an adult.

The effects can, furthermore, differ according to the different age of the victim. A very young child, for example, may find certain experiences such as being taken hostage with his or her mother for instance, less frightening than a child old enough to understand the motives behind the perpetrators actions.[216] However, whilst international law may consider the attributes of a certain group, (i.e. women), it does not usually consider the attributes of individual members of that group.

Moreover, children also differ from adults by nature of their emotional and physical dependency on their parents. Consequently, separation could render feelings of ill-treatment or even torture.

In taking the physical and mental attributes of the child into account, a more "child-friendly" approach may be adopted towards interpreting the definition of torture. In questioning whether international law requires children's status as children to be taken into account, the answer is clearly in the affirmative[217]. Article 24(1) of the International Covenant on Civil and Political Rights, for instance, reflects and supports the notion that children, through their vulnerability, may require additional protection under international law:

"Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State."

Although the European Convention on Human Rights does not include a similar article to the one mentioned above, it has supported this particular approach by stating that factors such as; the nature and context of the treatment or punishment, the manner and method of execution, its duration, its physical or mental effects and, **in some instances, the sex, age and the health of the victim**, would need to be taken into consideration when interpreting article 3 of the Convention[218].

1.2 Private Sphere

The most dangerous place for children can be their home, where they should be safest. They are more likely to be beaten, sexually

abused, abducted or subjected to harmful traditional practices or mental violence by family members than anyone else[219].

The private sphere, however, is traditionally perceived as unregulated by international human rights law. This traditional view could thus undermine the protection needs of children, as family members enjoy complete impunity in respect of violations of their children's Human Rights, such as the right not to be tortured and ill-treated.

1.2.1 Intent and Purpose

In connection with the "public sphere" requirement, both the "intent" and the "purpose" requirements would be difficult to satisfy in a case of family violence against a child. This is because both requirements relate to a public official acting in his official capacity. It would therefore not be applicable in the situation of a mother who has beaten her child.

The purpose requirement furthermore, relates to that of a public official to inflict torture in order to either; *"[...] obtain information or a confession, punish for an act that has been committed or has been suspected to have been committed, or intimidating or coercing, or for any other reason based on discrimination of any kind"*[220].

According to traditional approaches to human rights law, a child tortured by a family member would not be able to seek redress under the present definition of torture on the combined grounds that the act was committed within the private sphere and that it thereby lacked the required elements of intent and purpose on the part of a public official.

2. Benefits of a wider Interpretation in relation to Implementation

Children could benefit both on the National and International level, from a wider interpretation of the definition of torture.

2.1 National Implementation

Under article 4 of the UNCAT, States parties are obliged to; "*... ensure that all acts of torture are offences under its criminal law.*" In

doing so, States parties are expected, as a minimum, to implement the definition of torture contained in article 1 of UNCAT. Although the Convention does not preclude a wider definition than that contained in article 1[221], it is generally accepted that the UNCAT definition is the minimal standard.

If the definition of torture were interpreted in a manner in which children are considered a group requiring the benefits of a wider interpretation, national judicial bodies may be forced to follow that particular development. They may do this in the form of prohibiting certain punishments or treatments of children which are socially accepted or even legally proscribed, or they may simply apply different standards of interpretation of anti-torture legislation in order to distinguish between adult and child victims. Thereby, they may take a different approach regarding child torture cases, in contrast to the traditional objective approach taken in relation to adults. In dealing with child victims, national judicial bodies will find that it is foremost the protection needs of children that will have to be taken into account when interpreting the norms regarding torture and ill-treatment.

2.2 International Implementation

As the UN Convention on the Rights of the Child (UNCRC) does not to date provide for an individual complaint mechanism, children seeking redress on an international level may have to use the enforcement mechanism established under UNCAT.[222] This, however, may be problematic with regard to children for a number of reasons. In order for a complaint to be brought on behalf of a child under article 22 of UNCAT, the acts committed against the child must either fall within the definition of torture (article 1) or must amount to cruel, inhuman or degrading treatment (article 16). However, the admissibility of such a complaint brought on behalf of a child will depend on the approach taken by the Committee against Torture in interpreting these articles. If the Committee chooses to interpret articles 1 and 16 objectively, thereby not taking children's vulnerability and susceptibility into consideration, child torture victims may find that the severity threshold can not be reached. Although to date, the Committee against Torture has not received any individual complaints concerning children, the option of using the UNCAT as an enforcement tool for the UNCRC in the future should not be ruled out.

Furthermore, under UNCAT the state is obliged to establish jurisdiction over acts of torture and to either prosecute or extradite the individual.[223] This obligation however does not extend to acts of ill-treatment. Thus, children seeking redress under these principles, will again need to satisfy the prescribed severity requirements contained in the definition of torture under UNCAT.[224]

These problems relating to the present definition of torture when applied to children, will be further discussed within the following analysis of acts that are considered forms of torture or ill-treatment when inflicted upon children.

■ Summary

The present definition of torture, as enshrined in article 1 UNCAT, is inappropriate when applied to children. Despite numerous provisions under international law, which suggest that children require extra protection in their status as minors, the UNCAT definition does not take this into account. In particular, the UNCAT definition does not recognise the child's vulnerability to torture and ill-treatment, nor does it protect them in the private sphere, where their protection is most needed. Consequently, their protection can be undermined both on the national as well as the international level.

■ II. Threshold of Severity

In the following chapter the required threshold of severity for torture will be examined in relation to various acts commonly committed against children.

■ 1. Judicial and Disciplinary Corporal Punishment as a form of Torture

Judicial and disciplinary corporal punishment administered by public officials to children, have been interpreted to constitute forms of torture or other cruel or inhuman and degrading treatment and punishment. While corporal punishment of adults is mainly

restricted to countries that apply Shari'a law, corporal punishment of children is more widespread. In some countries, for example, in Tanzania, Nigeria, and Singapore, children that are convicted of certain offences may still be sentenced to punishments such as flogging and caning.

1.1 UN Treaties and Treaty Bodies on Judicial and Disciplinary Corporal Punishment of Children

1.1.1 The International Covenant on Civil and Political Rights (ICCPR) and the Human Rights Committee (HRC)

Article 7 of the ICCPR prohibits Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, yet does not define these terms.
An explanation of this article is, however, provided in the Human Rights Committee's General Comment No. 20, which states that article 7 of the ICCPR prohibits *inter alia*;

"[...] corporal punishment including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure."[225]

The Committee continued by expressly stating that the article protects in particular **"children and pupils"**.[226]

Although, it is of great importance that the Committee included the prohibition of excessive chastisement and corporal punishment as a form of torture or ill-treatment, it remains unclear as to what is meant by the term "excessive chastisement". Does chastisement not in general involve some form of corporal punishment? If so, then even moderate chastisement would have to be included in the prohibition.

Furthermore, the Committee did not specify whether excessive chastisement and corporal punishment amount to torture or whether they amount to ill-treatment, nor did it provide guidelines for assessing these acts. The fact that "**excessive**" chastisement was not defined leaves this General Comment somewhat ambiguous.

According to the Human Rights Committee, however, it was unnecessary to draw up a list of prohibited acts or draw sharp distinctions between the different kinds of punishment and treatment, as the distinctions depend on the **nature**, **purpose and severity of**

the treatment applied[227]. Regrettably, the Committee did not include the "attributes" of the victim in its list, such as age and sex.

1.1.2 The Convention against Torture (UNCAT)

The UNCAT does not expressly include the act of corporal punishment in its article 1 definition. Instead it sets out clear requirements for an act to amount to torture, and thereby may encompass corporal punishment. The requirements, previously outlined in section I of this paper, include; intentional infliction of a high severity of pain, by or with the acquiescence of a public official acting within his official or private capacity, for a purpose.

The requirements of intent and purpose will be fairly straightforward to satisfy in a case of judicial and disciplinary corporal punishment of a child. If it is inflicted by a state actor and given the required threshold of severity, such corporal punishment could amount to torture. In the case where the judicial or disciplinary corporal punishment has not attained the required threshold of severity, it may still be prohibited under article 16 UNCAT, which prohibits; *"[...] other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined under art.1[...]"*

1.1.3 The Convention and Committee on the Rights of the Child (UNCRC)

Although the UNCRC does not have an article expressly addressing the issue of judicial and disciplinary corporal punishment, the following two articles may adequately imply such a prohibition;

Article 37 (a) prohibits the torture of children specifically, adopting the formula under the ICCPR; "*...torture, or other cruel, inhuman or degrading treatment or punishment...*". Like the ICCPR, however, it does not give a definition of the prohibited conduct.

Article 40 (1) stipulates that States parties have the obligation to recognise;

"[...] *the rights of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of pro-*

moting the child's reintegration and the child's assuming a constructive role in society."

Judicial and disciplinary corporal punishment could both lead to violations of articles 37 (a) and 40 (1) UNCRC. In interpreting article 37(a), however, those States which are also parties to the UNCAT are usually required to use the definition contained therein[228], yet those not parties to UNCAT could, hypothetically, use a more restrictive definition.[229]

Furthermore, the definition enshrined in article 1 UNCAT, as emphasised earlier, requires a high threshold of pain and suffering, and may therefore be unsuitable for a child who has a lower threshold than an adult.

With the inclusion of article 40(1), however, it would seem that the only requirement needed for a violation is that the treatment was inconsistent with the "**child's sense of dignity**". This requirement would, arguably be much easier to satisfy in a case of the corporal punishment of a child. The Committee on the Rights of the Child has also confirmed this view on its Day of General Discussion in 2000, on the topic of "State Violence against Children", when the Committee recommended that;

*"States parties review all relevant legislation to ensure that all forms of violence against children, however light, are prohibited, including the use of torture, or cruel, inhuman or degrading treatment (such as flogging, **corporal punishment** or other violent measures), for punishment or disciplining within the child justice system, or in any other context."*[230]

Yet, while clearly in contravention to the UNCRC, it still remains unclear as to whether judicial or disciplinary corporal punishment amounts to torture or whether it amounts to the lesser forms of ill-treatment such as cruel, inhuman or degrading treatment or to a mere violation of the child's sense of dignity (article 40(1)).

1.1.4 Other UN Juvenile Provisions

1.1.4.1 The UN Rules for the Protection of Juveniles Deprived of their Liberty[231]

Amongst a list of prohibited disciplinary measures for children rule 67 states that:

"All disciplinary measures constituting cruel, inhuman or degrading treatment shall be strictly prohibited, including ***corporal punishment****..."*.

By omitting the term "torture", this provision seems to interpret corporal punishment as a lesser form of ill-treatment, namely; cruel, inhuman and degrading treatment and punishment.

1.1.4.2 Standard Minimum Rules for the administration of Juvenile Justice (Beijing Rules)[232]

Article 17.3 includes as a guiding principle in adjudication and disposition that *"Juveniles shall not be subject to corporal punishment"*.

While not specifying whether corporal punishment amounts to torture or ill-treatment, the commentary to article 17.3 states that this provision is in line with the ICCPR, the UNCAT and the (draft)UNCRC.

1.1.4.3 Guidelines for the prevention of Juvenile Delinquency[233] (Riyadh Rules)

Guideline 54 states;

"No child or young person should be subjected to ***harsh or degrading correction or punishment*** *at home, in schools or in any other institutions"*.

Arguably, corporal punishment would fall within the terms *"harsh or degrading correction or punishment"*.

1.2 The UN Commission on Human Rights

Corporal punishment was long considered by the first Special Rapporteur on Torture, to fall within a "grey zone"; a phenomena neither to entirely fall within the ambit of torture nor within the ambit of "other forms of cruel, inhuman and degrading treatment or punishment"[234]. Although the present Special Rapporteur on Torture has expressly stated that corporal punishment is in contravention to art 1 of UNCAT(see section 3.1), in a recent resolution, however, the Commission, reminded governments that;

"[...] *corporal punishment, including of children, can amount to cruel, inhuman or degrading punishment or even to torture"*[235].

Prior to this resolution, the Commission had also invited States parties to incorporate:

"[...] *information concerning children and juveniles in the reports they submit to the Committee against Torture*".[236]

It would seem that the Commission is taking an increased interest in children's rights. Perhaps by reminding governments that corporal punishment *of children could also amount to an article 7 ICCPR violation*, the Commission has made an attempt to place children on an equal footing with adults in relation to protection against torture[237].

1.3 Regional Provisions and Jurisprudence on Judicial and Disciplinary Corporal Punishment of Children

1.3.1 The African Charter on the Rights and Welfare of the Child (ACRWC)

Article 17(1) of the Charter states that;

"*Every child accused or found guilty of having infringed the penal law shall have the right to special treatment in a manner consistent with the child's sense of dignity and worth and which reinforces the child's respect for human rights and fundamental freedoms of others*".

Article 17 (2) (a) makes specific reference to the prohibition of torture by conferring an obligation on State parties to *"[...]ensure that no child who is detained or imprisoned or otherwise deprived of his/her liberty is subjected to torture, inhuman or degrading treatment or punishment."* What would constitute torture under article 17 is, however, not defined and since the Charter has only recently entered into force, the article lacks interpretation.

1.3.2 The European Convention and Court of Human Rights

The European Court of Human Rights has, perhaps, the most outspoken jurisprudence on this issue. Its leading case on judicial corporal punishment inflicted upon children is *Tyrer v. United Kingdom*[238];

This case involved a 15 year old boy who was birched at a police station. He was forced to remove his trousers and underwear and bend

over, while two policemen held him and another birched him. The boy was in pain for 10 days after the incident and claimed an article 3 violation. The court made a clear distinction between the prohibited conducts under article 3. They decided that the degree of severity of the birching was not sufficiently strong for the act to amount to torture. However, the court did find that his punishment: "[...]*whereby he was treated as an object in the power of the authorities- constituted an assault on precisely that which it is one of the main purposes of the Convention to protect, namely a person's dignity and physical integrity*"[239].

The European Court has been notorious for regarding the different acts under article 3 separately.[240] Although the Court, in this case, held that there had been a violation of article 3, the act was not considered to amount to torture. It was merely held to constitute **degrading treatment**. In arriving at this conclusion the Court stated that for the act to amount to degrading punishment, there must be an element of "humiliation and debasement" such as to attain a particular level "other than that involved in judicial punishment generally". It was however, held to be sufficient if *"the victim is humiliated in his own eyes, even if not in the eyes of others"*.[241]

Notably, the court further stated that **all institutional corporal punishment of children was degrading**.

Another important point to note about this decision, was that in arriving at its judgement, the European Court made reference to *"commonly accepted standards in the penal policy of the member states of the Council of Europe in the field"* as an important factor to take into consideration when interpreting article 3.[242] This perhaps demonstrates how the Court in interpreting the Convention as a "living instrument" may widen its interpretation of article 3 to encompass other treatment and punishments previously not falling within the prohibition.

▬ Summary

Judicial and Disciplinary corporal punishment of children is increasingly considered a form of torture or cruel, inhuman and degrading treatment or punishment under international law. However, in most cases it is considered ill-treatment rather than torture. Although, given the required severity of the punishment, corporal punishment can amount to torture; especially where the punishment is considered "excessive". Both the UNCRC and the

ECHR seem to take the approach that corporal punishment amounts to ill-treatment, as it violates the child's sense of dignity.

2. Life Imprisonment as a form of Torture

Article 37(a) CRC states that a child may not be imprisoned for life without the possibility of release. While the Convention does not expressly claim that life imprisonment of children is a form of torture, this may be implicit by the fact that it is stated immediately after the sentence prohibiting torture or other cruel, inhuman or degrading treatment.

3. Conditions of Detention as Forms of Torture

Rule 67 of the UN Rules for the Protection of Juveniles deprived of their Liberty sets up a list of prohibited disciplinary measures for children:

"All disciplinary measures constituting cruel, inhuman or degrading treatment shall be strictly prohibited, including corporal punishment, ***placement in a dark cell, closed or solitary confinement or any other punishment*** *that may compromise the physical or mental health of the juvenile concerned. The reduction of diet and the restriction or denial of contact with family members should be prohibited for any purpose..."*

This rule interprets solitary confinement and the denial of contact with family members as cruel, inhuman or degrading treatment. While it is regrettable that these rules make no mention of torture, the recognition of the special status of children should be welcomed.

In contrast, it is surprising that the UNCRC makes no mention of solitary confinement constituting ill-treatment, and leaves open the possibility of denying children in custody the right to receive visits from family members[243]. However, article 40 (1) of the Convention on the Rights of the Child stipulates that children must be;

"[...] treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society."

It is important to note that this provision expressly makes reference to the child's age as a factor to be taken into account in the treatment of the juvenile. This provision may also allow for a wide interpretation and perhaps encompass other forms of punishment of children, previously not considered to amount to ill-treatment.

Summary

As opposed to adults, some treatment or punishment such as life imprisonment without possibility of release and solitary confinement, are considered to amount to ill-treatment or even torture in respect to children.

4. Rape as a form of Torture

4.1 European Court of Human Rights

In the case of *Aydin v. Turkey*[244], the European Court held that the rape of a minor constituted torture. The applicant in this case was 17 years old when detained in a Turkish prison, where she was kept blindfolded and isolated from her father and sister-in-law throughout the period of detention. During that time she was debased by being raped and had suffered long-term psychological damage as a result. Although she had also suffered other ill-treatment such as beating, the European Court of Human Rights held that the act of rape separated from the other acts of physical and mental violence amounted to torture.

Although the Court made reference to her age, it did not explicitly state that this was a deciding factor.[245] This is the first and only case of the European Court of Human Rights where the act of rape alone was held to amount to torture.

4.2 The Inter-American Court of Human Rights

In the case of *Raquel Mejia v. Peru*[246], the Inter-American Commission of Human Rights confirmed that;

"*Rape produces physical and mental suffering for the victim. In addition*

to the violence suffered at the time that it is perpetrated, victims usually sustain injuries and in some instances become pregnant..."

This case also involved a minor (17 years old) who was abused and harassed by a public official, for her alleged participation in an armed dissident group. The Commission held that the Peruvian government had violated article 5 of the American Convention of Human Rights.

Citing *Aydin v. Turkey*, the Inter-American Commission came to a similar conclusion in the case of *Ana, Beatriz and Celia Gonzalez Perez v. Mexico*.[247] In this case, three young indigenous women, one of them being a minor (16 years old) were suspected of being members of the Zapatista National Liberation Army and were detained tortured and raped by members of the Mexican armed forces as part of an illegal interrogation. The particularity of the Gonzalez Perez case is that the Commission made direct reference to the fact that one of the women raped was a minor. The Commission stated;

"*The facts established here are particularly serious, since one of the women raped was a minor, and as such was entitled to special protection under the American Convention*".[248]

This is perhaps an appropriate example of where article 19 of the American Convention, which guarantees that every child has "*the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state*" can assist in widening the traditional interpretation of the definition of torture for the protection of children.

■ 5. Intimidation as a form of Torture

Although the UNCAT definition of torture also includes mental torture, the inclusion of intimidation as a form of mental torture is a fairly new development.

The European Court of Human Rights has first made mention of this type of torture in the case of *Campbell and Cosans v. UK*[249]. Here, the applicants were the families of children enrolled in State schools where physical punishment was administered to students. Although the applicants' children themselves were not hit, the

European Court stated that threats of torture may in themselves constitute torture, provided that;

"[...] it is sufficiently real and immediate, a threat of conduct prohibited by article 3 may itself be in conflict with the provision. Thus to threaten an individual with torture may in the least constitute inhuman treatment".[250]

In this case, however, there was not sufficient evidence that the threats would have amounted to such prohibited conduct.

In a recent resolution, the Commission on Human Rights condemned;

"[...] all forms of torture, including through intimidation, as described in article 1 of the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment".[251]

In interpreting the term "mental torture" as enshrined in article 1 UNCAT, the Special Rapporteur on Torture takes the following view:

"[...] *serious and credible threats, including death threats, to the physical integrity of the victim or a third person can amount to cruel, inhuman or degrading treatment or even to torture, especially when the victim remains in the hands of law enforcement officials."*[252]

The inclusion of intimidation as a form of torture could be of importance to children, who are by nature mentally more susceptible to such treatment than adults. Children could therefore benefit from these new developments.

6. Enforced or Involuntary Disappearances as a form of Torture

The international crime of enforced or involuntary disappearance has increasingly been considered to constitute a form of torture or ill-treatment.

6.1 On the part of the Victim

The UN Declaration on the Protection of all Persons from Enforced

Disappearance[253] states in its article 1 (2) that enforced disappearance;

"[...] constitutes a violation of the rules of international law and guaranteeing, inter alia, the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subject to torture and other cruel, inhuman or degrading treatment or punishment."

The Human Rights Committee has also supported this approach in the case of *Celis Laureano v. Peru,* where it found that the abduction and disappearance of a 16 year old, and the prevention of contact with her family and the outside world constituted cruel and inhuman treatment in violation of article 7 ICCPR[254]. It was considered irrelevant that she herself was not tortured.

6.2 On the part of the Family of the Victim

The Human Rights Committee, as well as the Inter-American Court and the European Court of Human Rights, have all held that an enforced disappearance can constitute torture on the part of the family of the victim. This is of great significance in respect to children, who by the nature of their dependency can suffer intensely through the disappearance of a parent.

In the case of *Quinteros v. Uruguay*[255], the Human Rights Committee held that Uruguay was in breach of article 7, not only in respect to the disappearance of Elena Quinteros, but also in respect to her mother. The Human Rights Committee held that the mother (also the applicant in this case) had suffered a violation of article 7. This was because the "[...] *anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning the fate and whereabouts. The mother has the right to know what has happened to her daughter*"[256].

The Inter-American Commission has stated with respect to the children of the Argentine disappeared that:

"The uncertainty and lack of all contact with the victims have upset the families greatly and especially the children who, in some cases, witnessed the kidnapping of their parents and mistreatment to which they were subject during the raid. Many of these children will never see their parents

again and will thus inherit a number of psychological problems from the memory of the circumstances of the disappearance [...]".[257]

Similarly, in the case of *Kurt v. Turkey*[258], the European Court of Human Rights stated that enforced disappearance can under certain circumstances, constitute a violation of the rights of family members not to be subjected to torture or cruel, inhuman and degrading treatment. It found Turkey to be in violation of article 3, after having required no further proof other than fact that the woman had suffered psychological effects through the disappearance of her son.

The Special Rapporteur on Torture, Sir Nigel Rodley, has also confirmed his support for equating enforced disappearances with torture, both on the part of the victim as well as on the part of the families of the victims;

"The Special Rapporteur believes that to make someone disappear is a form of prohibited torture or ill-treatment, clearly as regards the relatives of the disappeared person and arguably in respect of the disappeared person him/herself."[259]

Children's need for increased protection in this area is, furthermore, reflected in the Declaration on the Protection of all Persons from Enforced Disappearance.[260]
Article 20 of that declaration specifically protects those children whose parents are subjected to enforced disappearance by searching for and identifying such children; restituting them to their families, prosecuting and punishing those responsible for the disappearance and by setting up a recognised system of adoption.[261]

Accordingly, following from the recent jurisprudence mentioned above, children may bring an action in respect to the enforced disappearance of their parents.

Summary

The widening of the interpretation of the definition of torture in order to recognise acts of rape, intimidation and enforced disappearances as forms of torture may perhaps increase the protection of children. Children, in particular, may benefit from these developments as third parties to enforced disappearances. According to recent jurisprudence, they may be able to bring separate actions for

torture, in respect to disappeared family members. The new developments regarding rape and intimidation may also increase children's protection.

III. Lawful Sanctions

1. UNCAT

In particular, when dealing with punishments sanctioned by law, such as corporal punishment, ambiguities may arise in relation to the second sentence in Article 1(1) UNCAT, which stipulates that an act will not amount to torture, if it merely consists of;
"*pain or suffering arising only from inherent in or incidental to lawful sanctions*".

Thus, could States permitting corporal punishment of juveniles within their legislation not argue that this is perfectly compatible with article 1 UNCAT?

The Special Rapporteur against torture, Nigel Rodley, however, does not;

"*[...] accept the notion that the administration of such punishments as stoning to death, flogging and amputation – acts which would be unquestionably unlawful in say, the context of custodial interrogation – can be deemed lawful simply because the punishment has been authorised in a procedurally legitimate manner i.e. through the sanction of legislation, administrative rules or judicial order.*"[262]

The Special Rapporteur went on confirming that;

"*[...] To accept this view would be to accept that any physical punishment, no matter how torturous and cruel, can be considered lawful, as long as the punishment had been duly promulgated under the domestic law of a State. Punishment is after all one of the prohibited purposes of torture.*"[263]
He also excluded the possibility of considering as "lawful sanctions" treatment or punishment which is "cruel, inhuman and degrading", as these are "*...by definition unlawful*".[264]

Thus, according to the Special Rapporteur, corporal punishment permitted by law is in contravention to the UNCAT. Needless to say, the prohibition applies *mutatis mutandis* to children.

2. The European Convention on Human Rights

The European Convention does not have a provision that excludes lawful sanctions from constituting torture. The Court has however dealt with this issue in relation to the law on "reasonable chastisement" under UK law, which provides a defence to a charge of assault against a child.

In the case of *A v. UK*[265], the Court considered whether the defence of reasonable chastisement did not in actual fact compromise the protection against treatment or punishment contrary to article 3. After the Court had found that a minimum level of severity had been attained in order for the treatment to fall within the scope of article 3, it held that the law on reasonable chastisement, which enabled the stepfather of the child to be acquitted for the ill-treatment inflicted upon the applicant, had failed to provide adequate protection for the child. The court held that *"[...] this law currently fails to provide adequate protection to children and should be amended."*[266]

IV. Torture in the private sphere

1. Torture within the Family

From a child's perspective, being forced to live under a regime of fear, threat and experience of physical beatings, or being subjected to other forms of deliberate humiliation, or placement in solitary confinement amount to torture, whether it takes place in the home or in an institution.[267]

There have been academic discussions on whether international human rights law should be applied vis à vis parents and their children, as the authority of parents over their children is a framework recognised by law.[268] Although such an approach has yet to be

tested, there have been significant developments where human rights law was applied for the benefit of protecting children in the private sphere, notably, by implying that the state in question was responsible for either not preventing, investigating or punishing acts of torture or ill-treatment in the private sphere.

1.1 The ICCPR and Human Rights Committee

In General Comment 20 on article 7 ICCPR, the Human Rights Committee stated that States parties have a duty to "[...] *afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity*".[269]

This suggests that obligations under article 7 ICCPR may extend to the private sphere, when requiring the State to ensure through legislative and other measures, that torture is prohibited even between individuals acting in a private capacity. Undoubtedly, this would have to include legislation prohibiting parents or care-takers from torturing and/or ill-treating children.

This principle was further reiterated in the Committee's General Comment No.17 on article 24 ICCPR, where the Committee took the view that States parties to the Covenant must adopt measures to:

"[...]prevent (children) from being subjected to acts of violence and cruel and inhuman treatment [...]".[270]

In particular, this duty extends to;

"[...] cases where the parents and the family seriously fail in their duties, ill-treat or neglect the child, the State should intervene to restrict parental authority [...]"[271].

General Comment 17 clearly confers a duty on States to protect children in the form of preventing torture and ill-treatment in the private sphere.

General Comments No. 20 and 17 when read together, suggest that State responsibility extends into the private sphere in so far as to oblige States to;

- ensure that torture and ill-treatment of children both in the public as well as in the private sphere are prohibited by their national legislation;
- intervene whenever there is a need to protect children from private actors such as their parents or legal guardians.

1.2 The Convention and Committee on the Rights of the Child

The UNCRC explicitly addresses the question of violence against children in the private sphere in article 19. This provides children with a right to protection from

"[...] all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), guardian(s) or any other person who has the care of the child".

States parties have the obligation to take all appropriate measures to protect children from these forms of violence and thereby clearly takes domestic violence out of the exclusive private sphere and into the public sphere. Therefore, article 19 could be perceived as seeking to prohibit "milder" forms of torture, such as parental neglect, which are perhaps more suited to the protection needs of children.

On the issue of reasonable chastisement of children permitted by law, the Committee stated the following in its concluding observations on the 1995 UK report;

"The Committee expresses its worries about the national legal provisions dealing with reasonable chastisement within the family. The imprecise nature of the expression of reasonable chastisement as contained in these legal provisions may pave the way for it to be interpreted in a subjective and arbitrary manner."[272]

The Committee continued by expressing its concern that;

"[...] legislative and other measures relating to the physical integrity of children do not appear to be compatible with the provisions and principles of the convention, including those of its articles 3, 19 and 37."[273]

Thus, the Committee, in interpreting articles 37 and 19, does not preclude the possibility of defining violence in the home under the prohibition of torture and ill-treatment (art.37).

Furthermore, in its consideration of the Australian report in 1997, the Committee on the Rights of the Child reminded the government that;

"[...] any punishment or physical chastisement, however sparingly inflicted, would be prejudicial to the child's dignity and would contravene the Convention, particularly articles 3 and 19, article 20 paragraph 2, ***article 37 (a)*** *and (c), and articles 39 and 40."*[274]

Also, in its concluding observations on the State Report submitted by Tanzania, the Committee recommended that;

"[...] the State party take legislative measures to prohibit all forms of physical and mental violence, including corporal punishment within the juvenile systems, schools and care institutions as well as in families"[275].

Whilst this clearly suggests that corporal punishment in the home is in contravention with the Convention, the Committee does not seem to take a clear approach as to whether such acts constitute violations of article 19 or 37 (a).

As a matter of principle, it seems that several members of the Committee support the complete abolition of all corporal punishment including "reasonable or moderate chastisement"[276] within the family. It is therefore not unlikely that the Committee on the Rights of the Child could outlaw all violence against children in the future, whether committed within the family or in the public sphere.[277]

1.3 The African Charter on the Rights and Welfare of the Child

The ACRWC does not prohibit corporal punishment of children within the family *per se*;

> *"1. Parents or other persons responsible for the Child shall have the primary responsibility for the upbringing and development of the child and shall have the duty:*

a) *to ensure that domestic discipline is administered in a manner consistent with the inherent dignity of the child."*[278]

The interesting point to note about the African Charter, is that the primary responsibility in ensuring that these child-rearing practices are consistent with the Charter fall on the parents, rather than on the State. The Charter seems to take the approach that human rights law is directly enforceable between private individuals, without a link between the state and the victim. The State is only required to assist parents in the performance of child-rearing "*in accordance with their means and national conditions*"[279]. The justification behind the Charter's use of terminology more common in connection with Economic, Social and Cultural rights[280], rather than with Civil and Political ones, is also unclear.

1.4 European Convention and Court of Human Rights

Recent judgements of the European Court of Human Rights have confirmed their desire to expand article 3 in order to extend the prohibition against torture to the private sphere.

In *A v. UK,* the Court considered the case of a 9 year old boy who had been hit by his stepfather on several occasions with a garden cane. In assessing whether the treatment attained a minimum level of severity, the Court took into consideration the nature and context of the treatment, its duration, **its physical and mental effects and the sex, age and state of health of the victim**.

The Court held that the State was responsible for a violation of article 3 ECHR, as the defence of "reasonable chastisement" under English law, had allowed a jury to acquit the stepfather who had clearly administered treatment prohibited by article 3. The State, by allowing reasonable chastisement, was held to have failed to provide adequate protection to the applicant against treatment contrary to article 3 of the Convention. Read together, articles 1 and 3;

"[...] *requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman and degrading treatment or punishment, including such ill-treatment administered by private individuals."*[281]

Surprisingly, the Court did not distinguish between the different

acts of ill-treatment in this case. It merely held that the treatment on the whole amounted to a violation of article 3.

Further, the interesting point to note about this judgement, is that the Court recognised that children require additional protection in the private sphere:

"Children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity."[282]

This would also suggest that the State has a duty to deter acts which are considered to be in violation of the prohibition of torture and ill-treatment contained in article 3 ECHR.

In a more recent case, *Z and Others v. UK*[283], the Court reiterated the same reasoning applied in *A v. UK*. This case involved four children who were neglected and abused by their parents over an extended period of time. As a result, they suffered grave psychological as well as physical injury and the treatment endured by the four applicants had therefore clearly attained the level of severity required for **inhuman and degrading treatment**. The local authority that was under a statutory duty to protect the children, had failed to do so. Again, the Court underlined the importance of state protection for children against ill-treatment, and held that the UK was directly responsible for failing to protect these child applicants from serious, long-term neglect and abuse. The UK was held to have violated article 3 of the European Convention on Human Rights.

1.4.1 Intent and Purpose

As pointed out in section I, certain elements of intent and purpose are usually required for an act to amount to torture. This is especially the case under article 3 of the European Convention on Human Rights. It would seem however, from the above mentioned cases, that the European Court does not require an element of intent when examining cases in the private sphere. Instead it seems take the view that an element of "negligence" on the part of a public official or authority may imply intent. In *Z and Others v. UK*[284], for instance, the Court emphasised that article 3 requires States to adopt measures that should;

"... provide effective protection, in particular, of children and other vul-

nerable persons and include reasonable steps to prevent ill-treatment of which authorities had or ought to have had knowledge."[285]

The language used by the Court could suggest that "gross negligence" on the part of a public official implies intent. It may even be compared to the criminal law term "implied intent" for establishing *mens rea.*

The real significance of this judgement lies in the fact that the Court did not require an element of intent on the part of the public authority to commit the acts of ill-treatment, in a case involving private actors. However, the European court of Human Rights, when considering damages will, in some cases, afford less awards in absence of an intention.[286]

Similarly, the European Court has not made reference to the requirement of purpose in cases involving private actors. This is surprising as, in the recent case of *Egmez v. Cyprus*[287], for instance, the European Court of Human Rights held that, in the absence of evidence that police officers had inflicted ill-treatment on the applicant for the purposes of extracting a confession, the treatment could not be classified as torture[288]. It was held that the acts could thus only amount to ill-treatment.

The Court, although inconsistent in its approach to the purpose requirement, has stated in the recent case of *V v. UK,* **that the absence of any such purpose cannot conclusively rule out a finding of a violation of article 3.**[290] This would explain the Court's approach to cases in the private sphere.

1.5 The Convention and Committee against Torture

The UNCAT does not apply to private individuals acting in a non-official capacity. This is perhaps partly because problems could arise in respect to international jurisdiction of those responsible[290], and partly because the Convention embodies the traditional view that human rights are rights vis à vis the State and not vis à vis other individuals.

Article 1 of the Convention, however, stipulates that a State can be held responsible for "[...] *pain or suffering inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting within an official capacity*".

The term "acquiescence", could be interpreted to include persistent non-action on the part of the State to protect persons within their jurisdiction, from torture and ill-treatment. This has also been the approach taken especially at the regional level[291].

Furthermore, the Convention definition does not preclude the application of a wider definition of torture contained under domestic law or other international instruments.[292] This is of great importance as it may open up the possibility for the definition of torture under article 1 of the Convention to be extended to protect persons from torture and ill-treatment inflicted by private individuals.

2. Torture in Private and Public Institutions

2.1 Human Rights Committee

As previously mentioned, the HRC has emphasised in its General Comment No.20 on article 7 ICCPR, that the prohibition of torture and ill-treatment;

"[...] protects in particular children, pupils and patients in teaching and medical institutions."[293]

Although, the Committee did not specify whether private institutions are also covered by this prohibition, it is precisely the lack of such a specification that may imply that no distinction is to be made in the application of article 7 to private and public institutions.

2.2 The Committee on Economic, Social and Cultural Rights

In a recent General Comment on the Right to Education, the Committee on Economic, Social and Cultural Rights confirmed that:

"Corporal Punishment is inconsistent with the fundamental guiding principle of international human rights law enshrined in the Preambles to the Universal Declaration of Human Rights and both Covenants: the dignity of the individual. Other aspects of school discipline may also be inconsistent with human dignity, such as public humiliation.

Nor should any form of discipline breach other rights under the Covenant, such as the right to food. A State party is required to take measures to ensure that discipline which is inconsistent with the Covenant does not occur in any public or private educational institution within its jurisdiction. The Committee welcomes initiatives taken by some States parties which actively introduce "positive", non-violent approaches to school discipline."[294]

Here, similar to the approach taken by the Committee on the Rights of the Child, corporal punishment of children is interpreted as a violation of the child's dignity.

2.3 The European Court of Human Rights

Although the European Court found that institutionalised corporal punishment was degrading in the Tyrer Case, it does not seem to take the same approach regarding privately funded schools. The leading cases on this subject are *Costello-Roberts v. UK*[295] and *Y v. UK.*[296]

In Costello-Roberts the applicant had been hit with a rubber soled gym shoe by his headmaster of his privately funded school. The European Court found that the treatment was insufficient to amount to an article 3 violation. The Court held that the humiliation and debasement involved had not attained the particular level of severity and not in any event been other than that usual element of humiliation inherent in any punishment.

Only in the dissenting opinions was reference made to the fact that the State had an obligation to extend guarantees of the Convention to independent schools:

"[...] *the State must exercise some measure of control over private schools so as to safeguard the essence of the Convention guarantees. A state can neither shift prison administration to the private sector and thereby make corporal punishment in prisons lawful, nor can it permit the setting up of a system of private schools which are run irrespective of Convention guarantees.*"[297]

In the case of *Y v. UK*[298], where the facts were similar to those in Costello-Roberts, the European Commission held that there had been an article 3 violation. The Commission was however not prepared to find that;

"[...] moderate corporal punishment in schools to constitute, as a general principle, institutionalised violence of the kind observed in the Tyrer case".

Claims of the present kind would always be assessed on the basis of the individual circumstances of each case.[299] Nonetheless, the Commission recognised that the UK;

"[...] has a duty under the Convention to secure that all pupils, including pupils at private schools are not exposed to treatment contrary to article 3 of the Convention".

2.4 The Convention and Committee on the Rights of the Child

The Convention on the Rights of the Child requires school discipline to be administered in a manner that is *"consistent with the child's human dignity and in conformity with the present Convention."*[300]

In its General Comment on the Aims of Education the Committee stated that;

"[...] the use of corporal punishment does not respect the inherent dignity of the child nor the strict limits on school discipline."[301]

The Committee also expressed its concern that the UK permitted the administering of corporal punishment in privately funded schools. This was considered to be incompatible with the Convention on the Rights of the Child.[302] Surprisingly, the Committee has not made reference to the jurisprudence of the European Court of Human Rights.

Summary

The child's need for protection in the private sphere is increasingly being acknowledged under international law. In particular, the European Court of Human Rights is in the process of developing elaborate jurisprudence on the application of human rights law for the benefit of protecting the child in the home. This is also the case for the Committee on the Rights of the Child, which has been taking a very strong stance on the Child's right not to be tortured and ill-treated in the home and in school.

There seems to be a clear inclination towards applying international human rights law in the private sphere, where a link can be established between the infliction of torture or ill-treatment upon the child by a private individual, and the failure on the part of the State to prevent it or prosecute the perpetrator. It still remains to be seen whether the Committee against Torture will follow this approach.

■ Conclusion

In section one, the problems regarding the application of the definition of torture in respect to children were outlined. Problems such as children's lower threshold for pain, their presence especially in the private sphere, where human rights law is not traditionally applicable and their lack of protection through the implementation of the current definition of torture, were highlighted.

From the examination completed, the following conclusions can be drawn:

Firstly, reference to children's vulnerability to torture and ill-treatment is only made in the rarest cases; even when considering judicial and disciplinary corporal punishment. It is a fairly recent development that these acts are considered ill-treatment amounting to torture. Even the UNCRC, a treaty that came into force in 1989, does not prohibit judicial or disciplinary corporal punishment of children. Currently, however, it is a generally accepted principle that such corporal punishment is expressly prohibited both vis à vis adults as well as children.

Secondly, the prohibition of torture and ill-treatment is increasingly being applied to protect children in the private sphere. The European Court of Human Rights in particular, has developed impressive jurisprudence in this area, for the benefit of children. Although international law is still somewhat reluctant to define ill-treatment administered by private individuals as torture, acts such as parental neglect in the case of *Y and Others v. UK* have been held to amount to degrading and inhuman treatment. This is undoubtedly a very significant development. The approach of the Committee against Torture regarding these new developments however, still remains to be seen.

Thirdly, new developments in the interpretation of the definition of torture, such as rape, intimidation and enforced disappearance as forms of torture, may enhance the protection of children a great deal. All the above mentioned acts are crimes to which children are especially vulnerable.

Lastly, since the Committee on the Rights of the Child, in interpreting one of the most universally ratified UN treaties, has become increasingly inclined to prohibit *all* violence against children in the home, in schools and in the public sphere, it only seems to be a question of time when States and their judiciaries and legislators, will find themselves forced to follow.

BACKGROUND PAPER 4

References to torture under international law: a compilation

Mr. Georg Stein[303]

International Covenant on Civil and Political Rights, 1966[304]

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984[305]

Article 1

1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, 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.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)

Article 3

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

American Convention on Human Rights (Pact of San José, Costa Rica, 1969)

Article 5 Right to Humane Treatment

1. Every person has the right to have his physical, mental, and moral integrity respected.

2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

3. Punishment shall not be extended to any person other than the criminal.

4. Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons.

5. Minors while subject to criminal proceedings shall be separated from adults and brought before specialised tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors.

6. Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.

Rome statute of the International Criminal Court, 1998[306]

Article 7 Crimes against humanity (abstracts)

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

[...]

   f. Torture;

[...]

2. For the purpose of paragraph 1:

[...]

   e. "Torture" means 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;

Article 8 War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

2. For the purpose of this Statute, "war crimes" means:

   a. Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

[...]

      ii. Torture or inhuman treatment, including biological experiments;

[...]

b. Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

[...]

xxi. Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

[...]

c. In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

[...]

i. Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

ii. Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

[...]

d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

Elements of Crime as contained in the finalised draft prepared by the fifth session of the Preparatory Commission for the International Court held in New York from June 12 to 30 2000: [307]

Article 7 (1) (f) Crime against humanity of torture[308]

Elements

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.

2. Such person or persons were in the custody or under the control of the perpetrator.

3. Such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions.

4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

5. 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.

Article 8 War crimes

Introduction

The elements for war crimes under article 8, paragraph 2 (c) and (e), are subject to the limitations addressed in article 8, paragraph 2 (d) and (f), which are not elements of crimes.

The elements for war crimes under article 8, paragraph 2, of the Statute shall be interpreted within the established framework of the international law of armed conflict including, as appropriate, the international law of armed conflict applicable to armed conflict at sea.

With respect to the last two elements listed for each crime:
There is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or non-international;

In that context there is no requirement for awareness by the perpetrator of the facts that established the character of the conflict as international or non-international;

There is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict that is implicit in the terms "took place in the context of and was associated with".

Article 8 (2) (a) (ii)-1 War crime of torture

Elements[309]

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.

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.

Article 8 (2) (a) (ii)-2 War crime of inhuman treatment

Elements

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.

2. 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.

Article 8 (2) (c) (i)-3 War crime of cruel treatment

Elements

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.

2. Such person or persons were either *hors de combat,* or were civilians, medical personnel, or religious personnel taking no active part in the hostilities.

3. The perpetrator was aware of the factual circumstances that established this status.

4. The conduct took place in the context of and was associated with an armed conflict not of an international character.

5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (c) (i)-4 War crime of torture

Elements

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.

3. Such person or persons were either *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in the hostilities.

4. The perpetrator was aware of the factual circumstances that established this status.

5. The conduct took place in the context of and was associated with an armed conflict not of an international character.

6. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (c) (ii) War crime of outrages upon personal dignity

Elements

1. The perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons.[310]

2. The severity of the humiliation, degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity.

3. Such person or persons were either *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in the hostilities.

4. The perpetrator was aware of the factual circumstances that established this status.

5. The conduct took place in the context of and was associated with an armed conflict not of an international character.

6. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Annex

1. **Article 2, Inter-American Convention to Prevent and Punish the Crime of Torture;**
"For the purposes of this Convention, torture shall be understood to be an 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."

2. **Article 10 (3) (1), International Covenant on Economic, Social and Cultural Rights (ICESCR);**
"Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions."

3. **Preambular paragraph IV, Convention on the Rights of the Child (CRC);**
"Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth."

4. **Convention on the Rights of the Child, Article 3(1);**
"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the primary consideration."

5. **Article 19, American Convention on Human Rights;**
"Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society and the State."

1 UN General Assembly Resolution 39/46 of 10 December 1984, entry into force on 26 June 1987.

2 Including members of the CAT, UN Special Rapporteurs and staff of the UN Office of the High Commissioner for Human Rights; members of the African Commission on Human Rights, European Court for Human Rights, the European Committee for the Prevention of Torture, the International Committee of the Red Cross; legal professionals, doctors, academics and NGO representatives.

3 UN Committee on the Elimination of Discrimination against Women General Recommendation No. 14: A/45/38 2 February 1990, Recommendation No. 19: A/47/38 29 January 1992.

4 UN Human Rights Committee UN Doc. CCPR/C/79/Add 65; A/51/40, §267-305.

5 "The Greek Case", (1969) Year Book of the European Convention on Human Rights, 12; Ireland v. UK, (1978) ECHR (Series A) No.25.

6 UK Criminal Justice Act 1988, Section 134:

"4. It shall be a defence for a person charged with an offence under this section in respect of any conduct of his to prove that he had lawful authority, justification or excuse for that conduct.

5. For the purposes of this section 'lawful authority, justification or excuse' means

a. in relation to pain or suffering inflicted in the United Kingdom, lawful authority, justification or excuse under the law of the part of the United Kingdom where it was inflicted; [...]*".*

7 UN Committee against Torture, Concluding Observations, UN Doc. A/54/44, 17 November 1998.

8 Protocol no. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe doc. H (83)3.

9 UN HRC General Comment No. 20, 10 March 1992.

10 UN doc. ECOSOC res.663 C (XXIV), 31 July 1957, ECOSOC res. 2076 (LXII), 13 May 1977.

11 See for example: In the Inter-American system: Suarez Rosero case, Judgment of 12 November 1997, IACHR, Series C-No.35 (1997), Castillo Petruzzi et al. Case, Judgment of 30 May 1999, IACHR, Series C-No.52 (1999), In Europe, Keenan v. UK, (2001) Judgment of 3 April, Dougoz c Greece, (2001), Judgment of 6 March, Peers v. Greece (2001), Judgment of 19 April.

12 Article 4 UNCAT:

"1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to

commit torture and to an act by any person which constitutes complicity or participation in torture.

2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature".

13 UN HRC General Comment No. 20, 10 March 1992.

14 See for example in Europe: H.L.R. v. France (1997), Reports 1997 – iii, A v. UK, (1998), 27 EHRR, 611, Z and Others v. UK, application no. 29392/95, Judgement of 10 May 2001.
In the Americas: Velasquez Rodriguez v. Honduras, (1988) - Inter-Am.Ct.H.R. (Ser C) No.4.

15 See for example: Assenov v. Bulgaria, (1998), EHRR-III, Kurt v. Turkey (1998), EHRR 1998-III.

16 Commission Nationale des droits de l'homme et des Libertés de la Fédération Nationale des Unions des Jeunes Avocats de France v. Chad, Case no. 74/92, October 1995.

17 UNCAT Article 2(1):
"Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction".

18 The origins of this comment lie in the writer's Inaugural Lecture as Professor on Public International Law at the University of Bristol, delivered on 23rd November 2000. As will be clear from the contents, it has been considerably updated but aims to retain the essential thrust of the lecture then delivered.

19 See Report of the Working Group on its Ninth Session, UN Doc. E/CN.4/2001/67 and CHR Resolution 2001/44 of 23 April 2001.

20 A draft was tabled by Costa Rica in March 1980 in E/CN.4/1409. A new draft, which still provides a basis for the current negotiations, was submitted to the UN Commission in 1991. See E/CN.4/1991/66. The decision to establish the open-ended working group was taken in CHR Resolution 1992/43 of 3 March 1992.

21 See ETS No 126. The ECPT was opened for signature of 26th November 1987 and entered into force on 1st February 1989. For the background to the adoption of the CPT see Cassese, A. "A New Approach to Human Rights: The European Convention for the Prevention of Torture", (1989) 83 *AJIL* 130 and Evans, M. and Morgan, R, Preventing *Torture: A Study of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (OUP, 1998), Chapter 4.

22 At the time of writing, Armenia and Azerbaidjan, which joined the Council of Europe in January 2001, are the only member

states who are yet to ratify the ECPT. Armenia signed the Convention on 11 May 2001 but Azerbaidjan has yet to do so.

23 The CPT's 10th General Report records that to the 15 August 2000, it had adopted 98 visit reports, and 65 of them had been published with the consent of the state. See CPT/Inf (2000) 13, §11 and Appendix 2.

24 At the outset of its work the CPT conceptualised the relationship in the following terms: *"Unlike the Commission and the Court, the CPT is not a judicial body empowered to settle legal disputes concerning alleged violations of treaty obligations (i.e. to determine claims ex post facto). The CPT is first and foremost a mechanism designed to prevent ill-treatment from occurring, although it may also in special cases intervene after the event. Consequently, whereas the Commission's and Court's activities aim at 'conflict solution' on the legal level, the CPT's activities aim at 'conflict avoidance' on the practical level."* See 1st General Report CPT/Inf (91) 3, §2.

25 ECPT, Preamble.

26 For overviews of the work of the CPT see Evans, M. and Morgan, R., "The European Convention for the Prevention of Torture: Operational Practice", (1992) 41 *ICLQ* 590 and "The European Convention for the Prevention of Torture: 1992-1997", (1997) 46 *ICLQ* 633 and the essays by various contributors in Morgan and Evans (eds.) *Protecting Prisoners: The Standards of the CPT in Context* (OUP, 1999).

27 At the 9th session of the Working Group in February 2001 Mexico, with the support of the Group of Latin American and Caribbean states (GRULAC), tabled a proposal which places great emphasis upon the role played by national mechanisms and this has had the effect of galvanising thinking across a broad spectrum of issues. This prompted the tabling of new and revised articles to be included within the original Costa Rica draft by Sweden on behalf of the EU. Both sets of proposals are included as Annexes to the 9th Report of the Working Group, E/CN.4/2001/67.

28 See UNGA Res. 39/46, adopted 10 December 1984. The Convention entered into force on 26 June 1987 and there are currently 125 states parties.

29 See UNCAT, Article 19. For a recent examination of practice of the CAT concerning reporting procedures, see Bank, R. "Country-Oriented Procedures under the Convention against Torture: Towards a new dynamism" in Alston, P. and Crawford, J. (eds.) *The Future of UN Human Rights Monitoring,* CUP, 2000,

chapter 7. As at 31 March 2001 there were a total of 123 reports yet to be submitted to the Committee. For full details see *Recent Reporting History under the Principal International Human Rights Instruments* HRI/GEN/4/Rev.1.

30 UNCAT, Article 22. 44 states have currently made a declaration accepting the right of individuals to submit communications to the CAT. As of 12 October 2000 169 such communications had been made, yielding 18 findings of violations, with 44 cases still pending.

31 UNCAT, Article 21. 47 states have currently made a Declaration under this Article, although no inter-state communication has yet been made. Japan, UK and the USA have made declarations under Article 21 but not Article 22.

32 UNCAT, Article 20. The other UN human rights treaty monitory bodies do not have this innovative procedure at their disposal. For an examination of this procedure see Bank, *supra.*, pp 166-172.

33 See General Comment No 1, Implementation of Article 3 of the Convention in the context of Article 22 adopted 21st November 1997, A/53/44, §258 and annex IX. See also *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies,* HRI/GEN/1/Rev.5. This contains all texts adopted up until 31 March 2001 and shows that the one Comment adopted by the CAT compares with 14 General Comments adopted by the Committee on Economic, Social and Cultural Rights, 28 adopted by the Human Rights Committee; 27 adopted by the Committee on the Elimination of Racial Discrimination and 24 adopted by the Committee on the Elimination of Discrimination against Women. It does, however, equal the record of the Committee on the Rights of the Child, which has adopted just one General Comment. Obviously, these bodies have been in existence for various periods of time and have very different workloads and pressures. But this cannot be the sole reason for these differentials.

34 See CAT/C/SR.435 (meeting of 17 May 2000).

35 During the 24th session of the CAT in May 2000 the possibilities of drawing up two general comments were discussed and committee members designated to prepare background papers for subsequent consideration, these being (1) the definition of torture appearing in article 1 of the Convention and the need for its incorporation into domestic legislation of the state parties and (2) Interim Measures requested by the Committee, exercising its competence under Article 22 of the Convention. See *ibid.* and GAOR A/55/44, §21. As regards the second of these topics, a

background paper was prepared by Committee member Mr Camara and a preliminary discussion took place at the 26th session in May 2001 (see CAT.C/SR.479/Add.1). Although some preparatory work has taken place, there does not appear to have been any further substantive consideration of the questions at formal meetings of the Committee and so the process may be described as being at an embryonic stage.

36 Because the particular focus of this comment concerns the relevance of the lessons and experience of the European system for the CAT, the potential relevance of other bodies of experience – and in particular those flowing from the Inter-American system and the work of the UN Human Rights Committee under the 1966 International Covenant on Civil and Political Rights – is not addressed. This should not be taken to imply that they are of secondary importance. For an authoritative presentation of the work of the Human Rights Committee, the UN Special Rapporteur on Torture and the work of the Inter-American system pertinent to the questions addressed here, see generally Rodley, N., *The Treatment of Prisoners Under International Law* (OUP, 2nd Ed., 1999) and in particular chapters 3 and 9.

37 For a more general consideration of the tensions between the various forms of torture prevention see Evans, M. and Morgan, R., "Torture: Prevention versus Punishment? " in Scott, C. (ed.), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation*, (Hart Publishing, 2001), chapter 5.

38 *Greek* case, Report of the European Commission on Human Rights, 5 November 1969, 12 Yearbook of the European Convention on Human Rights 1, p. 186.

39 Ireland v. UK, Report of the European Commission of Human Rights, 25 Jan 1976, ECHR Ser. B, No 23-I, 410.

40 Ireland v. UK, Judgement, 18 January 1978, ECHR Ser. A., No. 25 (2 *EHRR* 25), §167.

41 H.C. 5100/94 Public Committee against Torture in Israel et al. v. The State of Israel and the General Security Service (GSS), Judgement of 6 September 1999, §17 [nyr]. It was decided that all such use of physical force in the course of interrogation was beyond the powers of the interrogators and so could not be authorised. Nor could a defence of necessity to a criminal charge brought against an interrogator be accepted, save in certain exceptional circumstances. For a detailed examination of this judgement and its broader ramifications see Reichman A, and Kahana T, "Israel and the Recognition of Torture: Domestic and

International Aspects" in Scott (ed.), *supra,* chapter 24. The judgement does not cast any new light on the threshold between torture and inhuman and degrading treatment, however.

42 Aksoy v. Turkey, Judgement, 18 December 1996, *RJD* 1996-VI, p. 2260 (23 *EHRR* 553), §63. These words are derived from the judgement of the Court in Ireland v. UK, Judgement, 18 January 1978, ECHR Ser. A., No. 25 (2 *EHRR* 25), §167 and have frequently been used and endorsed by the Court. For a recent example see Akkoc v. Turkey, Judgement, 10 October 2000, nyr, §115.

43 Selmouni v. France, [GC] Judgement, 28 July 1999, 29 *EHRR* 403, §101.

44 Costello Roberts v. UK, Judgement, 25 March 1993, ECHR Ser. A., No. 247-C (19 *EHRR* 112). For a recent example of a claim which fell beneath the threshold altogether see Rehbock v. Slovenia, Judgement, 28 November 2000, nyr, §79-81 (failure to provide a detainee with a pain killer).

45 Raninen v. Finland, Judgement, 16 December 1997, RJD 1997-VIII, p. 2804 (26 *EHRR* 563), §55.

46 This is further supported by those cases in which discrimination, and particularly discrimination on the grounds of race, is seen as a form of degrading treatment. The origins of this approach are found in the East African Asians v. UK, Commission Report, 14 December 1973, DR 78-A, p. 62 and Abdulaziz, Cabales and Balkandali v. UK, Judgement, 28 May 1985, Ser. A. No. 94 (7 *EHRR* 471) and recently in Cyprus v. Turkey, [GC] Judgement, 10 May 2001, nyr, §302-311, where the Court concluded that the overall conditions of living for the Greek Cypriot community in Karpas area of Northern Cyprus comprised discriminatory treatment of a degrading nature within the meaning of Article 3.

47 *Greek* case, Report of the European Commission on Human Rights, 5 November 1969, 12 Yearbook of the European Convention on Human Rights 1, pp. 468-97.

48 For recent examples see Peers v. Greece, Judgement, 19 April 2001, nyr, §63-74 and Dougoz v. Greece, Judgement 6 June 2001, nyr, §42-49.

49 There is now a long line of cases flowing from Soering v. UK, Judgement, 7 July 1989, ECHR Ser. A. No. 161 (11 *EHRR* 439) around which a complex jurisprudence has emerged.

50 See, for example, HLR v. France, Judgement, 29 April 1997, *RJD* 1997-III, p.758 (26 *EHRR* 29).

51 See, for example, cases concerning the availability of forms of medical care, D v. UK, Judgement, 2 May 1997, *RJD* 1997-III,

p. 777 (24 *EHRR* 423) and Bensaid v. UK, Judgement, 6 May 2001, nyr.

52 Ireland v. UK, Judgement, 18 January 1978, ECHR Ser. A., No. 25 (2 *EHRR* 25), §162.

53 See Peukert, W. "The European Convention for the Prevention of Torture and the European Convention on Human Rights" in Morgan and Evans, *Protecting Prisoners,* chapter 3, p. 98.

54 Keenan v. UK, Judgement, 3 April 2001, nyr, §112. The case concerns the death by suicide of a segregated prisoner with a known history of mental illness (and who was under a suicide surveillance regime at the time of his death). The Commission, by the narrowest of margins (10-9), had concluded that there was no violation of Article 3 on the facts because of the lack of evidence of any suffering caused by the relevant failings of the prison service and the prolongation of the period of segregation (Commission Report, 16 September 1999, §91). Diminishing the significance of the suffering consequential on the actions of the authorities paved the way for the finding by the Court (and foreshadowed in the dissenting opinion of Mrs Thune to the Commission's Report).

55 For examples see the manner in which CPT Reports have been discussed by the Court in Aerts v. Belgium, Judgement, 30 July 1998, *RJD* 1998-V, p. 1939 (29 *EHRR* 50); Magee v. UK, Judgement, 6 June 2000, nyr; Akkoc v. Turkey, Judgement, 10 October 2000, nyr; Tanli v. Turkey, Judgement, 10 April 2001, nyr; Peers v. Greece, Judgement, 19 April 2001, nyr; Dougoz v. Greece, Judgement 6 June 2001, nyr.

56 For a detailed examination of the CPT's approach to these terms see Morgan, R. and Evans, M., *Combating Torture in Europe: the work and standards of the CPT* (Council of Europe Press, 2001), chapter 3.

57 It might be noted in passing that this is seemingly the view of the UN Commission on Human Rights which, in its most recent resolution on torture, CHR Resolution 2001/62, adopted 25 April 2001, "reminds" states that incommunicado detention could "facilitate" torture and "itself constitute a form of cruel, inhuman or degrading treatment" (§10). It was not described as being potentially torture itself – unlike, for example, corporal punishment in §5. *A fortiori,* other species of isolation would seem to fall outside the range of torture, although the same resolution seems to acknowledge that forms of "intimidation" could amount to torture (§1).

58 UNCAT Articles 4, 5 and 7.

59 UNCAT Article 16. States undertake to prevent such acts but it is only the obligations found in Articles 10 (education), 11 (review of interrogation rules and other arrangements for persons in custody), 12 (the conducting of prompt and impartial investigations) and 13 (securing the victim's right submit a complaint to competent authorities for investigation) that are directly applicable to forms of treatment other than torture.

60 UNCAT, Article 14.

61 UNCAT, Article 15.

62 See note 42 above.

63 This, of course, assumed a great importance in the House of Lords in the Pinochet case. In its first decision, two of the judges stressed the idea that acts of torture could not be "official acts" whilst in the second substantive decision it seemed vital to the reasoning that they were.

64 See Burgers, J. and Danelius, H. *Handbook on the Convention against Torture and other Cruel and, Inhuman or Degrading Treatment of Punishment (1984)* (Martinus Nijhoff, 1988), p. 1 and 131. This point was stressed by a number of judgements in Pinochet No 3. See, for example, R v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte *(Amnesty International and other intervening)* No. 3, [1999] 2 All ER 97 at 109 (Lord Browne-Wilkinson), 150 (Lord Hope), 163-164 (Lord Hutton) and 177-178 (Lord Millet).

65 This can be traced through the jurisprudence of the war crimes tribunals. In Prosecutor v. Akayesu, Judgement, Case ICTR 96-4-T, 2 September 1998, §593, the UNCAT definition was regarded providing the relevant definition for the purposes of interpreting the Statute of the Court and this was endorsed by Trial Chambers of the ICTY in Prosecutor v. Delalic, Case No IT-96-21-T, 16 November 1998, §459 and Prosecutor v. Furundzija, Case No. IT-95-17/1, 10 December 1998, §160. However, that latter judgement also went on to say that, though of general application, in the context of armed conflict there were a number of additional definitional elements (§162) and the logic of this approach was taken up in the recent Trial Chamber judgement in the case of Prosecutor v. Kunarac, Kovac and Vukovic, Case No IT-96-23/1-T, 22 February 2001, §482 in where it was concluded that *"the definition of torture contained in the torture convention cannot be regarded as the definition of torture under customary international law which is binding regardless of the context in which it is applied"*. For an appraisal – which concludes that the UNCAT definition remains reliable

as far as the conduct prohibited is concerned – see Cassese, A, *International Law*, (OUP, 2001), pp. 254-256. It should also be noted that the Elements of Crime adopted by the Preparatory Commission for the International Criminal Court are also not necessarily ad idem with the UNCAT approach. See Kittichchaisaree, K. *International Criminal Law*, (OUP. 2001), pp. 110-112 and 143-147.

66 Selmouni v. France, [GC] Judgement, 28 July 1999, 29 *EHRR* 403, §97 and 100, where the *European* Court of Human Rights says *"it remains to establish in the instant case whether the 'pain or suffering' inflicted on Mr Selmouni can be defined as 'severe' with the meaning of Article 1 of the UN Convention"*.

67 Ilhan v. Turkey, [GC] Judgement of 27 June 2000, nyr, §85-88; Salman v. Turkey, [GC] Judgement of 27 June 2000, nyr, §114-116. For a more recent endorsement of the UNCAT definition see Akkoc v. Turkey, Judgement, 10 October 2000, nyr, §115.

68 Egmez v. Cyprus, Judgement, 21 December 2000, nyr, §78; Denizci v. Cyprus, Judgement of 21 May 2001, nyr, §384-386. In both cases the Court also noted the lack of evidence of long-term consequences flowing from the ill-treatment.

69 The *Greek* case had contained some hints that justifications for forms of ill-treatment might be relevant to its findings but this was recanted in Ireland v. UK and it has been quite clear since then that there can be not justification for ill-treatment. See, for example, Aksoy v. Turkey, Judgement, 18 December 1996, *RJD* 1996-VI, p. 2260 (23 *EHRR* 553) and Chahal v. UK, Judgement, 15 November 1996, *RJD* 1996-V, p. 1831(23 *EHRR* 413). For the approaches to justification and purpose see Rodley, N. *The Treatment of Prisoners under International Law* (OUP, 1999), pp. 78-85.

70 See, for example, A v. UK, Judgement, 23 September 1998, *RJD* 1998-VI, p. 2692 (27 *EHRR* 611), §22; Assenov v. Bulgaria, Judgement, 28 October 1998, *RJD* 1998-VIII, p. 3264 (28 *EHRR* 652), §95; Kudla v. Poland, [GC] Judgement, 26 October 2000, nyr, §97.

71 Mahmut Kaya v. Turkey, Judgement, 28 March 2000, nyr, §115-116. The Court drew on the reasoning in Osman v. UK, [GC] Judgement 28 October 1998, RJD 1998-VIII, p. 3124 ((29 *EHRR* 245), §115-116, although that concerned Article 2 rather than Article 3 of the Convention.

72 Z v. UK, Judgement, 10 May 2001, nyr, §73.

73 See McCann v. UK, Judgement, 27 September 1995, ECHR Ser. A. No. 324 (25 *EHRR* 97), §161 (as regards state actors)

and Yasa v. Turkey, Judgement, 2 September 1998, RJD 1998-VI, p. 2492 (28 *EHRR* 408), §100 (as regards non state actors). These are now drawn together in Cyprus v. Turkey, [GC] Judgement, 10 May 2001, nyr, §131 (where it is also made clear that a breach can arise by a failure to respond to an *"arguable claim that an individual, who was last seen in the custody of agents of the State, subsequently disappeared in a context which was life-threatening"* (§132).

74 Arguably, there is really no need at all to find a state in breach of a "procedural" obligation under Article 3 since in all such cases there should also be a breach of Article 13 of the Convention which concerns the obligation to provide an effective remedy.

75 Ilhan v. Turkey, [GC] Judgement of 27 June 2000, nyr, §92.

76 This approach should be kept within bounds. Its origins lie in claims made on behalf of "disappeared" persons and in this context it makes excellent sense. A state should not be able to hide behind unacknowledged detention or the activities of irregular groups with which it tacitly connives. If involvement or acquiescence cannot be shown, it might nevertheless be possible to demonstrate a failure to respond to the allegation. However, it should certainly not be used to upset the well-established principle that it is for the state to disprove its responsibility for injuries demonstrably sustained whilst in the custody of the state. In such cases, the involvement of the state is clear. Unfortunately the Court has recently started to find breaches of the "procedural obligation" to investigate in cases where injuries have been sustained in custody but the cause of injury is in doubt, such as Labita v. Italy [GC], Judgement, 6 April 2000, nyr, §125-129 and Sevtap Veznedaroglu v. Turkey, Judgement, 11 April 2000, nyr, §30-35. This is regrettable and unnecessary backtracking.

77 Kurt v. Turkey, Judgement, 25 May 1998, *RJD* 1998-III, p. 1152 (27 *EHRR* 373).

78 Ibid. §133.

79 Ibid. §134.

80 Cakici v. Turkey, [GC] Judgement, 8 July 1999, 31 *EHRR* 133, §98.

81 Ibid.

82 Other cases exploring the application of this principle include Timutas v. Turkey, Judgement, 13 June 2000, nyr; Tas v. Turkey, Judgement, 14 November 2000, nyr; Cicek v. Turkey, Judgement, 27 February 2001, nyr; Cyprus v. Turkey, [GC] Judgement, 10 May 2001, nyr; Akdeniz v. Turkey, Judgement, 31 May 2001.

83 Tanli v. Turkey, Judgement, 10 April 2001, nyr, §159. It may be that the real scope of the principle is restricted to the anguish

caused by the refusal to pursue the question of the whereabouts of a person, rather than the manner in which they have been treated whilst in detention by persons unknown. However, it is difficult to see why it is less distressing to know that the authorities have remained inactive in the face of claims that your son or daughter has been tortured in an acknowledged period of official custody than held – and potentially torture and/or killed – in a period of unacknowledged detention by parties unknown.

84 *Greek* case, Report of the European Commission on Human Rights, 5 November 1969, 12 Yearbook of the European Convention on Human Rights 1, p. 186.

85 APT Programme Advisor

86 Article 5 of the African Charter on Human Rights, whilst prohibiting torture, is not a defining instrument. Furthermore, the African Human Rights system currently lacks a Court which can deliver binding judgments. Complaints are brought before the African Commission which can make considerations as to violations but their decisions are not binding upon a State. Consequently unlike the other two regional systems, the African Commission has not developed principles defining what acts constitute torture, cruel, inhuman or degrading treatment or punishment and will therefore not feature in this paper.

87 For the purposes of this paper "acts" must also be read so as to include "omissions".

88 "The Greek Case", (1969), Y.B.Eur.Conv. on H.R. 12, p. 186.

89 Ireland v. UK, (1978), 2 Eur.Ct.H.R. (Ser.A), p. 25.

90 The Greek Case, (1969) Y.B: Eur.Conv. on HR, 12, p. 186.

91 Morgan and Evans, "Preventing Torture", (1998) Clarendon Press, Oxford, p. 77.

92 Ireland v. UK, 1978), 2 Eur.Ct.H.R. (Ser.A), §162.

93 Ibid. §167.

94 Cf dissenting opinion of Judge Zekia, who did not share the view that; *"extreme intensity of physical or mental suffering is a requisite for a case of ill-treatment to amount to torture"* because *"the nature of torture admits gradation in its intensity, in its severity and in the methods adopted"*. Also, he did not consider that the Court had jurisdiction to overturn the Commission's earlier decision that the treatments amounted to torture. He stated that; *"this was a finding of fact for the competent authority dealing with the case in the first instance"*. Ibid.§B.

95 Ibid. §167.

96 Cf. The Greek Case, idem, which considered that combined application of certain techniques did amount to torture.

97 Morgan and Evans, "Preventing Torture", (1998) Clarendon Press, Oxford, p. 82.
98 See for example; Aksoy v. Turkey (1996), 23 EHRR 553, Aydin v. Turkey (1997) Judgment of 25 September, Selmouni v. France, (1999), 95 ECHR 1999-V.
99 Aydin v. Turkey (1997) Judgment of 25 September.
100 Aydin v. Turkey (1997) Judgment of 25 September, §83-86
101 Tyrer v. UK, (1978) Series A no. 26 p. 15. See also Soering v. UK (1989) Series A no.161 p. 15, §31, Loizidou v. Turkey (1995) Series A no.310 p. 21, §71.
102 Selmouni v. France, (1999), 95 ECHR 1999-V.
103 See for example Aydin v. Turkey (1997) Judgment of 25 September.
104 Ibid. §105.
105 See also Article 1 of the UNCAT.
106 Loayza Tamyo v. Peru, 1997, Inter-Am.Ct.H.R. Series C No.33, §57. See also Paniagua Morales v. Guatemala, (1998) Inter-Am. Ct.H.R. (Ser. C) No. 37, §126-136.
107 Fernando and Raquel Mejia v. Peru, (1996), Inter-Am.Ct.H.R. (Ser C) No.5.
108 Prosecutor v. Zenjil Delalic et al, Case no. IT-96-21-T, 16 November 1998.
109 Ibid. §442.
110 Ibid. §470.
111 Ibid. §471.
112 Prosecutor v. Zenjil Delalic et al, Case no. IT-96-21-T, 16 November 1998, §471.
113 Ibid. §495.
114 Ibid. §495.
115 See Prosecutor v. Funrundija, Case no. IT-95-17-T, 10 December 1998, which held, inter alia; that under international humanitarian law acts of torture must be linked to an armed conflict, §162, and Prosecutor v. Kunarac and others, Case no. IT-96-23-T, 22 February 2001, which held, inter alia; *"that torture under international humanitarian law does not comprise the same elements as international human rights law nor does this field of law require the presence of a state official or authority wielding person in the act of torture for the offence to be regarded as torture"*, §496.
116 See for example, Prosecutor v. Jelisic, Case no. IT-95-10, 14 December 1999, Prosecutor v. Blaskic, Case no. IT-95-14, 3 March 2000, Prosecutor v. Krstic, Case no. IT-98-33, 3 August 2001.

[117] Prosecutor v. Furundija, Case no. IT-95-17/1-T, 10 December 1998.
[118] Ibid. §162.
[119] Prosecutor v. Kunarac and others, idem. §500.
[120] Ibid. §502.
[121] Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, 2 September 1998.
[122] Ibid. §59.
[123] Ibid. §597.
[124] The duty to protect applies to all rights and in this chapter can be read so as to include as well as acts of torture other forms of ill-treament.
[125] Velasquez Rodriguez v. Honduras, (1988) Inter-Am.Ct.H.R. (Ser C) No.4.
[126] Ibid. §170.
[127] Ibid. §172.
[128] Ibid. §176.
[129] H.L.R. v. France (1997), Reports 1997 – iii, p. 758.
[130] Ibid. §40.
[131] A v. UK (1998), Reports 1998 – Vi, p. 2690.
[132] Ibid. §22.
[133] Ibid. §24. See also Z and others v. UK, 10 May 2001, n.y.p. §73.
[134] Prosecutor v. Zenjil Delalic et al, Case no. IT-96-21-T, 16 November 1998, See also Prosecutor v. Furundjia, Case no. IT-95-17/1-T, 10 December 1998.
[135] Prosecutor v. Zenjil Delalic et al, Case no. IT-96-21-T, 16 November 1998. §473.
[136] Prosecutor v. Furundija, Case no. IT-95-17/1-T, 10 December 1998.
[137] Ibid. §162.
[138] Prosecutor v. Kunarac, Kovac, Vukovic, Case no. IT-96-23-T, 22 February 2001.
[139] Ibid. §469.
[140] Ibid. §470.
[141] Ibid. §478.
[142] Ibid. §495.
[143] Ibid. §492. Citing Article 12 of the 1949 Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces.
[144] Prosecutor v. Kunarac, Kovac, Vukovic, Case no. IT-96-23-T, 22 February 2001 §496.
[145] See also for example; The Reports of the Committee Against Torture, Mutambo v. Switzerland (13/1993) GAOR, 49th Session Supplement No.44 (1994) Khan v. Canada (15/1994), GAOR, 50th Session, Supplement No.44 (1995), the Committee Against

Torture's General Comment on the implementation of Article 3 as regards Article 22 of the UNCAT, UN doc. CAT/C/xx/Misc.I (1997), see also; The Human Rights Committee's Second General Comment on the ICCPR.

146 Soering v. UK, (1989), ECHR Series A, No.161. See also the earlier communication, Amekrane v. UK, Application No. 5961/72, (1973) 16 Yearbook of the European Convention on Human Rights 356.(Friendly settlement reached)

147 Ibid. §92. Note that it was not claimed that the conditions would amount to torture.

148 See for example Cruz Varas v. Sweden (1991) ECHR Series A no.201, Vilvarajah v. UK (1991), ECHR Series A, No. 215, H.L.R. v. France (1997) ECHR Series A, D v. UK (1997) Judgement of 2 May, Jabari v. UK (2000) Judgement of 11 November, see also the Human Rights Committee decision on the communication, NG v. Canada (1993) 15 HRJL p. 149.

149 Cruz Varas v. Sweden (1991) ECHR Series A no.201.

150 Ibid. §76.

151 Vilvarajah v. UK, (1991), ECHR Series A, No. 215.

152 Ibid. §108, citing Soering v. UK (1989) ECHR Series A, no.161 §88.

153 Chahal v. UK (1996), Judgement of 15 November.

154 Ibid. §97.

155 Ibid. §78-9.

156 D v. UK, (1997) Judgement of 2 May.

157 Ibid. §49.

158 Ribitsch v. Austria, (1995), Series A no. 336, §108-111.

159 Assenov v. Bulgaria, (1998) Reports 1998-VIII.

160 Ibid. §102.

161 See in relation to article 2, McCann and Others v. UK, (1995), Series A, no.324, p. 49, §161, and Kaya v. Turkey (1998), Reports 1998-1, p. 324, §86 and Yasa v. Turkey (1998), Reports 1998-VI, p. 2438, §98.

162 Ibid. §102. See also Selmouni v. France (1999), 95 ECHR 1999-V, §71-90, wherein the Court dismissed the Government's preliminary objection on the ground of non-exhaustion of domestic remedies, finding that *"the notion of an effective remedy entails... a thorough and effective investigation... the authorities did not take the positive measures required in the circumstances of the case to ensure that the remedy referred to by the Government was effective"*, §79-80.

163 1187, Cakici v. Turkey (1999) Judgement of 8 July, Akdeniz and others v. Turkey (2001) Judgement of 31 May.

[164] See Velasquez Rodriguez v. Honduras, (1988), Inter-Am.Ct.H.R. (Ser.C) No. 4.; Godinez Cruz v. Honduras, (1989), Inter-Am. Ct.H.R. (Ser C) No.5; Suarez Rosero v. Ecuador, (1997), Inter-Am.Ct.H.R. (Ser C) No.35; Paniagua Morales v. Guatemala (1998), Inter-Am.Ct.H.R. (Ser C) No. 34; Loayza Tamayo v. Peru, (1997), Inter-Am.Ct.H.R. (Ser C) No. 33.

[165] Velasquez Rodriguez v. Honduras, (1988), Inter-Am.Ct.H.R. (Ser.C) No. 4. See also Godinez Cruz v. Honduras, (1989), Inter-Am. Ct.H.R. (Ser C) No.5 §164.

[166] Ibid. §155-6.

[167] Ibid. §174.

[168] Ibid. §177.

[169] Godinez Cruz v. Honduras, (1989), Inter-Am. Ct.H.R. (Ser C) No.5.

[170] Ibid. §191.

[171] Villagran Morales et al v. Guatemala, (The "Street Children" case) (1999) Judgement of 19 November 1999.

[172] Ibid. §173.

[173] Ibid. §173-4.

[174] Kurt v. Turkey (1998), Reports 1998-III, pp.1187, see also Cakici v. Turkey (1999) Judgment of 8 July.

[175] Ibid. §128-9.

[176] Kurt v. Turkey (1998), Reports 1998-III, §134.

[177] Cakici v. Turkey (1999) idem.§98-99.

[178] Ibid. §99.

[179] Akdeniz v. Turkey, Judgement of the 31 May 2001, §101.

[180] Ibid. §101.

[181] See also Article 1 UNCAT.

[182] See Campbell and Cosans v. UK, (1982) ECHR Series A, No.48, §30, Y v. UK, (1991) Comm Rep, No.8, Costello-Roberts v. UK, (1993) ECHR Series A, No. 247-C.

[183] See Article 2 of the Inter-American Convention.

[184] The Greek Case (1969), 12 Yearbook of the European Commission, 504.

[185] Ireland v. UK (1978), 2 Eur.Ct.H.R. (Ser.A), as discussed in Chapter One.

[186] Ibid. §750. This issue was not revisited by the Court in its consideration.

[187] Ibid. §752.

[188] Tomasi v. France (1992) ECHR Series A No. 241.§115.

[189] Ibid. §78

[190] See Tyrer v. UK, (1978) ECHR Series A, No. 26, Campbell and Cosans v. UK (1982) ECHR Series A, No.48.

[191] Tyrer v. UK (1978) ECHR Series A, No. 26, §33.
[192] See for example, Campbell and Cosans v. UK, supra.n.102.
[193] Jabari v. Turkey, (2000) Judgment of 11 July 2000.
[194] Ibid. §41-42.
[195] Soering v. UK (1989) Series A no.161 §111.
[196] It may also come within the scope of Article 2 as well.
[197] Ibid. §111. See Human Rights Committee, Pratt Morgan v. Attorney General for Jamaica, (1986) communication no 210/1986.
[198] Soering v. UK (1989), Series A no.161, §104.
[199] See also Pratt and Morgan v. Attorney General for Jamaica, supra. n. 110.
[200] See cases 12.023, 12.044, 12.107, 12.126, 12.146, (1997) Inter-American Commission Annual Report No.41/00, p. 918.
[201] Ibid. §169.
[202] Ibid. §201.
[203] Ibid. §203.
[204] Ibid. §259.
[205] The Suarez Rosero case (1997), Annual Report of the Inter-American Court, p. 283.
[206] Cases 12.023, 12.044, 12.107, 12.126, 12.146, (1997) Inter-American Commission Annual Report No.41/00. §287-288 citing the Suarez Rosero Case, §98.
[207] For further consideration of this issue, see the 1986 Report of the UN Special Rapporteur on Torture, and the 1994 Report of the UN Special Rapporteur on Torture.
[208] Cf. Although the Inter-American Convention does not specify a level of severity, as discussed in 2.2.3 above, the Inter-American Court has indicated that a distinction can be drawn between torture and other forms of ill-treatment based upon severity.
[209] APT UN Programme Intern
[210] Adopted 9 Dec. 1975, by the General Assembly of the UN.
[211] See no.1 in Annex p.27.
[212] Adopted 19 Dec. 1984, by the General Assembly of the UN.
[213] Article 1(1) UNCAT.
[214] Ireland v. UK, European Court of Human Rights, series A no.25, §16.
[215] E/CN.4/1996/35 §10; Report of Mr. Nigel Rodley, Special Rapporteur on torture to the UN Commission on Human Rights, on the Question of the Human Rights of all Persons subjected to any form of detention or imprisonment, in particular: Torture and other Cruel, Inhuman and Degrading Treatment or Punishment.

216 Amnesty International; Hidden Scandal, Secret shame; 2000, p.16.

217 See annex for further provisions on this issue.

218 Soering v. UK, European Court of Human Rights, series A., No. 161, §100; Costello-Roberts v. UK, European Court of Human Rights, judgement of 25 March 1993, §30.

219 Innocenti Digest, number 2, Children and Violence, UNICEF International Child Development Center.

220 Article 1 UNCAT.

221 See article 1(2) UNCAT.

222 On its day of General Discussion on State Violence against Children 2000, the Committee on the Rights of the Child encouraged NGOs to disseminate information about the individual complaint mechanism under article 22 UNCAT; see Rounding up Briefing Notes on the 25th session of the Committee against Torture.

223 Art.7(1) UNCAT.

224 The International Law Commission has also recently confirmed the peremptory character of the prohibition against torture as it is enshrined in the definition contained in article 1 UNCAT. This would arguably allow for universal jurisdiction in respect to crimes of torture. See Commentary to the 83rd session of the ILC (July/Aug. 2001) Art. 40 (6).
The obligation to either extradite (to the ICC) or prosecute in respect to the crime of torture as a Crime against Humanity, is also reflected in the Rome Statute for an International Criminal Court; art. 5. This obligation however, does not extend to ill-treatment, unless the acts committed took place in the context of an armed conflict as a war crime, where "inhuman treatment" will also give rise to an obligation to extradite or prosecute; article 8 (2) (ii).

225 Human Rights Committee General Comment No. 20, §5.

226 Ibid. §5.

227 Ibid. §4.

228 Although, the Committee in its commentary on a report on Norway, suggested that it pay attention to the definition of torture contained in the CAT, as Norway is a party to both the CRC and CAT, it is unclear what position the CRC would take if the State in question were not party to CAT as well. CRC/C/15/Add.23., §15.

229 This is especially noteworthy as far more States have ratified the CRC than they have UNCAT.

230 Day of General Discussion, 22 September 2000 on State violence against children; CRC/C/97.

[231] Adopted by the General Assembly on 14 December 1990.
[232] Adopted by the General Assembly 29 Nov. 1985.
[233] Adopted by the General Assembly 14 dec. 1990.
[234] E/CN.4/1986/15, §33; SR on Torture, Peter Koojimans, in his report to the Commission.
[235] E/CN.4/RES/2001/62, §5; Torture and other Cruel, Inhuman and Degrading Treatment or Punishment.
[236] E/CN.4/RES/1999/32; §11; Torture and other Cruel, Inhuman and Degrading Treatment or Punishment.
[237] E/CN.4/1997/7 §6; SR on torture proclaims corporal punishment to be in contravention of the prohibition of torture and other cruel, inhuman and degrading treatment and punishment.
[238] Tyrer v. United Kingdom, Series A No. 26, 1978.
[239] Ibid. §30.
[240] See The Greek case (1969), Y.B.Eur.Conv.on H.R 12, p. 186. And Ireland v. UK (1978) 2 Eur. Ct. H.R. (ser.A), p. 25. In both cases, the European Court of Human Rights, distinguished between the three prohibited acts i.e. torture, inhuman and degrading treatment or punishment. It was held to be the purpose rather than the severity and nature of the act which could lead to torture.
[241] Ibid.
[242] Ibid. §31.
[243] See CRC article 37 (c), children *"…shall have the right to maintain contact with his or her family through correspondence and visits, **save in exceptional circumstances**"*.
[244] Aydin v. Turkey; 25 Sept. 1997.
[245] Ibid; *"The applicant was subjected to a series of particularly terrifying and humiliating experiences while in custody at the hands of the security forces at Derik gendarmerie headquarters having regard to her **sex and youth** and the circumstances under which she was held"*.
[246] (1996), I.A.Ct.H.R. (Ser.C) No.5.
[247] Report No. 53/01, Case 11.565, April 4, 2001; Inter-American Commission on Human Rights.
[248] Ibid.
[249] Cambell and Cosans v. UK, 1982, Judgement of 22 February.
[250] Ibid. §182.
[251] UN Commission on Human Rights Resolution 2001/62, §2.
[252] Report of the Special Rapporteur on Torture to the 56th session of the General Assembly; A/56/156, §8.
[253] U.N.G.A. Res. 47/133 of December 1992.
[254] 17 HRLJ 18 (1996), Human Rights Committee.

[255] (107/1981), Report of the Human Rights Committee, GOAR, 38th Session, Supplement No. 40 (1983).
[256] Ibid.
[257] Report on the Situation on Human Rights in Argentina, OAS/Ser. L/V/II.49, doc. 19, corr. 1, 11 April 1980. Magnitude and consequences of the problem of the disappeared. Chapter III.
[258] Kurt v. Turkey; European Court of Human Rights (1998), Reports 1998-III.
[259] Question of torture and other cruel, inhuman or degrading treatment or punishment; interim report by the SR on Torture to the UN General Assembly; A/56/156, p. 5.
[260] Adopted by the GA on Dec. 18 1992.
[261] Article 20 (1) Declaration on the protection of all persons from enforced disappearance 1992.
[262] The Mandate and Methods of Work; the Report of the Special Rapporteur against Torture to the Commission on Human Rights E/CN.4/1997/7.
[263] Ibid.
[264] Ibid.
[265] A v. UK, Judgement 23 Sept. 1998.
[266] Ibid. §24.
[267] E/CN.4/1999/NGO/104; Written statement submitted by the International Save the Children Alliance.
[268] See Eric Sottas cited above in Childhood Abused, Geraldine Van Bueren, p. 146.
[269] General Comment No.20, ibid.
[270] General Comment No. 17 on Article 24, HRC 35th session 1989, at §3.
[271] Ibid. §6.
[272] CRC/C/15/Add.34, §16.
[273] Ibid.
[274] CRC/C/SR.404, 10.
[275] CRC/C/15/Add.156, §39.
[276] See for example, Thomas Hammarberg; *"To draw an analogy, no one would argue that a 'reasonable' level of wife-beating should be permitted. The notion of a permissible level of corporal punishment is thus best avoided"*. CRC/C/SR.205, §61-63.
[277] See for example Comments by Mrs. Karp; *"...any punishment or physical chastisement, however sparingly inflicted, would be prejudicial to the child's dignity and would contravene the Convention, particularly articles 3 and 19, article 20, §2, article 37 (a) and (c) and articles 39 and 40"*. CRC/C/SR.404, §10. Initial Report of Australia. Also see press releases of CRC Day of General

Discussion on Violence against Children in the Family and Home, 28. September 2001.

[278] Article 20 1(c) ACRWC.

[279] Article 20 (2) ACRWC.

[280] See article 2 ICESCR; *"Each State party to the present Covenant undertakes to take steps, individually and thorough international assistance and co-operation, especially economic and technical,* ***to the maximum of its available resources..."***

[281] A v. UK Judgement 23. September 1998.

[282] Ibid.

[283] Z and Others v. UK, Judgement 10 May 2001.

[284] Ibid.

[285] Ibid. §73.

[286] See i.e. Price v. UK, Judgement of the E.Ct.HR on 10 July 2001.

[287] Egmez v. Cyprus; ECHR Application no. 30873/96.

[288] Ibid. §78.

[289] V.v. UK, Judgement of the European Court of Human Rights on 16 Dec. 1999.

[290] See articles 5, 6 and 7 UN Convention against Torture dealing with extradition and jurisdictional matters. It would be difficult to envisage the extradition or extraterritorial jurisdiction of social workers who had failed to protect a child from torture by removing him from his home for example.

[291] I.e. Velasquez Rodriguez v. Honduras, 21 July 1989, Ser C No.7, §172-173; the "due diligence test", whereby a State can be held responsible for not preventing, investigating or punishing human rights violations by private actors.

[292] Article 1(2) UN Convention against Torture.

[293] Ibid. §5.

[294] E/C.12/1999/10, CESCR General Comment 13, 8 December 1999, §41.

[295] Costello Roberts v. UK, 24 March 1993.

[296] Y v. UK, Report of the Commission, 8 October 1991.

[297] Joint partly dissenting opinions of Judges Ryssdal, Thor Vilhjalmsson, Matscher and Wildhaber in Costello-Roberts v. UK.

[298] Y v. UK, Report of the European Commission on Human Rights, 8 October 1991.

[299] Ibid.

[300] Article 28 (2) CRC.

[301] CRC/GC/2001/1, §8.

[302] CRC/C/15 Add. 34.

[303] APT Programme Advisor

[304] Adopted and opened for signature, ratification and accession by General Assembly resolution 2200 A (XXI) of 16 December 1966. Entry into force 23 March 1976.

[305] Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984. Entry into force 26 June 1987.

[306] Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998.

[307] PCNICC/2000/INF/3/Add.2

[308] It is understood that no specific purpose need be proved for this crime.

[309] As element 3 requires that all victims must be "protected persons" under one or more of the Geneva Conventions of 1949, these elements do not include the custody or control requirement found in the elements of article 7 (1) (e).

[310] For this crime, "persons" can include dead persons. It is understood that the victim need not personally be aware of the existence of the humiliation or degradation or other violation. This element takes into account relevant aspects of the cultural background of the victim.