



Torture in International Law

A guide to jurisprudence

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association pour
la prévention de la torture
association for the prevention of torture
asociación para la prevención de la tortura

CEJIL

Association for the Prevention of Torture

The Association for the Prevention of Torture (APT) is an independent non-governmental organisation based in Geneva. It was founded by the Swiss banker and lawyer, Jean-Jacques Gautier, in 1977.

The APT envisions a world in which no one is subjected to torture or cruel, inhuman or degrading treatment or punishment, as promised by the Universal Declaration of Human Rights.

The APT focuses on the prevention of torture, rather than denunciations of individual cases or the rehabilitation of victims. This strategic focus on prevention enables the APT to collaborate with state authorities, police services, the judiciary, national institutions, academics and NGOs that are committed to institutional reform and changing practices.

To prevent torture, the APT focuses on three integrated objectives:

1. Transparency in institutions

To promote outside scrutiny and accountability of institutions where people are deprived of their liberty, through independent visiting and other monitoring mechanisms.

2. Effective legal frameworks

To ensure that international, regional and national legal norms for the prevention of torture and other ill-treatment are universally promoted, respected and implemented.

3. Capacity strengthening

To strengthen the capacity of national and international actors concerned with persons deprived of their liberty by increasing their knowledge and commitment to prevention practices.

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Center for Justice and International Law

The Center for Justice and International Law (CEJIL) is a non-governmental, non-profit human rights organization with consultative status before the Organization of American States (OAS) and the United Nations (UN), and observer status before the African Commission on Human and Peoples' Rights.

CEJIL's mission is to advocate for the full implementation of international human rights norms in the Member States of the OAS, through the use of the Inter-American System for the Protection of Human Rights (IAS). CEJIL works towards its mission and objectives through

- 1) the litigation of paradigmatic cases as well as monitoring their outcome;
- 2) training human rights defenders and government officials on the use of the IAS and international human rights standards; and
- 3) a comprehensive strategy to advocate before the OAS, IAS and Member States for increased transparency, dialogue and effectiveness of human rights protection.

CEJIL takes a victim-centered approach, working in partnership with human rights defenders and organizations to contribute to social justice. Founded in 1991 by a group of prominent human rights defenders in the Americas. CEJIL currently has offices in Washington D.C., USA; San Jose, Costa Rica; Buenos Aires, Argentina; and Rio de Janeiro, Brazil. In 2006–2007, CEJIL held activities in 23 countries.

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Jointly published in 2008 by the Association for the Prevention of Torture (APT) and the Center for Justice and International Law (CEJIL).

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ISBN 2-940337-27-6

Designed by minimum graphics

Printed by SRO-Kundig, Geneva

Summary of Contents

Introduction	1
Chapter 1: UN Treaty Bodies	5
Introduction	6
1.1 Definitions	7
1.2 State Parties' Obligations	13
1.3 Scope of Application	29
Conclusion	53
Chapter 2: The European Regional System	55
Introduction	56
2.1 Definitions	56
2.2 States Parties' Obligations	63
2.3 Scope of Application	72
Conclusion	90
Chapter 3: The Inter-American Regional System	93
Introduction	94
3.1 Definitions	94
3.2 States Parties' Obligations	101
3.3 Scope of Application	111
Conclusion	123
Chapter 4: The African Regional System	125
Introduction	126
4.1 Definitions	126
4.2 State Parties' Obligations	129
4.3 Scope of Application	137
Conclusion	144

Chapter 5: International Tribunals	145
Introduction	146
5.1 Definitions	147
5.2 Scope of Application	169
5.3 The International Criminal Court	174
Conclusion	176
Conclusion	179
Table of cases	183

Contents

Abbreviations	x
Foreword	xi
Introduction	1
Chapter 1: UN Treaty Bodies	5
Introduction	5
1.1 Definitions	7
1.1.1 The ICCPR and the Human Rights Committee	7
1.1.1.1 Article 7 ICCPR	7
1.1.1.2 Article 10 ICCPR	9
1.1.2 The UNCAT and the Committee against Torture	10
1.1.2.1 “Intentional” infliction of “severe pain or suffering”	12
1.1.2.2 Purpose	13
1.2 State Parties’ Obligations	13
1.2.1 Duty to protect from ill-treatment by private actors	13
1.2.2 Duty to investigate	15
1.2.3 Duty to enact and enforce legislation criminalising torture	18
1.2.3.1 Universal jurisdiction	21
1.2.4 Duty to exclude statements obtained by torture or other ill-treatment	23
1.2.5 Duty to train personnel and provide procedural safeguards	24
1.2.6 Duty to grant redress and compensate victims	27
1.3 Scope of Application	29
1.3.1 The absolute nature of the prohibition of torture and other ill-treatment	30
1.3.2 Lawful sanctions	31
1.3.2.1 The death penalty	32
1.3.2.2 Corporal punishment	36
1.3.3 Conditions of detention	38
1.3.4 Solitary confinement	41
1.3.5 Incommunicado detention and enforced disappearances	43
1.3.6 Relatives of victims of human rights violations	45

1.3.7	Extradition and expulsion	46
1.3.7.1	Diplomatic assurances	51
	Conclusion	53
	Chapter 2: The European Regional System	55
	Introduction	56
2.1	Definitions	56
2.1.1	Torture	56
2.1.2	Inhuman treatment	60
2.1.3	Degrading treatment	61
2.2	States Parties' Obligations	63
2.2.1	Duty to protect from ill-treatment by private actors	63
2.2.2	Duty to investigate	65
2.2.3	Duty to enact and enforce legislation	68
2.2.4	Duty to exclude evidence obtained by torture or other ill-treatment	69
2.2.5	Duty to train personnel and provide procedural safeguards	70
2.2.6	Duty to grant redress and compensate victims	72
2.3	Scope of Application	72
2.3.1	The absolute nature of the prohibition of torture and other ill-treatment	72
2.3.2	Lawful sanctions	75
2.3.2.1	The death penalty	75
2.3.2.2	Corporal punishment	76
2.3.3	Conditions of detention	77
2.3.4	Solitary confinement	81
2.3.5	Incommunicado detention and enforced disappearances	82
2.3.6	Relatives of victims of human rights violations	83
2.3.7	Extradition and expulsion	84
2.3.7.1	Diplomatic assurances	89
	Conclusion	90
	Chapter 3: The Inter-American Regional System	93
	Introduction	94
3.1	Definitions	94
3.1.1	Torture	95
3.1.2	Cruel, inhuman or degrading treatment or punishment	98
3.1.3	Humane treatment of detainees	99

3.2 States Parties' Obligations	101
3.2.1 Duty to protect from ill-treatment by private actors	101
3.2.2 Duty to investigate	103
3.2.3 Duty to enact and enforce legislation	105
3.2.3.1 Universal jurisdiction	106
3.2.4 Duty to exclude evidence obtained by torture or other ill-treatment	107
3.2.5 Duty to train personnel and provide procedural safeguards	108
3.2.6 Duty to grant redress and compensate victims	110
3.3 Scope of Application	111
3.3.1 The absolute nature of the prohibition of torture and other ill-treatment	111
3.3.2 Lawful sanctions	113
3.3.2.1 The death penalty	113
3.3.2.2 Corporal punishment	114
3.3.3 Conditions of detention	115
3.3.4 Solitary confinement	116
3.3.5 Incommunicado detention and enforced disappearances	118
3.3.6 Relatives of victims of human rights violations	120
3.3.7 Extradition and expulsion	121
3.3.7.1 Diplomatic assurances	122
Conclusion	123
Chapter 4: The African Regional System	125
Introduction	126
4.1 Definitions	126
4.1.1 Dignity	127
4.1.2 Torture	127
4.1.3 Cruel, inhuman or degrading punishment and treatment	128
4.2 State Parties' Obligations	129
4.2.1 Duty to protect from ill-treatment by private actors	129
4.2.2 Duty to investigate	132
4.2.3 Duty to enact and enforce legislation criminalising torture	132
4.2.4 Duty to exclude statements obtained by torture or other ill-treatment	133
4.2.5 Duty to train personnel and provide procedural safeguards	133
4.2.6 Duty to grant redress and compensate victims	136

4.3	Scope of Application	137
4.3.1	The absolute nature of the prohibition of torture and other ill-treatment	137
4.3.2	Lawful sanctions	138
4.3.2.1	The death penalty	138
4.3.2.2	Corporal punishment	139
4.3.3	Conditions of detention	140
4.3.4	Solitary confinement	140
4.3.5	Incommunicado detention and enforced disappearances	141
4.3.6	Relatives of victims of human rights violations	142
4.3.7	Extradition and expulsion	142
	Conclusion	144
	Chapter 5: International Tribunals	145
	Introduction	146
5.1	Definitions	147
5.1.1	The purpose requirement	149
5.1.2	Intentional infliction of severe pain or suffering	152
5.1.3	The official capacity requirement	153
5.1.4	The distinction between torture and other ill-treatment	155
5.1.4.1	Inhuman treatment	156
5.1.4.2	Cruel treatment	158
5.1.4.3	Outrages upon personal dignity	159
5.1.4.4	Wilfully causing great suffering or serious injury to body or health	161
5.1.4.5	Violence to life, health and physical or mental well-being	162
5.1.4.6	Other inhumane acts	164
5.1.4.7	Summary	167
5.1.5	Torture and other ill-treatment within the crime of genocide	167
5.2	Scope of Application	169
5.2.1	The absolute nature of the prohibition of torture and other ill-treatment	169
5.2.2	Lawful sanctions	170
5.2.2.1	The death penalty	170
5.2.2.2	Corporal punishment	170

5.2.3	Conditions of detention	171
5.2.4	Solitary confinement	172
5.2.5	Incommunicado detention and enforced disappearances	173
5.2.6	Relatives of victims of human rights violations	173
5.3	The International Criminal Court	174
5.3.1	Torture as a crime against humanity	174
5.3.2	Torture as a war crime	175
	Conclusion	176
	Conclusion	179
	Table of cases	183

Abbreviations

AfrCommHPR	African Commission on Human and Peoples' Rights
ACHPR	African Charter of Human and Peoples' Rights
ACHR	American Convention on Human Rights
CAT	Committee against Torture
CRC	Committee on the Rights of the Child
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
HRC	Human Rights Committee
IACCommHR	Inter-American Commission on Human Rights
IACPPT	Inter-American Convention to Prevent and Punish Torture
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ICCPR	International Covenant on Civil and Political Rights
UN	United Nations
UNCAT	UN Convention against Torture
UNCRC	UN Convention on the Rights of the Child

Foreword

The Association for the Prevention of Torture (APT) is an international non-governmental organisation committed to preventing torture and other ill-treatment worldwide. The APT focuses on three integrated objectives: effective legal frameworks, transparency in institutions, and capacity strengthening.

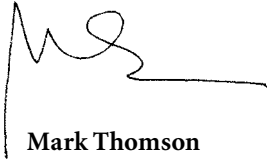
This Guide is the culmination of an APT project begun in 2002 with the publication of a guide to the jurisprudence of the European Court of Human Rights on torture and ill-treatment, which forms the basis of Chapter 2 of this Guide.

The Center for Justice and International Law (CEJIL) is a regional non-governmental human rights organisation whose mission is to achieve the full implementation of international human rights norms in the Member States of the Organisation of American States, through the use of the Inter-American System for the protection of human rights and other international protection mechanisms. CEJIL's approach is victim-centred, working in partnership with human rights defenders and organisations to contribute to social justice. In furtherance of its mission CEJIL litigates cases of grave violations of human rights to obtain justice and reparations for victims and to foster human rights protections through changes in countries' laws, policies and practices.

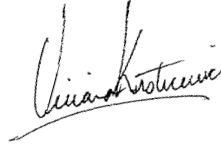
This Guide is a collaborative effort to help ensure that international and regional legal norms for the prevention of torture and other ill-treatment are universally respected and implemented. Governments, lawyers and civil society actors must be aware of what acts qualify as torture or ill-treatment, as well as the full scope of the obligations undertaken by the State to prevent, investigate and punish torture. Standards must be consistently applied at the international, regional and national levels to ensure equal protection for everyone. This Guide aims to answer such questions as what constitutes torture, who should be held responsible when ill-treatment occurs, when a State must investigate allegations of abuse, and how detainees should be treated.

The APT and CEJIL would like to thank in particular Emma Reilly, APT Legal Advisor, the author of this publication, who provided an insightful analysis on the jurisprudence of the international and regional human rights systems. The APT and CEJIL would also like to thank Ariela Peralta, Deputy

Director of CEJIL, for examining the jurisprudence of the Inter-American Human Rights System and for her comments on the draft of this Guide. We are also very grateful to Debra Long, Edouard Delaplace and Matt Pollard, former APT colleagues, for their contributions to and comments on drafts of this Guide. We would also like to thank Silvio Flückiger, Caroline Fournet, Gulia Grazioli and Yann Ledochowski, former APT interns, for their early research on this subject.



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Introduction

International human rights law defines the limits of a State's power over individuals, and imposes positive obligations owed by the State to individuals. States voluntarily sign and ratify treaties that recognise and ensure the rights of every person, and submit themselves to the control of judicial or quasi-judicial organs which accept complaints from individuals. From the vantage point of the 21st century, with few States openly admitting to abuses of human rights, it is perhaps difficult to imagine the revolutionary nature of the first human rights treaties; for the first time, international law governed not only relations among States, but also between States and individuals. For certain acts, States could no longer claim that their sovereignty over their own territory prevented interference. State behaviour at the domestic level was now open to outside scrutiny.

The prohibition against torture in international law is, like that against slavery or genocide, absolute. Torture is impermissible under *any* circumstances, including war, public emergency or terrorist threat. The prohibition is so strong and universally accepted that it is now a fundamental principle of customary international law. This means that even States which have not ratified any of the international treaties explicitly prohibiting torture are banned from using it against anyone, anywhere. However, there is no forum at the international level to which an individual can make a complaint based solely on a violation of customary international law, so such violations often carry consequences only where there is political will among other States to hold one another responsible.¹

The extent of all States' obligations to prevent torture is therefore largely determined by international treaties, and the bodies that interpret them. At the international level, the United Nations' Human Rights Committee and Committee against Torture interpret State obligations under the International Covenant on Civil and Political Rights and Convention against Torture, respectively. Where the State in question has recognised their competence to do so, these bodies may consider complaints from individuals against a State. The Committees are not courts, but rather quasi-judicial bodies, meaning that their decisions, while important to the interpretation of treaties, are not directly legally enforceable. Three regional systems for the protection of human rights

¹ Where a complaint is submitted by a State, the International Court of Justice has competence to declare whether a violation of customary international law has in fact occurred (Article 38(1)(b), Statute of the International Court of Justice, annexed to the Charter of the United Nations, 26 June 1945, T.S. 993, entered into force Oct. 24, 1945, and incorporated therein by Article 92).

also exist; in Europe, in the Americas and in Africa. All three systems adopted a two-body mechanism for the protection of human rights, consisting of a Commission, which is a quasi-judicial body with the power to issue decisions and recommendations, and a Court with the power to issue legally enforceable judgements. In 1999, reforms to the European system eliminated the European Commission of Human Rights.

International law does not exist in a vacuum. The judges of the Courts, and the members of the Committees and Commissions, who interpret the treaties are also members of societies, and attitudes within societies change over time. As a culture of human rights has developed, the term ‘torture’ has come to cover acts which may not have been envisaged by the drafters of the earliest declarations and laws in which it was mentioned. This development is to be welcomed; as pointed out in the ICRC Commentary on the Geneva Conventions, a strict definition listing every prohibited act would simply test the apparently endless ingenuity of torturers rather than providing effective protection to their victims.²

The international and regional bodies increasingly borrow from one another’s jurisprudence, and draw inspiration from independent experts and expert bodies, gradually creating a more consistent and coherent body of international law. In particular, they refer to the reports and findings of the UN Special Rapporteur on Torture.³ To take but one example, recognition at the international level that rape is an act of torture began with statements by the Special Rapporteur on Torture.⁴ These statements were taken into account by the Inter-American Commission in the 1996 case *Martí de Mejía v Peru*, where it became the first of the regional bodies explicitly to recognise that rape could constitute torture.⁵ The following year, the European Court followed suit in *Aydin v Turkey*.⁶ Submissions to the Court by Amnesty International included

² ICRC Commentary on the Geneva Conventions, IV Convention, International Committee of the Red Cross, Geneva, 1958 (Reprinted 1994), pp. 38–39.

³ The UN Special Rapporteur on Torture is an independent expert created by the UN Commission on Human Rights in 1985, whose mandate has been continued by the UN Human Rights Council, which replaced the Commission on Human Rights in 2006. The Special Rapporteur can consider individual cases, but his opinions and recommendations are not binding, and are all too frequently ignored by States.

⁴ See, for example, the 1986 report of the Special Rapporteur on Torture, UN Doc. E/CN.4/1986/15, §119; or his 1992 statement to the Commission on Human Rights explicitly stating that rape constitutes torture, Summary Record of the 21st meeting of the Commission on Human Rights, UN Doc. E/CN.4/1992/SR.21, §35.

⁵ *Martí de Mejía v Peru*, IACCommHR, Case 10970, Report No. 5/96, 28 February 1996.

⁶ *Aydin v Turkey*, no. 23178/94, Rep. 1997-VI, ECHR, judgement of 25 September 1997.

reference to the decision of the Inter-American Commission, reports of the UN Special Rapporteur on Torture, and the fact that the International Criminal Tribunal for the former Yugoslavia (ICTY) had indicted individuals for torture based on allegations that they had raped detainees.⁷ In 1998, the ICTY in turn referred to the decision of the European Court, as well as that of the Inter-American Commission, in finding that rape constitutes torture.⁸ In the same year, the International Criminal Tribunal for Rwanda also concluded that rape is torture⁹ and, in 2000, the African Commission on Human and Peoples' Rights also specifically found that rape could be qualified as torture or other cruel, inhuman or degrading treatment.¹⁰

This guide to international jurisprudence on the question of torture and other forms of ill-treatment aims to give both experts and those unfamiliar with international law an overview of the expanding definition of torture, the duties incurred by States, the scope of the prohibition, and international criminal law on individual responsibility for the crime of torture. The first four chapters deal with the international and regional law applicable to States in the UN, European, Inter-American and African systems. For ease of comparison, these chapters share a common structure, which also reflects the increasing cross-fertilisation between the systems. The fifth chapter addresses individual criminal responsibility for the international crime of torture, considering the jurisprudence of the ad-hoc International Tribunals for the former Yugoslavia and for Rwanda, and the statute of the International Criminal Court.

Finally, it should never be forgotten that, however strong the legal prohibition on torture, reality has yet to conform to the strict letter of the law. Additionally, non-judicial mechanisms are required to ensure that agents of the State do not resort to or tolerate torture, that violations are detected, and that victims receive treatment and compensation.

⁷ *Ibid.* §51.

⁸ *Prosecutor v Delalić and Others (the Čelebići case)*, Case No. IT-96-21, ICTY Trial Chamber II, judgement of 16 November 1998; *Prosecutor v Furundžija*, Case No. IT-95-17/1, ICTY Trial Chamber II, judgement of 10 December 1998.

⁹ *Prosecutor v Akayesu*, Case No. ICTR-96-4-T, ICTR Trial Chamber I, judgement of 2 September 1998.

¹⁰ *Malawi African Association and Others v Mauritania*, AfrCommHPR Communication Nos. 54/1991, 61/1991, 98/1993, 164/1997 to 196/1997 and 210/1998, 27th session, 27 April–11 May 2000.

UN Treaty Bodies

Introduction	6
1.1 Definitions	7
1.2 State Parties' Obligations	13
1.3 Scope of Application	29
Conclusion	53

Introduction

Article 5 of the Universal Declaration of Human Rights 1948 reads “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”¹¹ This Article is widely regarded as expressing customary international law. Within the United Nations framework, torture and other cruel, inhuman or degrading treatment or punishment are explicitly prohibited under a number of international treaties, which are legally binding on those States which have ratified them.¹² Many treaties establish Committees, known collectively as the treaty bodies, which are mandated to monitor States Parties’ compliance with their obligations under the treaties. They do this by issuing General Comments or Recommendations, which provide detailed interpretation of specific aspects of the treaty. Some of the treaty bodies also adjudicate individual cases, provided the State in question has made a declaration recognising the Committee’s competence in this regard.

The purpose of this chapter is to analyse the definition of torture applied within the United Nations system, by considering the General Comments and jurisprudence of the treaty bodies, in particular the Human Rights Committee (HRC), which monitors compliance with the International Covenant on Civil and Political Rights (ICCPR),¹³ and the Committee against Torture (CAT), which monitors compliance with the United Nations Convention against

¹¹ Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

¹² Torture and other forms of ill-treatment are prohibited under, *inter alia*: Article 7 of the International Covenant on Civil and Political Rights (ICCPR), G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976; the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987; Article 37 of the Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sept. 2, 1990; Article 10 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. res. 45/158, annex, 45 U.N. GAOR Supp. (No. 49A) at 262, U.N. Doc. A/45/49 (1990), entered into force July 1, 2003.; and Article 15 of the Convention on the Rights of Persons with Disabilities, G.A. res. A/61/611 (2006). Additionally, Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, entered into force Jan. 4, 1969, provides that everyone has “*The right to security of person and protection by the State against violence or bodily harm.*” and the Committee on the Elimination of Discrimination against Women has stated that “*Gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, [including the right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment,] is discrimination within the meaning of article 1 of the [Convention on the Elimination of All Forms of Discrimination against Women]*” (CEDAW, General Recommendation No.19, §7).

¹³ The HRC was established under Article 28 of the ICCPR.

Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT).¹⁴

The chapter is split into three sections. The first section contains an analysis of the elements required for an act to be classified as torture or other cruel, inhuman or degrading treatment or punishment. The second section focuses on States Parties' obligations under the main treaties. The third section considers the scope of application of these obligations. This structure will also be followed in Chapters 2–4 on the regional human rights systems, to aid comparison.

1.1 Definitions

In contrast to the regional bodies, whose jurisprudence is the subject of later chapters, neither the Human Rights Committee nor the Committee against Torture have found it necessary to make stark distinctions between torture and other prohibited ill-treatment.

1.1.1 The ICCPR and the Human Rights Committee

The 1966 International Covenant on Civil and Political Rights (ICCPR) was the first universal human rights treaty explicitly to include a prohibition of torture and other cruel, inhuman or degrading treatment,¹⁵ which aims to protect both the dignity and the physical and mental integrity of the individual.¹⁶ The two provisions of the ICCPR particularly relevant to this prohibition are Articles 7 and 10.

1.1.1.1 Article 7 ICCPR

Article 7 ICCPR reads:

“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.”

While it forbids them in absolute terms, Article 7 does not contain a definition of the prohibited acts. In its General Comment on Article 7, the HRC stated that it did not consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between torture and the other forms of ill-

¹⁴ The CAT was established under Article 17 of the UNCAT.

¹⁵ For the purposes of this chapter, please read “treatment” so as to include “punishment.”

¹⁶ HRC, General Comment No. 20, “Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment” (1992) §2, in UN Doc. HRI/GEN/1/Rev.7.

treatment, though such “*distinctions depend on the nature, purpose and severity of the treatment applied.*”¹⁷ Therefore, in its jurisprudence, the HRC often does not specify precisely which aspect of the prohibition has been breached, but simply states that there has been a violation of Article 7.

The HRC has indicated that the assessment of whether particular treatment constitutes a violation of Article 7 “*depends on all circumstances of the case, such as the duration and manner of the treatment, its physical or mental effects as well as the sex, age and state of health of the victim.*”¹⁸ Elements such as the victim’s age and mental health may therefore aggravate the effect of certain treatment so as to bring it within Article 7. However, it is not sufficient that treatment be capable of producing an adverse physical or mental effect; it must be proven that this has occurred in a specific case.¹⁹

The second sentence of Article 7 ensures that the prohibition is understood to include any medical or scientific experimentation conducted without the free consent of the subject. This specific prohibition was a response to atrocities committed by doctors in Nazi concentration camps during World War II. In this regard, the Committee has stated that special protection is necessary for persons not capable of giving valid consent, in particular those deprived of their liberty, who should not be subjected to any medical or scientific experimentation that may be detrimental to their health.²⁰

In contrast to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), discussed below, there is no requirement in the ICCPR for a level of involvement or acquiescence by a State official for an act to be qualified as torture or ill-treatment. Rather, “*It is the duty of the State Party 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.*”²¹

¹⁷ *Ibid.* §4.

¹⁸ *Vuolanne v Finland*, HRC Communication No. 265/1987, 7 April 1989, §9.2.

¹⁹ *Ibid.*

²⁰ *Ibid.* §7.

²¹ HRC, General Comment No. 20, 1992, §2.

1.1.1.2 Article 10 ICCPR

Article 10(1) ICCPR states:

“All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”

Article 10 complements, for those who have been deprived of their liberty, the prohibition of torture and ill-treatment. Not only may detainees not be subjected to treatment contrary to Article 7, but they also have a positive right to be treated with respect. This provision means that detainees may not be “*sub-jected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons.*”²² It therefore covers forms of treatment which would not be sufficiently severe to qualify as cruel, inhuman or degrading under Article 7.²³

From the jurisprudence of the HRC, it seems that the Committee tends to apply Article 10(1) to general conditions of detention, reserving Article 7 for situations where an individual is subjected to specific attacks on his or her personal integrity.²⁴ In *Kennedy v Trinidad and Tobago*, for example, the Committee considered that beatings to which the author was subjected while in police custody amounted to a violation of Article 7, whereas the general conditions under which he was held, which included overcrowding while on remand and solitary confinement while on death row, violated Article 10(1).²⁵ To support a finding of a violation of Article 7, on the other hand, a detainee must show that he or she has been subjected to worse treatment than other detainees. In *Pinto v Trinidad and Tobago*, the author complained about appalling conditions of detention, but “*failed to provide details on the treatment he was subject to, other*

²² HRC, General Comment No. 21, “Humane treatment of persons deprived of their liberty” (1992), §3, in UN Doc. HRI/GEN/1/Rev.7

²³ Notwithstanding this lower threshold level of severity, and the fact that Article 10 as a whole is not included in the list of non-derogable rights in Article 4 ICCPR, the HRC has concluded that Article 10(1) expresses a norm of general international law, and is therefore not subject to derogation. See HRC, General Comment No. 29, “Derogations during a state of emergency”, §13(a), in UN Doc. HRI/GEN/1/Rev.7.

²⁴ Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary, 2nd revised edition*, NP Engel, Strasbourg, 2005, p. 250.

²⁵ *Kennedy v Trinidad and Tobago*, HRC Communication No. 845/1998, 26 March 2002, §§7.7–7.8. In this case, the author was kept on remand for a total of 42 months with between five and ten other detainees in a cell measuring 6 by 9 feet. Following his trial, he was detained for a period of almost eight years on death row, during which he was subjected to solitary confinement in a small cell with no sanitation except for a slop pail and no natural light. He was allowed out of his cell only once a week, and provided with wholly inadequate food that did not take into account his particular dietary requirements.

than by reference to conditions of detention that affected all inmates equally.”²⁶ The HRC therefore concluded that there had been no violation of Article 7.²⁷ In contrast, in *Mukong v Cameroon*, the fact that the author was “singled out for exceptionally harsh and degrading treatment,” including being “detained incommunicado, ... threatened with torture and death and intimidated, deprived of food, and kept locked in his cell for several days on end without the possibility of recreation” led the Committee to find a violation of Article 7.²⁸

It may be argued that a violation of Article 7 in respect of a person deprived of liberty automatically entails a violation of Article 10(1). In *Linton v Jamaica*, for example, the Committee considered that “*The physical abuse inflicted on the author. . . , the mock execution set up by prison warders and the denial of adequate medical care after the injuries sustained in the aborted escape attempt. . . constitute cruel and inhuman treatment within the meaning of article 7 and, therefore, also entail a violation of article 10, paragraph 1, of the Covenant.*”²⁹

While general trends may be detected from the jurisprudence, there remains considerable overlap in the Committee’s application of Articles 7 and 10(1). In some cases, general conditions of detention have been so severe that they have reached the threshold of severity for a violation of Article 7, and in others, breaches of Article 10(1) have been found in cases of specific attacks.³⁰

1.1.2 The UNCAT and the Committee against Torture

In 1984, for the purposes of describing specific measures against torture, the UNCAT included a definition of torture:

“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

²⁶ *Pinto v Trinidad and Tobago*, HRC Communication No. 512/1992, 16 July 1996, §8.3. The HRC made no finding of fact on the conditions of detention in the case.

²⁷ The Committee did not specifically rule on whether the conditions in the case amounted to a violation of Article 10(1), although a violation of this provision was found in respect of other allegations. *Ibid.*

²⁸ *Mukong v Cameroon*, HRC Communication No. 458/1991, 21 July 1994, §9.4.

²⁹ *Linton v Jamaica*, HRC Communication No. 255/1987, 22 October 1992, §8.5. See also *Bailey v Jamaica*, HRC Communication No. 334/1988, 31 March 1993, §9.3: “*In the Committee’s opinion, the fact that Mr. Bailey was beaten repeatedly with clubs, iron pipes and batons, and then left without any medical attention in spite of injuries to head and hands, amounts to cruel and inhuman treatment within the meaning of article 7 of the Covenant and also entails a violation of article 10, paragraph 1.*”

³⁰ See, for example, *Walker and Richards v Jamaica*, HRC Communication No. 639/1995, 28 July 1997. In this case, no violation of Article 7 was alleged by the complainant in respect of the beating.

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.”³¹

The UNCAT also requires States to prevent “other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture..., 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.”³² However, the UNCAT provides no definition of such acts. The Committee against Torture has itself recognised that “In practice, the definitional threshold between cruel, inhuman or degrading treatment or punishment and torture is often not clear.”³³

However, the UN Special Rapporteur on Torture takes the position that “a thorough analysis of the travaux préparatoires of articles 1 and 16 of [UNCAT] as well as a systematic interpretation of both provisions in light of the practice of the Committee against Torture leads one to conclude that the decisive criteria for distinguishing torture from [cruel, inhuman or degrading treatment] may best be understood to be the purpose of the conduct and the powerlessness of the victim, rather than the intensity of the pain or suffering inflicted.”³⁴ The Special Rapporteur considers that, while torture is absolutely prohibited in all circumstances, the circumstances in which other forms of treatment are perpetrated will determine whether they qualify as cruel, inhuman or degrading within the meaning of the UNCAT. If force is used legally (under domestic law) and for a lawful purpose, and the force applied is not excessive and is necessary to meet the purpose (that is to say, it is proportionate), then this generally will not qualify as cruel, inhuman or degrading treatment.³⁵ However, in a situation of detention or similar direct control, no such test of proportionality applies, and

³¹ Article 1 UNCAT.

³² Article 16 UNCAT.

³³ CAT, General Comment No. 2, “Implementation of article 2 by States Parties”, UN Doc. CAT/C/GC/2/CRP.1/Rev.4 (23 November 2007), §3. It should be noted that this lack of a clear distinction potentially poses a problem as regards those State obligations which apply only to torture, and not to other acts of ill-treatment. See section 1.2.3, below.

³⁴ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, UN Doc. E/CN.4/2006/6 (23 December 2005), §39.

³⁵ Manfred Nowak and Elizabeth McArthur, “The distinction between torture and cruel, inhuman or degrading treatment”, *Torture*, Vol. 16, No. 3, 2006, pp. 147–151. “Lawful purposes” include effecting a lawful arrest, preventing the escape of a person lawfully detained, self-defence or defence of others from unlawful violence, and action lawfully taken to quell a riot or insurrection.

any form of physical or mental pressure or coercion constitutes at least cruel, inhuman or degrading treatment.³⁶

One common element of the definitions of torture and other forms of ill-treatment under the UNCAT is that all must involve a public official or someone acting in an official capacity (a requirement discussed in detail in section 1.2.1 below). However, for the purposes of the UNCAT, cruel, inhuman or degrading treatment may “not amount to torture” either because it does not have the same purposes as torture, or because it is not intentional, or perhaps because the pain and suffering is not “severe” within the meaning of Article 1. It is therefore instructive to analyse these aspects of the definition of torture in Article 1 in more detail.

1.1.2.1 “Intentional” infliction of “severe pain or suffering”

The UNCAT definition of torture covers not only positive acts, but also omissions.³⁷ Many authors have concluded that recklessness, but not negligence, would suffice for the intention element. However, it appears that at least one member of the CAT disagrees. In the 2007 discussion of the report of Denmark, Mr. Grossman asked the delegation to corroborate his understanding that negligence was excluded as a basis for charges to be brought under the Danish Military Criminal Code in the case of torture, and asked for an explanation of the rationale behind its exclusion since negligence was otherwise “*a well-established subjective component of criminal liability.*”³⁸ It is not yet clear to what extent other members of the CAT agree with this analysis.

Assessing the severity of physical or mental pain or suffering includes a subjective element. Where the State agent inflicting pain or suffering or acquiescing in its infliction is aware that the victim is particularly sensitive, it is possible that acts which would not otherwise reach the threshold of severity to constitute torture may do so.³⁹ It should be remembered that purely mental torture

³⁶ *Ibid.*

³⁷ See Nigel Rodley and Matt Pollard, “Criminalisation of Torture: State Obligations under the United Nations Convention against Torture” [2006] E.H.R.L.R No.2, p. 115, at p. 120. See also, for example, CAT, Concluding Observations on Chile, UN Doc. CAT/C/CR/32/5 (14 June 2004), §§6(j) and 7(m), where the Committee recommended that Chile eliminate the practice of refusing to provide emergency medical care to women suffering complications from illegal abortions, unless the women confessed to information about those who performed the abortions.

³⁸ Discussion of Denmark, CAT, Summary record of the 757th meeting, UN Doc. CAT/C/SR.757 (8 May 2007), §35.

³⁹ This was implied in *Dzemajl and Others v Yugoslavia*, CAT Communication No. 161/2000, 21 November 2002, §9.2.

is included within the definition, so the threat of torture may itself amount to psychological torture.⁴⁰

1.1.2.2 Purpose

The purposes specifically named in Article 1 do not constitute an exhaustive list; “*such purposes as*” indicates that other similar purposes may be included. The element joining these purposes is perhaps best understood as “*some connection with the interests or policies of the State and its organs.*”⁴¹ Sufficiently severe pain or suffering inflicted by a public official purely sadistically, but for no other purpose, would therefore appear to be excluded from the definition of torture. However, it is likely that such behaviour would come within the scope of the UNCAT if there was an additional element of punishment or intimidation, and acquiescence by the State.⁴²

1.2 States Parties’ Obligations

1.2.1 Duty to protect from ill-treatment by private actors

– ICCPR

The prohibition on torture and ill-treatment in the ICCPR applies regardless whether the acts were committed by “*public officials*” or “*other persons acting on behalf of the State*”, or “*private persons*” and “*whether by encouraging, ordering, tolerating or perpetrating prohibited acts.*”⁴³ Thus, the prohibition on ill-treatment does not merely create a negative duty on State agents not to engage in such treatment. The State also has positive duties to protect persons under its jurisdiction from acts of private individuals.⁴⁴

– UNCAT

The UNCAT specifies that, to qualify as torture or other cruel, inhuman or degrading treatment, the pain or suffering must be inflicted at the instigation, or with the consent or acquiescence, of a public official or other person acting in an official capacity. This requirement means that States are not generally responsible for acts beyond their control. However, they can be held responsi-

⁴⁰ This is well-established. See, for example, CAT, Report on Argentina, UN Doc. A/45/44, 1990, §154.

⁴¹ Burgers and Danelius, *The United Nations Convention against Torture*, Martinus Nijhoff, Dordrecht, 1988, p. 119.

⁴² *Ibid.* See also sections 1.1.2.1 and 1.2.1.

⁴³ HRC, General Comment No. 20, 1992, §13.

⁴⁴ See also HRC, General Comment No. 31, “Nature of the General Legal Obligation Imposed on States Parties to the Covenant”, UN Doc. CCPR/C/21/Rev.1/Add.13 (26 May 2004), §8.

ble for acts of torture by private individuals if they fail to respond adequately to them, or fail to take general and specific measures to prevent them.

From the Committee's jurisprudence, it seems that it is only in the absence of any *de jure* government control that the Committee will recognise persons holding *de facto* power as public officials. Where *de facto* control of a region is held by a faction that does not enjoy government support, acts by members of the faction will not fall within the definition of torture in Article 1 of the Convention.⁴⁵ Thus, in *G.R.B. v Sweden*⁴⁶ a risk of ill-treatment at the hands of Sendero Luminoso, a non-State entity controlling significant portions of Peru, could not qualify as torture within the meaning of Article 1. However, in *Elmi v Australia*,⁴⁷ the Committee considered that, in the exceptional circumstance where State authority was wholly lacking (Somalia had no central government at the time), acts by groups exercising quasi-governmental authority could fall within the definition of Article 1. While this led some authors to believe that the Committee would now apply a wider definition of 'public official' in a broader range of circumstances, any such hopes were dashed three years later in *H.M.H.I. v Australia*.⁴⁸ In the intervening period, a Transitional National Government had been formed in Somalia, and while doubts remained as to the reach of its territorial authority and its permanence, the Committee considered that acts by entities other than those acting under the authority of, or tolerated by, the new government did not fall within the definition of torture under Article 1.⁴⁹

The question of whether the failure of a State Party to respond adequately to private torturers amounts to "acquiescence" under UNCAT was considered in *Dzemajl and Others v Yugoslavia*.⁵⁰ In this case, the police, though present at the scene, failed to intervene to prevent the destruction of a Roma settlement. The Committee considered that this lack of action constituted acquiescence

⁴⁵ It is important to recall that article 1 of the Convention also specifies that its definition "is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application." Thus, the fact that acts are perpetrated by non-officials (*de jure* or *de facto*) does not mean they could not qualify as acts of "torture" under other treaties or laws.

⁴⁶ *G.R.B. v Sweden*, CAT Communication No. 83/1997, 15 May 1998, §6.5. See also, for example, *M.P.S. v Australia*, CAT Communication No. 138/1999, 30 April 2002, §7.4; *S.V. and Others v Canada*, CAT Communication No. 49/1996, 15 May 2001, §9.5.

⁴⁷ *Elmi v Australia*, CAT Communication No.120/1998, 14 May 1999, § 6.5.

⁴⁸ *H.M.H.I. v Australia*, CAT Communication No 177/2001, 1 May 2002.

⁴⁹ *Ibid.* §6.4. The issue was also raised by the complainant, but not specifically addressed by the CAT, in *Y.H.A. v Australia*, CAT Communication No.162/2000, 23 November 2001.

⁵⁰ *Dzemajl and Others v Yugoslavia* (2002), *op. cit.*

in the sense of Article 16 of the Convention, which prohibits cruel, inhuman or degrading treatment.⁵¹ In its decision, the Committee reiterated that in the context of other States it had previously expressed its concern at reports of failure by police and law-enforcement officials to provide adequate protection against racially motivated attacks.⁵² The decision confirms that State failure to take steps to prevent torture or cruel, inhuman or degrading treatment, or to prosecute private individuals responsible for such acts, can constitute acquiescence, giving rise to accountability under the UNCAT.

The CAT further clarified the nature and extent of State responsibility for acts of torture or ill-treatment committed by non-State actors in its recent General Comment No. 2. The Committee, recognising that indifference or inaction by the State can provide encouragement or *de facto* permission for torture and ill-treatment, stated that “*where State authorities or others acting in official capacity or under color of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with [the] Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts.*”⁵³ The Committee drew particular attention to the application of this principle as regards gender-based violence, including rape, domestic violence, female genital mutilation and trafficking.⁵⁴

1.2.2 Duty to investigate

Under both the UNCAT and the ICCPR, States parties have a duty to investigate allegations of torture or cruel, inhuman or degrading treatment.

– UNCAT

Article 12 of the UNCAT provides:

“Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to

⁵¹ *Ibid.* §9.2.

⁵² The CAT referred to its Concluding Observations on the initial report of Slovakia, UN Doc. A/56/44 (2001), §104; Concluding Observations on the second periodic report of Czech Republic, UN Doc. A/56/44 (2001), §113; and Concluding Observations on the second periodic report of Georgia, UN Doc. CAT/56/44 (2001), §81.

⁵³ CAT, General Comment No. 2, §18.

⁵⁴ *Ibid.*

believe that an act of torture has been committed in any territory under its jurisdiction.”

This obligation to investigate is complemented by Article 13, which provides that individuals shall have the right to complain to the competent authorities, and that the State shall take steps to protect the complainant and witnesses against reprisal. Articles 12 and 13 also apply to acts of cruel, inhuman or degrading treatment.⁵⁵

While the Committee has given no specific guidance on the maximum time which may elapse between grounds for suspicion of ill-treatment having arisen, and commencing or completing an investigation, it stressed in *Blanco Abad v Spain* that “*promptness is essential both to ensure that the victim cannot continue to be subjected to such acts and also because in general, unless the methods employed have permanent or serious effects, the physical traces of torture, and especially of cruel, inhuman or degrading treatment, soon disappear.*”⁵⁶ In that case, the Committee considered a period of 18 days between the initial report of ill-treatment and the initiation of an investigation too long.

The State obligation to ensure a prompt and impartial investigation does not depend on the submission of a formal complaint. Rather, it is sufficient for torture to have been alleged by the victim,⁵⁷ or that other reasonable grounds exist to believe that torture or ill-treatment may have occurred, whatever the origin of the suspicion.⁵⁸

Furthermore, the investigation must be effective, carried out by appropriately qualified individuals,⁵⁹ and “*seek both to determine the nature and circumstances of the alleged acts and to establish the identity of any person who might have been involved therein.*”⁶⁰ At least where it is necessary to ensure the right of redress, the alleged victim must be informed of the outcome of the investigation.⁶¹

⁵⁵ Article 16 UNCAT.

⁵⁶ *Blanco Abad v Spain*, CAT Communication No. 59/1996, 14 May 1998, §8.2.

⁵⁷ *Parot v Spain*, CAT Communication No. 6/1990, 2 May 1995, §10.4. See also *Blanco Abad v Spain* (1998), *op. cit.*, §8.6, where the CAT stated that “*it is enough for the victim simply to bring the facts to the attention of an authority of the State for the latter to be obliged to consider it as a tacit but unequivocal expression of the victim’s wish that the facts should be promptly and impartially investigated, as prescribed by this provision of the Convention.*” This point was reiterated in *Ltaief v Tunisia*, CAT Communication No. 189/2001, 14 November 2003, §10.6,

⁵⁸ *Blanco Abad v Spain* (1998), *op. cit.*, §8.2. See also *Ltaief v Tunisia* (2003), *op. cit.*, §10.5.

⁵⁹ *Ristic v Yugoslavia*, CAT Communication No. 113/1998, 11 May 2001, §9.5.

⁶⁰ *Blanco Abad v Spain* (1998), *op. cit.*, §8.8.

⁶¹ *Dimitrijevic v Serbia and Montenegro*, CAT Communication No. 207/2002, 24 November 2004, §5.4.

– ICCPR

Article 2(1) ICCPR requires that the State ensure Covenant rights to all individuals within its territory and subject to its jurisdiction, and Article 2(3) provides that persons whose rights are violated shall have an effective remedy, with their right thereto to be determined by the competent authorities. Taken together with Article 7, these provisions mean that “*Complaints [about ill-treatment] must be investigated promptly and impartially by competent authorities.*”⁶² Furthermore, the right to lodge complaints against ill-treatment must be recognized in the State’s domestic law.⁶³ The HRC has held that investigation should not depend on the receipt of a complaint, but should be initiated as soon as there are grounds for believing that ill-treatment has occurred.⁶⁴

Investigations conducted by the State must be effective. In *Fuenzalida v Ecuador*, an investigation into allegations of torture and ill-treatment by the applicant had been initiated and subsequently rejected by a criminal court. However, the HRC found this investigation insufficient in the specific circumstances of the case, as there was no evidence that an incident in which the author suffered a bullet wound had been investigated by the court.⁶⁵

The State obligation to investigate extends even to acts of a prior regime. In its General Comment on Article 7, the HRC stated that “*Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.*”⁶⁶ Thus, in *Rodríguez v Uruguay*, the State’s failure to investigate allegations that the applicant had been tortured by the secret police of the former military regime amounted to a violation of Article 7 in connection with Article 2(3) of the Covenant, irrespective of the existence of a law granting amnesty.⁶⁷ Furthermore, notwithstanding the viability of other avenues of redress, the HRC found in *Zelaya Blanco v Nicaragua* that “*responsibility for investigations falls under the*

⁶² HRC General Comment No. 20, §14.

⁶³ *Ibid.*

⁶⁴ *Alzery v Sweden*, HRC Communication No. 1416/2005, 25 October 2006, §11.7.

⁶⁵ *Fuenzalida v Ecuador*, HRC Communication No. 480/1991, 12 July 1996, §9.4. The applicant claimed that the shooting was a deliberate part of a larger set-up by the police, but the State Party claimed that it was necessary to prevent his escape.

⁶⁶ HRC General Comment 20, §15.

⁶⁷ *Rodríguez v Uruguay*, HRC Communication No. 322/1988, 19 July 1994. The Committee expressed concern that, “*in adopting this law, the State party has contributed to an atmosphere of impunity which may undermine the democratic order and give rise to further grave human rights violations*” (§12.4).

*State party's obligation to grant an effective remedy.*⁶⁸ Thus, as under UNCAT, the State has a duty to investigate allegations of torture, regardless of any other action taken by, or on behalf of, the complainant to seek redress.

1.2.3 Duty to enact and enforce legislation criminalising torture

The UNCAT explicitly obliges States to enact and enforce legislation criminalising torture, while a similar duty may also be inferred in the ICCPR.

– UNCAT⁶⁹

Article 4 of the UNCAT provides:

“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.”

This Article is limited in its application to torture, and is not among those listed in Article 16 as applying also to other forms of ill-treatment.

The CAT now systematically asks States Parties about domestic criminal law, and has repeatedly emphasised that Article 4 requires States to “*incorporate into domestic law the crime of torture and adopt a definition of torture that covers all the elements contained in article 1 of the Convention.*”⁷⁰ Where such a law has been adopted, the Committee will consider both its compatibility with the definition in Article 1 of the UNCAT and its enforcement in practice.⁷¹ Even States with legal systems where provisions of international law have direct effect and can be relied upon in domestic courts (i.e. “monist” legal systems), must take measures under this Article. Furthermore, in practice, those exer-

⁶⁸ *Zelaya Blanco v Nicaragua*, HRC Communication No. 328/1988, 20 July 1994, §10.6.

⁶⁹ For more details on the jurisprudence of the CAT in this area, see Rodley and Pollard, “Criminalisation of Torture”, *op. cit.*

⁷⁰ CAT, Concluding Observations on Italy, UN. Doc. CAT/C/ITA/CO/4, 18 May 2007, §5. At its 38th Session, held in April–May 2007, the issue was addressed in six of the seven Concluding Observations adopted (Denmark, Italy, Japan, the Netherlands, Poland and Ukraine: Report of the Committee against Torture, UN Doc. A/62/44, 2007), and was raised in dialogue with the seventh State Party (Luxembourg: CAT, Summary record of the 762nd meeting, UN Doc. CAT/C/SR.762, 2007, §8).

⁷¹ See, for example, CAT, Concluding Observations on Uzbekistan, UN Doc. A/55/44, 1999, §80. See also HRC, Concluding Observations on Uzbekistan, U.N. Doc. CCPR/CO/71/UZB/Add.2, 2004, §2(1), indicating that the recommendations of the CAT had been at least partially applied.

cising authority must not be permitted to “avoid accountability or escape criminal responsibility for torture or ill-treatment committed by subordinates” where they knew or should have known that such conduct was likely to occur.⁷²

The CAT has not specified a minimum penalty that would appropriately reflect the gravity of the crime of torture, although one author, through an analysis of the views expressed by individual Committee members, concluded that a custodial sentence of between six and twenty years will generally be considered appropriate.⁷³ In *Urra Guridi v Spain*, the Committee found that the imposition of light penalties on three Civil Guards who had been found guilty of torture were incompatible with the duty to impose appropriate punishment, and therefore constituted a violation of Article 4(2).⁷⁴

Furthermore, the Committee considered that the pardons later granted to the Civil Guards in *Urra Guridi v Spain* had the practical effect of allowing torture to go unpunished and encouraging its repetition. The pardons therefore constituted a violation of Article 2(1) of the Convention, which requires that States take effective measures to prevent torture.⁷⁵ By similar reasoning, the Committee considers that amnesties for the crime of torture are incompatible with States’ obligations under Article 4. The Committee has stated: “*In order to ensure that perpetrators of torture do not enjoy impunity, [States parties must] ensure the investigation and, where appropriate, the prosecution of those accused of having committed the crime of torture, and ensure that amnesty laws exclude torture from their reach.*”⁷⁶ This obligation to apply criminal law to all acts of torture is unlimited in time, so no statute of limitations should apply to the crime of torture.⁷⁷

⁷² CAT, General Comment No. 2, §26.

⁷³ Chris Ingelse, *The UN Committee against Torture: An Assessment*, Kluwer Law International, 2001, p. 342.

⁷⁴ *Urra Guridi v Spain*, CAT Communication No. 212/2002, 17 May 2005, §6.7. The sentences imposed on the Civil Guards, who had been found guilty of torturing a suspected member of ETA, had been reduced by the Spanish Supreme Court from four years’ imprisonment to one, prior to the granting of pardons by the Council of Ministers.

⁷⁵ *Ibid.* §6.6.

⁷⁶ CAT, Concluding Observations on Azerbaijan, UN Doc. A/55/44, 1999, §69(c). See also CAT, Concluding Observations on Senegal, UN Doc. A/51/44, 1996, §117; CAT, Concluding Observations on Chile, UN Doc. CAT/C/CR/32/5, 2004, §7b; CAT, Concluding Observations on Bahrain, UN Doc. CAT/CO/34/BHR, 2005, §6d; CAT, Concluding Observations on Cambodia, UN Doc. CAT/C/CR/31/7, 2005, §6.

⁷⁷ See, for example, CAT, Concluding Observations on Turkey, UN Doc. CAT/C/CR/30/5, 2003, §7(c); CAT, Concluding Observations on Chile, UN Doc. CAT/C/CR/32/5, 2004, §7(f).

– ICCPR

Article 2(2) of the ICCPR provides:

“Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.”

This is broader than the requirement in Article 4 of the UNCAT, both in terms of the wider range of measures to be taken and the broader scope of treatment potentially covered. For present purposes, however, as Article 7 prohibits torture and cruel, inhuman or degrading treatment or punishment, Article 2(2) specifically requires States to adopt laws or take other measures against all of these forms of ill-treatment.

The HRC clearly considers that the necessary steps to prevent violations of Article 7 will include criminalising acts of torture and other ill-treatment, and, in its General Comment on Article 7, stated that *“States Parties should indicate when presenting their reports the provisions of their criminal law which penalise torture and cruel, inhuman and degrading treatment or punishment, specifying the penalties applicable to such acts, whether committed by public officials or other persons acting on behalf of the State, or by private persons.”*⁷⁸ The Committee will consider not only the adequacy of such laws in addressing torture and other forms of ill-treatment, but also their enforcement in practice.⁷⁹

Furthermore, the HRC has stated that *“[t]hose who violate Article 7, whether by encouraging, ordering, tolerating or perpetrating prohibited acts, must be held responsible.”*⁸⁰ As discussed above, the general obligation to provide redress for victims and to punish perpetrators effectively prohibits amnesties for acts of torture, but as this particular statement by the Committee indicates, the prohibition may also extend to other forms of ill-treatment. However, while the State is under an obligation to punish offenders, the Covenant does not give particular individuals the right to require that the State party criminally prosecute another person.⁸¹

⁷⁸ HRC General Comment No. 20, §13.

⁷⁹ See, for example, HRC, Concluding Observations on Sri Lanka, UN Doc. CCPR/CO/79/LKA, 2003, §9.

⁸⁰ HRC General Comment No. 20, §13.

⁸¹ See, for example, *H.C.M.A. v the Netherlands*, HRC Communication No. 213/1986, 30 March 1989, §11.6; *S.E. v Argentina*, HRC Communication No. 275/1988, 26 March 1990, §5.5; *Rodríguez v Uruguay* (1994), *op. cit.*, §6.4.

1.2.3.1 Universal jurisdiction

While most of the other specific measures required under the UNCAT have been found by the Human Rights Committee to apply in parallel under Article 7 of the ICCPR, this is not the case for the requirement to establish and exercise universal jurisdiction over acts of torture, which is provided for only in the UNCAT.⁸² However, permissive universal jurisdiction, meaning that all States have the legal capacity, but not the obligation, to exercise universal jurisdiction over the crime of torture, probably now constitutes a norm of customary international law.⁸³

Article 5 of the UNCAT provides:

“1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:

- (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;*
- (b) When the alleged offender is a national of that State;*
- (c) When the victim is a national of that State if that State considers it appropriate.*

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.”

Though Article 5 rarely arises in the jurisprudence of the CAT, some clarification of this Article was given in *Roitman Rosenmann v Spain*, a case concerning Spain’s unsuccessful request that the UK government extradite former Chilean dictator Augusto Pinochet to face prosecution in Spain for the torture of Spanish citizens in Chile during his rule. The Committee observed that, while States Parties possess extraterritorial jurisdiction over acts of torture

⁸² As with Article 4, this Article is limited in its application to torture, and does not apply as regards other forms of ill-treatment.

⁸³ This was confirmed by the International Criminal Tribunal for the former Yugoslavia in its judgement in *Prosecutor v Furund-ija* (1998), *op. cit.*, §156. See also Nigel Rodley, *The Treatment of Prisoners under International Law*, 2nd ed., Oxford, Clarendon Press, 1997, p. 107. For a discussion of the sometimes related issue of diplomatic immunity, see Antonio Cassese, “When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v Belgium Case” *European Journal of International Law*, Vol. 13 No. 4, pp. 853–875, especially at p. 857.

committed against their nationals, Article 5(1)(c) establishes “a discretionary faculty rather than a mandatory obligation to make, and insist upon, an extradition request.”⁸⁴ However, the Committee, recalling that one of the objects of the UNCAT is to avoid impunity for torture, did clarify that “the Convention imposes an obligation [on a State Party] to bring to trial a person, alleged to have committed torture, who is found in its territory.”⁸⁵ This obligation applies both where there is no extradition request, and where the State refuses to extradite the person; it therefore does not depend on the prior existence of such a request.⁸⁶ Furthermore, where the State on whose territory the suspect is present does not prosecute, refusal to comply with an extradition request will itself amount to a breach of its obligations under UNCAT.⁸⁷

Thus, the UNCAT requires States Parties either to exercise their jurisdiction to prosecute an individual suspected of torture, or to extradite that individual to a State where he will be prosecuted. It thus goes further than customary international law, which permits the exercise of universal jurisdiction but does not require it, in making the exercise of universal jurisdiction mandatory for States Parties. The CAT has increasingly focussed on this issue in its discussions with State Parties, and now systematically includes it its Concluding Observations a recommendation that States Parties who have not yet introduced legislation providing for universal jurisdiction for the crime of torture do so.⁸⁸

⁸⁴ *Roitman Rosenmann v Spain*, CAT Communication No. 176/2000, 30 April 2002, §6.7. This Communication was declared inadmissible, but the CAT nonetheless discussed some of the substantive issues raised.

⁸⁵ *Ibid.* This obligation arises in particular under Articles 5(2), and 7(1). Article 7(1) provides that the “State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.” Furthermore, Article 6 provides that States shall take into custody any person on their territory who is alleged to have committed torture. See also CAT, Concluding Observations on the UK, UN Doc. A/54/44, §77(f).

⁸⁶ *Guengueng and Others v Senegal*, CAT Communication No. 181/2001, 17 May 2006, §9.7. This case concerned the failure by Senegal to either bring to trial the former Chadian dictator Hissène Habré or to respond positively to an extradition request from Belgium under universal jurisdiction for torture. In 2007, under pressure from the African Union, Senegal set up its own war crimes court to try Habré.

⁸⁷ *Ibid.* §9.11.

⁸⁸ The CAT also considers the effectiveness and scope of any such legislation. For example, in its 2003 Concluding Observations on Belgium, the Committee expressed concern at changes to the rules regarding universal jurisdiction which would allow the Minister of Justice to remove judges from some cases (UN Doc. CAT/C/CR/30/6, 2003, §5(g)).

1.2.4 Duty to exclude statements obtained by torture or other ill-treatment

The effective prevention of torture and ill-treatment requires that any incentive to use such abuse to assist investigations be eliminated. The admissibility of statements made under such treatment, which are in any case inherently unreliable,⁸⁹ must therefore be prohibited by law.

– UNCAT

Article 15 of the UNCAT provides:

“Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.”

This prohibition is absolute. While it is not among those explicitly mentioned in Article 16 as applying to other forms of ill-treatment, in light of the Committee’s approach to Article 16, it seems that the prohibition also applies to statements obtained as a result of cruel, inhuman or degrading treatment.⁹⁰ Given the importance of the “purpose” element in the definition of torture, it seems likely that any form of prohibited ill-treatment leading to incriminating statements would in any case be classified as torture.⁹¹

The prohibition applies to statements made by the victim of ill-treatment concerning him- or herself, as well as statements made about third parties.⁹² It seems that the prohibition also encompasses derivative information or evidence, which includes information uncovered by following leads given in statements made as a result of torture.⁹³ The CAT considers that this obligation derives from the absolute nature of the prohibition on torture, so when allegations are made that a statement has been obtained by torture, the State party has an obligation *“to ascertain whether or not statements constituting part of the evidence of a procedure for which it is competent have been made as a result of tor-*

⁸⁹ For a summary of studies on the relative effectiveness of torture and other methods, see, for example, Jeannine Bell, “One thousand shades of gray: The effectiveness of torture”, Bloomington Legal Studies Research Paper No. 37, 2005, available at <http://ssrn.com>, which concludes that torture should not be relied upon over non-violent interrogation techniques, the effectiveness of which have been proven.

⁹⁰ CAT, General Comment No. 2, §§3, 6.

⁹¹ See section 1.1.2.2, above.

⁹² *P.E. v France*, CAT Communication No. 193/2001, 21 November 2002.

⁹³ See, for example, CAT, Concluding Observations on the UK, UN Doc. A/54/44, 1999, §76(d); CAT, Concluding Observations on Zambia, UN Doc. A/57/44, 2002, §3(b)(iii).

ture,” regardless of whether the alleged torture occurred under the jurisdiction of that State.⁹⁴ Furthermore, the State should ensure that in any proceeding individuals can challenge the legality of any evidence plausibly suspected of having been obtained by torture.⁹⁵

– ICCPR

Article 14(3)(g) of the ICCPR provides that everyone has the right “*Not to be compelled to testify against himself or to confess guilt.*” The HRC also recognises that “*It is important for the discouragement of violations under article 7 that the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment.*”⁹⁶ Thus, no direct or indirect physical or psychological coercion may be used.⁹⁷ Where an allegation is made that evidence was obtained through duress, the burden of proof is on the prosecution to prove that this was not the case.⁹⁸

While the prohibition under the UNCAT extends to all evidence, it is in the nature of the individual complaints procedure under the ICCPR that the HRC may find a violation of Article 7 only as regards ill-treatment of the author or subject of the complaint. However, the Committee may find a violation of the right to a fair trial under Article 14(1) of the ICCPR where persons testifying against the author were subjected to torture.⁹⁹

1.2.5 Duty to train personnel and provide procedural safeguards

Torture generally occurs when a person is deprived of liberty, whether in a judicial or an administrative context. The CAT and the HRC have each interpreted their respective treaty as incorporating a duty on the part of State Parties to introduce, and monitor compliance with, procedural safeguards, and to train staff that may have contact with detainees.

⁹⁴ *P.E. v France* (2002), *op. cit.*, §6.3. See also *G.K. v Switzerland*, CAT Communication No. 219/2002, 7 May 2003, §6.10.

⁹⁵ CAT, Concluding Observations on the UK, UN Doc. CAT/C/CR/33/3, 2004, §5(d).

⁹⁶ HRC, General Comment No. 20, 1992, §12.

⁹⁷ See *Berry v Jamaica*, HRC Communication No. 330/1998, 7 April 1994, §11.7; *Sahadeo v Guyana*, HRC Communication No. 728/1996, 1 November 2001, §9.3; *Deolall v Guyana*, HRC Communication No. 912/2000, 1 November 2004, §5.1;

⁹⁸ *Singarasa v Sri Lanka*, HRC Communication No. 1033/2001, 21 July 2004, §7.4; *Sultanova and Ruzmetov v Uzbekistan*, HRC Communication No. 915/2000, 30 March 2006, §7.3.

⁹⁹ *Bazarov v Uzbekistan*, HRC Communication No. 959/2000, 14 July 2006, §8.3.

– UNCAT

Article 10 of the UNCAT provides:

“1. Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.

2. Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such person.”

For medical personnel, such training should now include the Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (also known as the Istanbul Protocol).¹⁰⁰

Article 11 of the UNCAT requires that:

“Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.”

In *Barakat v Tunisia*, the CAT considered that, in a case of torture in custody leading to death, Tunisia had failed to meet its obligations under Article 11, among others.¹⁰¹

The CAT considers that Article 11 requires compliance with international standards including the Standard Minimum Rules for the Treatment of Prisoners¹⁰² and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.¹⁰³ Furthermore, the CAT frequently includes in its Concluding Observations a recommendation that States *“establish a systematic and independent system to monitor the treatment in practice of persons arrested, detained or imprisoned.”*¹⁰⁴ While the Optional Protocol to the UNCAT provides for the establishment of National Preventive Mechanisms

¹⁰⁰ CAT, Concluding Observations on Turkey, UN Doc. CAT/C/CR/30/5, 2003, §7(k).

¹⁰¹ *Barakat v Tunisia*, CAT Communication No. 60/1996, 10 November 1999.

¹⁰² See, for example, CAT, Concluding Observations on Kyrgyzstan, UN Doc. A/55/44, 1999, §75(e).

¹⁰³ See, for example, CAT, Concluding Observations on Monaco, UN Doc. CAT/C/CR/32/1, 2004, §5(e).

¹⁰⁴ CAT, Concluding Observations on Brazil, UN Doc. A/56/44, 2001, §120(d). See also, for example, CAT, Concluding Observations on Moldova, UN Doc. CAT/C/CR/30/7, 2003, §6(l);

for precisely this purpose, it is clear that the conclusion of the Protocol does not lessen the existing obligation under UNCAT to monitor the treatment of persons deprived of their liberty, but rather provides more detailed mechanisms for its fulfilment.¹⁰⁵

– ICCPR

In its General Comment on Article 7, the HRC recognised the importance of keeping interrogation rules under review, and of training “*Enforcement personnel, medical personnel, police officers and any other persons involved in the custody or treatment of any individual subjected to any form of arrest, detention or imprisonment,*” and incorporating the prohibition of ill-treatment into the operational rules and ethical standards to be followed by such persons.¹⁰⁶

The Committee further recognised that procedural guarantees can provide an effective means of preventing ill-treatment. It therefore stated that “*provisions should be made for detainees to be held in places officially recognized as places of detention and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends. To the same effect, the time and place of all interrogations should be recorded, together with the names of all those present and this information should also be available for purposes of judicial or administrative proceedings.*”¹⁰⁷

The Committee explained its expectations in more detail in its General Comment on Article 10(1), inviting States parties “*to indicate in their reports to what extent they are applying the relevant United Nations standards applicable to the treatment of prisoners: the Standard Minimum Rules for the Treatment of Prisoners (1957), the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988), the Code of Conduct for Law Enforcement Officials (1978) and the Principles of Medical Ethics relevant to the Role of Health*

CAT, Concluding Observations on Russia, UN Doc. A/52/44, 1996, §43(d) (and UN Doc. CAT/C/CR/28/4, 2002, §8(f)).

¹⁰⁵ This is made clear in the Preamble of the OPCAT. The CAT has also made it clear that the pre-existing obligation also applies, for example encouraging the Cambodian government to “*establish a systematic and independent system to monitor the treatment in practice of persons arrested, detained or imprisoned [and i]n this connection, ... consider signing and ratifying the Optional Protocol to the Convention.*” (CAT, Concluding Observations on Cambodia, UN Doc. CAT/C/CR/30/2, 2003, §7(i)). See also, for example, CAT, Concluding Observations on Monaco, UN Doc. CAT/C/CR/32/1, 2004, §5(f)–(g)).

¹⁰⁶ HRC, General Comment No. 20, 1992, §10. See also HRC, General Comment No. 21, 1992, §9.

¹⁰⁷ HRC, General Comment No. 20, 1992, §11.

*Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1982).*¹⁰⁸ These detailed rules and principles provide, among other things, that detailed registers be kept in all places of detention, that detainees should have adequate access to the outside world, legal advice and medical care, and that law enforcement officials may use force only when strictly necessary and only to the extent required for the performance of their duty.

Furthermore, the Committee also considers that States must implement a system of impartial supervision of penitentiary establishments to ensure the effective application of rules regarding the treatment of persons deprived of their liberty.¹⁰⁹ The HRC has given limited guidance on what form such monitoring should take, but in its 2004 Concluding Observations on Namibia, it found that, while magistrates were mandated to carry out independent inspections of detention centres, there was a need to establish “*an additional external and independent body entrusted with the functions of visiting the centres and receiving and investigating complaints emanating from such centres... A strong and independent mechanism is also required for the investigation of allegations of acts of police brutality in general.*”¹¹⁰ In *Alzery v Sweden*, the HRC made reference to “*key aspects of international good practice*” in detention monitoring, including “*private access to the detainee and inclusion of appropriate medical and forensic expertise.*”¹¹¹ Non-conformity with these elements contributed to the finding of a violation in that case. It is thus clear that the basic duty to establish an independent body mandated to monitor detention facilities arises not only under the Optional Protocol to the UNCAT, but also under both the UNCAT itself and the ICCPR.

1.2.6 Duty to grant redress and compensate victims

Both the UNCAT and the ICCPR impose an obligation on States Parties to grant redress and provide adequate compensation to victims of torture or ill-treatment.

¹⁰⁸ HRC, General Comment No. 21, 1992, §5

¹⁰⁹ *Ibid.* §6.

¹¹⁰ HRC, Concluding Observations on Namibia, UN Doc. CCPR/CO/81/NAM, 2004, §14.

¹¹¹ *Alzery v Sweden* (2006), *op. cit.*, §11.5.

– UNCAT

Article 14 of the UNCAT provides:

“Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.”

The CAT considers that *“the right to an effective remedy for a breach of the Convention underpins the entire Convention, for otherwise the protections afforded by the Convention would be rendered largely illusory.”*¹¹² In some cases, the Convention itself sets out a remedy for particular breaches, but where it does not, the Committee will interpret a substantive provision to contain within it a remedy for its breach.¹¹³ Thus, while Article 14 is not explicitly included in the list of articles applicable to other ill-treatment under Article 16, the Committee held in *Dzemajl and Others v Yugoslavia* that *“The positive obligations that flow from the first sentence of article 16 of the Convention include an obligation to grant redress and compensate the victims of an act in breach of that provision.”*¹¹⁴ The State is therefore obliged to provide redress and compensation to victims of all forms of prohibited ill-treatment.

Moreover, in *Urra Guridi v Spain*, the Committee found that the pardoning of three Civil Guards who had been found guilty of torture breached not only Articles 2 and 4, but also Article 14, as the notion of compensation *“should cover all the damages suffered by the victim, which includes, among other measures, restitution, compensation, and rehabilitation of the victim, as well as measures to guarantee the non-repetition of the violations, always bearing in mind the circumstances of each case.”*¹¹⁵

¹¹² *Agiza v Sweden*, CAT Communication No. 233/2003, 20 May 2005, §13.6.

¹¹³ See, for example, *Agiza v Sweden* (2005), *ibid*, where the Committee found that the prohibition on refoulement in Article 3 of the UNCAT should be interpreted so as to include a remedy for its breach.

¹¹⁴ *Dzemajl and Others v Yugoslavia* (2002), *op. cit.*, §9.6. This was confirmed in CAT General Comment No. 2, §3. The first sentence of Article 16 reads: *“Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment 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.”*

¹¹⁵ *Urra Guridi v Spain* (2005), *op. cit.*, §6.8.

– ICCPR

Article 2(3) of the ICCPR provides:

“Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.”

The HRC has repeatedly emphasised the importance of an effective remedy, and has indicated that States Parties should include in their reports information on how their legal system effectively guarantees the immediate termination of all the acts prohibited by Article 7 as well as appropriate redress.¹¹⁶

In *Rodríguez v Uruguay*, discussed above, the Committee reiterated that the right to redress could not include a right to demand the criminal prosecution of particular individuals. However, in order to ensure the applicant’s right to redress, the State Party should take effective measures “*a) to carry out an official investigation into the author’s allegations of torture, in order to identify the persons responsible for torture and ill-treatment and to enable the author to seek civil redress; b) to grant appropriate compensation to Mr. Rodríguez; and c) to ensure that similar violations do not occur in the future.*”¹¹⁷ Thus, like the CAT, the HRC considers that measures to guarantee the non-repetition of the violations form part of the duty to grant redress.

1.3 Scope of Application

The HRC and the CAT have both generated a rich jurisprudence on the extent of State obligations related to the prohibition of torture and other cruel, inhuman or degrading treatment or punishment beyond the ‘traditional’ view of preventing the use of torture in interrogations. This section will provide an overview of this jurisprudence, identifying some of the main sources of violations of the absolute prohibition of torture and ill-treatment.

¹¹⁶ HRC, General Comment No. 20, 1992, §14.

¹¹⁷ *Rodríguez v Uruguay* (1994), *op. cit.*, §14.

1.3.1 The absolute nature of the prohibition of torture and ill-treatment

– ICCPR

Article 4(2) ICCPR explicitly provides that the State may not derogate from the right not to be subjected to torture or other ill-treatment under Article 7, even in times of public emergency. The HRC emphasised this point in its General Comment on Article 7, observing that “*no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons, including those based on an order from a superior officer or public authority.*”¹¹⁸

– UNCAT

No derogation is possible to any of the provisions of UNCAT, Article 2(2) of which provides:

“No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”

This provision is complemented by Article 2(3), which provides that orders from a superior cannot be invoked to justify torture. As discussed above, the offence of torture cannot be the subject of defences,¹¹⁹ a statute of limitations, or an amnesty. The prohibition is therefore absolute.

Efforts by some States to justify torture and ill-treatment as a means to protect public safety or avert emergencies prompted the Committee against Torture to reiterate the absolute nature of the prohibition in a statement adopted following the events of 11 September 2001,¹²⁰ in its Concluding Observations to States Parties,¹²¹ and in the case *Agiza v Sweden*, in which the Committee emphasised that “*the Convention’s protections are absolute, even in the context of national security concerns.*”¹²² Furthermore, in its General Comment No. 2, the Committee stressed that the provisions of the UNCAT apply wherever a State Party exercises *de jure* or *de facto* control.¹²³

¹¹⁸ HRC, General Comment No. 20, 1992, §3.

¹¹⁹ See, further, CAT, Concluding Observations on the UK, UN Doc. CAT/C/CR/33/3, 2004, §4(a)(ii) and 5(a).

¹²⁰ UN Doc. A/57/44, 17 May 2002, §§17–18.

¹²¹ See, for example, CAT, Concluding Observations on the USA, UN Doc. CAT/C/USA/C/2, 2006, §14–15, where the CAT reiterated that the UNCAT applies in times of war, and on territory over which the State Party exercises *de facto* control,

¹²² *Agiza v Sweden* (2005), *op. cit.*, §13.8.

¹²³ CAT, General Comment No. 2, §16.

1.3.2 Lawful sanctions

While Article 7 ICCPR does not describe any exceptions to the prohibition on torture and ill-treatment, the HRC has made it clear that some types of lawful sanctions are permissible.¹²⁴ The lawfulness of any sanction will be determined by reference to national and international law, with international law taking precedence in cases of conflict; as the HRC noted in *Osbourne v Jamaica*, “*The permissibility of the sentence under domestic law cannot be invoked as justification under the Covenant.*”¹²⁵

The exception for “lawful sanctions” is explicit in UNCAT, where the definition of torture specifically excludes “*pain or suffering arising only from, inherent in or incidental to lawful sanctions.*”¹²⁶ Unlike the earlier Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly in 1975, the 1984 UNCAT did not elaborate the concept of lawful sanctions. The text in the Declaration, on which the UNCAT language was based, specifically referred to “*pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners,*” which prohibit, among other things, corporal punishment of detainees.¹²⁷ The change in language may well have been based solely on technical considerations, as during negotiations for the Convention text States were reluctant to refer to a non-treaty text, such as the Standard Minimum Rules, in a binding treaty.¹²⁸

While the issue is not yet definitively resolved, it has become clear over time that the CAT will determine the lawfulness of a sanction with reference to both national and international law and standards, including the Standard Minimum Rules for the Treatment of Prisoners.¹²⁹ This is a logical approach given the absolute nature of the prohibition of torture and the need for consistency of application. It also reflects the general principle of international law, expressed in the Vienna Convention on the Law of Treaties, that a State

¹²⁴ See, for example, *Vuolanne v Finland* (1989), *op. cit.*

¹²⁵ *Osbourne v Jamaica*, HRC Communication No. 759/1997, 15 March 2000, §9.1.

¹²⁶ Article 1 UNCAT.

¹²⁷ Article 1, Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

¹²⁸ See Burgers and Danelius, *op. cit.*, at p. 121.

¹²⁹ See, for example: Concluding Observations on the Democratic Republic of the Congo, UN Doc. A/61/44, 2006, §26(11); Concluding Observations on Togo, UN Doc. A/61/44, 2006, §36(19),

“*may not invoke the provisions of its internal law as justification for its failure to perform a treaty.*”¹³⁰

Both Committees have also developed substantial jurisprudence regarding two types of punishment which a number of States have claimed fall under the ‘lawful sanctions’ exception; the death penalty, and corporal punishment.

1.3.2.1 The death penalty

– ICCPR

There is no explicit ‘lawful sanctions’ clause in the ICCPR, but the HRC has frequently been called upon to consider cases involving the death penalty, and in particular the ‘death row phenomenon,’ which refers to the anguish created by prolonged detention on death row.

The death penalty is specifically permitted in strictly limited circumstances under Article 6 ICCPR,¹³¹ and therefore its imposition following a fair trial does not in principle constitute a breach of Article 7.¹³² However, the HRC considers it one of the aims of the Covenant to reduce recourse to capital punishment,¹³³ and its comments and jurisprudence increasingly reflect this view. Where a State has abolished the death penalty, the HRC is now of the view that it “*may not remove, either by deportation or extradition, individuals from their jurisdiction if it may be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence would not be carried out.*”¹³⁴ The HRC has also stated that, where the death penalty is carried out, it must be done “*in such a way as to cause the least possible physical and mental suffering.*”¹³⁵ In making this determination, the Committee “*will have regard to the relevant personal*

¹³⁰ Article 27, Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, entered into force Jan. 27, 1980. The approach of the CAT reflects interpretive declarations made by Luxembourg and the Netherlands at the time of ratification stating that the term “lawful sanctions” refers to those accepted by both national law and international law. These declarations were not commented upon by other States. In contrast, a number of States objected to Qatar’s reservation purporting to reject “*any interpretation of the provisions of the Convention that is incompatible with the precepts of Islamic law and the Islamic religion.*”

¹³¹ The Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty prohibits capital punishment in all circumstances. However, it is binding only on those States that have ratified it.

¹³² Where the trial leading to the death sentence is unfair, there is an automatic violation of Article 7. See *Larrañaga v The Philippines*, HRC Communication No. 1421/2005, 24 July 2006, §7.11.

¹³³ See *Errol Johnson v Jamaica*, HRC Communication No. 588/1994, 22 March 1996.

¹³⁴ *Judge v Canada*, HRC Communication No. 829/1998, 5 August 2002, §10.4. The HRC explicitly stated in §10.6 that this decision applies irrespective of whether the State in question has ratified the Second Optional Protocol to the ICCPR.

¹³⁵ HRC, General Comment No. 20, 1992, §6.

factors regarding the author, the specific conditions of detention on death row, and whether the proposed method of execution is particularly abhorrent.”¹³⁶ Thus, the Committee has held that execution by gas asphyxiation would constitute cruel and inhuman treatment in violation of Article 7,¹³⁷ whereas execution by lethal injection may not.¹³⁸

While it is clear that conditions of detention on death row may violate Article 10(1) or Article 7 in the same way as conditions of detention elsewhere,¹³⁹ most members of the HRC have consistently denied that the “death row phenomenon” per se violates these provisions. The Committee expanded on this position in *Errol Johnson v Jamaica*.¹⁴⁰ It reiterated that imposition of the death penalty is permitted in narrow circumstances under Article 6 ICCPR. Detention on death row may be a necessary consequence of imposing the death penalty, and so cannot, of itself, be regarded as a violation of Articles 7 and 10(1) ICCPR.¹⁴¹ Furthermore, making the length of time one waits for execution the determining factor for a violation of Articles 7 and 10(1) would convey a message to States parties that they should carry out the death penalty as quickly as possible after its imposition. As international law requires that the Covenant be interpreted in light of its objects and purposes,¹⁴² which include reducing recourse to the death penalty,¹⁴³ the Committee rejected this interpretation.¹⁴⁴ Therefore, in *Errol Johnson v Jamaica* the HRC, while conceding that keeping prisoners on death row for many years is not acceptable, nonetheless declined to find a violation of Articles 7 and 10(1) for pragmatic reasons.

In particular cases, aggravating factors may render detention on death row a violation of Articles 7 or 10(1). In this regard, “each case must be considered on its own merits, bearing in mind the imputability of delays in the administration of

¹³⁶ *Kindler v Canada*, HRC Communication No. 470/1991, 30 July 1993, §15.3.

¹³⁷ *Ng v Canada*, HRC Communication No. 469/1991, 5 November 1993, §16.4. The case involved extradition of Mr. Ng by Canada to the USA.

¹³⁸ *Kindler v Canada* (1993), *op. cit.* See also *Cox v Canada*, HRC Communication No. 539/1993, 31 October 1994, §17.3.

¹³⁹ See, for example, *Freemantle v Jamaica*, HRC Communication No. 625/1995, 24 March 2000, §7.3

¹⁴⁰ *Errol Johnson v Jamaica* (1996), *op. cit.* §§8.2-8.6.

¹⁴¹ See also *Earl Pratt and Ivan Morgan v Jamaica*, Nos. 210/1986 and 225/1987, 6 April 1989, §13.6; *Barrett and Sutcliffe v Jamaica*, HRC Communication Nos. 270/1988 and 271/1988, 30 March 1992, §8.4;

¹⁴² Article 31, Vienna Convention on the Law of Treaties.

¹⁴³ To support this position, the HRC referred to its General Comment No. 20, 1992, §16 and the Preamble to the Second Optional Protocol to the Covenant Aiming at the Abolition of the Death Penalty.

¹⁴⁴ *Errol Johnson v Jamaica* (1996), *op. cit.*, §8.2, 8.4.

justice on the State party, the specific conditions of imprisonment in the particular penitentiary and their psychological impact on the person concerned.”¹⁴⁵ The Committee has found violations where a minor was detained on death row,¹⁴⁶ where a warrant was issued for the execution of a person suffering from mental illness,¹⁴⁷ where a prisoner was returned to death row after having been told that his sentence had been commuted,¹⁴⁸ and where detention in a death cell awaiting execution was unreasonably prolonged.¹⁴⁹

– UNCAT

While the CAT increasingly raises the death penalty in its discussions with States Parties,¹⁵⁰ welcomes its abolition in Concluding Observations,¹⁵¹ expresses concern where it continues to be imposed,¹⁵² and recommends its abolition¹⁵³ or a moratorium on its use,¹⁵⁴ it has never explicitly stated that it considers the imposition of capital punishment itself to be inconsistent with the UNCAT. Indeed, individual members have stressed that the *death penalty* itself is not in violation of the UNCAT, and does not therefore come within the Committee’s mandate.¹⁵⁵

¹⁴⁵ *Francis v Jamaica*, HRC Communication No. 606/1994, 25 July 1995, §9.2. In that case, the Committee found that a serious deterioration in the author’s mental health, the prison conditions, allegations of regular beatings by warders, and the ridicule and strain to which the author was subjected during the five days he spent in a death cell awaiting execution revealed a violation of Articles 7 and 10 (1).

¹⁴⁶ *Clive Johnson v Jamaica*, HRC Communication No. 592/1994, 20 October 1998. The sentence imposed was in violation of Article 6(5) ICCPR, which prohibits imposition of the death penalty for crimes committed by persons below eighteen years of age.

¹⁴⁷ *R.S. v Trinidad and Tobago*, HRC Communication No. 684/1996, 2 April 2002. The Committee considered the state of mental health of the prisoner at the time of issue of the warrant.

¹⁴⁸ *Chisanga v Zimbabwe*, HRC Communication No. 1132/2002, 18 October 2005.

¹⁴⁹ *Pratt and Morgan v Jamaica* (1989), *op. cit.*; *Pennant v Jamaica*, HRC Communication No. 647/1995, 20 October 1998.

¹⁵⁰ See, for example, questions to the Ukraine, Summary record of the 283rd meeting, UN Doc. CAT/C/SR.283, 1997, §21.

¹⁵¹ See, for example, CAT, Concluding Observations on Turkey, UN Doc. CAT/C/CR/30/5, 2003, §4.

¹⁵² See, for example, CAT, Concluding Observations on Belarus, UN Doc. A/56/44, 2001, §45(i).

¹⁵³ See, for example, CAT, Concluding Observations on Kyrgyzstan, UN Doc. A/55/44, 2000, §75(g).

¹⁵⁴ See, for example, CAT, Concluding Observations on Japan, UN Doc. CAT/C/JPN/CO/1, 2007, §20.

¹⁵⁵ See, for example, Mr. Mariño Menéndez’s statement that “*While the maintenance of the death penalty in Egyptian law was not in itself a violation of the Convention, the Committee would like to receive further information on its practical application.*” CAT, Summary record of the 532nd meeting, UN Doc. CAT/C/SR.532, 2002, §15. See also the discussion of Libya, CAT, Summary record of the 381st meeting, UN Doc. CAT/C/SR.381, 1999, §38.

Despite this position, the Committee specifically asked to be informed of cases where Austria had refused extradition, return or expulsion owing to the risk that the person might be subjected to torture, ill-treatment or *the death penalty upon return*.¹⁵⁶ This explicit extension is unusual, although it does reflect European regional law.¹⁵⁷ When Guatemala extended the death penalty to new types of crime even though it had agreed not to do so under regional and international instruments, the Committee found that the failure to revoke death penalties imposed for such crimes constituted cruel and inhuman treatment or punishment, and violated Article 16.¹⁵⁸ Thus, while the Committee has never explicitly extended the prohibition on torture and ill-treatment to the execution of the death penalty, it seems that it is prepared to find that the death penalty is in violation of the UNCAT where a State party acts in breach of its legal obligations under other instruments.

Specific circumstances surrounding the death penalty may render its imposition a violation even in the absence of regional law. For example, the CAT found that creating a situation of uncertainty for death row prisoners by delaying adoption of an instrument abolishing the death penalty amounted to cruel and inhuman treatment in breach of Article 16.¹⁵⁹ Like the HRC, the CAT has also found that the method of execution may itself amount to torture or ill-treatment, for example holding that death by stoning would violate the UNCAT.¹⁶⁰ The CAT may apply stricter limits than the HRC in this regard, as it has indicated that the use of lethal injections should be reviewed due to its potential to cause severe pain and suffering.¹⁶¹ If lethal injection, which was often viewed as the most ‘humane’ method of execution, is considered by the CAT as a whole to constitute ill-treatment, or perhaps even torture, then it is

¹⁵⁶ CAT, Concluding Observations on Austria, UN Doc. CAT/C/AUT/CO/3, 2005, §8.

¹⁵⁷ Neither Council of Europe nor European Union laws on extradition specifically prohibit extradition of an individual regarding a crime for which the death penalty may be applied. However, the European Court of Human Rights has held that death row phenomenon could constitute inhuman and degrading treatment, and therefore that extradition where there is a real risk of the death penalty being imposed violates the European Convention on Human Rights. See *Soering v UK*, no. 14038/88, ECHR (Series A) No. 161, judgement of 7 July 1989, discussed in Chapter 2.

¹⁵⁸ CAT, Concluding Observations on Guatemala, UN Doc. A/61/44, 2006, §32(22).

¹⁵⁹ CAT, Concluding Observations on Armenia, UN Doc. A/56/44, 2001, §39(g). At the time the CAT considered the report of Armenia in November 2000, Armenia had neither signed nor ratified Protocol 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which prohibits the death penalty in peacetime.

¹⁶⁰ *A.S. v Sweden*, CAT Communication No. 149/1999, 24 November 2000.

¹⁶¹ CAT, Concluding Observations on the USA, UN Doc. A/61/44, 2006, §37(31). This difference may, however, be due to evidence which came to light in the thirteen years between the HRC decision and the comment by the CAT.

unclear whether the CAT will find any other method of execution to be acceptable in the future.¹⁶²

In addition to its findings on the death penalty as a whole, the CAT has taken a similar approach to the HRC in finding that specific characteristics or circumstances of the convicted person may render imposition of the death penalty to be cruel, inhuman or degrading in a particular case. For example, execution of the death penalty on a woman that has just given birth would probably constitute inhuman and degrading treatment.¹⁶³

Like the HRC, the CAT has found violations related to conditions of detention on death row, and has recommended in its Concluding Observations in such cases that conditions be improved.¹⁶⁴ A case specifically involving death row phenomenon has yet to come before the CAT, so it is unclear whether the CAT will follow HRC jurisprudence in this regard.

1.3.2.2 Corporal punishment

The issue of corporal punishment has been considered by the HRC, CAT and, as regards minors, the Committee on the Rights of the Child (CRC).

– ICCPR

In its General Comment on Article 7, the HRC stated that the prohibition in Article 7 extends to “*corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure.*”¹⁶⁵ The subsequent case law of the Committee has shown that any corporal punishment will be held to violate the ICCPR. In *Osbourne v Jamaica* the HRC stated that “*Irrespective of the nature of the crime that is to be punished, however brutal it may be, it is the firm opinion of the Committee that corporal punishment constitutes cruel, inhuman and degrading treatment or punishment contrary to article 7 of the Covenant.*”¹⁶⁶ In *Higginson v Jamaica*, the Committee confirmed

¹⁶² Individual Committee members have commented on other methods of execution. For example, Mr. Mavrommatis expressed serious concern that execution by hanging was not considered inhuman in Japan: CAT, Summary record of the 767th meeting, UN Doc. CAT/C/SR.767, 2007, §40.

¹⁶³ Discussion of Libya, Summary record of the 381st meeting, UN Doc. CAT/C/SR.381, 1999, §38.

¹⁶⁴ See, for example, CAT, Concluding Observations on Japan, UN Doc. CAT/C/JPN/CO/1, 2007, §19; CAT, Concluding Observations on Guyana, UN Doc. CAT/C/GUY/CO/1, 2006, §23.

¹⁶⁵ HRC, General Comment No. 20, 1992, §5.

¹⁶⁶ *Osbourne v Jamaica* (2000), *op. cit.*, §9.1. See also *Higginson v Jamaica*, HRC Communication No. 792/1998, 28 March 2002, §6; *Pryce v Jamaica*, HRC Communication No. 793/1998, 15 March 2004, §6.2; *Sooklal v Trinidad and Tobago*, HRC Communication No. 928/2000, 25

that the very imposition of a sentence of corporal punishment violates Article 7, whether or not the sentence is actually carried out.¹⁶⁷

The HRC has explicitly stated that the prohibition on corporal punishment extends to schools and hospitals,¹⁶⁸ and welcomes its prohibition in the private as well as the public sphere.¹⁶⁹ Until recently, the Committee refrained from making explicit recommendations addressing corporal punishment by private actors, notably punishment of children by their parents, apparently considering this the domain of the CRC. However, following the launch of the World Report on Violence against Children in November 2006,¹⁷⁰ it would seem that the HRC is taking a more expansive view, recommending that Zambia “*prohibit all forms of violence against children wherever it occurs.*”¹⁷¹

– UNCAT

As recently as 1996, the CAT was still relatively cautious in its approach to corporal punishment, recommending merely that the UK reconsider corporal punishment “*with a view to determining if it should be abolished in those dependencies that still retain it.*”¹⁷² However, like the HRC, the CAT has more recently adopted a stricter approach, and it is now clear that the CAT considers all corporal punishment to violate the UNCAT. In 2002, the CAT recommendation to Saudi Arabia was phrased in much stronger terms; the State was to “*Re-examine its imposition of corporal punishments, which are in breach of the Convention.*”¹⁷³

The CAT considers that States must go beyond passing legislation to prohibit corporal punishment in detention centres, hospitals, schools and other public institutions; a monitoring mechanism should also be established to ensure that

October 2001, §4.6. The prohibition applies to punishments under Shariah. See HRC, Concluding Observations on Yemen, UN Doc. CCPR/CO/84/YEM, 2005, §16.

¹⁶⁷ *Higginson v Jamaica* (2002), *op. cit.*

¹⁶⁸ HRC, General Comment No. 20, 1992, §5.

¹⁶⁹ See, for example, HRC, Concluding Observations on Guyana, UN Doc. CCPR/C/79/Add.121, 2000, §5, where the Committee “*welcome[d] the enactment of the Domestic Violence Act in 1996 and its extension to children.*”

¹⁷⁰ The report was the result of research by the Independent Expert for the United Nations Secretary-General’s Study on Violence against Children. See <http://www.violencestudy.org/>.

¹⁷¹ HRC, Concluding Observations on Zambia, UN Doc. CCPR/C/ZMB/CO/3, 2007, §22. The HRC recognises that full compliance with this obligation, which requires societal change, may take time, but States should nonetheless “*take all necessary measures towards the eventual total abolition of corporal punishment*”: HRC, Concluding Observations on Barbados, UN Doc. CCPR/C/BRB/CO/3, 2007, §12.

¹⁷² CAT, Concluding Observations on the UK, UN Doc. A/51/44, 1996, §65(i).

¹⁷³ CAT, Concluding Observations on Saudi Arabia, UN Doc. CAT/C/CR/28/5, 2002, §8(b).

such laws are strictly implemented.¹⁷⁴ While the CAT has never addressed the issue of corporal punishment of children by their parents in detail, a number of individual Committee members recently indicated that they consider this to fall within the scope of the UNCAT.¹⁷⁵ It is as yet unclear whether this position will be adopted by the Committee as a whole, or whether detailed comment on the issue of corporal punishment in the private sphere will remain the exclusive domain of the CRC.

– The Convention on the Rights of the Child (UNCRC)

While the HRC, the CAT, and the CRC all address corporal punishment in *public* institutions, the provisions of the UNCRC give the Committee on the Rights of the Child greater scope than the CAT and HRC to address the issue of corporal punishment in the home. Article 37(a) UNCRC provides, in part, that “*No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.*” This is complemented by Article 19(1), which provides:

“States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child 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), legal guardian(s) or any other person who has the care of the child.”

In its General Comment on the right of the child to protection from corporal punishment and other cruel and degrading forms of punishment, the CRC was emphatic that “*There is no ambiguity: ‘all forms of physical or mental violence’ does not leave room for any level of legalized violence against children. Corporal punishment and other cruel or degrading forms of punishment are forms of violence and States must take all appropriate legislative, administrative, social and educational measures to eliminate them.*”¹⁷⁶

1.3.3 Conditions of detention

Both the HRC and the CAT recognise that conditions of detention may themselves constitute ill-treatment or, in extreme cases, torture. However, the wider

¹⁷⁴ CAT, Concluding Observations on South Africa, UN Doc. CAT/C/ZAF/CO/1, 2006, §25.

¹⁷⁵ See the questions of Mr. Mavrommatis and Ms Belmir to the Netherlands, Summary record of the 763rd meeting, UN Doc. CAT/C/SR.763, 2007, §§14, 40; of Ms Belmir and Mr. Mariño Menéndez to Luxembourg, Summary record of the 759th meeting, UN Doc. CAT/C/SR.759, 2007, §§39–40.

¹⁷⁶ CRC, General Comment No. 8, UN doc. CRC/C/GC/8, 2006, §18. The CRC considers that this is “*an immediate and unqualified obligation of States parties*” (*Ibid.* §22),

detention system may also create conditions conducive to torture or ill-treatment, or, on the contrary, an environment in which such acts are not tolerated. Given their reduced autonomy, prisoners and other detainees are particularly vulnerable to abuse. The ICCPR therefore includes an article explicitly requiring that detainees be treated with humanity,¹⁷⁷ and the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment aims to “*establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.*”¹⁷⁸

– ICCPR

As discussed in section 1 of this chapter, the HRC usually considers *general* conditions of detention under Article 10(1) ICCPR, and abuses targeted against *particular* detainees under Article 7.

In its General Comment on Article 10, the HRC indicated that the humane treatment of detainees required by this article implies compliance with existing UN standards in this area.¹⁷⁹ In *Mukong v Cameroon*, the HRC explained further the obligations under this Article, laying out absolute minimum standards that must be observed regardless of a State Party’s level of development. “*These include, in accordance with rules 10, 12, 17, 19 and 20 of the Standard Minimum Rules for the Treatment of Prisoners, minimum floor space and cubic content of air for each prisoner, adequate sanitary facilities, clothing which shall be in no manner degrading or humiliating, provision of a separate bed and provision of food of nutritional value adequate for health and strength. It should be noted that these are minimum requirements which the Committee considers should always be observed, even if economic or budgetary considerations may make compliance with these obligations difficult.*”¹⁸⁰

¹⁷⁷ See the discussion of Article 10(1), above.

¹⁷⁸ Article 1, Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

¹⁷⁹ The standards specifically referred to in the General Comment are: the Standard Minimum Rules for the Treatment of Prisoners (1957); the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988); the Code of Conduct for Law Enforcement Officials (1978); and the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1982). HRC, General Comment No. 21, 1992, §5.

¹⁸⁰ *Mukong v Cameroon* (1994), *op. cit.*, §9.3.

As with Article 7, “*Inhuman treatment must attain a minimum level of severity to come within the scope of article 10 of the Covenant. The assessment of this minimum depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical or mental effects and, in some instances, the sex, age, state of health or other status of the victim.*”¹⁸¹ The Committee has found violations of Article 10(1) arising from, inter alia, overcrowding, a lack of natural light and ventilation, inadequate or inappropriate food, a shortage of mattresses, no integral sanitation, unhygienic conditions, inadequate medical services (including psychiatric treatment), and a lack of recreation or educational facilities.¹⁸²

– UNCAT

The CAT has found violations based on conditions of detention during its visits to places of detention.¹⁸³ Following its visit to Turkish prisons, for example, the Committee called on the authorities “*to demolish immediately and systematically all the solitary confinement cells known as ‘coffins’, which in themselves constitute a kind of torture. These cells measure approximately 60 by 80 centimetres, they have no light and inadequate ventilation, and the inmate can only stand or crouch.*”¹⁸⁴ Like the HRC, the CAT has expressed concern about conditions such as overcrowding, violence among prisoners, lack of separation of different categories of detainee, excessive periods of detention in facilities equipped only for short-term detention, lack of natural light or ventilation, unhygienic conditions, inadequate medical services or undue delays in the provision of medical services, and lack of recreation or educational facilities.¹⁸⁵ Again like

¹⁸¹ *Brough v Australia*, HRC Communication No. 1184/2003, 17 March 2006, §9.2.

¹⁸² See, for example, *Mika Miha v Equatorial Guinea*, HRC Communication No. 414/1990, 8 July 1994; *Griffin v Spain*, HRC Communication No. 493/1992, 4 April 1995; *Yasseen and Thomas v Guyana*, HRC Communication No. 676/1996, 30 March 1998; *M’Boissona v the Central African Republic*, HRC Communication No. 428/1990, 7 April 1994; *Freemantle v Jamaica* (2000), *op. cit.*; *Sextus v Trinidad and Tobago*, HRC Communication No. 818/1998, 16 July 2001; *Lantsova v the Russian Federation*, HRC Communication No. 763/1997, 26 March 2002; *Madafferi v Australia*, HRC Communication No. 1011/2001, 26 July 2004.

¹⁸³ Under Article 20 UNCAT, the CAT has the power to request that a State Party allow such a visit where there is “*reliable information which appears to it to contain well-founded indications that torture is being systematically practised in the territory of a State Party.*” The CAT has yet to find a violation based solely on conditions of detention, but has indicated that such violations are, however, possible. See, for example, *Attia v Sweden*, CAT Communication No. 199/2002, 17 November 2003.

¹⁸⁴ CAT, Summary account of the results of the proceedings concerning the inquiry on Turkey, UN Doc. A/48/44/Add.1, 1993, §52.

¹⁸⁵ See, for example, CAT, Concluding Observations on Japan, UN Doc. CAT/C/JPN/CO/1, 2007; Concluding Observations on Croatia, UN Doc. CAT/C/CR/32/3, 2004; Concluding Observations on Chile, UN Doc. CAT/C/CR/32/5, 2004; Concluding Observations on Moldova, UN

the HRC, the CAT also makes direct reference to the Standard Minimum Rules for the Treatment of Prisoners, recommending that States end all practices that are contrary to these rules.¹⁸⁶

1.3.4 Solitary confinement

The issue of solitary confinement is addressed by the HRC and the CAT, and is also covered by other international guidelines and recommendations. Principle 7 of the Basic Principles for the Treatment of Prisoners, for example, provides that “*Efforts addressed to the abolition of solitary confinement as a punishment, or to the restriction of its use, should be undertaken and encouraged.*”

– ICCPR

In its General Comment No. 20, the HRC stated that prolonged solitary confinement may violate Article 7.¹⁸⁷ In its Concluding Observations on the report of Denmark in 2000, the Committee expressed the view that “*solitary confinement is a harsh penalty with serious psychological consequences and is justifiable only in case of urgent need; the use of solitary confinement other than in exceptional circumstances and for limited periods is inconsistent with article 10, paragraph 1, of the Covenant.*”¹⁸⁸ Therefore, if solitary confinement is not justified in the circumstances of the case, it will violate Article 10(1), and if it is for a prolonged period, it will in any case violate Article 7.

In *Polay Campos v Peru*, a period of nine months of solitary confinement during pre-trial detention was found by the Committee to amount to a violation of Article 10(1) ICCPR, and the later “*total isolation of Mr. Polay Campos for a period of a year and the restrictions placed on correspondence between him and his family constitute[d] inhuman treatment within the meaning of Article 7,*”¹⁸⁹ as well as violating Article 10(1).

Not all instances of solitary confinement will violate the Covenant, however. In *Vuolanne v Finland*, the author was placed in solitary confinement for a total of 10 days as punishment for being absent without leave during his military serv-

Doc. CAT/C/CR/30/7, 2003; Concluding Observations on the Russian Federation, UN Doc. CAT/C/CR/28/4, 2002, especially §6(i) which explicitly categorises the conditions of detention of children in institutions as inhuman or degrading.

¹⁸⁶ See, for example, CAT, Concluding Observations on the Democratic Republic of the Congo, UN Doc. CAT/C/DRC/CO/1, 2006, §11; CAT, Concluding Observations on Togo, UN Doc. CAT/C/TGO/CO/1, 2006, §19.

¹⁸⁷ HRC, General Comment No. 20, 1992, §6.

¹⁸⁸ HRC, Concluding Observations on Denmark, UN Doc. CCPR/CO/70/DNK, 2000, §12.

¹⁸⁹ *Polay Campos v Peru*, HRC Communication No. 577/1994, 6 November 1997, §8.6.

ice.¹⁹⁰ The HRC considered that “*the solitary confinement to which the author was subjected, having regard to its strictness, duration and the end pursued, [did not appear to produce] any adverse physical or mental effects on him.*”¹⁹¹ The only interference with the dignity of the author was “*embarrassment inherent in the disciplinary measure to which he was subjected.*”¹⁹² The Committee restated that, in order to be degrading, the humiliation or debasement involved must exceed a particular level and entail elements beyond the mere fact of deprivation of liberty. Thus, in this case, the Committee found that neither Article 7 nor Article 10 had been violated.

– UNCAT

While it has yet to consider the issue in detail under its individual complaints procedure, the CAT also considers that solitary confinement may constitute ill-treatment or torture.¹⁹³ For example, in its inquiry into indications of systematic torture in Peru, the Committee expressed the view that the solitary confinement regime, which included “*sensorial deprivation and the almost total prohibition of communication cause[d] persistent and unjustified suffering which amount[ed] to torture,*” and recommended that the Peruvian authorities put an end to the situation.¹⁹⁴

The CAT has become increasingly strict over time in its response to solitary confinement. For example, in its 2002 Concluding Observations on Denmark it recommended only that the State Party continue to monitor the effects of solitary confinement on detainees and establish adequate review mechanisms relating to its determination and duration.¹⁹⁵ But in its 2007 Concluding Observations, while noting that improvements had occurred, the Committee was much more forceful in its recommendations, stating that Danish authorities “*should limit the use of solitary confinement as a measure of last resort, for as short a time as possible under strict supervision and with a possibility of judicial review,*” and that the authorities must respect the principle of proportionality and impose strict limits on the use of indefinite pre-trial solitary confinement for security offences.¹⁹⁶ In addition, the Committee recommended that the

¹⁹⁰ *Vuolanne v Finland* (1989), *op. cit.*

¹⁹¹ *Ibid.* §9.2.

¹⁹² *Ibid.*

¹⁹³ Ingelse considers it unlikely that a complaint specifically on this issue will ever come before the CAT, given that the HRC is better equipped to deal with the issue. Ingelse, *op. cit.*, p. 257.

¹⁹⁴ CAT, Summary account of the results of the proceedings concerning the inquiry on Peru, UN Doc. A/56/44, 2001, §186.

¹⁹⁵ CAT, Concluding Observations on Denmark, UN Doc. A/57/44, 2002, §74(c)–(d).

¹⁹⁶ CAT, Concluding Observations on Denmark, UN Doc. CAT/C/DNK/CO/5, 2007, §14.

level of “*psychological meaningful social contact for detainees while in solitary confinement*” be increased.¹⁹⁷

The Committee went even further in its Concluding Observations on Japan. In response to allegations that solitary confinement was being used as punishment, that procedural safeguards were lacking, and that in some cases the period of isolation exceeded 10 years, the Committee recommended that the State party not only amend its legislation, but also “*consider systematically reviewing all cases of prolonged solitary confinement, through a specialized psychological and psychiatric evaluation, with a view to releasing those where the detention can be considered in violation on the Convention.*”¹⁹⁸

1.3.5 Incommunicado detention and enforced disappearances

Effective prevention of torture requires the enactment and enforcement of procedural guarantees requiring that all detainees be registered and have regular contact with people outside the detention centre. The International Convention for the Protection of all Persons from Enforced Disappearance, which has yet to enter into force, aims to eliminate the practice of incommunicado detention and enforced disappearance, which place detainees at particular risk, and may in themselves constitute ill-treatment or torture. The Disappearances Convention defines an “enforced disappearance” as:

*“the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.”*¹⁹⁹

The Convention also addresses incommunicado detention, providing that states shall enact laws “*guaranteeing that any person deprived of liberty shall be authorised to communicate with and be visited by his or her family, counsel or any other person of his or her choice, subject only to the conditions established by law.*”²⁰⁰

¹⁹⁷ *Ibid.*

¹⁹⁸ CAT, Concluding Observations on Japan, UN Doc. CAT/C/JPN/CO/1, 2007, §18.

¹⁹⁹ International Convention for the Protection of All Persons from Enforced Disappearance, 2006, GA Res. 61/177, 20 December 2006, UN Doc. A/RES/61/177 (not yet in force), Article 2.

²⁰⁰ *Ibid.* Article 17(d).

While allegations of incommunicado detention and enforced disappearances have in the past been addressed mainly by the HRC and CAT, there will soon be a Committee on Enforced Disappearances mandated to deal specifically with these issues.²⁰¹ It is likely that the number of individual complaints of enforced disappearances considered by the HRC and CAT will decrease as more states ratify the new treaty. However, there is a possibility that the functions of this new Committee may eventually be subsumed by one of the existing treaty bodies, with the HRC perhaps the most likely candidate.²⁰²

– ICCPR

As noted by the HRC in its General Comment on Article 7, “*keeping under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment is an effective means of preventing cases of torture and ill-treatment. To guarantee the effective protection of detained persons, provisions should be made for detainees to be held in places officially recognized as places of detention and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends... Provisions should also be made against incommunicado detention.*”²⁰³

Many of the cases of incommunicado detention considered by the HRC also include allegations of other types of ill-treatment during the period for which contact with the outside world was denied. However, incommunicado detention alone can constitute a violation of Article 10(1) ICCPR, even when it is for a relatively short period.²⁰⁴ Where the period of incommunicado detention is prolonged, it may amount to cruel and inhuman treatment, or even torture. In *El-Megreisi v Libya*, the HRC found that the victim, “*by being subjected to prolonged incommunicado detention [of more than three years] in an unknown location, [was] the victim of torture and cruel and inhuman treatment, in violation of articles 7 and 10, paragraph 1, of the Covenant.*”²⁰⁵

From its jurisprudence, it is clear that the HRC considers that the practice of enforced disappearances “*is inseparably linked to treatment that amounts to a*

²⁰¹ *Ibid.* Article 26.

²⁰² *Ibid.* Article 27.

²⁰³ HRC, General Comment No. 20, 1992, §11.

²⁰⁴ *Arutyunyan v Uzbekistan*, HRC Communication No. 917/2000, 29 March 2004, §6.2. In this case, the incommunicado detention was for a period of two weeks.

²⁰⁵ *El-Megreisi v Libya*, HRC Communication No. 440/1990, 23 March 1994, §5.4.

violation of Article 7.”²⁰⁶ No further ill-treatment is necessary for a finding of a violation of Article 7. In *Laureano v Peru*, the Committee held that “the abduction and disappearance of the victim and prevention of contact with her family and with the outside world constitute cruel and inhuman treatment, in violation of article 7.”²⁰⁷ Enforced disappearances often also involve a breach of the right to life, guaranteed under Article 2 ICCPR.²⁰⁸

– UNCAT

While the CAT has found violations of the UNCAT as regards treatment which has occurred during incommunicado detention, failures to investigate allegations of ill-treatment during such detention, and an illegal expulsion which included incommunicado detention,²⁰⁹ it has not found a violation based only on such detention. Instead, it sees incommunicado detention as creating a situation conducive to torture.²¹⁰ Thus, the Committee requests that States parties include information on incommunicado detention in their reports under Articles 2(1) and 11, which deal with measures to prevent torture.²¹¹

1.3.6 Relatives of victims of human rights violations

The HRC considers that families of victims of human rights violations may themselves be victims of ill-treatment, particularly in cases involving enforced disappearances or execution. Given the smaller number of cases on these issues which have come before CAT, it has yet to find such a violation. However, family members of the disappeared are explicitly recognised as victims in their own right in the International Convention for the Protection of All Persons from Enforced Disappearances.

– ICCPR

The HRC has found that family members of disappeared persons may themselves be victims of a violation of Article 7. In *Quinteros Almeida v Uruguay*, the applicant was the mother of a disappeared person arrested by military personnel in the grounds of the Venezuelan Embassy in Montevideo. The Commit-

²⁰⁶ *Mojica v Dominican Republic*, HRC Communication No. 449/1991, 15 July 1994, §5.7.

²⁰⁷ *Laureano v Peru*, HRC Communication No. 540/1993, 25 March 1996.

²⁰⁸ HRC, General Comment No. 6, 1982, §4. See also, for example, *Laureano v Peru* (1996), *ibid.* §§8.3-8.4.

²⁰⁹ *Arkauz Arana v France*, CAT Communication No. 63/1997, 9 November 1999.

²¹⁰ *Ibid.* §11.4. See also CAT, Concluding Observations on Spain, UN Doc. CAT/C/CR/29/3, 2002, §10.

²¹¹ CAT, Guidelines on the form and content of initial reports under Article 19 to be submitted by States Parties to the Convention against Torture, UN Doc. A/60/44, Annex VII.

tee noted “*the anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts. The author has the right to know what has happened to her daughter. In these respects, she too is a victim of the violations of the Covenant suffered by her daughter in particular, of article 7.*”²¹²

Similarly, in *Schedko v Belarus*, the HRC found that “*the authorities’ initial failure to notify the author of the scheduled date for the execution of her son, and their subsequent persistent failure to notify her of the location of her son’s grave amounts to inhuman treatment of the author.*”²¹³ Thus, the State will be found to violate the rights of a condemned person’s family if it does not inform them of details of the execution, whether or not the execution itself amounts to a violation of the rights of the condemned person.

1.3.7 Extradition and expulsion

Extradition or expulsion of an individual who risks being subjected to torture if returned to another State is explicitly prohibited under the UNCAT. The HRC has held that such expulsions are also prohibited by the ICCPR, which also covers cases where there is a risk of cruel, inhuman or degrading treatment or punishment.

– UNCAT

The vast majority of communications considered by the CAT concern Article 3 UNCAT, which states:

“1. No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”

In its General Comment on Article 3, the CAT confirmed that this provision applies only to a danger of torture, as defined in Article 1 UNCAT, and does

²¹² *Quinteros Almeida v Uruguay*, HRC Communication No. 107/1981, 21 July 1983, §14.

²¹³ *Schedko v Belarus*, HRC Communication No. 886/1999, 3 April 2003, §10.2. See also *Shukurova v Tajikistan*, HRC Communication No.1044/2002, 17 March 2006, § 8.7; *Sankara and Others v Burkina Faso*, HRC Communication No.1159/03, 28 March 2006, § 12.2; *Bazarov v Uzbekistan* (2006), *op. cit.*, §8.5.

not encompass other forms of ill-treatment.²¹⁴ The reference to “another State” includes both the State to which the individual is being expelled, returned or extradited and any other State to which he or she may subsequently be expelled, returned or extradited.²¹⁵ Pursuant to Article 1, only human rights violations by, at the instigation of, or with the consent or acquiescence of a public official or other person acting in an official capacity will be considered as relevant under Article 3.²¹⁶

The CAT further specified that a finding of substantial grounds for believing that an individual would be in danger of being subjected to torture requires that the risk of torture “*be assessed on grounds that go beyond mere theory or suspicion.*”²¹⁷ The risk need not be “*highly probable,*” but must be “*personal and present.*”²¹⁸ To be present, the risk must be linked to current public officials, or persons acting in an official capacity. Thus, in *A.D. v the Netherlands*, allegations that the author had been tortured by a previous government were insufficient to show a present risk given the intervening shift in political power.²¹⁹ Where an author has been subjected to torture in the recent past, this will generally be taken into account.²²⁰ However, when a long period of time has elapsed, the Committee may find that a risk is no longer present, whether or not the government has changed in the intervening period.²²¹

The Committee will take into account any findings of fact by the domestic courts, but does not consider itself bound by any such findings; it may make its own “*free assessment of the facts based upon the full set of circumstances in*

²¹⁴ CAT, General Comment No. 1, 1997, §1. See also, for example, *B.S. v Canada*, CAT Communication No.166/2000, 14 November 2001, §7.4.

²¹⁵ CAT, General Comment No. 1, 1997, §2.

²¹⁶ *Ibid.* §3. See also the discussion of the “official capacity” requirement in section 1.2.1, and, for example, *K.K. v Switzerland*, CAT Communication No. 186/2001, 11 November 2003, §6.8; *G.R.B. v Sweden* (1998), *op. cit.*, §6.7.

²¹⁷ CAT, General Comment No. 1, 1997, §6.

²¹⁸ *Ibid.* §6–7.

²¹⁹ *A.D. v the Netherlands*, CAT Communication No. 96/1997, 12 November 1999, §7.4. See also *M.M.K. v Sweden*, CAT Communication No. 221/2002, 3 May 2005, §8.6; *S.A. v Sweden*, CAT Communication No. 243/2004, 6 May 2005, §4.2; *T.M. v Sweden*, CAT Communication No. 228/2003, 18 November 2003, §7.3. Such changes will not, however, preclude the finding of a violation where the risk continues, as was the case in *T.A. v Sweden*, CAT Communication No. 226/2003, 6 May 2005 (at §7.3).

²²⁰ CAT, General Comment No. 1, 1997, §8(b).

²²¹ See, for example, *X, Y and Z v Sweden*, CAT Communication No. 61/1996, 6 May 1998, §11.2; *H.A.D. v Switzerland*, CAT Communication No. 126/1999, 10 May 2000, §8.6; *S.S. v Netherlands*, CAT Communication No. 191/2001, 5 May 2003, §6.6; *A.I. v Switzerland*, CAT Communication No. 182/2001, 12 May 2004, §6.5–6.7; *S.S.S. v Canada*, CAT Communication No. 245/2004, 16 November 2005, §8.4; *N.Z.S. v Sweden*, CAT Communication No. 277/2005, 22 November 2006, §8.5.

every case.”²²² The risk to which the author may be exposed will be assessed at the time of consideration of the complaint, so the CAT may consider elements which have come to light since the initial submission was made.²²³ In assessing the risk, the Committee may consider whether the State to which the individual is to be returned is itself a party to the UNCAT, or whether it allows for individual complaints to be made to the Committee.²²⁴ Where expulsion has already occurred, the Committee will take its decision in light of the information which the authorities of the State party had or should have had in their possession at the time of the expulsion.²²⁵ If a State party expels a person in the period between submission of the complaint and its consideration by the CAT, this may in itself amount to a violation of the Convention.²²⁶

The CAT has developed substantial jurisprudence on the requirement that the risk of torture be “foreseeable, real and personal.”²²⁷ Thus, “the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute a sufficient ground for determining that a person would be in danger of being subjected to torture upon his return to that country; additional grounds must exist that indicate that the individual concerned would be personally at risk.”²²⁸ Furthermore, it is not sufficient for an author to show that he or she risks being tortured in one particular region of a State if expulsion to another region is possible and would not entail a risk of torture.²²⁹ The

²²² CAT, General Comment No. 1, 1997, §9.

²²³ See, for example, *Attia v Sweden* (2003), *op. cit.*, §12.1, referring to *H.M.H.I v Australia* (2002), *op. cit.*

²²⁴ See, for example, *Khan v Canada*, CAT Communication No. 15/1994, 15 November 1994, §12.5; *Korban v Sweden*, CAT Communication No. 88/1997, 16 November 1998; *Attia v Sweden* (2003), §12.3. The CAT revisited this aspect of its decision from *Attia v Sweden* (2003) in the subsequent case *Agiza v Sweden* (2005), which concerned Ms Attia’s husband. It indicated that, given information which had come to light in the intervening period regarding Egypt’s non-respect of diplomatic assurances, the original case might have been decided differently. See *Agiza v Sweden* (2005), *op. cit.*, §13.5.

²²⁵ See, for example, *Agiza v Sweden* (2005), *op. cit.*, §13.2; *Tebourski v France*, CAT Communication No. 300/2006, 1 May 2007, §8.1.

²²⁶ See, for example, *Brada v France*, CAT Communication No. 195/2002, 17 May 2005. This case also makes clear that applicants should not be deported prior to the exhaustion of domestic remedies, §13.5.

²²⁷ *A.R. v the Netherlands*, CAT Communication No. 203/2002, 21 November 2003, §7.3. See also *S.P.A. v Canada*, CAT Communication No. 282/2005, 7 November 2006, §7.2.

²²⁸ *Khan v Canada* (1994), *op. cit.*, §12.2. See also, for example, *Mutombo v Switzerland*, CAT Communication No. 13/1993, 27 April 1994, §9.3; *E.A. v Switzerland*, CAT Communication No. 28/1995, 10 November 1997, §11.2; *N.P. v Australia*, CAT Communication No. 106/1998, 6 May 1999, §6.4; *S.S.H. v Switzerland*, CAT Communication No. 254/2004, 15 November 2005, §6.3; *El Rgeig v Switzerland*, CAT Communication No. 280/2005, 15 November 2006, §7.4.

²²⁹ *B.S.S. v Canada*, CAT Communication No. 183/2001, 12 May 2004, §11.5. See also *H.M.H.I. v Australia* (2002), *op. cit.*, §6.6.

test is an individual one, so, the absence of a consistent pattern of violations does not mean that a person is individually free from risk.²³⁰ Thus, it is not permissible for a State to take decisions entirely based on lists of ‘safe’ countries or any other criterion which would preclude individual consideration.²³¹

The burden to present an arguable case is on the author of a communication,²³² although the State is required to make available to the CAT all relevant and necessary information.²³³ The author must provide a minimum level of substantiation for the complaint to be admissible.²³⁴ The Committee “*considers that complete accuracy is seldom to be expected by victims of torture,*”²³⁵ but serious and material inconsistencies will generally lead to the rejection of the submission.²³⁶ Where the author provides a sufficient level of credible detail, it is possible for the burden of proof to be reversed. In *A.S. v Sweden*, the Committee was of the view that “*the author has submitted sufficient details regarding her sighe or mutah marriage and alleged arrest, such as names of persons, their positions, dates, addresses, name of police station, etc., that could have, and to a certain extent have been, verified by the Swedish immigration authorities, to shift the burden of proof.*”²³⁷ In that case, the Swedish authorities had not made sufficient efforts to determine whether there were substantial grounds for believing that the author would be in danger of being subjected to torture, and so any forcible return of the author to Iran, or to any other country where she ran a risk of being expelled or returned to Iran, would breach Article 3 UNCAT.

As was seen in section 1.2.2, State parties to the UNCAT are obliged to conduct an effective investigation into allegations of past violations. However, as the Committee observed in *Agiza v Sweden*, “*The nature of refoulement is such... that an allegation of breach... relates to a future expulsion or removal; accordingly, the right to an effective remedy contained in article 3 requires, in this context, an opportunity for effective, independent and impartial review of the*

²³⁰ *Khan v Canada* (1994), *op. cit.*, §12.2.

²³¹ See, for example, CAT, Concluding Observations on Finland, UN Doc. A/51/44, 1996, §62.

²³² CAT, General Comment No. 1, 1997, §5. This has been affirmed in the Committee’s jurisprudence. See, for example, *Zare v Sweden*, CAT Communication No. 256/2004, 17 May 2006, §9.5; *M.A.K. v Germany*, CAT Communication No. 214/2002, 14 May 2004, §13.5; *S.L. v Sweden*, Communication No. 150/1999, 11 May 2001, §6.4.

²³³ Article 22(4) UNCAT. See also *Agiza v Sweden* (2005), *op. cit.*, §13.10.

²³⁴ *Y v Switzerland*, CAT Communication No. 18/1994, 17 November 1994, §4.2.

²³⁵ *Kisoki v Sweden*, CAT Communication No. 41/1996, 8 May 1996, §9.3. See also, for example, *Tala v Sweden*, CAT Communication No. 43/1996, 15 November 1996, §10.3; *C.T. and K.M. v Sweden*, CAT Communication No. 279/2005, 17 November 2006, §7.6.

²³⁶ See *H.K.H. v Sweden*, CAT Communication No. 204/2002, 19 November 2002.

²³⁷ *A.S. v Sweden* (2000), *op. cit.*, §8.6.

*decision to expel or remove, once that decision is made, when there is a plausible allegation that article 3 issues arise.*²³⁸

– ICCPR

The Human Rights Committee considers that States parties to the ICCPR “*must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.*”²³⁹ This prohibition is wider than that under the UNCAT in that it extends to all forms of ill-treatment, but the jurisprudence of the HRC on this point is less plentiful than that of the CAT.

In deciding whether deportation would violate Article 7, the HRC will consider whether extradition or expulsion would expose an individual to a real risk of ill-treatment, i.e. whether such ill-treatment would be a “*necessary and foreseeable consequence*” of deportation.²⁴⁰ However, the anguish inherent in leaving a State of long-term residence is insufficient on its own to constitute ill-treatment.²⁴¹

Article 13 ICCPR provides:

“An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.”

The HRC allows the State party “*very wide discretion*” in the assessment of whether a case presents national security concerns.²⁴² Thus, in a case involving rendition flights,²⁴³ the HRC found no breach of the author’s rights under this Article. However, in the same case, the Committee held that the right to an effective remedy under Articles 7 and 2 of the ICCPR requires that “*effective review of a decision to expel to an arguable risk of torture must have an oppor-*

²³⁸ *Agiza v Sweden* (2005), *op. cit.*, §13.7. See also *Arkausz Arana v France* (1999), *op. cit.*

²³⁹ HRC General Comment No. 20, 1992, §9.

²⁴⁰ *G.T. v Australia*, HRC Communication No. 706/1996, 4 November 1997, §8.1, 8.6; *A.R.J. v Australia*, HRC Communication No. 692/1996, 28 July 1997, §6.8–6.9.

²⁴¹ *Canepa v Canada*, HRC Communication No. 558/1993, 3 April 1997, §11.2.

²⁴² *Alzery v Sweden* (2006), *op. cit.*, §11.10. See also *Borzov v Estonia*, HRC Communication No. 1136/2002, 26 July 2004.

²⁴³ “Rendition” is the transfer of a person from one country to another, without any form of ordinary judicial or administrative process.

tunity to take place prior to expulsion, in order to avoid irreparable harm to the individual and rendering the review otiose and devoid of meaning.”²⁴⁴ Thus, while the State is obliged to provide for independent review of its decisions, failure to do so may violate only Articles 7 and 2, and not necessarily Article 13.

1.3.7.1 Diplomatic assurances

A number of States attempt to respond to the prohibition on deporting individuals to States where they may face torture or ill-treatment by seeking diplomatic assurances from the receiving State that a particular individual will not be subjected to torture or other ill-treatment. Both the HRC and the CAT are sceptical about the value of such assurances, and require States that continue to rely on them to establish clear procedures for their use, with strong judicial review mechanisms and post-return monitoring. Both Committees recognise that any such assurance will be of lower value from a State which has a history of non-respect of its obligation not to subject persons under its jurisdiction to torture or other ill-treatment.

– UNCAT

In its Concluding Observations on the USA in 2006, the CAT expressed concern at the State Party’s use of diplomatic assurances and other kinds of guarantees assuring that a person will not be tortured if expelled, returned, transferred or extradited to another State. In particular, it was “*concerned by the secrecy of such procedures including the absence of judicial scrutiny and the lack of monitoring mechanisms put in place to assess if the assurances have been honoured.*”²⁴⁵ While it stopped short of forbidding their use in all circumstances, the Committee urged the US to establish and implement clear procedures for obtaining such assurances, with adequate judicial review, and effective post-return monitoring arrangements. The Committee further held that the government should “*only rely on ‘diplomatic assurances’ in regard to States which do not systematically violate the Convention’s provisions, and after a thorough examination of the merits of each individual case.*”²⁴⁶

The leading case in this area is *Agiza v Sweden*.²⁴⁷ The author in that case was suspected of involvement in terrorist activities, and had been removed by Sweden to Egypt on 18 December 2001, on an aircraft provided by the USA. He

²⁴⁴ *Alzery v Sweden* (2006), *op. cit.*, §11.8.

²⁴⁵ CAT, Concluding Observations on the USA, UN Doc. CAT/C/USA/CO/2, 2006, §21.

²⁴⁶ *Ibid.*

²⁴⁷ *Agiza v Sweden* (2005), *op. cit.*

was ill-treated by foreign agents immediately preceding his expulsion, while still on Swedish territory. The Committee found that this ill-treatment had taken place with the acquiescence of the Swedish police. However, even without the ill-treatment, the State party had enough information at its disposal at the time of removal to draw the “*natural conclusion*” that the complainant was at a real risk of torture. Moreover, “*The procurement of diplomatic assurances, which... provided no mechanism for their enforcement, did not suffice to protect against this manifest risk.*”²⁴⁸ Thus, while diplomatic assurances may not be inherently incompatible with a State’s obligations under Article 3 UNCAT, they must include provisions for both enforcement and rigorous monitoring. The CAT expanded on these requirements in *Pelit v Azerbaijan*, noting that seeking diplomatic assurances is itself “*an acknowledgment that, without more, expulsion of the complainant would raise issues of her mistreatment.*”²⁴⁹ Furthermore, the post-expulsion monitoring undertaken by the returning State must be, both objectively and in the complainant’s perception, “*objective, impartial and sufficiently trustworthy.*”²⁵⁰

– ICCPR

As discussed above, in the context of the right to life, the HRC has held that States which have abolished the death penalty may not extradite individuals to other countries where they may face this sentence. Nonetheless, the Committee allowed an exception; where the receiving State gives assurances that the death penalty will not be imposed, extradition will not automatically violate Article 6.²⁵¹ The attitude of the HRC to Article 7 has, however, been more restrictive, particularly in the light of ‘extraordinary renditions’ and the ‘war on terror.’

In its Concluding Observations on the USA in 2006, the Committee warned that “*The State party should exercise the utmost care in the use of diplomatic assurances and adopt clear and transparent procedures with adequate judicial mechanisms for review before individuals are deported, as well as effective mechanisms to monitor scrupulously and vigorously the fate of the affected individuals.*”²⁵²

²⁴⁸ *Ibid.* §13.4. In its decision, the Committee did not explicitly name this case as involving so-called ‘extraordinary rendition,’ in which persons suspected to pose a national security threat are taken to States where they will be tortured in order to provide information for the security services of a third State. Such practices are clearly prohibited under the UNCAT.

²⁴⁹ *Pelit v Azerbaijan*, CAT Communication No. 281/2005, 1 May 2007, §11.

²⁵⁰ *Ibid.*

²⁵¹ *Judge v Canada* (2002), *op. cit.*, §10.4.

²⁵² HRC, Concluding Observations on the USA, UN Doc. CCPR/C/USA/CO/3, 2006, §16.

Furthermore, the Committee explicitly recognised the limits of diplomatic assurances, stating that “*the more systematic the practice of torture or cruel, inhuman or degrading treatment or punishment, the less likely it will be that a real risk of such treatment can be avoided by such assurances, however stringent any agreed follow-up procedures may be.*”²⁵³

The Committee applied its position in *Alzery v Sweden*.²⁵⁴ The facts in that case were substantially similar to those in the CAT case *Agiza v Sweden*, to which the HRC made explicit reference.²⁵⁵ The HRC found that, while the existence of diplomatic assurances may be taken into account in the evaluation of whether a real risk of torture or ill-treatment exists, such assurances must be reliable, and accompanied by monitoring and other measures for effective implementation.²⁵⁶ In this case, the assurances procured contained no mechanism for monitoring their enforcement, no other arrangements were made to ensure effective implementation, and the visits that did take place did not conform to international good practice, in that there was no private access to the detainee, and no recourse to medical and forensic expertise. Thus, the Committee found that the diplomatic assurances received were insufficient to eliminate the foreseeable risk of torture, so Sweden had breached Article 7.

Conclusion

The conclusions, recommendations and decisions of the treaty bodies are not legally binding in the strictest sense; they have only advisory power. However, treaty bodies have, over time, come to make fuller use of the flexibility inherent in this relatively limited power, expanding the definitions of torture and ill-treatment, the extent of State obligations, and scope of application of the prohibition. This is also a reflection of the progress made towards entrenchment of a human rights culture in every region of the world. The HRC, as the older of the two bodies, has been noticeably braver than the CAT in a number of the areas discussed above.

The treaty bodies meet for only a few weeks per year, and therefore, while their influence is of vital importance, they can make only a limited contribution to the international jurisprudence on torture. Just as the treaty bodies inspire the regional mechanisms, much of the jurisprudence of the treaty bodies reflects

²⁵³ *Ibid.*

²⁵⁴ *Alzery v Sweden* (2006), *op. cit.*

²⁵⁵ The author was also transferred from Sweden to Egypt on 18 December 2001 on an aircraft provided by the USA, with involvement of both US and Egyptian security agents.

²⁵⁶ *Alzery v Sweden* (2006), *op. cit.*, §§11.3, 11.5.

standards developed by the regional mechanisms. The treaty bodies have made a particularly high number of references to decisions of the European Commission and Court of Human Rights. This is to be expected; the European regional mechanisms were the first to be established, and the system has a much higher turnover of cases than the other bodies. Thus, it has arguably developed the most detailed jurisprudence on the prohibition of torture and other ill-treatment. This jurisprudence will be analysed in Chapter 2, with the jurisprudence of the Inter-American and African systems to follow in Chapters 3 and 4, respectively.

The European Regional System

2

Introduction	56
2.1 Definitions	56
2.2 States Parties' Obligations	63
2.3 Scope of Application	72
Conclusion	90

Introduction

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) was opened for signature in 1950. The prohibition on torture and other forms of ill-treatment is enshrined in Article 3 of the ECHR, which simply states:

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

Article 3 of the ECHR does not define torture, nor inhuman or degrading treatment or punishment.²⁵⁷ Accordingly, the European Court of Human Rights and, prior to November 1999, the European Commission of Human Rights,²⁵⁸ have developed a complex and extensive body of jurisprudence to determine the constituent elements of these forms of abuse.

The purpose of this chapter is to consider the definitions which have emerged from the jurisprudence of the European Court and Commission, as well as the recent expansion of the scope of application of Article 3.

2.1 Definitions

Starting from the simple proclamation of the prohibition of torture, inhuman and degrading treatment or punishment in Article 3 ECHR, the Court and Commission have developed complex definitions of, and drawn distinctions between, the prohibited acts.

2.1.1 Torture

*The Greek Case*²⁵⁹ and *Ireland v UK*²⁶⁰ are the leading cases as regards the distinction between the prohibited acts. *The Greek Case*, decided by the European Commission, concerned the conduct of Greek security forces following the military coup in 1967. The Commission adopted a general approach that distinguished between ‘torture,’ ‘inhuman’ and ‘degrading’ treatment. The European Court and Commission, unlike some of their international and

²⁵⁷ For the purposes of this chapter, ‘acts’ should be read to include ‘omissions,’ and ‘treatment’ so as to include ‘punishment.’

²⁵⁸ Since 1998, following a review of the supervisory mechanisms of the Council of Europe’s human rights system, the work of the European Commission of Human Rights has been subsumed by a restructured European Court of Human Rights. The Commission ceased to function on 1 November 1999 pursuant to Protocol No. 11 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

²⁵⁹ *The Greek Case*, nos. 3321/67, 3322/67, 3323/67 and 3344/67, 1969 Yearbook of the European Convention on Human Rights, No. 12, p. 186.

²⁶⁰ *Ireland v UK*, no. 5310/71, ECHR (Series A) No. 25, judgement of 18 January 1978.

regional counterparts, have continued to follow this approach of distinguishing between the different forms of ill-treatment. While the definitions have been refined since these early cases, torture continues to carry a special stigma which distinguishes it from other forms of ill-treatment.

In *The Greek Case*, the European Commission held that the abuses exist on a continuum, with each an aggravated form of another. The defining characteristic of torture is not necessarily the nature and severity of the act, but rather the purpose for which it was perpetrated. Thus, “*all torture must be inhuman and degrading treatment, and inhuman treatment also degrading. The notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable... 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.*”²⁶¹

However, in subsequent decisions, most notably *Ireland v UK*, the purposive element of the definition of torture was for a time marginalised in favour of a threshold based upon a sliding scale of severity between the three acts. *Ireland v UK* concerned the treatment of IRA suspects by UK troops in Northern Ireland. The case was brought by the Irish Government against the UK alleging, among other things, that use of ‘the five techniques’ (sleep deprivation, stress positions, deprivation of food and drink, subjection to noise and hooding) during interrogations constituted a breach of Article 3. In its judgement, the Court drew a distinction between torture, inhuman treatment, and degrading treatment, holding that such a distinction was necessary because of the “*special stigma*” attached to torture.²⁶² An act must cause “*serious and cruel suffering*” to constitute torture.

In this instance, the Court held that ‘the five techniques’ caused “*if not actual bodily injury, at least intense physical and mental suffering... and also led to psychiatric disturbances during the interrogation,*” and therefore constituted inhuman treatment, but did not “*occasion suffering of the particular intensity and cruelty implied by the word torture.*”²⁶³ The Court thereby contradicted the Commission’s decision in *The Greek Case* that such practices did amount to

²⁶¹ *The Greek Case* (1969) *op. cit.*

²⁶² *Ireland v UK* (1978), *op. cit.*, §167.

²⁶³ *Ibid.* §167.

torture,²⁶⁴ effectively replacing the distinction based on the purpose of the act by a subjective assessment of the severity of pain and suffering occasioned by the act.²⁶⁵ Under such a distinction, degrading treatment which reaches a certain severity can be re-classified as inhuman treatment, which in turn, if sufficiently serious, can be re-classified as torture.²⁶⁶

The ‘threshold of severity’ approach was reiterated and followed in a number of subsequent decisions of the Court and Commission.²⁶⁷ For example, in *Aydin v Turkey*,²⁶⁸ the Court restated the defining characteristics of torture established in *Ireland v UK*, and used these to hold that rape could amount to torture. The case involved a young woman who was held by Turkish police on suspicion of involvement with the Workers’ Party of Kurdistan (the PKK). While in detention, she was blindfolded, stripped, beaten, sprayed with cold water from high pressure jets, and raped. The Court 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.*”²⁶⁹ Furthermore, the Court held that it would have “reached this conclusion on either of the grounds taken separately,” i.e. the allegation of torture due to the rape and the allegation of torture due to the other forms of physical and mental violence inflicted. Accordingly, an act of rape can in and of itself constitute torture.

Yet a distinction between the three acts cannot be drawn simply by a crude measure of the level of pain or suffering caused. The assessment is relative and

²⁶⁴ See *The Greek Case* (1969), *op. cit.*, which considered that the combined application of certain techniques amounted to torture.

²⁶⁵ See 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 treatment amounted to torture, stating that; “*this was a finding of fact for the competent authority dealing with the case in the first instance.*” *Ibid.* § B.

²⁶⁶ Morgan and Evans, *Preventing Torture*, Clarendon Press, Oxford, 1998, p. 82.

²⁶⁷ See for example, *Aksoy v Turkey*, no. 21987/93, Rep. 1996-VI, judgement of 18 December 1996; *Aydin v Turkey* (1997), *op. cit.*; *Selmouni v France*, no. 25803/94, ECHR 1999-V, judgement of 28 July 1999.

²⁶⁸ *Aydin v Turkey* (1997), *op. cit.*

²⁶⁹ *Ibid.* §83–86

“depends on all the circumstances of the case such as the duration of the treatment, its physical and mental effects and in some circumstances the sex, age and state of health of the victim.”²⁷⁰ More recently, the Court has held that, while the severity of suffering will be a significant consideration, “there are circumstances where actual proof of the actual effect on the person may not be a major factor.”²⁷¹

The judgement in *Selmouni v France* marked a milestone in the approach of the Court, in part because it contained the Court’s first reference to the definition of torture in Article 1 UNCAT.²⁷² In making reference to this definition, the Court re-emphasised the purposive element of torture, which had been marginalised since *The Greek Case*. The Court has referred to the UNCAT in several of its subsequent decisions, noting in *İlhan v Turkey* that, “in addition to the severity of the treatment, there is a purposive element as recognised in the United Nations Convention against Torture... which defines torture in terms of the intentional infliction of severe pain or suffering with the aim, inter alia, of obtaining information, inflicting punishment or intimidating.”²⁷³

In general, the European judicial system has refrained from drawing up a list of acts which will automatically be considered sufficiently severe to constitute torture. The Court has always allowed itself a degree of flexibility when considering the prohibited acts, and has concluded that the Convention should be regarded as a “living instrument which must be interpreted in the light of present-day conditions.”²⁷⁴ This was reiterated in the strongest terms in *Selmouni v France*,²⁷⁵ in which the Court held that “[c]ertain acts which were classified in the past as ‘inhuman and degrading treatment’ as opposed to ‘torture’ could be

²⁷⁰ *Ireland v UK* (1978), *op. cit.*, §162.

²⁷¹ *Keenan v UK*, no. 27229/95, ECHR 2001-III, judgement of 3 April 2001, §112.

²⁷² The Court, having established that the suffering inflicted amounted to at least inhuman and degrading treatment, stated that “it remains to establish in the instant case whether the ‘pain or suffering’ inflicted... can be defined as ‘severe’ within the meaning of Article 1 of the United Nations Convention against Torture.” *Selmouni v France* (1999), *op. cit.*, §100. For a discussion of Article 1 UNCAT, see Chapter 1.

²⁷³ *İlhan v Turkey*, no. 22277/93, ECHR 2000-VII, judgement of 27 June 2000, §85. See also *Salman v Turkey*, no. 21986/93, ECHR 2000-VII, judgement of 27 June 2000; *Akkoç v Turkey*, nos. 22947/93 and 22948/93, ECHR 2000-X, judgement of 10 October 2000; and *Bati and Others v Turkey*, no. 57834/00, ECHR 2004-IV, judgement of 3 June 2004.

²⁷⁴ *Tyrrer v UK*, no. 5856/72, ECHR (Series A) No. 26, judgement of 25 April 1978. See also *Soering v UK* (1989), *op. cit.*, § 31; *Loizidou v Turkey*, no. 15318/89, ECHR (Series A) No. 310, judgement of 23 March 1995, §71; *Bursuc v Romania*, no. 42066/98, judgement of 12 October 2004; *Mamatkulov and Askarov v Turkey*, nos. 46827/99 and 46951/99, ECHR 2005-I, judgement of 4 February 2005, §121.

²⁷⁵ *Selmouni v France* (1999), *op. cit.* This case involved allegations of various forms of ill-treatment while the applicant was in police custody, including repeated punching, hitting with objects, and sexual abuse.

classified differently in the future.” The Court took 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.”²⁷⁶ Thus, the Court is not bound to follow its previous decisions, but is free to re-evaluate case law and extend the scope of Article 3 to acts which had not previously been regarded as torture or ill-treatment.²⁷⁷

2.1.2 Inhuman treatment

In *The Greek Case*, the Commission drew a distinction not only between torture and the other forms of ill-treatment, but also between inhuman treatment and degrading treatment. The Commission defined inhuman treatment as “at least such treatment as deliberately causes severe suffering, mental or physical, which in the particular situation is unjustifiable.”²⁷⁸ Furthermore, in the later case *Ireland v UK*, the Commission expressed the view that “any definition of the provisions of Article 3 of the Convention must start from the notion of inhuman treatment.”²⁷⁹ However, the Court and Commission have given fewer definitions of inhuman treatment than the other prohibited acts. Inhuman treatment can be defined by reference to the other forms of ill-treatment; it is such treatment as is not sufficiently severe, or without the purposive element, to constitute torture, but yet which crosses the upper ‘severity threshold’ of degrading treatment.²⁸⁰

The judgement in *Campbell and Cosans v UK* illustrates both this somewhat ambiguous approach to the definition of inhuman treatment, and the Court’s ‘threshold of severity’ approach to the prohibited acts.²⁸¹ This case involved a threat to use corporal punishment on two school boys. The punishment did not in fact take place, but the Court nevertheless stated that “provided it is sufficiently real and immediate a mere threat of conduct prohibited by Article 3 may itself be in conflict with the provision. Thus to threaten an individual with torture might in some circumstances constitute at least ‘inhuman treatment’.”²⁸²

²⁷⁶ *Selmouni v France* (1999), *op. cit.*, §102.

²⁷⁷ See for example *Henaf v France*, no. 65436/01, ECHR 2003-XI, judgement of 27 November 2003, §55.

²⁷⁸ *The Greek Case* (1969), *op. cit.*

²⁷⁹ *Ireland v UK*, no. 5310/71, Commission Report (Series B) Vol. 23-I, 1976, §389.

²⁸⁰ See M. Evans and R. Morgan, *Preventing Torture*, Clarendon Press, Oxford, 1998, p. 93.

²⁸¹ *Campbell and Cosans v UK*, nos. 7511/76 and 7743/76, ECHR (Series A) No. 48, judgement of 25 February 1982.

²⁸² *Ibid.* § 26. The Court held that the threat of punishment was not sufficiently severe to constitute torture or inhuman treatment, nor did it humiliate or debase the boys sufficiently to

2.1.3 Degrading treatment

Unlike inhuman treatment, degrading treatment has been the subject of substantial definitional consideration, possibly because it constitutes the baseline for a violation of Article 3. Once again, *The Greek Case* provides the springboard for subsequent refinements of the definitions, with its finding that for an act to be considered ‘degrading’, it must include some form of “*gross humiliation*.”²⁸³ Furthermore, in *Ireland v UK*, the Court determined that, to come within the scope of Article 3, an act of ill-treatment must attain a “*minimum level of severity*.”²⁸⁴

The Commission and Court have expanded on these distinguishing characteristics in their subsequent decisions. In *East African Asians v UK*,²⁸⁵ the Commission stated that “*the general purpose of this provision is to prevent interferences with the dignity of man of a particularly serious nature. It follows that an action, which lowers a person in rank, position, reputation or character can only be regarded as ‘degrading treatment’ in the sense of Article 3, where it reaches a certain level of severity.*” Accordingly, for an act to constitute degrading treatment, it must in some way interfere with a person’s dignity. The Court also took the opportunity to comment on the ‘threshold of severity’ approach to degrading treatment in *Tyrer v UK*. That case involved the infliction of a judicial sentence of birching on a fifteen-year old boy who had been convicted of unlawful assault. After deciding that the treatment was not sufficiently severe to constitute torture or inhuman treatment, the Court considered whether it could amount to degrading treatment, noting that “*What is relevant for the purposes of Article 3 is that he should be humiliated not simply by his conviction but by the execution of the punishment which is imposed upon him... In order for punishment to be ‘degrading’ and in breach of Article 3, the humiliation or debasement involved must attain a particular level.*”²⁸⁶ The Court further stated that the assessment of the level of humiliation or debasement involved is “*in the nature of things relative: it depends on all the circumstances of the case and in particular, on the nature and context of the punishment itself and the manner and method of its execution.*”²⁸⁷

constitute degrading treatment. See also *Tyrer v UK* (1978), *op. cit.*, §29.

²⁸³ *The Greek Case* (1969), *op. cit.*

²⁸⁴ *Ireland v UK*, (1978), *op. cit.*, §162.

²⁸⁵ *East African Asians v UK*, no. 4403/70, Commission Report of 14 December 1973, published in full following Resolution of 21 March 1994.

²⁸⁶ *Tyrer v UK* (1978), *op. cit.*, §32, 35.

²⁸⁷ *Ibid.* §§30–31.

There is both an objective and a subjective element to the assessment of whether the treatment reaches a minimum level of severity. In *Campbell and Cosans v UK*, the Court stated that “the ‘treatment’ itself will not be ‘degrading’ unless the person has undergone – either in the eyes of others or in his own eyes – humiliation or debasement attaining a minimum level of severity.”²⁸⁸ The subjective element of this evaluation was reiterated in *Yankov v Bulgaria*.²⁸⁹ In that case, the applicant’s head had been forcibly shaved without legal basis or valid justification, and the Court considered that “Even if it was not intended to humiliate, the removal of the applicant’s hair without specific justification was in itself arbitrary and punitive and therefore likely to appear to him to be aimed at debasing and/or subduing him.”²⁹⁰ Thus, the victim’s subjective experience of the treatment will be taken into account in the assessment of its severity. Furthermore, the Court has held that racial discrimination may in itself constitute degrading treatment.²⁹¹

Traditionally, the Court’s approach has been to consider whether the object of the treatment was to humiliate and debase the person concerned.²⁹² However, in more recent cases, such as *V v UK*, the Court has considered that “the absence of any such purpose cannot conclusively rule out the finding of a violation.”²⁹³ This case involved an allegation that the trial of a boy of ten for the murder of a younger child amounted to a breach of Article 3, as the accusatorial nature of the trial, the adult proceedings in a public court, the length of the trial, the physical lay-out of the courtroom and the overwhelming presence of the media and public, all had a cumulative effect which amounted to a breach of Article 3. The Court held that the absence of an intention on the part of the State authorities to humiliate or debase the applicant did not bar consideration of the alleged violation of Article 3, though in the particular instance the Court found no violation of Article 3.²⁹⁴ However, it applied similar reasoning

²⁸⁸ *Campbell and Cosans v UK* (1982), *op. cit.*, §28. In this instance, the Court considered that the two schoolboys had not suffered any adverse effects, and their feelings of apprehension were not sufficiently severe to come within the scope of Article 3.

²⁸⁹ *Yankov v Bulgaria*, no. 39084/97, ECHR 2003-XII, judgement of 11 December 2003.

²⁹⁰ *Ibid.*, §117.

²⁹¹ See, for example, *Cyprus v Turkey*, no. 25781/94, ECHR 2001-IV, judgement of 10 May 2001, §310.

²⁹² *Raninen v Finland*, no. 20972/92, Rep. 1997-VIII, judgement of 16 December 1997, §55.

²⁹³ *V v UK*, no. 24888/94, ECHR (Series A) No.9, judgement of 16 December 1999, §71. See also *Farbtuhs v Latvia*, no. 4672/02, judgement of 2 December 2004; *Gorodnichev v Russia*, no. 52058/99, judgement of 24 May 2007.

²⁹⁴ *V v UK* (1999), *op. cit.*, §71. In this instance, the Court held that every effort had been made to modify the trial to take into account the defendant’s young age and there was accordingly no violation of Article 3.

in *Peers v Greece* to find that the treatment in that case was degrading, despite the lack of evidence of any “*positive intention of humiliating or debasing*” the applicant.²⁹⁵ Thus, a lack of intent will not prevent a finding of a violation. However, following *Price v UK*, the Court may take the absence of intent into account when considering the amount of compensation to be awarded.²⁹⁶

2.2 States Parties' Obligations

Article 3 imposes a negative obligation upon States not to subject people to torture, inhuman and degrading treatment or punishment. The Court and Commission have found that State obligations under this article go further, and entail positive duties to protect individuals from these forms of abuse.

2.2.1 Duty to protect from ill-treatment by private actors

In general, actions incompatible with Article 3 incur the liability of a State only if they were inflicted by persons holding an official position. However, the obligation on States Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken in conjunction with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman and degrading treatment by private actors.

This positive duty was considered in *A v UK*,²⁹⁷ which involved the caning of a boy by his stepfather. In this instance, the stepfather was prosecuted, but was ultimately acquitted by a jury that considered the punishment to be “reason-

²⁹⁵ *Peers v Greece*, no. 28524/95, ECHR 2001-III, judgement of 19 April 2001, §§74–75. The applicant in this case was a convicted drug user, who was detained in a psychiatric hospital within a prison for a period of time and then transferred to the prison's segregation unit. It was alleged that the conditions of detention were poor and unsuitable for a person in need of psychiatric care. The Court considered that the authorities' omission to improve unacceptable conditions denoted “*a lack of respect for the applicant*,” and that there had therefore been a violation of Article 3. See also, for example, *Kalashnikov v Russia*, no. 47095/99, ECHR 2002-VI, judgement of 15 July 2002, §101; *Labzov v Russia*, no. 62208/00, judgement of 16 June 2005, §48.

²⁹⁶ The applicant in *Price v UK* did not have any limbs, and suffered from kidney problems. She was imprisoned for seven days for contempt of court, during which she was not allowed to use a battery charger for her electric chair, as this was considered to be a luxury item. Furthermore, she spent one night in a police cell, which was not appropriate for a person with disabilities, and its cold condition provoked a kidney infection. She was subsequently moved to a prison health care centre which was also unsuitable for her needs. The Court held that, while there was no evidence of any positive intention to humiliate or abuse the applicant, the conditions in which she was kept were inappropriate and constituted degrading treatment. However, the Court took the lack of an intention to humiliate or abuse the applicant into account when calculating the amount of compensation to be awarded. *Price v UK*, no. 33394/96, ECHR 2001-VII, judgement of 10 July 2001, §34.

²⁹⁷ *A v UK*, no. 25599/94, Rep. 1996-VI, judgement of 23 September 1998.

able chastisement”, and therefore not a criminal offence. The Court held 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.”²⁹⁸ In this case, the State’s responsibility was engaged through its failure to provide adequate protection to the applicant against ill-treatment because, despite the fact that the child had been “subjected to treatment of sufficient severity to fall within Article 3”, the jury had acquitted the stepfather who had administered the treatment.²⁹⁹ While this is a significant decision, it should not be interpreted too widely. A State will not be responsible for all acts of ill-treatment committed in the private sphere; State responsibility still has to be engaged in some way.

The necessity for a link to the State was confirmed in *Z and Others v UK*.³⁰⁰ This case involved the extreme neglect and ill-treatment of four children by their parents. The family’s situation had been brought to the attention of the relevant health officials and social services for many years, and the children’s poor living conditions and state of health had been reported to the police. Despite their appalling living conditions, the children were not given adequate protection and were taken into care only five years after the ill-treatment had been brought to the attention of the local authority. The Court recalled its finding in *A v UK* that States have a duty to take measures to ensure that individuals are not subjected to ill-treatment by private actors. It specified that “these measures should provide adequate protection, in particular, of children and other vulnerable groups and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge.”³⁰¹ Accordingly, as the local authorities had knowledge of the ill-treatment but had failed to take reasonable steps to prevent it from continuing, the Court found a violation of Article 3.

²⁹⁸ *Ibid.* §22. See also *H.L.R. v France*, no. 24573/94, Rep. 1997-III, judgement of 29 April 1997.

²⁹⁹ *Ibid.* §24. See also *Z and Others v UK*, no. 29392/95, ECHR 2001-V, judgement of 10 May 2001, §73.

³⁰⁰ *Z and Others v UK* (2001), *op. cit.*, §73. See also *E and Others v UK*, no. 33218/96, judgement of 26 November 2002.

³⁰¹ *Z and Others v UK* (2001), *op. cit.*, §73. See also *Osman v UK*, Rep. 1998-VIII, judgement of 28 October 1998, §116; *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*, no. 13178/03, ECHR 2006-XI, judgement of 12 October 2006, §53; *Members of the Gldani Congregation of Jehovah’s Witnesses v Georgia*, no. 71156/01, judgement of 3 May 2007, §96.

*Pretty v UK*³⁰² further illustrates the positive obligation on the State. The applicant in that case suffered from a degenerative fatal disease which caused her great pain and distress. She had sought an assurance from the Government's prosecution service that, should her husband assist in her suicide, he would not be prosecuted. She alleged that the State's failure to provide her with such an assurance was in violation of its duty under Article 3 to take steps to protect her from undue suffering.

In its judgement, the Court, citing *A v UK*, *Z and Others v UK*,³⁰³ and other cases, reiterated the positive duty of States to provide protection against inhuman and degrading treatment, even where such treatment results from the acts of private individuals. Nevertheless, the Court distinguished between the positive duty imposed in such cases and the circumstances of the instant case. The Court noted that the State obligation arose out of the necessity for “*the removal or mitigation of harm, for instance, preventing any ill-treatment by public bodies or private individuals or providing improved conditions or care.*”³⁰⁴ However, in this instance, the positive duty claimed would “*require the State to sanction actions intended to terminate life, an obligation that cannot be derived from Article 3.*”³⁰⁵ Accordingly, the Court held that there is no positive obligation under Article 3 which would require the State to give an undertaking not to prosecute the applicant's husband, or to provide a lawful opportunity for any other form of assisted suicide.³⁰⁶ The positive obligation to protect individuals from ill-treatment by private actors is therefore purely protective in nature, and extends only to the removal or mitigation of harm, and not the provision of reassurance.

2.2.2 Duty to investigate

One of the most notable developments in the scope of application of Article 3 has been the finding of violations due to the lack of an effective investigation. Following *Ribitsch v Austria*,³⁰⁷ when an individual is taken into custody in good

³⁰² *Pretty v UK*, no. 2346/02, ECHR 2002-III, judgement of 29 April 2002.

³⁰³ The Court also cited *Keenan v UK* (2001), *op. cit.*, and *D v UK*, no. 30240/96, Rep. 1997-III, judgement of 2 May 1997.

³⁰⁴ *Pretty v UK* (2002), *op. cit.*, §55.

³⁰⁵ *Ibid.* §55.

³⁰⁶ *Ibid.* §56.

³⁰⁷ *Ribitsch v Austria*, no. 18896/91, ECHR (Series A) No. 336, judgement of 4 December 1995, §108–111. See also *Salman v Turkey* (2000), *op. cit.*; *Aksoy v Turkey* (1996), *op. cit.*, §61; *Assenov and Others v Bulgaria*, no. 24760/94, Rep. 1998-VIII, judgement of 28 October 1998; *Labita v Italy*, no. 26772/95, ECHR 2000-IV, judgement of 6 April 2000; and, more recently, *Stefan Iliev v Bulgaria*, no. 53121/99, judgement of 10 May 2007.

health but is 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 whether or not other evidence of ill-treatment is presented by the complainant.³⁰⁸ One of the requirements for such an explanation is that the State conduct an effective investigation into the allegations of ill treatment.

The finding of a violation due to the lack of an effective investigation appears to have arisen in order to address evidential difficulties regarding allegations of ill-treatment. In *The Greek Case* and *Ireland v UK*, the Commission and Court held that the standard of proof required for a finding of a violation of Article 3 was proof “*beyond reasonable doubt*” that ill-treatment occurred.³⁰⁹ In *Ireland v UK*, the Court tried to address the dichotomy between this standard of proof and the difficulty in obtaining evidence from the alleged violator itself, i.e. State authorities or agents. In this instance, the Court held that “*proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. In this context, the conduct of the Parties when evidence is being obtained has to be taken into account.*”³¹⁰

Over time, the Court has become increasingly mindful of the difficulties victims may face in obtaining supporting evidence. Consequently, it has imposed an obligation upon State authorities to carry out an effective investigation into allegations of ill-treatment. As the Court noted in *Mammadov (Jalaloglu) v Azerbaijan*, “*Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries occurring during such detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation.*”³¹¹ Thus, where the State has exclusive knowledge of, or ability to obtain, the facts, the burden of proof is, in effect, reversed.

The importance of the duty to investigate was emphasised in *Assenov and Others v Bulgaria*.³¹² This case involved two applicants, Mr. Assenov, who was 14 years old at the time of the incident, and his father. They alleged that Mr. Assenov had been ill-treated by police officers whilst detained. The Court found

³⁰⁸ *Ibid.* §108-111.

³⁰⁹ See *The Greek Case*, (1969) *op. cit.*, §30; *Ireland v UK* (1978), *op. cit.*, §161.

³¹⁰ *Ireland v UK* (1978), *op. cit.*, §161.

³¹¹ *Mammadov (Jalaloglu) v Azerbaijan*, no. 34445/04, judgement of 11 January 2007, §62.

³¹² *Assenov and Others v Bulgaria* (1998), *op. cit.* See also *Indelicato v Italy*, no. 31143/96, judgement of 18 October 2001.

it impossible to determine whether his injuries had been caused by police officers or by the second applicant, but nonetheless held that there had been a procedural violation of Article 3, read in conjunction with Article 1,³¹³ due to failure on the part of the State to conduct an effective investigation. The Court noted that such an investigation should “*be capable of leading to the identification and punishment of those responsible.*”³¹⁴ Without such a duty to investigate, “*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.*”³¹⁵ Thus, the Court extended the State obligations in this regard in order to give effect to the rights guaranteed in the ECHR.

The duty to investigate does not depend on the submission of a complaint; even “*in the absence of an express complaint, an investigation should be undertaken if there are other sufficiently clear indications that torture or ill-treatment might have occurred.*”³¹⁶ The Court has detailed a number of requirements which an investigation into alleged ill-treatment must satisfy to be considered effective. The complainant must have effective access to the investigatory procedure,³¹⁷ and the investigation must be carried out promptly and with due diligence.³¹⁸ Furthermore, the persons responsible for the investigation must be independent from those under investigation,³¹⁹ which implies not only a lack of hierar-

³¹³ Article 1 of the Convention reads: “*The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.*”

³¹⁴ *Assenov and Others v Bulgaria* (1998), *op. cit.*, §102. See also *Labita v Italy* (2000), *op. cit.*, §64. The requirements of the duty to investigate follow those required for Article 2. See, for example, *McCann and Others v UK*, no. 18984/91, ECHR (Series A) No. 324, judgement of 27 September 1995, §161; *Kaya v Turkey*, no. 22729/93, Rep. 1998-I, judgement of 19 February 1998 §86.

³¹⁵ *Assenov and Others v Bulgaria* (1998), *op. cit.*, §102. See also *Selmouni v France* (1999), *op. cit.*, §§79–80, where 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.*”

³¹⁶ *Members of the Gldani Congregation of Jehovah’s Witnesses v Georgia*, *op. cit.*, §97.

³¹⁷ *Aksoy v Turkey* (1996), *op. cit.*, §98; *İlhan v Turkey* (2000), *op. cit.*, §92. In both cases, the Court, having found a substantive violation of Article 3, discussed the investigation under article 13 of the Convention. However, the reasoning applies equally to procedural violations of Article 3.

³¹⁸ See, for example, *İlhan v Turkey* (2000), *op. cit.*, §§92–93; *Dalan v Turkey*, no 38585/97, judgement of 7 June 2005, §31; *Osman v Bulgaria*, no 43233/98, judgement of 16 February 2006, §74; *Colibaba v Moldova*, no. 29089/06, judgement of 23 October 2007, §53.

³¹⁹ *Barbu Anghelescu v Romania*, no. 46430/99, judgement of 5 October 2004, §66. See also *Güleç v Turkey*, no. 21593/93, Rep. 1998-IV, judgement of 27 July 1998, §§81–82; *Mikheyev v Russia*,

chical or institutional links, but also practical independence.³²⁰ More recently, the Court explicitly expanded the duty to investigate beyond allegations of ill-treatment perpetrated by agents of the State; it is now clear that the positive obligation also extends to ill-treatment by private actors.³²¹

2.2.3 Duty to enact and enforce legislation

While, unlike the UNCAT, the ECHR contains no explicit duty to criminalise torture, such a duty arises from the implicit duties to protect individuals from ill-treatment by other private individuals and to investigate cases where ill-treatment may have occurred. Thus, in *M.C. v Bulgaria*, the Court considered that “States have a positive obligation inherent in Articles 3 and 8 of the Convention to enact criminal-law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution.”³²² Furthermore, this duty is especially strict with regard to vulnerable groups. In *A v UK*, the Court held that “Children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against... serious breaches of personal integrity.”³²³

As discussed above, investigations must be capable of leading to identification and punishment of offenders. However, under the European Convention, there may be no punishment without law. Article 7 of the ECHR provides:

“1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.”

Torture should fall within the exception contemplated by the second paragraph of this Article, though this may not yet be the case for all forms of inhu-

no. 77617/01, judgement of 26 January 2006.

³²⁰ *Kelly and Others v UK*, no. 30054/96, ECHR 2001-III, judgement of 4 May 2001, §114.

³²¹ *M.C. v Bulgaria*, *op. cit.*, §151; *Members of the Gldani Congregation of Jehovah’s Witnesses v Georgia*, *op. cit.*, §97; *Šečić v Croatia*, no. 40116/02, judgement of 31 May 2007.

³²² *M.C. v Bulgaria*, *op. cit.*, §153.

³²³ *A v UK* (1998), *op. cit.*, §22. See also *X and Y v the Netherlands*, no. 8978/80, judgement of 26 March 1985, §§21 27; *Stubbings and Others v UK*, nos. 22083/93 and 22095/93, Rep. 1996-IV, judgement of 22 October 1996, §§62 64; *M.C. v Bulgaria*, *op. cit.*, §150.

man or degrading treatment.³²⁴ The obligation to protect individuals and to provide an effective deterrent against all forms of ill-treatment therefore should be seen as combining to create an obligation to enact national legislation criminalising torture and some or all inhuman or degrading treatment.³²⁵ Furthermore, the court will consider the adequacy of such legislation, which must be effectively enforced.³²⁶

2.2.4 Duty to exclude evidence obtained by torture or other ill-treatment

Article 6(1) of the ECHR provides in part:

“In the determination of... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

The European Court held in *Jalloh v Germany* that “*incriminating evidence – whether in the form of a confession or real evidence – obtained as a result of acts of violence or brutality or other forms of treatment which can be characterised as torture – should never be relied on as proof of the victim’s guilt, irrespective of its probative value. Any other conclusion would only serve to legitimate indirectly the sort of morally reprehensible conduct which the authors of Article 3 of the Convention sought to proscribe.*”³²⁷ Thus, any use of evidence obtained by torture automatically violates Article 6(1) as well as Article 3.

The Court explicitly left open the question of whether the use of evidence obtained by a ‘lesser’ breach of Article 3, i.e. an act qualified as inhuman or degrading treatment, would automatically render a trial unfair.³²⁸ In any such determination, the Court will take into account “*the nature and degree of the compulsion, the existence of any relevant safeguards in the procedures and the use to which any material so obtained is put.*”³²⁹ However, “*It cannot be excluded that on the facts of a particular case the use of evidence obtained by intentional acts of*

³²⁴ See section 1.2.3.

³²⁵ It should be noted that, while the Committee against Torture requires States to adopt legislation creating or defining a crime specifically named ‘torture,’ the corresponding obligation under the ECHR does not necessarily specifically require that the crimes be called ‘torture,’ ‘inhuman treatment,’ or ‘degrading treatment’; it is probably sufficient that every aspect of these abuses be covered in some way, however the offence is named.

³²⁶ See, for example, *A v UK* (1998), *op. cit.*, §24; *M.C. v Bulgaria*, *op. cit.*, §167; *Macovei and Others v Romania*, no. 5048/02, judgement of 21 June 2007.

³²⁷ *Jalloh v Germany*, no. 54810/00, judgement of 11 July 2006, §105. The Court referred to Article 15 of the UNCAT in this context.

³²⁸ *Ibid.* §107.

³²⁹ *Ibid.* §101.

ill-treatment not amounting to torture will render the trial against the victim unfair irrespective of the seriousness of the offence allegedly committed, the weight attached to the evidence and the opportunities which the victim had to challenge its admission and use at his trial.”³³⁰

2.2.5 Duty to train personnel and provide procedural safeguards

Procedural safeguards regarding deprivation of liberty are guaranteed in Article 5 of the ECHR, which provides in part that every detention must be in accordance with a procedure prescribed by law,³³¹ that everyone who is arrested must be informed promptly of the reasons for the arrest,³³² that all arrestees and detainees must be brought promptly before a judge,³³³ and that:

*“Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”*³³⁴

Article 6(2) of the ECHR further provides that everyone shall be considered innocent until proven guilty, while the elements of a fair trial are laid out in Article 6(3), which provides:

“Everyone charged with a criminal offence has the following minimum rights:

- a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;*
- b. to have adequate time and facilities for the preparation of his defence;*
- c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;*
- d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*
- e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.”*

³³⁰ *Ibid.* §106.

³³¹ Article 5(1) ECHR.

³³² Article 5(2) ECHR.

³³³ Article 5(3) ECHR.

³³⁴ Article 5(4) ECHR.

Non-compliance with domestic and international procedural guarantees may result in treatment which otherwise would not fall within the scope of Article 3 being considered ill-treatment or torture. For example, the use of handcuffs or other instruments of restraint does not normally give rise to an issue under Article 3 where the measure has been imposed in connection with a lawful detention and does not entail the use of force, or public exposure, exceeding what is reasonably necessary (which can include medical necessity).³³⁵ Nonetheless, in such cases, the Court must satisfy itself that the procedural guarantees for the decision to restrain or forcefully treat the applicant are complied with, and that the manner in which the applicant is subjected to the measure does not go beyond the threshold of severity envisaged by the Court's case law.³³⁶

Furthermore, the Court considers that “*proper medical examinations are an essential safeguard against ill-treatment of persons in custody. Such examinations must be carried out by a properly qualified doctor, without any police officer being present and the report of the examination must include not only the detail of any injuries found, but the explanations given by the patient as to how they occurred and the opinion of the doctor as to whether the injuries are consistent with those explanations.*”³³⁷

While it has not yet found a violation of Article 3 based solely on a State's failure to train personnel, the European Court has pointed out that any evaluation of the use of force by law enforcement officials must take into account actions related to the planning and control of the events.³³⁸ The level of training of law enforcement officials is likely to be taken into account in this assessment.³³⁹

³³⁵ *Raninen v Finland*, *op. cit.*, §56; *Mathew v the Netherlands*, *op. cit.*, §180; *Kucheruk v Ukraine*, no. 2570/04, judgement of 6 September 2007, §139. As regards medical necessity, the Court considers that restraint or forced treatment which is of therapeutic necessity in accordance with established principles of medicine cannot in principle be regarded as inhuman and degrading, although the Court must satisfy itself that the medical necessity has been convincingly shown to exist: *Herczegfalvy v Austria*, no. 10533/83, judgement of 24 September 1992, §§82–83; *Ciorap v Moldova*, no. 12066/02, judgement of 19 June 2007, §§82–83, 89.

³³⁶ See *Nevmerzhitsky v Ukraine*, no. 54825/00, ECHR 2005-II, judgement of 5 April 2005, *op. cit.*, §94. The government had not shown any medical justification, the applicant resisted the forced feeding, and handcuffs, a mouth-widener and a special rubber tube were used. In view of the severity of these elements, the treatment was found to constitute torture. See also *Kucheruk v Ukraine*, *op. cit.*, §139; *Ciorap v Moldova*, *op. cit.*, §§82–83, 89.

³³⁷ *Akkoç v Turkey* (2000), *op. cit.*, §118. The Court emphasised the findings of the European Committee for the Prevention of Torture in this regard.

³³⁸ *Andronicou and Constantinou v Cyprus*, Rep 1997-VI, judgement of 9 October 1997, §171.

³³⁹ *Ibid.* §185.

2.2.6 Duty to grant redress and compensate victims

In *Assanidze v Georgia*,³⁴⁰ the Court reiterated the scope of the State's obligation to ensure adequate redress and compensation for victims of ill-treatment:

*“A judgment in which it finds a breach imposes on the respondent State a legal obligation under [Article 46 of the ECHR] to put an end to the breach and to make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach. If, on the other hand, national law does not allow – or allows only partial – reparation to be made for the consequences of the breach, Article 41 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate. It follows, inter alia, that a judgment in which the Court finds a violation of the Convention or its Protocols imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in its domestic legal order to put an end to the violation found by the Court and make all feasible reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach.”*³⁴¹

The right to compensation therefore goes beyond monetary compensation, and may even require legislative changes at the domestic level in States Parties to the Convention.

2.3 Scope of Application

As outlined in section 2.1, an expansive jurisprudence has emerged from the European Court and Commission of Human Rights defining the prohibited acts. However, recent developments in the jurisprudence relating to Article 3 have focused not so much upon the definitions of torture, inhuman and degrading treatment or punishment, which are now well established, but rather upon the scope of application of Article 3 and, consequently, the extent of States Parties' obligations.

2.3.1 The absolute nature of the prohibition of torture and other ill-treatment

Article 15 of the ECHR provides that the State may never derogate from its obligations under Article 3, even in times of “*war or other public emergency*”

³⁴⁰ *Assanidze v Georgia*, no. 71503/01, ECHR 2004-II, judgement of 8 April 2004.

³⁴¹ *Ibid.* §198.

*threatening the life of the nation.*³⁴² As discussed above, The Greek Case defined inhuman treatment as “*at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation is unjustifiable.*”³⁴³ Despite the non-derogable nature of the prohibition, the Commission, by using the phrase “*which in the particular situation is unjustifiable,*” appeared to leave the door open to arguments that there may be circumstances in which ill-treatment could be justified. This controversial point was revisited in *Ireland v UK*.³⁴⁴ In this instance, the 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.*”³⁴⁵ In its decision, the Commission closed the loophole opened in *The Greek Case*, holding 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.*”³⁴⁶

The reasoning in *Ireland v UK*, seems clear and unambiguous; if an act reaches the thresholds set for torture, inhuman or degrading treatment or punishment, there can be no justification for it. Furthermore, the conduct of the victim cannot be raised as a defence. For example, in *Tomasi v France*, the Government advanced as justification for Mr. Tomasi’s treatment his suspected involvement in a terrorist attack. The Court rejected this defence, stating that “[t]he 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.”³⁴⁷

Furthermore, the conduct of the victim at the time of detention is not necessarily a defence to inhuman or degrading treatment. In *Rivas v France*,³⁴⁸ the applicant, a minor, was kicked in the testicles by a police officer, and required

³⁴² Article 15(1) provides that “*In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation.*” However, Article 15(2) explicitly states that no derogation from Article 3 is possible, even in such an emergency.

³⁴³ *The Greek Case* (1969), *op. cit.*, p. 504.

³⁴⁴ *Ireland v UK* (1978), *op. cit.*

³⁴⁵ *Ireland v UK* (1978), *op. cit.*, §750. This issue was not revisited by the Court in its consideration.

³⁴⁶ *Ibid.* §752.

³⁴⁷ *Tomasi v France*, no. 12850/87, ECHR (Series A) No. 241-A, judgement of 27 August 1992, §115.

³⁴⁸ *Rivas v France*, no. 59584/00, judgement of 1 April 2004.

emergency hospitalisation. The Government's attempt to justify the police officer's actions as a response to the applicant's attempt to escape was rejected by the Court, which held that "*the applicant's alleged attempt to escape could not absolve the State of its responsibility in the present case.*"³⁴⁹ The Court further found that the kick was unnecessary, as that the applicant had been unarmed and in a police station, so the police officer should have used other means to detain him.

These judgements follow the reasoning in *Chahal v UK*,³⁵⁰ where the Court held that the conduct of the applicant or "victim" is irrelevant to the 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.*"³⁵¹

One possible situation in which treatment normally contrary to Article 3 may fall outside the scope of the Article arose in *X v Germany*.³⁵² The European Commission considered whether force-feeding a prisoner who was on hunger strike amounted to a violation of Article 3. The Commission, while noting that "*forced feeding of a person does involve degrading elements which in certain circumstances may be regarded as prohibited by Article 3,*" was nevertheless "*satisfied that the authorities acted solely in the best interests of the applicant when choosing between either respect for the applicant's will not to accept nourishment of any kind and thereby incur the risk that he might be subject to lasting injuries or even die, or to take action with a view to securing his survival although such action might infringe the applicant's human dignity.*"³⁵³

More recently, in *Jalloh v Germany*,³⁵⁴ the Court held that Article 3 did not, in principle, prohibit recourse to a forcible medical intervention that would assist in the investigation of an offence. However, any interference with a person's physical integrity carried out with the aim of obtaining evidence had to be the subject of rigorous scrutiny. In this case, the Court found that use of a forcible emetic to make the applicant regurgitate a bag of drugs was unjustified, as the offence was not sufficiently serious, and the evidence could have been obtained by less invasive methods.

³⁴⁹ *Ibid.* § 41.

³⁵⁰ *Chahal v UK*, no. 22414/93, Rep. 1996-V, judgement of 15 November 1996.

³⁵¹ *Ibid.* §78.

³⁵² *X v Germany*, 7 EHRR 152, 1984.

³⁵³ *Ibid.* §153-154.

³⁵⁴ *Jalloh v Germany* (2006), *op. cit.*

2.3.2 Lawful sanctions

Despite the absolute prohibition on torture, inhuman and degrading treatment, the European Court and Commission have drawn a distinction between acts which are inherent in lawful sanctions and those which are not.³⁵⁵

This proviso can be seen as an attempt to draw a distinction between treatment and punishment that is a “reasonable” or unavoidable part of a penal system, and acts that unreasonably violate a person’s physical or mental integrity. Clearly, tolerance of some lawful sanctions does not give the State “carte blanche” simply to create legislation permitting actions that amount to acts of torture or other forms of ill-treatment. Lawful sanctions must not be inconsistent with the spirit of the absolute prohibition of torture, inhuman and degrading treatment. Yet the qualification of “lawful sanctions” can be seen as somewhat subjective and this perception may encompass many elements of a State’s society, i.e. the dominant cultural, political and religious thinking.

The European Court and Commission have considered lawful sanctions in the context of corporal punishment and, to a lesser extent, the imposition of the death penalty, and have developed considerable jurisprudence on this issue.³⁵⁶

2.3.2.1 The death penalty

The tension between on the one hand prohibiting torture in absolute terms and on the other allowing certain forms of lawful sanctions has also arisen in relation to the death penalty. While the European human rights system long restricted the imposition of the death penalty without absolutely prohibiting it,³⁵⁷ progress towards total abolition was made with the adoption by the Council of Europe of Protocol No. 13 to the European Convention on Human Rights and Fundamental Freedoms. This Protocol, which entered into force on 1 July 2003, closed the loophole left by Protocol No. 6, which did not exclude the death penalty being imposed in respect of acts committed in time of war or imminent threat of war. Protocol No. 13 excludes the death penalty in all circumstances, but, as with all treaties, is binding only on States which have ratified it.

³⁵⁵ See *Campbell and Cosans v UK* (1982), *op. cit.*, §30, *Y v UK*, Commission Report No. 8, 1991; *Costello-Roberts v UK*, no. 13134/87, ECHR (Series A) No. 247-C, judgement of 25 March 1993.

³⁵⁶ See *Tyrer v UK* (1978), *op. cit.*; *Campbell and Cosans v UK* (1982), *op. cit.*

³⁵⁷ See Protocol No. 6 to the European Convention on Human Rights and Fundamental Freedoms.

Prior to the entry into force of Protocol No. 13, the Court used an indirect method to bring the death penalty within the scope of Article 3. One of the leading cases is *Soering v UK*,³⁵⁸ in which the finding of a violation was motivated not by the actual imposition of the death penalty, but rather by the conditions under which the applicant would be held on death row.

The Court noted that “*for any prisoner condemned to death, some elements of delay between the imposition and execution of the sentence and the experience of severe stress in conditions necessary for strict incarceration are inevitable.*”³⁵⁹ Yet, it held that certain factors could bring this sanction within the scope of Article 3:³⁶⁰

*“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.”*³⁶¹

*In other words, whilst the death penalty was a lawful sanction, and remains so for those States which have not ratified Protocols No. 6 and 13, in certain circumstances the “manner in which it 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 amount to a violation of Article 3.*³⁶² Thus the Court held in *Öcalan v Turkey*,³⁶³ which was decided before the entry into force of Protocol No. 13, that “*the imposition of the death sentence on the applicant following an unfair trial by a court whose independence and impartiality were open to doubt amounted to inhuman treatment in violation of Article 3.*”³⁶⁴

2.3.2.2 Corporal punishment

One of the cases that established the Court’s approach to the issue of corporal punishment is *Tyrer v UK* (discussed earlier). Despite the arguments raised on behalf of the Isle of Man that judicial corporal punishment was not in breach

³⁵⁸ *Soering v UK* (1989), *op. cit.*

³⁵⁹ *Ibid.*, §111

³⁶⁰ Note that it may also come within the scope of Article 2.

³⁶¹ *Soering v UK* (1989), *op. cit.*, §111. See also the HRC decision *Pratt and Morgan v Jamaica* (1986), *op. cit.*

³⁶² *Soering v UK* (1989), *op. cit.*, §104.

³⁶³ *Öcalan v Turkey*, no. 46221/99, judgement of 12 March 2003.

³⁶⁴ *Ibid.*, §175.

of the Convention since it did not “outrage public opinion,”³⁶⁵ the Court held that “it must be pointed out that a punishment does not lose its degrading character just because it is believed to be, or actually is, an effective deterrent or aid to crime control.”³⁶⁶ While considering that the form of punishment in this case was not so severe as to amount to torture, the Court stated that “[t]he 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... [this] 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.”³⁶⁷ This judgement did not, however, impose an absolute prohibition on all forms of corporal punishment. In order to be considered a violation of Article 3, the punishment must still attain a minimum level of severity.³⁶⁸

2.3.3 Conditions of detention

In respect of a person deprived of liberty, recourse to physical force which has not been made strictly necessary by the detainee’s own conduct is in principle an infringement of Article 3.³⁶⁹ However, potential violations within places of detention are not limited to violence by law enforcement officials, custodial or medical staff, or other detainees. The European Court has long considered the general conditions of detention as a potential source of violations of Article 3.³⁷⁰ Particularly since its judgement in *Aerts v Belgium*,³⁷¹ the Court has examined the material conditions of detention of individuals deprived of their liberty, taking into account the cumulative effects of overcrowding, sanitation facilities, heating, lighting, sleeping arrangements, food, recreation and contact with the outside world. In *Kudła v Poland*, the Court stated that, under Article 3 of the Convention, “the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in

³⁶⁵ *Ibid.* § 31.

³⁶⁶ *Ibid.* § 31.

³⁶⁷ *Ibid.* § 33.

³⁶⁸ See for example, *Campbell and Cosans v UK* (1982), *op. cit.*, where the threatened corporal punishment was considered not to have caused sufficiently severe suffering to amount to degrading treatment.

³⁶⁹ *Ribitsch v Austria*, *op. cit.*, § 38; *BerliDski v Poland*, nos. 27715/95 and 30209/96, judgement of 20 June 2002, § 59; *Kucheruk v Ukraine*, no. 2570/04, judgement of 6 September 2007, §§ 131–132.

³⁷⁰ See for example, *The Greek Case* (1969), *op. cit.*, p. 504; *Soering v UK* (1989), *op. cit.*

³⁷¹ *Aerts v Belgium*, no. 25357/94, Rep.1998-V, judgement of 30 July 1998.

*detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance.*³⁷²

While it retains the power to make on-site visits, in its assessment of the conditions of detention the Court has increasingly come to rely on the reports of the European Committee for the Prevention of Torture (CPT), the regional visiting body established under the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.³⁷³

Recently, the Court has extended its examination from the material conditions of detention to the underlying prison regime.³⁷⁴ The decision in *Van der Ven v the Netherlands* demonstrates this new approach.³⁷⁵ The applicant was held in a high-security prison, and the restrictions imposed in the high-security prison had provoked a deep, and medically confirmed, depression. He was subjected to routine body searches, including anal searches, during weekly cell inspections, and before and after open visits, and visits to the dentist or hairdresser. These searches were not in response to a concrete security need, and did not result from the applicant's conduct. Taking into consideration the fact that the applicant was already subject to a large number of security measures,

³⁷² *KudBa v Poland*, no. 30210/96, ECHR 2000-XI, judgement of 26 October 2000, §94. See also *Nevmerzhiitsky v Ukraine* (2005), *op. cit.*; *McGlinchey and Others v UK*, no. 50390/99, ECHR 2003-V, judgement of 29 April 2003; *Kadiķis v Latvia*, no. 62393/00, judgement of 4 May 2006; *Mamedova v Russia*, no. 7064/05, judgement of 1 June 2006.

³⁷³ For example, in *Aerts v Belgium* the Court explicitly considered the report produced by the CPT following its visit to the prison in question. The report severely criticised the conditions of detention, noting that the standard of care fell below the minimum acceptable from an ethical and humanitarian viewpoint, and carried an undeniable risk of a deterioration of mental health. Nonetheless, the Court held that, in that instance, there was insufficient evidence to establish "conclusively" that the conditions resulted in suffering contrary to Article 3: *Aerts v Belgium* (1998), *op. cit.*, §§65–67. CPT reports were used to greater effect in *Dougouz v Greece*, where it was found that the conditions in which the applicant was held while awaiting expulsion amounted to inhuman and degrading treatment. These conditions included significant overcrowding, a lack of beds or bedding (some detainees were sleeping in corridors), insufficient sanitary facilities, and scarcity of food. Once again, the Court did not undertake its own on-site visit, but instead relied upon a CPT report on the police station and detention centre in question, which concluded that the accommodation and detention regime were unsuitable for long periods of detention. The CPT had even felt it necessary to renew its visit to these places of detention. The Court considered that this supported the claims advanced by the applicant, and found a violation of Article 3: *Dougouz v Greece*, no. 40907/98, ECHR 2001-II, judgement of 6 March 2001. See also *Peers v Greece* (2001), *op. cit.*

³⁷⁴ This approach was developed notably in a series of cases against Italy. See, for example, *Messina v Italy*, no. 25498/94, ECHR 1999-V, decision of 8 June 1999; *Indelicato v Italy* (2001), *op. cit.*; *Ganci v Italy*, no. 41576/98, ECHR 2003-XI, judgement of 20 September 2001; and *Bonura v Italy*, no. 57360/00, judgement of 30 May 2002.

³⁷⁵ *Van der Ven v the Netherlands*, no. 50901/99, ECHR 2003-II, judgement of 4 February 2003.

the Court found that “*the practice of weekly strip-searches that was applied to the applicant for a period of approximately three and a half years diminished his human dignity and must have given rise to feelings of anguish and inferiority capable of humiliating and debasing him.*”³⁷⁶ The Court therefore held that the applicant had suffered at least degrading treatment in violation of Article 3 of the Convention.

The Court considers each case on its merits, so it is possible for positive aspects of the prison regime to compensate for conditions of detention to such an extent that these will not constitute a violation. For example, in *Valašinas v Lithuania*, the Court found that the small amount of individual space allocated to the applicant within a dormitory should be considered in light of the wide freedom of movement he enjoyed between 6:30am and 10:30pm.³⁷⁷ However, such a finding would be unlikely in a case where a number of aspects of the conditions of detention gave rise to a cumulative negative effect on detainees. Furthermore, it is not sufficient that conditions of detention be *capable* of giving rise to distress meeting the minimum level of severity to come within Article 3; the applicant must demonstrate that he or she actually suffered such distress.³⁷⁸ In the case of mentally ill persons, the assessment of whether the treatment or punishment concerned is incompatible with the standards of Article 3 will take into consideration their particular vulnerability and their inability, in some cases, to complain about how they are being affected by a particular treatment.³⁷⁹

State obligations under Article 3 of the Convention include a positive duty to protect the physical integrity of detainees, notably though the provision of necessary medical treatment,³⁸⁰ which may require transfer in some cases, for example to a specialist psychiatric hospital.³⁸¹ However, the Article cannot “*be interpreted as laying down a general obligation to release a detainee on health grounds or to place him in a civil hospital to enable him to obtain a particular kind of medical treatment.*”³⁸² The Court will consider on the facts of an individual

³⁷⁶ *Van der Ven v the Netherlands* (2003), *op. cit.*, §62. See also *Lorsé and Others v the Netherlands*, no. 52750/99, judgement of 4 February 2003, §74; *Frérot v France*, no. 70204/01, judgement of 12 June 2007, §48, in which non-routine strip searches were considered degrading, but did not reach the threshold of inhuman treatment.

³⁷⁷ *Valašinas v Lithuania*, no. 44558/98, ECHR 2001-VIII, judgement of 24 July 2001, §103.

³⁷⁸ *Van der Graaf v the Netherlands*, no. 8704/03, decision of 1 June 2004; *Aerts v Belgium* (1998), *op. cit.*, §34–37.

³⁷⁹ *Herczegfalvy v Austria*, *op. cit.*, §82; *Aerts v Belgium* (1998), *op. cit.*, §63.

³⁸⁰ See *McGlinchey and Others v UK* (2003), *op. cit.*, §57; *İlhan v Turkey* (2000), *op. cit.*, §87.

³⁸¹ See *Kucheruk v Ukraine*, *op. cit.*, §151.

³⁸² *KudBa v Poland* (2000), *op. cit.*, §93.

case whether the prisoner's state of health is compatible with continued detention. In *Mouïsel v France*,³⁸³ the applicant needed prolonged chemotherapy for his leukaemia, and a medical report had recommended that he be placed in a specialised unit, but the prison authorities had merely transferred him to a prison closer to a hospital. Only one year after this transfer was the applicant granted conditional release based on his need for regular hospitalisation. The Court therefore examined the period between the report recommending transfer to a specialised unit and the conditional release, considering whether the continued detention of the applicant gave rise to "*a situation which attained a sufficient level of severity to fall within the scope of Article 3 of the Convention*,"³⁸⁴ taking into account "*factors show[ing] that the applicant's illness was progressing and that the prison was scarcely equipped to deal with it, yet no special measures were taken by the prison authorities*."³⁸⁵ The Court thus found that the national authorities did not take sufficient care of the applicant's health to ensure that he did not suffer treatment contrary to Article 3 of the Convention, concluding that his continued detention under these circumstances "*undermined his dignity and entailed particularly acute hardship that caused suffering beyond that inevitably associated with a prison sentence and treatment for cancer*."³⁸⁶ While the Court did not establish a general obligation to release a detainee for health reasons, it approved conditional release of individuals suffering from incurable diseases which necessitate serious and regular treatment.

Thus, the State is under an obligation to ensure that all detainees are held in conditions that respect their human dignity, that the conditions and manner of detention do not subject detainees to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, the health and well-being of prisoners are adequately secured by measures including provision of medical assistance.³⁸⁷

³⁸³ *Mouïsel v France*, no. 67263/01, ECHR 2002-IX, judgement of 14 November 2002.

³⁸⁴ *Ibid*, §45.

³⁸⁵ *Ibid*, §45.

³⁸⁶ *Ibid*, §48. See also, for example, *Hüseyin Yıldırım v Turkey*, no. 2778/02, judgement of 3 May 2007.

³⁸⁷ See *Papon v France* (no. 1), no. 64666/01, ECHR 2001-VI, judgement of 7 June 2001; *Gelfmann v France*, no. 25875/03, judgement of 14 December 2004.

2.3.4 Solitary confinement

The Court has held that complete sensory isolation, coupled with total social isolation, can destroy the personality and constitutes a form of inhuman treatment which cannot be justified by the requirements of security or any other reason. On the other hand, isolation from other prisoners for security, disciplinary or protective reasons does not in itself amount to inhuman treatment or degrading punishment.³⁸⁸ Thus, solitary confinement does not automatically violate Article 3.³⁸⁹

In assessing whether solitary confinement falls within the ambit of Article 3 in a particular case, the Court will consider among other things the stringency of the measure, its duration, the objective pursued and its effects on the person concerned.³⁹⁰ Where conditions of detention comply with the Convention and the detainee has contact with the outside world, through visits and contact with prison staff, the prohibition of contact with other prisoners will not breach Article 3 provided that the regime is proportional to the aim to be achieved, and the period of solitary detention is not excessive. In its determination of whether the period is “*excessive under Article 3 the Court [will]... take into account the conditions of the detention including the extent of the social isolation.*”³⁹¹ Thus, in *Ramirez Sanchez v France*, a period of more than eight years of solitary confinement was not found to be excessive, “*having regard to the physical conditions of the applicant’s detention, the fact that his isolation is ‘relative,’ the authorities’ willingness to hold him under the ordinary regime, his character and the danger he poses,*”³⁹² whereas in *Mathew v the Netherlands*, a period of approximately 19 months was considered excessive in light of the poor conditions of detention and the health problems of the applicant.³⁹³ In the former case, the Court stressed the importance of safeguards to prevent arbitrariness, such as regular assessments of the continued necessity of the solitary detention and of the prisoner’s physical and mental health, as well as access to independent judicial review of the solitary confinement.³⁹⁴

³⁸⁸ *Messina v Italy*, *op. cit.*

³⁸⁹ See, for example, *Öcalan v Turkey*, no. 46221/99, ECHR 2005-IV, judgement of 12 May 2005, §191; *Valaainas v Lithuania* (2001), *op. cit.*, §112; *Rohde v Denmark*, no. 69332/01, judgement of 21 July 2005, §93.

³⁹⁰ *Dhoest v Belgium*, no. 10448/83, Commission report of 14 May 1987, §§ 117–18; *McFeeley and Others v UK*, no. 8317/78, Commission decision of 15 May 1980.

³⁹¹ *Rohde v Denmark* (2005), *op. cit.*, §97.

³⁹² *Ramirez Sanchez v France*, no. 59450/00, judgement of 4 July 2006, §150.

³⁹³ *Mathew v the Netherlands*, no. 24919/03, ECHR 2005-IX, judgement of 29 September 2005.

³⁹⁴ *Ramirez Sanchez v France* (2006), §139–145.

2.3.5 Incommunicado detention and enforced disappearances

Article 5(3) of the Convention provides:

“Everyone arrested or detained... shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.”

The Court considers that *“the unacknowledged detention of an individual is a complete negation of these guarantees and a most grave violation of Article 5. Having assumed control over that individual, it is incumbent on the authorities to account for his or her whereabouts. For this reason, Article 5 must be seen as requiring the authorities to take effective measures to safeguard against the risk of disappearance and to conduct a prompt effective investigation into an arguable claim that a person has been detained and has not been seen since.”*³⁹⁵ The duty to investigate has been central in many cases relating to disappearances.³⁹⁶

In *Aksoy v Turkey* the government claimed that it had been necessary to hold the applicant incommunicado for fourteen days as part of its fight against terrorism. The Court found that *“insufficient safeguards were available to the applicant, who was detained over a long period of time. In particular, the denial of access to a lawyer, doctor, relative or friend and the absence of any realistic possibility of being brought before a court to test the legality of the detention meant that he was left completely at the mercy of those holding him.”*³⁹⁷ Therefore, the Court found a violation of Article 5(3); the exigencies of the situation could not justify incommunicado detention.³⁹⁸

Furthermore, incommunicado detention can amount to a breach of Article 8 of the Convention, which guarantees the right to respect for private and family life. In *Sarı and Çolak v Turkey*, the Court stressed that *“it may be extremely important for a person who has been arrested to be able to communicate with his*

³⁹⁵ *Orhan v Turkey*, no. 25656/94, judgement of 18 June 2002, §369. See also *Timurtaş v Turkey*, no. 23531/94, ECHR 2000-VI, judgement of 13 June 2000, §103; *Çiçek v Turkey*, no. 25704/94, judgement of 27 February 2001, §164.

³⁹⁶ See for example, *Kurt v Turkey*, no. 24276/94, Rep. 1998-III, judgement of 25 May 1998; *Çakıcı v Turkey*, no. 23657/94, ECHR 1999-IV, judgement of 8 July 1999; *Akdeniz and Others v Turkey*, no. 23954/94, judgement of 31 May 2001. This duty is discussed in greater detail in section 2.2.2.

³⁹⁷ *Aksoy v Turkey* (1996), *op. cit.*, §83. In reaching its decision, the Court referred to findings of reports of the CPT, CAT and Amnesty International (§80). See also *Demir and Others v Turkey*, Rep. 1998-VI, judgement of 23 September 1998, §§55, 57.

³⁹⁸ *Aksoy v Turkey* (1996), *op. cit.*, §84.

or her family promptly. The unexplained disappearance of a family member, even for a short period, may cause deep anxiety.”³⁹⁹ In that case, a period of seven days of incommunicado detention was found to breach Article 8.

2.3.6 Relatives of victims of human rights violations

The Court has expanded the beneficiaries of the State obligation to conduct an effective investigation to include relatives of victims of enforced disappearances. In *Kurt v Turkey*,⁴⁰⁰ an application was 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.*”⁴⁰¹ In respect of his mother, the Court noted that she 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.*”⁴⁰² Her suffering was considered sufficiently severe for the Court to find a separate violation of Article 3.

Following this decision, the Court has avoided opening the floodgate to claims from relatives, by imposing a number of conditions. In *İpek v Turkey*,⁴⁰³ the applicant alleged the unacknowledged detention and subsequent disappearance of his two sons during an operation conducted by armed forces in his village. The Court held that “*the question whether a family member of a ‘disappeared person’ is a victim of treatment contrary to Article 3 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.*”⁴⁰⁴

³⁹⁹ *Sarı and Çolak v Turkey*, nos. 42596/98 and 42603/98, judgement of 4 April 2006, §36.

⁴⁰⁰ *Kurt v Turkey* (1998), *op. cit.* See also *Çakıcı v Turkey* (1999), *op. cit.*

⁴⁰¹ *Kurt v Turkey* (1998), *op. cit.*, §128-9.

⁴⁰² *Ibid.* In support of this finding, the European Court cited the UN Declaration on the Protection of All Persons from Enforced Disappearance, the HRC case *Quinteros v Uruguay* (1983), *op. cit.*, the Inter-American Convention on Forced Disappearance of Persons, and case law of the Inter-American Court.

⁴⁰³ *İpek v Turkey*, no. 25760/94, ECHR 2004-II, judgement of 17 February 2004.

⁴⁰⁴ *Ibid.* §181. In this case, the applicant, like the mother in *Kurt v Turkey* (1998), *op. cit.*, was present when the security forces took his sons, and he, not the State, had borne the weight of the investigation. Furthermore, his investigations were characterised by a systematic refusal to cooperate on the part of the Turkish authorities. The Court found that the father himself was the victim of a violation of Article 3 due to the anxiety he suffered as a result of not being able to ascertain the whereabouts of his sons.

These ‘special factors’ include proximity in time and space to the alleged violation, the closeness of the relationship (a certain weight will attach to the parent-child bond), the degree of the relatives’ involvement in attempts to obtain information, and the way in which the authorities respond to inquiries.⁴⁰⁵

The Court was careful to distinguish the circumstances in *İpek v Turkey* from those of *Tahsin Acar v Turkey*.⁴⁰⁶ In the latter case, the brother’s application failed to satisfy the applicable criteria as the Court found that “*it has not been established that there were special factors which would justify finding a violation of Article 3 of the Convention in relation to the applicant himself.*”⁴⁰⁷

It is clear from these cases that a State generally owes a duty to investigate a disappearance not only to victims but also to their relatives. In relation to disappearances, the finding of a violation of the rights of the relatives arises not so much from the fact of the disappearance itself, but “*rather concerns the authorities’ reactions and attitudes to the situation when it is brought to their attention.*”⁴⁰⁸

2.3.7 Extradition and expulsion

The nature of the State’s obligation to protect individuals from violations has been examined extensively in respect of expulsion and extradition cases, over and above the prohibition of collective expulsion of non-citizens provided by Article 4 of Protocol No. 4 to the Convention.

The leading case on this issue is *Soering v UK*.⁴⁰⁹ The case involved an extradition application by the USA regarding a German national residing in the UK, on a charge of murder. The applicant claimed that, should the extradition take place, the UK would violate Article 3. While the European Convention on Human Rights does not prohibit the imposition of the death penalty per se,

⁴⁰⁵ *Ibid.* §181.

⁴⁰⁶ *Tahsin Acar v Turkey*, no. 26307/95, ECHR 2004-III, judgement of 8 April 2004.

⁴⁰⁷ *Ibid.* §239. In this instance, the applicant was the brother of the disappeared person. Unlike the mother in *Kurt v Turkey* (1998), *op. cit.*, he was not present when the security forces took his brother, and while he was involved in making various enquiries, he did not bear the brunt of the task. The Court 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.

⁴⁰⁸ *İpek v Turkey* (2004), *op. cit.*, §181.

⁴⁰⁹ *Soering v UK* (1989), *op. cit.* See also the earlier case, *Amekrane v UK*, no. 5961/72, 1973 Yearbook of the European Convention on Human Rights, No. 16, p. 356, where a friendly settlement was reached.

nor consider it to be a form of torture,⁴¹⁰ it was claimed that a violation would arise because the conditions on death row amounted to a breach of Article 3.

As regards the duty to protect individuals, the Court held that the UK would violate Article 3 were Soering to be extradited, because he would be exposed to a “real risk” of inhuman or degrading treatment.⁴¹¹ In other words, the violation in such circumstances attaches not to the receiving State because of what it might do, but to the returning State for exposing the individual to ill-treatment.⁴¹² The Court thus took an indirect approach to the question of the death penalty, considering that the death penalty itself does not violate the Convention, but that exposure of an individual to the conditions on death row would amount to treatment contrary to Article 3. A State is thus obliged to ensure that individuals do not risk exposure to ill-treatment following extradition or expulsion.

The reasoning in *Soering v UK* has been revisited in subsequent cases and expansive jurisprudence on this issue has arisen.⁴¹³ One of the key cases in this body of jurisprudence is *Cruz Varas v Sweden*.⁴¹⁴ The 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 submitted that they faced a real risk of being tortured if they were expelled to Chile, where they claimed to have been tortured previously. The Court held that “substantial grounds” must be shown for believing in the existence of a real risk of treatment contrary to Article 3.⁴¹⁵ 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 consideration of information which came to light after the

⁴¹⁰ Article 2(1) of the Convention reads: “Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.”

⁴¹¹ *Soering v UK* (1989), *op. cit.*, §92. Note that it was not claimed that the conditions would amount to torture.

⁴¹² Of course, where the receiving State is a party to the European Convention, a separate issue arises as to its own responsibility.

⁴¹³ See, for example, *Cruz Varas and Others v Sweden*, no. 15576/89, ECHR (Series A) No. 201, judgement of 20 March 1991; *Vilvarajah and Others v UK*, nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, ECHR (Series A) No. 215, judgement of 30 October 1991; *H.L.R. v France* (1997), *op. cit.*; *D v UK* (1997), *op. cit.*; *Jabari v Turkey*, no. 40035/98, ECHR 2000-VIII, judgement of 11 July 2000; *Naoumenko v Ukraine*, no. 42023/98, judgement of 10 February 2004; *Öcalan v Turkey* (2005), *op. cit.*

⁴¹⁴ *Cruz Varas and Others v Sweden* (1991), *op. cit.*

⁴¹⁵ *Ibid.* §76.

expulsion. In this instance, the Court concluded that there were no substantial grounds for believing in the existence of a real risk.

This approach to assessing the level of risk was applied in *Vilvarajah v UK*,⁴¹⁶ in which the Court noted that its “*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.*”⁴¹⁷ That 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. On the other hand, where an expulsion has not yet occurred, the relevant time for assessing the risk would be the date on which the Court considers the case, therefore evidence which had come to light since the case was first reviewed could be considered.⁴¹⁸

In *Chahal v UK*, the applicant was threatened with expulsion because he was suspected of involvement in acts of terrorism. The Court stated that, while it was aware of the difficulties facing States in protecting communities from acts of terrorism, the European Convention prohibits torture (and inhuman or degrading treatment or punishment) in absolute terms, irrespective of the victim’s conduct. Accordingly, national interests could not override the interests of the individual where substantial grounds exist for believing that he would be subjected to ill-treatment if expelled.⁴¹⁹

In *Jabari v Turkey*,⁴²⁰ Mrs. Jabari alleged that, were she to be expelled from Turkey to Iran, she would face a real risk of torture due to the nature of the penal sanctions imposed upon women for adultery, which included stoning. As noted above, a State has a duty to protect individuals from acts contrary to Article 3 when returning that individual, even when the receiving State imposes a sanction which is considered “lawful” under its domestic law. In this instance, the Court held that Mrs. Jabari faced a real risk of treatment contrary to Article 3.⁴²¹

The Court has developed the scope of the obligation not to expel persons to States where they may face ill-treatment to include ill-treatment caused by a lack of adequate medical care in the receiving State, in cases where the return-

⁴¹⁶ *Vilvarajah and Others v UK* (1991), *op. cit.*

⁴¹⁷ *Ibid.*, §108, citing *Soering v UK* (1989), *op. cit.*, §88.

⁴¹⁸ *Chahal v UK* (1996), *op. cit.*, §97.

⁴¹⁹ *Ibid.*, §78–9.

⁴²⁰ *Jabari v Turkey* (2000), *op. cit.*

⁴²¹ *Ibid.*, §41–42.

ing State has accepted responsibility for the provision of medical care. One of the leading cases in this regard is *D v UK*,⁴²² where the applicant had been arrested upon his arrival in the UK from St. Kitts for possession of cocaine. He was subsequently sentenced to a term of imprisonment in a UK prison. While in prison, he was diagnosed as HIV-positive and suffering from AIDS, infection having occurred prior to his arrival in the UK. During his detention, he received medical treatment for his illness. However, upon his release, the authorities sought to return him to St. Kitts. D challenged the efforts to return him, alleging that if he were returned to St. Kitts, where hospital facilities were extremely limited, not only would this hasten his death, but the conditions in which he would die would be inhuman and degrading.

The Court recalled the established principle that returning States owe a duty to ensure that persons are not subjected to treatment or punishment in violation of Article 3, regardless of the conduct of the person to be expelled, or whether that person entered the returning State legally.⁴²³ The Court observed that this principle had been applied in the context of risks emanating either directly from the State or from non-State bodies from which the State has failed to afford adequate protection.⁴²⁴ However, the Court stressed that, given the importance of the protection afforded by Article 3, it must retain sufficient flexibility to address other contexts that might arise.⁴²⁵

Accordingly, the Court held that the abrupt withdrawal of medical treatment and the adverse conditions that awaited D upon his return would reduce his limited life expectancy and would amount to inhuman treatment. In this instance, the Court stressed that the State had assumed responsibility for D's treatment, and he had become reliant on the medical and palliative care which he was receiving. Although the conditions which he would face in the receiving country were not in themselves a breach of Article 3, "*his removal would expose him to a real risk of dying under most distressing circumstances and would thus amount to inhuman treatment.*"⁴²⁶

The case does not, however, establish a precedent for finding a violation simply because the receiving State has less-developed medical care than the returning State. In *Amegnigan v the Netherlands*,⁴²⁷ the Court was careful to distinguish

⁴²² *D v UK* (1997), *op. cit.*

⁴²³ See for example *Chahal v UK* (1996), *op. cit.*, §80.

⁴²⁴ *D v UK* (1997), *op. cit.*, §49.

⁴²⁵ *Ibid.* §49.

⁴²⁶ *Ibid.* §53.

⁴²⁷ *Amegnigan v the Netherlands*, no. 25629/04, judgement of 25 November 2004.

the facts in the case from the “*exceptional circumstances*” in *D v UK. Amegnigan v the Netherlands* concerned a Togolese national suffering from AIDS, who argued that an expulsion to his home country would expose him to a real risk of a painful death. The Court considered that the expulsion would not violate the Convention, as the applicant’s illness was not at a terminal stage, retroviral drugs were available in Togo, and the applicant had family in Togo who were likely to help him. The issue will soon be examined by a Grand Chamber of the Court in *N v UK*, which concerns expulsion of an HIV-positive woman to Uganda.⁴²⁸ However, the current case law indicates that expulsion of an individual suffering from a serious illness to his or her home country will amount to a violation of Article 3 of the Convention only if the illness is at a terminal stage, and suitable treatment is unavailable in the country to which he or she is being expelled.

Traditionally, the Court and Commission confined themselves to considering allegations of risks emanating from State authorities. More recently, however, the Court has confirmed that the absolute nature of the prohibition and the duty to protect individuals can engage a State’s responsibility even where the risk in a receiving country emanates from sources other than State authorities. One of the most significant cases to examine this issue was *H.L.R v France*.⁴²⁹ In this instance, H.L.R, was a Colombian national who had been imprisoned for a drug offence and was the subject of a deportation order from France back to Colombia. H.L.R claimed that if he were deported back to Colombia he would be exposed to acts of vengeance from the drug traffickers who had recruited him. Therefore, he claimed that, were it to proceed with the deportation, France would be in violation of Article 3.

While the Court found no violation of Article 3 in this case, it nevertheless held that the source of the risk of ill-treatment could emanate from private actors and not the State authorities themselves, stating that “[o]wing 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.”⁴³⁰

⁴²⁸ *N v UK*, no. 26565/05, pending.

⁴²⁹ *H.L.R. v France* (1997), *op. cit.*

⁴³⁰ *Ibid.* §40. See also the more recent case *Salah Sheekh v the Netherlands*, no. 1948/04, judgement of 11 January 2007.

2.3.7.1 Diplomatic assurances

In *Chahal v UK*, discussed above, the UK had sought and received an assurance from the Indian government that, if the applicant were extradited, “he would enjoy the same legal protection as any other Indian citizen, and... would have no reason to expect to suffer mistreatment of any kind at the hands of the Indian authorities.”⁴³¹ While the Court did not doubt that this assurance was given in good faith, it noted that violations by the security forces in India were an enduring problem, despite the efforts of the government and judiciary. The Court therefore found that extraditing the applicant would be in breach of Article 3, regardless of the existence of the assurance.⁴³²

The decision in *Chahal v UK* cannot be interpreted as implying that the Court will disregard diplomatic assurances in all such cases. Many authors cite *Mamatkulov and Askarov v Turkey* as an authority that the Court will accept diplomatic assurances in certain circumstances, but in fact the Court did not explicitly address the issue.⁴³³ Rather, it merely noted the existence of the diplomatic assurance, and concluded, based on all the material before it, that the applicants had not shown a personal risk of being subjected to torture.⁴³⁴ In the case of *Saadi v Italy*, Tunisia refused to give assurances requested by Italy against torture and other ill-treatment.⁴³⁵ However, the Court noted that even if such assurances had been given, “that would not have absolved the Court from the obligation to examine whether such assurances provided, in their practical application, a sufficient guarantee that the applicant would be protected against the risk of treatment prohibited by the Convention [citing *Chahal*]. The weight to be given to assurances from the receiving State depends, in each case, on the circumstances obtaining at the material time.”⁴³⁶

It should be noted that, under Protocol 6, Council of Europe member States are prohibited from expelling or extraditing any person to face the death penalty. In *Aylor-Davis v France*, it was held that guarantees from the receiving country, the United States, eliminated the risk of the applicant being sentenced to death, and thus that France would not break the prohibition if it extradited the applicant.⁴³⁷

⁴³¹ *Chahal v UK* (1996), *op. cit.*, §37.

⁴³² *Ibid.*, §105.

⁴³³ *Mamatkulov and Askarov v Turkey* (2005), *op. cit.*

⁴³⁴ *Ibid.*, §76-77.

⁴³⁵ *Saadi v Italy*, no. 37201/06, judgement of 28 February 2008.

⁴³⁶ *Ibid.*, §148.

⁴³⁷ *Aylor-Davis v France*, No. 22742/93, judgement of 20 January 1994.

The jurisprudence to date thus suggests that, in the future, the European Court may be prepared to accept diplomatic assurances against torture and ill-treatment where they are made in good faith, the authorities of the receiving State are in fact capable of preventing such treatment in the circumstances of the case, and, following the jurisprudence of the UN bodies, with the further possible proviso that the assurance contains some rigorous mechanism for monitoring compliance. The Court is due to revisit this issue in a number of pending cases, including *Ramzy v the Netherlands*, *Ahmed and Aswat v UK*, and *Boumediene v Bosnia and Herzegovina*, which may further elaborate its position.⁴³⁸

Conclusion

The simple formulation of the prohibition of ill-treatment in Article 3 of the ECHR hides the complexity of the underlying issues. Based on this proclamation, the European Court and Commission developed intricate and distinct definitions of the various prohibited acts. While the European Court has stated that the three categories of prohibited acts can and should be distinguished, section 2.1 showed that it can be difficult to pinpoint the distinguishing elements of such a categorisation. There is a danger that such an approach may lead to the conclusion that acts ‘falling short’ of torture are ‘only’ inhuman or degrading treatment. It must be remembered that acts of inhuman and degrading treatment are no less a violation of Article 3 than acts of torture.

The importance and instructive nature of the European jurisprudence cannot be overstated, and it has greatly influenced other regional and international judicial and quasi-judicial bodies, particularly as regards the definitions of torture, inhuman and degrading treatment. *The Greek Case*, for example, had a significant impact upon the drafting of the UN Declaration against Torture (1975) and the subsequent definition of torture contained within the UN Convention against Torture (1984). Furthermore, the judgements have had a profound impact on penal reform within Europe, by proscribing various treatments or punishments as violations of Article 3. The Court has also anticipated and contributed to societal change. For example, the judgements of the Court on corporal punishment led to the UK Government prohibiting corporal punishment in public schools from 1986, and in private schools from 1998. Thus, the Court has not merely reflected the evolution of human rights

⁴³⁸ *Ramzy v the Netherlands*, no. 25424/05, pending; *Ahmed and Aswat v UK*, no. 24027/07, pending; *Boumediene v Bosnia and Herzegovina*, no. 38703/06, pending.

values in Europe, but has acted as both engine and catalyst for the increased protection of human rights.

Perhaps most significantly, the Court has always afforded itself a degree of flexibility, considering the ECHR to be a living instrument. It has recognised that ideas and values do not remain static, and that acts or omissions which were not previously considered to constitute torture or inhuman or degrading treatment may later be viewed as such. Thus, the Court is not bound by its previous judgements and is free to re-evaluate its decisions. By taking this approach, the Court has ensured that it can continue to respond to the challenges brought by new as well as 'traditional' forms of ill-treatment and abuse.

The Inter-American Regional System

3

Introduction	94
3.1 Definitions	94
3.2 States Parties' Obligations	101
3.3 Scope of Application	111
Conclusion	123

Introduction

Article 1 of the 1948 American Declaration of the Rights and Duties of Man reads simply:

“Every human being has the right to life, liberty and the security of his person.”

This right was given detail in a series of binding norms within the Inter-American system, most importantly those included in the Inter-American Convention to Prevent and Punish Torture (IACPPT), which entered into force in 1987.

The controlling organs of the Inter-American system, the Inter-American Commission on Human Rights, of quasi-judicial nature,⁴³⁹ and the Inter-American Court of Human Rights, of judicial nature, have developed an abundant jurisprudence dealing with the protection of the right to personal integrity through reports, opinions and judgements,⁴⁴⁰ determining the prohibited conduct, as well as the extent of the State obligations of prevention and diligence.

The aim of this chapter is to identify the principles and standards that have been developed in the jurisprudence of the Inter-American Commission and Court of Human Rights, and thus define the extent and limits of State responsibility under the Inter-American system for conduct that constitutes torture or cruel, inhuman or degrading treatment.

3.1 Definitions

The American Convention on Human Rights (ACHR) gave detail to the rights included in the American Declaration of the Rights and Duties of Man, and established mechanisms for the supervision of the rights contained in the Convention. Article 5 of the ACHR provides, *inter alia*:

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

⁴³⁹ With respect to the quasi-judicial attributes of the Inter-American Commission on Human Rights, see Articles 44 to 51 of the American Convention on Human Rights and the Rules of Procedure of the Inter-American Commission on Human Rights, modifications to which were approved during the 126th regular session, held from 16–27 October 2006. Both documents are available on the Commission’s website at www.cidh.oas.org.

⁴⁴⁰ With respect to the judicial character of the Inter-American Court of Human Rights, see Articles 61 to 69. The reach of Advisory Opinions is governed by Article 64 of the American Convention on Human Rights.

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.”

The American Convention does not define the types of conduct which constitute torture or cruel, inhuman or degrading treatment,⁴⁴¹ nor does it differentiate between the prohibited acts. To understand the concept of torture in the Inter-American system, it is necessary to resort to other instruments, notably the IACPPT, and the jurisprudence of the Inter-American Court and Commission.

The IACPPT does not name the Inter-American Court as the organ with power to oversee its application, but rather provides for a State reporting system to the Commission.⁴⁴² Nonetheless, in *Paniagua Morales and Others v Guatemala*, the Court found a violation of the IACPPT, without elaborating on the source of its jurisdiction to do so.⁴⁴³ In the later case *Villagrán Morales and Others v Guatemala*, the Court explicitly extended its own jurisdiction to include supervision of the IACPPT, stating that this was possible where a State has given its consent to be bound by the IACPPT, and has accepted the jurisdiction of the Inter-American Court of Human Rights as regards the ACHR.⁴⁴⁴ The IACPPT also forms part of Inter-American body of law, and aids the Court in fixing the content and reach of the prohibition on torture and ill-treatment contained in Article 5(2) of the American Convention.⁴⁴⁵

3.1.1 Torture

Article 2(1) of the IACPPT defines torture as:

“any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or

⁴⁴¹ For the purposes of this chapter, “treatment” should be read so as to include “punishment.”

⁴⁴² Article 17 IACPPT.

⁴⁴³ *Paniagua Morales and Others v Guatemala* (“Panel Blanca”), IACHR (Series C) No. 37, judgement of 8 March 1998, §§133–36.

⁴⁴⁴ *Villagrán Morales and Others v Guatemala* (“Street Children”), IACHR, (Series C) No. 63, judgement of 19 November 1999, §247.

⁴⁴⁵ *Tibi v Ecuador*, IACHR (Series C) No. 114, judgement of 7 September 2004, §145. See also *La Cantuta v Peru*, IACHR (Series C) No. 162, judgement of 29 November 2006, and the interpretation of this judgement of 30 November 2007.

to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.

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

This definition goes further than that of the UNCAT in that it does not require that the pain or suffering be ‘severe,’ makes reference to ‘any other purpose’ rather than ‘such purposes as’ (as in the UNCAT), and includes methods intended to obliterate the personality of the victim or diminish his capacities, independently of whether such methods cause pain or suffering. Like that in the UNCAT, the definition includes a material element and a purposive element, and, in Article 3 of the IACPPT (discussed in section 3.2.1), a qualified, active subject.⁴⁴⁶

The material element is the intentional infliction of pain or suffering, or of methods intended to obliterate the personality or the victim or diminish his capacities. In determining which acts constitute torture, the Commission and the Court have taken into account objective elements including the length of time for which the pain or suffering was inflicted, the method of producing pain, the purpose, the wider socio-political circumstances, and the arbitrariness or otherwise of deprivation of liberty, as well as subjective elements such as the age, sex or particular vulnerability of the victim.⁴⁴⁷

With respect to the *intentionality* of violations, the Court has stated that “*Violations of the Convention cannot be founded upon rules that take psychological factors into account in establishing individual culpability. For the purposes of analysis, the intent or motivation of the agent who has violated the rights recognized by the Convention is irrelevant – the violation can be established even if the identity of the individual perpetrator is unknown. What is decisive is whether a violation of the rights recognized by the Convention has occurred with the support or the acquiescence of the government, or whether the State has allowed the act to*

⁴⁴⁶ For detailed discussion of these criteria, see Carlos Villán Durán, *La Práctica de la Tortura y los Malos Tratos en el Mundo. Tendencias actuales*, 2 Revista de Derechos Humanos, Cátedra UNESCO de Derechos Humanos 107, p. 113; Carlos Villán Durán, *La Convención contra la Tortura y su Contribución a la Definición del Derecho a la Integridad Física y Moral en el Derecho Internacional*, 2 Revista Española de Derecho Internacional pp. 386–398 (1985).

⁴⁴⁷ See, for example, *Ximenes-Lopes v Brazil*, IACHR (Series C) No. 149, judgement of 4 July 2006, §127.

take place without taking measures to prevent it or to punish those responsible.”⁴⁴⁸ In certain circumstances, it may not even be necessary to show that a particular individual has suffered to prove a violation by the State; “*subjecting a person to official, repressive bodies that practice torture and assassination with impunity is itself a breach of the duty to prevent violations of the rights to life and physical integrity of the person, even if that particular person is not tortured or assassinated, or if those facts cannot be proven in a concrete case.*”⁴⁴⁹

Thus, in the Inter-American system, the requirement of intentionality may be fulfilled not only by State failure to respect a negative duty of abstaining from torture or conduct injurious to personal integrity, but also by a breach of the positive duty of diligence and ensuring rights. As the Court recently reiterated, international responsibility can therefore be created without strict intentionality on the part of a State agent or person acting in an official capacity.⁴⁵⁰

The Inter-American Court has been more expansive than other international instances in its approach to the purposive element of torture, perhaps reflecting the wider definition of torture given in the IACPPT. In *Gómez-Paquiyaury Brothers v Peru*, the Court stated that, in situations of massive human rights violations, the purpose of the systematic use of torture is to intimidate the population, bringing all such cases within the scope of the Convention.⁴⁵¹ Where acts of torture are repeated, they will also generally fulfil the purpose requirement. In *Tibi v Ecuador*, the Court found that “[t]he aim of repetitive execution of these violent acts was to diminish [the] physical and mental abilities [of the victim] and annul his personality for him to plead guilty of a crime.”⁴⁵² Any acts that have been “planned and inflicted deliberately upon the victim to wear down his psychological resistance and force him to incriminate himself or to confess to certain illegal activities, or to subject him to other types of punishment, in addition to imprisonment itself” can be classified as physical and psychological torture, so any ill-treatment following conviction would fulfil this criterion.⁴⁵³ Furthermore, even the threat of ill-treatment may reach the required level of severity, as “the threat or real danger of subjecting a person to physical harm

⁴⁴⁸ *Velásquez-Rodríguez v Honduras*, IACHR (Series A) No. 4, judgement of 29 July 1982, §173; *Godínez-Cruz v Honduras*, IACHR (Series C) No. 5, judgement of 20 January 20 1989, §183.

⁴⁴⁹ *Velásquez-Rodríguez v Honduras* (1982), *op. cit.*, §175.

⁴⁵⁰ *Servellón-García v Honduras*, IACHR (Series C) No. 152, judgement of 21 September 2006, §107.

⁴⁵¹ *Gómez-Paquiyaury Brothers v Peru*, IACHR (Series C) No. 110, judgement of 8 July 2004, §116.

⁴⁵² *Tibi v Ecuador* (2004), *op. cit.*, §148.

⁴⁵³ *Ibid.* §146. See also *Cantoral-Benavides v Peru*, IACHR (Series C) No. 69, judgement of 18 August 2000, §104.

*produces, under determined circumstances, such a degree of moral anguish that it may be considered 'psychological torture.'*⁴⁵⁴

The Inter-American Commission became the first international adjudicatory body to recognise rape as torture in *Raquel Martí de Mejía v Peru*.⁴⁵⁵ The Commission noted that rape is a method of psychological torture that often has as an objective the humiliation of the victim, as well as her or his family or community.

The Inter-American Court and Commission have thus shown greater flexibility than other international instances in adopting an expansive definition of torture and State responsibility, based on the need to guarantee fundamental principles.

3.1.2 Cruel, inhuman or degrading treatment or punishment

Article 6 of the IACPPT provides in part:

"States Parties... shall take effective measures to prevent and punish other cruel, inhuman, or degrading treatment or punishment within their jurisdiction."

The IACPPT does not, however, provide a definition of such conduct, or indicate where the line lies between torture and other forms of ill-treatment.⁴⁵⁶ The Inter-American Court and Commission therefore adopted the distinctions developed in European jurisprudence (discussed in detail in sections 2.1.2 and 2.1.3) as its own in *Luis Lizardo Cabrera v Dominican Republic*.⁴⁵⁷ Furthermore, the Commission considered that both the ACHR and the IACPPT conferred upon it a certain amount of latitude to evaluate whether an act or practice constitutes torture or other ill-treatment in light of its intensity or seriousness. Such classification should be done on a case-by-case basis, taking into account the peculiarities of the case, the duration of the suffering, the physical and mental effects on the victim, and the personal circumstances of the victim.⁴⁵⁸

The Inter-American Court has taken a similar approach to the Commission. In *Loayza Tamayo v Peru*, the Court indicated that the distinction rests in part

⁴⁵⁴ *Urrutia v Guatemala*, IACHR (Series C) No. 103, judgement of 27 November 2003, §92. See also *Tibi v Ecuador* (2004), *op. cit.*, §149; *Servellón-García v Honduras* (2006), *op. cit.*, §99.

⁴⁵⁵ *Martí de Mejía v Peru* (1996), *op. cit.*

⁴⁵⁶ *Lizardo Cabrera v Dominican Republic*, Case 10832, Report No. 35/96, 17 February 1998, §76.

⁴⁵⁷ *Ibid.* §§77–80.

⁴⁵⁸ *Ibid.* §§82–83.

on the severity of the treatment, noting that “[t]he violation of 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.”⁴⁵⁹ In *Juvenile Reeducation Institute v Paraguay*, the Court emphasised that physical harm is not required; “creating a threatening situation or threatening an individual with torture may, in some circumstances, constitute inhumane treatment.”⁴⁶⁰

In *Gómez-Paquiyaury Brothers v Peru*, the Inter-American Court, citing the European Court, indicated that the “analysis of the gravity of the acts that may constitute cruel, inhumane or degrading treatment or torture, is relative and depends on all the circumstances of the case, such as duration of the treatment, its physical and mental effects and, in some cases, the sex, age, and health of the victim, among others.”⁴⁶¹ Thus, as in the European system, particular vulnerability of the victim may be the aggravating factor that transforms into torture treatment which might otherwise have been classified as cruel, inhuman or degrading.

The Court has maintained that the distinction between torture and other prohibited acts is not rigid, but rather evolves in light of growing demands for protection of fundamental rights and freedoms. Thus, an act which in the past may have been deemed cruel, inhuman and degrading treatment or punishment, could in the future constitute torture.⁴⁶²

3.1.3 Humane treatment of detainees

Article XXV of the American Declaration on the Rights and Duties of Man provides in part:

“Every individual who has been deprived of his liberty... has the right to humane treatment during the time he is in custody.”

This is supplemented by the prohibition in Article XXVI of “cruel, infamous or unusual punishment.”

⁴⁵⁹ *Loayza Tamayo v Peru*, IACHR (Series C) No. 33, judgement of 17 September 1997, §57.

⁴⁶⁰ *Juvenile Reeducation Institute v Paraguay*, IACHR (Series C) No. 112, judgement of 2 September 2004, §167.

⁴⁶¹ *Gómez-Paquiyaury Brothers v Peru* (2004), *op. cit.*, §113.

⁴⁶² *Cantoral-Benavides v Peru* (2000), *op. cit.*

While Declarations are not in general considered to be legally binding, the Inter-American Commission and Court have both indicated that they consider the American Declaration to have full legal force. In *White and Potter v United States*, the Commission expressed the view that, as a consequence of the State's agreement to be bound by the provisions of the Charter of the OAS, "the provisions of other instruments and resolutions of the OAS on human rights [including the American Declaration on the Rights and Duties of Man], acquired binding force."⁴⁶³ In an Advisory Opinion solicited by the Colombian Government, the Inter-American Court stated that none of the provisions of the American Convention can be interpreted as "excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have."⁴⁶⁴

The requirement of humane treatment of detainees is given detail in Article 5 of the IACPPT, which provides in part:

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 specialized 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."*

Thus, rather than interpreting the Convention in light of non-binding international instruments such as the UN Standard Minimum Rules for the Treatment of Prisoners, the Inter-American Court can find a direct violation of the Convention in cases where a number of these rules are not respected.

⁴⁶³ *White and Potter v United States*, IACommHR, Resolution 23/81, Case 2141, 6 March 1981, §16. See also *Roach and Pinkerton v United States*, IACommHR Resolution 3/87, Case 9647, 22 September 1987, §48.

⁴⁶⁴ Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89 of 14 July 14 1989, IACHR (Series A) No. 10, §36(b). This position was controversial given that the Declaration is, as the Court itself recognised, "not a treaty" (§23).

3.2 States Parties' Obligations

In concluding human rights treaties, “States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction.”⁴⁶⁵ The State obligation under Article 1(1) of the ACHR to respect rights and freedoms establishes a limit on the exercise of public authority, and assumes that there are spheres of human existence upon which the State may not infringe.⁴⁶⁶ The obligation to *guarantee* the free and full exercise of rights under the same Article implies a duty to prevent, investigate punish and compensate their violation, as well as to remove obstacles to the exercise and enjoyment of all rights.⁴⁶⁷

Under Articles 1 and 6 of the IACPPR, States are obligated to “take effective measures to prevent and punish torture within their jurisdiction.”⁴⁶⁸ The Court has stated that it is impossible to give a detailed enumeration of these measures, which vary according to the right and the specific conditions in each State Party.⁴⁶⁹ However, an analysis of the Convention and the jurisprudence of the Court allows the identification of a number of specific duties analogous to those which exist under the UN and European systems.

3.2.1 Duty to protect from ill-treatment by private actors

Article 3 of the IACPPT provides:

“The following shall be held guilty of the crime of torture:

a. A public servant or employee who acting in that capacity orders, instigates or induces the use of torture, or who directly commits it or who, being able to prevent it, fails to do so.

b. A person who at the instigation of a public servant or employee mentioned in subparagraph (a) orders, instigates or induces the use of torture, directly commits it or is an accomplice thereto.”

⁴⁶⁵ The Effect of Reservations on the Entry into Force of the American Convention on Human Rights, Advisory Opinion OC-2/82 of 24 September 1982, IACHR (Series A) No. 2, §29.

⁴⁶⁶ The Word “Laws” in Article 30 of the American Convention on Human Rights, Advisory Opinion OC-6/86 of 9 May 1986, IACHR (Series A) No. 6, §21; *Velásquez-Rodríguez v Honduras* (1982), *op. cit.*, §165; *Bamaca-Velásquez v Guatemala*, IACHR (Series C) No. 70, judgement of 25 November 2000, §210.

⁴⁶⁷ *Velásquez-Rodríguez v Honduras* (1982), *op. cit.*

⁴⁶⁸ Article 6 IACPPT. Article 17 of the IACPPT further establishes the obligation of State Parties to the Convention to report on the measures adopted, although this in fact occurs only rarely.

⁴⁶⁹ *Velásquez-Rodríguez v Honduras* (1982), *op. cit.*, §175; *Godínez-Cruz v Honduras* (1989), *op. cit.*, §§184–85.

Under the ACHR, the State will be held responsible for “acts or omissions of any of its powers or organs, irrespective of their rank, which violate the American Convention.”⁴⁷⁰ As noted in section 3.1.1, for State responsibility to arise, “it is not necessary to determine, as it is in domestic criminal law, the guilt of the authors or their intention; nor is it necessary to identify individually the agents to whom the acts that violate the human rights embodied in the Convention are attributed.”⁴⁷¹

While State responsibility most obviously arises where its agents directly ill-treat individuals,⁴⁷² the mere demonstration of support or tolerance by a public authority of a violation, whether by act or omission, is sufficient to generate State responsibility.⁴⁷³ As the Court stated in *Velásquez-Rodríguez v Honduras*, “An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the 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 required by the Convention.”⁴⁷⁴ To summarise, the act or omission must be in some way attributable to the State and constitute a violation of a previously assumed obligation or one whose source is recognised as customary international law.

State responsibility for acts of violence in the private sphere is further extended in the Inter-American Convention to Prevent, Punish and Eradicate Violence against Women (Convention of Belem do Para), Article 1 of which defines violence against women as:

“any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere.”

⁴⁷⁰ *Pueblo Bello Massacre v Colombia*, IACHR (Series C) No. 140, judgement of 31 January 2006, §112.

⁴⁷¹ *Ibid.*

⁴⁷² See, for example, *Mapiripán Massacre v Colombia*, IACHR (Series C) No. 134, judgement of 15 September 2005, §112; *Moiwana Community v Suriname*, IACHR (Series C) No. 124, judgement of 15 June 2005, §211; *Tibi v Ecuador* (2004), *op. cit.*, §108; *Gómez-Paquiyaury Brothers v Peru* (2004), *op. cit.*, §91; *19 Tradesmen v Colombia*, IACHR (Series C) No. 109, judgement of 5 July 2004, §183; *Urrutia v Guatemala* (2003), *op. cit.*, § 71; *Bulacio v Argentina*, IACHR (Series C) No. 100, judgement of 18 September 2003, §111; *Sánchez v Honduras*, IACHR (Series C) No. 99, judgement of 7 June 2003, §81; *Goiburú and Others v Paraguay*, IACHR (Series C) No. 153, judgement of 22 September 2006, §66; *La Cantuta v Peru*, *op. cit.*, §96.

⁴⁷³ *Mapiripán Massacre v Colombia* (2005), *op. cit.*, §110. See also *Servellón-García v Honduras* (2006), *op. cit.*, §107.

⁴⁷⁴ *Velásquez-Rodríguez v Honduras* (1982), *op. cit.*, §172.

The Convention of Belem do Para applies to violence “*that is perpetrated or condoned by the state or its agents regardless of where it occurs.*”⁴⁷⁵ State obligations to protect women against violence are further detailed Article 7, which provides that States parties shall:

“a. refrain from engaging in any act or practice of violence against women and to ensure that their authorities, officials, personnel, agents, and institutions act in conformity with this obligation;

b. apply due diligence to prevent, investigate and impose penalties for violence against women;

c. include in their domestic legislation penal, civil, administrative and any other type of provisions that may be needed to prevent, punish and eradicate violence against women and to adopt appropriate administrative measures where necessary;

d. adopt legal measures to require the perpetrator to refrain from harassing, intimidating or threatening the woman or using any method that harms or endangers her life or integrity, or damages her property;

e. take all appropriate measures, including legislative measures, to amend or repeal existing laws and regulations or to modify legal or customary practices which sustain the persistence and tolerance of violence against women;

f. establish fair and effective legal procedures for women who have been subjected to violence which include, among others, protective measures, a timely hearing and effective access to such procedures;

g. establish the necessary legal and administrative mechanisms to ensure that women subjected to violence have effective access to restitution, reparations or other just and effective remedies; and

h. adopt such legislative or other measures as may be necessary to give effect to this Convention.”

Article 8 of the Convention lays out a series of policies and programmes which the State must adopt to ensure the right in practice.

3.2.2 Duty to investigate

The duties of diligence and guarantee contained in Article 1 of the ACHR are reflected in Article 8 of the IACPPT, which provides:

⁴⁷⁵ Article 2(c) Inter-American Convention to Prevent, Punish and Eradicate Violence against Women.

“The States Parties shall guarantee that any person making an accusation of having been subjected to torture within their jurisdiction shall have the right to an impartial examination of his case.

Likewise, if there is an accusation or well-grounded reason to believe that an act of torture has been committed within their jurisdiction, the States Parties shall guarantee that their respective authorities will proceed properly and immediately to conduct an investigation into the case and to initiate, whenever appropriate, the corresponding criminal process.

After all the domestic legal procedures of the respective State and the corresponding appeals have been exhausted, the case may be submitted to the international fora whose competence has been recognized by that State.”

The Inter-American Commission and Court are among the organs with jurisdiction in such cases.

In *Vargas Areco v Paraguay*, the Court reaffirmed that “*the duty to investigate is a compulsory obligation of the State embodied in international law, which cannot be mitigated by any domestic legislation or act whatsoever.*”⁴⁷⁶ In *Servellón-García v Honduras*, the Court specified that the duty arises as soon as State authorities become aware of allegations or grounds to believe that torture has occurred, at which point “*they must begin a serious, impartial, and effective investigation ex officio and without delay. This investigation must be carried out through all legal means available and oriented to the determination of the truth and the investigation, persecution, capture, prosecution, and... punishment of all those responsible for the facts.*”⁴⁷⁷ Furthermore, to be considered effective, the investigation must comply with international standards. For example, in *Vargas Areco v Paraguay*, the Court considered that the investigation “*should take into consideration the international rules for documenting and interpreting forensic evidence elements regarding the commission of acts of torture and, particularly, those defined in the Istanbul Protocol.*”⁴⁷⁸

⁴⁷⁶ *Vargas Areco v Paraguay*, IACHR, (Series C) No. 155, judgement of 26 September 2006, §81. See also *Baldeón-García v Peru*, IACHR (Series C) No. 147, judgement of 6 April 2006, §157; *Gutiérrez Soler v Colombia*, IACHR (Series C) No. 132, judgement of 12 September 2005, §54; and *Tibi v Ecuador* (2004), *op. cit.*, §159.

⁴⁷⁷ *Servellón-García v Honduras* (2006), *op. cit.*, §119. See also *Vargas Areco v Paraguay* (2006), *op. cit.*, §§74-81; *Montero-Aranguren and Others (Detention Centre of Catia) v Venezuela*, IACHR (Series C) No. 150, judgement of 5 July 2006, §79; *Ximenes-Lopes v Brazil* (2006), *op. cit.*, §148; *Ituango Massacres v Colombia*, IACHR (Series C) No. 148 Judgement of 1 July 2006, §296; *Baldeón-García v Peru* (2006), *op. cit.*, §94; *Pueblo Bello Massacre v Colombia* (2006), *op. cit.*, §143.

⁴⁷⁸ *Vargas Areco v Paraguay* (2006), *op. cit.*, §93.

Where issues of official secrecy, confidentiality, public interest or national security arise during the investigation, determination of the secrecy of information may not depend exclusively on a State body whose members are deemed responsible for committing the act under investigation, as this would clearly be incompatible with effective judicial protection.⁴⁷⁹

The aims of conducting such investigations include avoiding repetition, fighting impunity, and respecting the right of the victim to know the truth. However, the Inter-American Court has gone further than its international counterparts in finding that not only the victims, but also “*society as a whole*” has a right to know the truth about the events.⁴⁸⁰

3.2.3 Duty to enact and enforce legislation

Article 2 of the ACHR provides:

“Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.”

This independent obligation compliments and reinforces the obligation to respect and ensure rights imposed by Article 1 of the ACHR.⁴⁸¹

Article 6 of the IACPPT further develops this obligation, providing in part:

“States Parties shall ensure that all acts of torture and attempts to commit torture are offenses under their criminal law and shall make such acts punishable by severe penalties that take into account their serious nature.

The States Parties likewise shall take effective measures to prevent and punish other cruel, inhuman, or degrading treatment or punishment within their jurisdiction.”

⁴⁷⁹ *Mack Chang v Guatemala*, IACHR (Series C) No. 101, judgement of 25 November 2003, §§180–181. See also *La Cantuta v Peru* (2006), *op. cit.*, §111.

⁴⁸⁰ *Vargas Areco v Paraguay* (2006), *op. cit.*, §81. See also *Ituango Massacres v Colombia* (2006), *op. cit.*, §§299, 402; *Baldeón-García v Peru* (2006), *op. cit.*, §§195, 201; *Blanco Romero v Venezuela*, IACHR (Series C) No. 138, judgement of 28 November 2005, §98; *Montero-Aranguren and Others v Venezuela* (2006), *op. cit.*, §137.

⁴⁸¹ The Word “Laws” in Article 30 of the American Convention on Human Rights, Advisory Opinion OC-6/86 of 9 May 1986, IACHR (Series A) No. 6, separate opinion by Justice Hector Gros Espiell, §6; Enforceability of the Right to Reply or Correction (Articles 14(1), 1(1) and 2 of the American Convention on Human Rights), Advisory Opinion OC-7/86 of 29 August 1986, IACHR (Series A) No. 7, §29-30; *Velásquez-Rodríguez v Honduras* (1982), *op. cit.*, §165–66.

The crime must be defined in accordance with the definition of torture in international law, which the Court considers to establish “a *minimum standard with regard to the correct definition of this type of conduct and the minimum elements that this must observe.*”⁴⁸² In particular, “*if elements considered non-derogable in the prosecution formula established at the international level are eliminated, or mechanisms are introduced that detract from meaning or effectiveness, this may lead to the impunity of conducts that the States are obliged to prevent, eliminate and punish under international law.*”⁴⁸³

3.2.3.1 Universal jurisdiction

Article 12 of the IACPPT provides:

“Every State Party shall take the necessary measures to establish its jurisdiction over the crime described in this Convention in the following cases:

- a. When torture has been committed within its jurisdiction;
- b. When the alleged criminal is a national of that State; or
- c. When the victim is a national of that State and it so deems appropriate.

Every State Party shall also take the necessary measures to establish its jurisdiction over the crime described in this Convention when the alleged criminal is within the area under its jurisdiction and it is not appropriate to extradite him in accordance with Article 11.

This Convention does not exclude criminal jurisdiction exercised in accordance with domestic law.”

Article 14 further provides that, when a State party does not grant extradition, “*the case shall be submitted to its competent authorities as if the crime had been committed within its jurisdiction, for the purposes of investigation, and when appropriate, for criminal action, in accordance with its national law.*” Moreover, Article 13 obliges States parties to include torture among extraditable offences.

Thus, the IACPPT establishes universal jurisdiction for the crime of torture: States are obligated either to extradite suspects or to conduct investigations and, if appropriate, criminal prosecutions, regardless of the nationality of

⁴⁸² *Goiburú and Others v Paraguay* (2006), *op. cit.*, §92.

⁴⁸³ *Ibid.*

the suspect and whether the crime was committed within the State's jurisdiction.⁴⁸⁴

While the requirement to extradite suspects is explicitly stated in the IACPPT, the Court has based its decisions in cases involving extradition directly on the ACHR. In *Goiburú and Others v Paraguay*, which involved the illegal and arbitrary detention, torture and forced disappearance of four persons between 1974 and 1977, the Court found that “*according to the general obligation of guarantee established in Article 1(1) of the American Convention, Paraguay should adopt the necessary measures, of a diplomatic and judicial nature, to prosecute and punish all those responsible for the violations committed, which includes furthering the corresponding extradition requests by all possible means.*”⁴⁸⁵ Furthermore, the Court considers that seeking extradition of suspects for the crime of torture is an obligation under customary international law, and that “*the mechanisms of collective guarantee established in the [ACHR], together with the regional and universal international obligations on this issue, bind the States of the region to collaborate in good faith in this respect, either by conceding extradition or prosecuting those responsible for the facts... on their territory.*”⁴⁸⁶

3.2.4 Duty to exclude evidence obtained by torture or other ill-treatment

Article 10 of the IACPPT provides:

“No statement that is verified as having been obtained through torture shall be admissible as evidence in a legal proceeding, except in a legal action taken against a person or persons accused of having elicited it through acts of torture, and only as evidence that the accused obtained such statement by such means.”

This provision complements Articles 8 of the ACHR, which provides in part that every person has

“2.(g) the right not to be compelled to be a witness against himself or to plead guilty...”

3. A confession of guilt by the accused shall be valid only if it is made without coercion of any kind.”

⁴⁸⁴ Rodley, *op. cit.*, pp.52–53.

⁴⁸⁵ *Goiburú and Others v Paraguay* (2006), *op. cit.*, §130. It should be noted that the IACPPT had not yet been adopted at the time of the facts, which may explain the Court's failure to make explicit reference to the provisions of that instrument regarding extradition.

⁴⁸⁶ *Ibid.* §§131–132. See also *La Cantuta v Peru* (2006), *op. cit.*, §160.

However, the latter provision may be of greater scope, as it is not limited to torture, but applies to all forms of coercion, presumably including other forms of ill-treatment.

Thus, in *Cantoral-Benavides v Peru*, the Court, having determined that the applicant had been subjected to physical and psychological torture with the purpose of “*wear[ing] down his psychological resistance and forc[ing] him to incriminate himself or to confess to certain illegal activities,*” found a violation of Article 8 of the ACHR.⁴⁸⁷

3.2.5 Duty to train personnel and provide procedural safeguards

Article 7 of the IACPPT provides:

“The States Parties shall take measures so that, in the training of police officers and other public officials responsible for the custody of persons temporarily or definitively deprived of their freedom, special emphasis shall be put on the prohibition of the use of torture in interrogation, detention, or arrest.

The States Parties likewise shall take similar measures to prevent other cruel, inhuman, or degrading treatment or punishment.”

Where the detention centre or police station houses particularly vulnerable groups, such as children, law enforcement officials may require additional training in the particular needs of such groups.⁴⁸⁸

The ACHR also contains a number of procedural guarantees. These include the right of anyone who is detained to be informed of the reasons for his or her detention.⁴⁸⁹ In *Tibi v Ecuador*, the Court explicitly extended this right to legal representatives, stating that it provides “*a mechanism to avoid unlawful or arbitrary conduct from the very act of deprivation of liberty on, and to ensure defense of the detainee. Both the detainee and those representing him or with legal custody over him [therefore] have the right to be informed of the motives of and reasons for the detention and about the rights of the detainee.*”⁴⁹⁰ The right to be brought promptly before a judge is also guaranteed.⁴⁹¹ In *Petruzzi and Others v Peru*,⁴⁹² the Court held that this guarantee is essential to the protection of the

⁴⁸⁷ *Cantoral-Benavides v Peru* (2000), *op. cit.*, §§104, 132–133. See also *Tibi v Ecuador* (2004), *op. cit.*, §149.

⁴⁸⁸ See, for example, *Bulacio v Argentina* (2003), *op. cit.*, §136.

⁴⁸⁹ Article 7(4) ACHR.

⁴⁹⁰ *Tibi v Ecuador* (2004), *op. cit.*, §109.

⁴⁹¹ Article 7(5) ACHR.

⁴⁹² *Castillo Petruzzi and Others v Peru*, IACHR (Series C) No. 52, judgement of 30 May 1999.

rights to personal integrity and liberty. It therefore applies to suspects of all crimes, including terrorist offences.⁴⁹³

Article 27(2) of the ACHR provides that, even in emergency situations, States parties may not suspend a number of rights, including the right to humane treatment, or “*the judicial guarantees essential for the protection of such rights.*” The Inter-American Court has been called upon to define the nature of such guarantees in two Advisory Opinions. In its Advisory Opinion on the right of *habeas corpus*, (i.e. the right of legal recourse to challenge detention), which is guaranteed under Articles 7(6) and 25(1) of the ACHR, the Court stated that “*habeas corpus performs a vital role in ensuring that a person’s life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret and in protecting him against torture or other cruel, inhumane [sic], or degrading punishment or treatment,*” and cannot therefore be suspended under any circumstances.⁴⁹⁴ The same reasoning applies to other procedural guarantees, in particular those specified in Article 8 of the ACHR.⁴⁹⁵ Article 8 provides for the right to a hearing, the presumption of innocence, the right to be assisted by an interpreter, the right to be notified in detail of all charges and the right to defence and free communication with counsel.

Article 5 of the ACHR provides in part:

“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 specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors.”*

Thus, many of the procedural safeguards that in other systems are “read into” general articles prohibiting ill-treatment are explicitly laid out in the Inter-American system. However, the Court has also found a number of other specific duties. For example, in *De la Cruz Flores v Peru*, the Court established that,

⁴⁹³ *Ibid.* §§109-112. The Inter-American Court cited jurisprudence of the European Court in this regard. See §108.

⁴⁹⁴ *Habeas corpus in Emergency Situations* (Articles 27(2), 25(1) and 7(6) American Convention on Human Rights). Advisory Opinion OC-8/87 of 30 January 1987, IACHR (Series A) No. 8, §35.

⁴⁹⁵ *Judicial Guarantees in States of Emergency* (Articles 27.2, 25 and 8 of the American Convention on Human Rights), Advisory Opinion OC-9/87 of 6 October 1987, IACHR (Series A) No. 9.

under Article 5 of the ACHR, “the State has the obligation to provide regular medical examinations and care to prisoners, and also adequate treatment when this is required. The State must also allow and facilitate prisoners being treated by the physician chosen by themselves or by those who exercise their legal representation or guardianship.”⁴⁹⁶ In *Tibi v Ecuador*, the Court stressed that the State “does in fact have the responsibility to guarantee the rights of individuals under its custody as well as that of supplying information and evidence pertaining to what has happened to the detainee.”⁴⁹⁷ This would appear to require the maintenance of detailed registers in places of detention.

3.2.6 Duty to grant redress and compensate victims

Article 63(1) of the ACHR provides:

*“If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.”*⁴⁹⁸

Article 9 of the IACPPT further provides that States parties shall “incorporate into their national laws regulations guaranteeing suitable compensation for victims of torture.” Furthermore, violating States cannot invoke domestic legal provisions to modify or breach their obligation to provide redress, which is regulated in all respects (scope, nature, method and determination of beneficiaries) by international law.⁴⁹⁹ They may “fix the manner in which the right of reply or correction is to be exercised” at the domestic level, but this “does not impair the enforceability, on the international plane, of the obligations [to respect and ensure the right] they have assumed under Article 1(1) [of the ACHR].”⁵⁰⁰

⁴⁹⁶ *De la Cruz Flores v Peru*, IACHR (Series C) No. 115, judgement of 18 November 2004, §132.

⁴⁹⁷ *Tibi v Ecuador* (2004), *op. cit.*, §129. See also *Gómez-Paquiyaury Brothers v Peru* (2004), *op. cit.*, §98; *Bulacio v Argentina* (2003), *op. cit.*, §138.

⁴⁹⁸ This reflects a principle of customary international law; *Gómez-Paquiyaury Brothers v Peru* (2004), *op. cit.*, §188; *19 Tradesmen v Colombia* (2004), *op. cit.*, §220; *Theissen v Guatemala*, IACHR (Series C) No. 108, judgement of 3 July 2004, §40.

⁴⁹⁹ *Gómez-Paquiyaury Brothers v Peru* (2004), *op. cit.*, §189. See also Ariel E. Dulitzky, *Alcance de las Obligaciones Internacionales de los Derechos Humanos* in Claudia Martín, Diego Rodríguez Pinzón & José A. Guevara B. Comp. *Derecho Internacional de los Derechos Humanos*, 79, 82 (Universidad Iberoamericana & others, 1st ed., 2004).

⁵⁰⁰ Enforceability of the Right to Reply or Correction (Articles 14(1), 1(1) and 2 of the American Convention on Human Rights), Advisory Opinion OC-7/86 of 29 August 1986, IACHR (Series A) No. 7.

The Court considers that reparation of the damage caused by a violation of human rights requires, whenever possible, the reestablishment of the situation before the violation. If this is not possible, the Court will order “*adoption of a series of measures that, in addition to ensuring respect for the rights that were abridged, provide reparation of the consequences caused by the violations and pay compensation for the damages caused in the pertinent case.*”⁵⁰¹ The Inter-American Court goes much further than other international bodies in the types of reparations it will order. For example, in *Vargas Areco v Paraguay*, in addition to pecuniary damages, the Court ordered that the State was, among other things, to organise an official public act to acknowledge its international liability and apologise to the victim’s relatives, prepare audiovisual presentations on the case for elementary and secondary schools to illustrate the risks of compulsory military service, and name a street after the victim.⁵⁰²

3.3 Scope of Application

The Inter-American Court and Commission, like their regional and international counterparts, have interpreted the prohibition of torture and ill-treatment in the ACHR and IACPPT widely, to ensure the fullest protection of individuals.

3.3.1 The absolute nature of the prohibition of torture and other ill-treatment

The right to personal integrity is included in the list of non-derogable rights under Article 27(2) of the ACHR; States can make no exception to this right even in extreme situations “*such as war, the threat of war, the struggle against terrorism, and any other crimes, state of siege or of emergency, internal disturbances or conflict, suspension of constitutional guarantees, domestic political instability, or other public disasters or emergencies,*” or when the life of a country is threatened.⁵⁰³ Similarly, as discussed in section 3.2.5, the judicial guarantees

⁵⁰¹ *Gómez-Paquiayauri Brothers v Peru* (2004), *op. cit.*, §189; *Goiburú and Others v Paraguay* (2006), *op. cit.*, §§141–42; *Urrutia v Guatemala* (2003), *op. cit.*, §143; *Ximenes-Lopes v Brazil* (2006), *op. cit.*, §177

⁵⁰² *Vargas Areco v Paraguay* (2006), *op. cit.*, §136(d).

⁵⁰³ Article 27(1) ACHR. See also *Juvenile Reeducation Institute v Paraguay* (2004), *op. cit.*, §157; *Tibi v Ecuador* (2004), §143; *Urrutia v Guatemala* (2003), *op. cit.*, §89; *Gómez-Paquiayauri Brothers v Peru* (2004), *op. cit.*, §111; *De la Cruz Flores v Peru* (2004), *op. cit.*, §125; *Berenson-Mejía v Peru*, IACHR (Series C) No. 119, judgement of 25 November 2004, §100; *Cantoral-Benavides v Peru* (2000), *op. cit.*, §95; *Servellón-García v Honduras* (2006), *op. cit.*, §97; *Baldeón-García v Peru* (2006), *op. cit.*, §117. See generally Robert Goldman, Claudio M. Grossman, Claudia Martin and Diego Rodríguez-Pinzón, *The International Dimension of Human Rights*, Inter-American Development Bank, 2001, section IIIA, p. 49.

indispensable for the protection of this right cannot be suspended.⁵⁰⁴ Articles 4 and 5 of the IACPPT reinforce this absolute prohibition as regards individual criminal liability for torture at the domestic level:

“Article 4

The fact of having acted under orders of a superior shall not provide exemption from the corresponding criminal liability.

Article 5

The existence of circumstances such as a state of war, threat of war, state of siege or of emergency, domestic disturbance or strife, suspension of constitutional guarantees, domestic political instability, or other public emergencies or disasters shall not be invoked or admitted as justification for the crime of torture.

Neither the dangerous character of the detainee or prisoner, nor the lack of security of the prison establishment or penitentiary shall justify torture.”

No statute of limitations may be applied to the crime of torture,⁵⁰⁵ and governments remain liable for the acts of former regimes where they do not take adequate measures to combat impunity and ensure redress.⁵⁰⁶ Similarly, amnesties may not extend to the crime of torture, as this would “*leave victims defenseless and perpetuate impunity for crimes against humanity. Therefore, they are overtly incompatible with the wording and the spirit of the American Convention, and undoubtedly affect rights embodied in such Convention. This constitutes in and of itself a violation of the Convention and generates international liability for the State.*”⁵⁰⁷

In more recent cases, the Inter-American Court has explicitly stated that the absolute prohibition applies not only to torture, but also to cruel, inhuman or degrading treatment or punishment, emphasising that both “*torture and cruel, inhuman, or degrading treatment, or punishment, are strictly prohibited by international human rights law. The prohibition of torture and cruel, inhuman or degrading treatment is absolute and non-derogable, even in the most difficult circumstances, such as war, threat of war, the fight against terrorism and any other crime, martial law or state of emergency, civil war or commotion, suspension of*

⁵⁰⁴ Article 27(2) American Convention on Human Rights.

⁵⁰⁵ See, for example, *Moiwana community v Suriname* (2005), *op. cit.*

⁵⁰⁶ See, for example, *La Cantuta v Peru* (2006), *op. cit.*

⁵⁰⁷ *Almonacid-Arellano and Others v Chile*, IACHR (Series C) No. 154, judgement of 26 September 2006, §119. See also *Barrios-Altos v Peru*, Interpretation of the Judgment on the Merits (Article 67 ACHR), IACHR (Series C) No. 83, judgement of 3 September 2001, §18.

*constitutional guarantees, internal political instability or any other public disaster or emergency.*⁵⁰⁸

The Court has repeatedly referred to the *jus cogens* character of the absolute prohibition of all forms of torture,⁵⁰⁹ and it is now clear that it also considers the prohibition on other forms of ill-treatment to be customary international law.⁵¹⁰

3.3.2 Lawful sanctions

The IACPPT provides an explicit exception to the prohibition on all ill-treatment by providing in Article 2 that:

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

On its face, this exception is narrower than that in the UNCAT, as it explicitly states that *acts* and *methods* falling within the definition of torture will still qualify as such if inflicted in the context of an otherwise lawful measure.

3.3.2.1 The death penalty

While the imposition of the death penalty is not prohibited by Article 4 of the ACHR, which concerns the right to life, strict limits are placed on its use. The Court has indicated that the conditions in which the sentence may be imposed will be interpreted restrictively.⁵¹¹ Nonetheless, imposition of the death penalty, or circumstances surrounding its use, may under certain circumstances violate the rights guaranteed under Article 5 of the ACHR.

The Commission has not as yet ruled on whether any particular method of execution amounts to cruel, inhuman or degrading treatment or punishment as compared with other methods, although it has reserved its competence to rule on this point in the future.⁵¹² Nonetheless, the Commission has found that

⁵⁰⁸ *Berenson-Mejía v Peru* (2004), *op. cit.*, §100; *De la Cruz Flores v Peru* (2004), *op. cit.*, §125; *Las Palmeras v Colombia*, IACHR (Series C) No. 90, judgement of 6 September 2001, §58.

⁵⁰⁹ *Goiburú and Others v Paraguay* (2006), *op. cit.*, §128; *Tibi v Ecuador* (2004), *op. cit.*, §143; *Gómez-Paquiyaui Brothers v Peru* (2004), *op. cit.*, §112; *Urrutia v Guatemala* (2003), *op. cit.*, §92.

⁵¹⁰ *Ximenes-Lopes v Brazil* (2006), *op. cit.*, §127.

⁵¹¹ See *Restrictions to the Death Penalty* (Articles 4(2) and 4(4) American Convention on Human Rights), Advisory Opinion OC-3/83 of 8 September 1983; *Hilaire and Others v Trinidad and Tobago*, IACHR (Series C) No. 94, judgement of 21 June 2002, §99.

⁵¹² *Sewell v Jamaica*, Case 12347, Report No. 76/02, 27 December 2002, §118.

mandatory death sentences following a conviction for murder are in violation of Article 5, holding that that provision's guarantees "*presuppose that persons protected under the Convention will be regarded and treated as individual human beings, particularly in circumstances in which a State Party proposes to limit or restrict the most basic rights and freedoms of an individual.*"⁵¹³ The mandatory imposition of the death penalty based on the category of crime and not the individual's personal circumstances or the circumstances of a particular case therefore amounted to inhuman or degrading treatment.

In *Hilaire and Others v Trinidad and Tobago*, the Inter-American Court, referring to the decision of its European counterpart in *Soering v UK*, found that the mental anguish suffered by death row prisoners awaiting execution, which could be carried out without notice, constituted cruel, inhuman and degrading treatment.⁵¹⁴ This followed expert testimony that "*the procedures leading up to the death by hanging of those convicted of murder terrorize and depress the prisoners; others cannot sleep due to nightmares, much less eat.*"⁵¹⁵

3.3.2.2 Corporal punishment

In *Loayza Tamayo v Peru*, the Court, once again citing the jurisprudence of the European Court, held that "*Any use of force that is not strictly necessary to ensure proper behavior on the part of the detainee constitutes an assault on the dignity of the person... , in violation of Article 5.*"⁵¹⁶

In *Caesar v Trinidad and Tobago*, the Court, referring to the jurisprudence of both the Human Rights Committee and the European Court, found that the very nature of corporal punishment for crimes "*reflects an institutionalization of violence, which, although permitted by the law, ordered by the State's judges and carried out by its prison authorities, is a sanction incompatible with the Convention. As such, corporal punishment by flogging constitutes a form of torture.*"⁵¹⁷ In that case, the Court also found "*severe aggravating circumstances,*" including "*the extreme humiliation caused by the flogging itself; the anguish, stress and fear experienced while awaiting the punishment in prison, a period that was marked*

⁵¹³ IACommHR, *Baptiste v Grenada*, Case 11743, Report No. 38/00, 13 April 2000, §89. See also IACommHR, *Aitken v Jamaica*, Case 12275, Report No. 58/02, 21 October 2002, §111; IACommHR, *Knights v Grenada*, Case 12028, Report No. 47/01, 4 April 2001, §81.

⁵¹⁴ *Hilaire and Others v Trinidad and Tobago* (2002), *op. cit.*, §§167–169. The Court found that the legislation permitting this system was incompatible with the ACHR.

⁵¹⁵ *Ibid.* §168.

⁵¹⁶ *Loayza Tamayo v Peru* (1997), *op. cit.*, §57.

⁵¹⁷ *Caesar v Trinidad and Tobago*, IACHR (Series C) No. 123, judgement of 11 March 2005, §73.

by excessive delay; and Mr. Caesar's observation of the suffering of other prisoners who had been flogged.⁵¹⁸

The Inter-American Court has yet to rule on a case of corporal punishment in the private sphere, for example punishment of children by their parents. In light of the Court's willingness to adopt standards developed by other international instances, and the position of the Committee on the Rights of the Child on this point, it seems likely that the Court would find a violation of the Convention where the State has not taken all reasonable measures to prevent such acts.

3.3.3 Conditions of detention

The Inter-American Court has made it clear that persons deprived of their liberty have the right to be treated with dignity. As the State is responsible for detention facilities and has full control of those in its custody, it is the guarantor of the rights of detainees, including the right to personal integrity.⁵¹⁹ Thus, the State has a duty to ensure that conditions of detention are compatible with the personal dignity of detainees; poor conditions of detention, “*depending on their intensity, length of detention and personal features of the inmate, ... can cause hardship that exceed[s] the unavoidable level of suffering inherent in detention, and ... involve humiliation and a feeling of inferiority*” in breach of Article 5 of the ACHR.⁵²⁰

As noted in section 3.2.5 above, the ACHR specifically provides for the separation of different categories of detainee. The Court has expanded on the other requirements regarding conditions of detention in its jurisprudence. In particular, the Court has found that overcrowding, a lack of ventilation or natural light, inadequate bedding, inadequate sanitary conditions, inappropriate or

⁵¹⁸ *Ibid.* §88.

⁵¹⁹ *Neira Alegria and Others v Peru*, IACHR (Series C) No. 20, judgement of 19 January 1995, §60; *Cantoral-Benavides v Peru* (2000), *op. cit.*, §87; *Hilaire and Others v Trinidad and Tobago* (2002), *op. cit.*, §165. See also *Tibi v Ecuador* (2004), *op. cit.*, §§129, 150; *Juvenile Reeducation Institute v Paraguay* (2004), *op. cit.*, §§152–153; and *Gómez-Paquiyaui Brothers v Peru* (2004), *op. cit.*, §98, *Caesar v Trinidad and Tobago* (2005), *op. cit.*, §97; *Berenson-Mejia v Peru* (2004), *op. cit.*, §102.

⁵²⁰ *Montero-Aranguren and Others v Venezuela* (2006), *op. cit.*, §97. Article 19 of the ACHR provides special protection to children, specifying that 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. This obligation is therefore particularly strict as regards the conditions of juvenile detention. See, for example *Servellón-García v Honduras* (2006), *op. cit.*, §112; *Juvenile Reeducation Institute v Paraguay* (2004), *op. cit.*, §16; *Gómez-Paquiyaui Brothers v Peru* (2004), *op. cit.*, §§124, 163, 164, 171; *Bulacio v Argentina* (2003), *op. cit.*, §126, 134; *Villagrán Morales and Others v Guatemala* (1999), *op. cit.*, §§146, 191.

inadequate food, inadequate physical activity, inadequate access to education or recreation, a lack of psychological or medical attention, and isolation or undue restrictions upon the visiting schedule constitute violations of the right to humane treatment under Article 5 of the ACHR.⁵²¹ Furthermore, States have an obligation to ensure adequate medical attention to those in their custody, including facilitating examination of detainees by the doctor of their choice.⁵²² In *Montero-Aranguren v Venezuela*, the Court emphasised that assistance by a doctor without links to the detention centre authorities constitutes “*an important safeguard against torture and physical or mental ill-treatment of inmates.*”⁵²³ Providing and ensuring adequate conditions of detention is an immediate obligation; “*States cannot invoke economic hardships to justify imprisonment conditions that do not respect the inherent dignity of human beings.*”⁵²⁴

In *Berenson-Mejía v Peru*, the Court explicitly related the conditions and the aims of detention, stating that conditions of detention which adversely affect the physical, mental and moral integrity of detainees are “*contrary to the ‘essential aim’ of the penalty of imprisonment, as established in [Article 5(6) of the ACHR]; in other words, ‘the reform and social readaptation of the prisoners.’*”⁵²⁵ Furthermore, the State must take measures to ensure that all detainees have the opportunity to “*build their life plan, even while incarcerated.*”⁵²⁶

3.3.4 Solitary confinement

The Inter-American Court has adopted a wider definition than other international instances of the term ‘solitary confinement,’ using it to refer both to isolation of a detainee from others and to isolation resulting from illegal

⁵²¹ See, for example, *Caesar v Trinidad and Tobago* (2005), *op. cit.*, §96; *Raxcacó Reyes v Guatemala*, IACHR (Series C) No. 134, judgement of 15 September 2005, §95; *Berenson-Mejía v Peru* (2004), *op. cit.*, §102; *Tibi v Ecuador* (2004), *op. cit.*, §150; *Juvenile Reeducation Institute v Paraguay* (2004), *op. cit.*, §151; *De la Cruz Flores v Peru* (2004), *op. cit.*, §130. See also the UN Standard Minimum Rules for the Treatment of Prisoners.

⁵²² *Tibi v Ecuador* (2004), *op. cit.*, §156; *Juvenile Reeducation Institute v Paraguay* (2004), *op. cit.*, §157; *Bulacio v Argentina* (2003), *op. cit.*, §131. See also Principle 24 of the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, to which the Court referred in *Tibi v Ecuador*. This principle establishes that “[a] proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge.”

⁵²³ *Montero-Aranguren and Others v Venezuela* (2006), *op. cit.*, §102. The Court made reference to the findings of the European Court in *Mathew v the Netherlands* (2005), *op. cit.*, in this respect.

⁵²⁴ *Montero-Aranguren and Others v Venezuela* (2006), *op. cit.*, §85.

⁵²⁵ *Berenson-Mejía v Peru* (2004), *op. cit.*, §101; *Baena-Ricardo v Panama*, IACHR (Series C) No. 72, judgement of 2 February 2001, §106.

⁵²⁶ *Juvenile Reeducation Institute v Paraguay* (2004), *op. cit.*, §164.

detention. There is thus considerable overlap between its jurisprudence in this area and that on incommunicado detention and enforced disappearances, which will be considered in section 3.3.5.

The Court has held that “*prolonged isolation and coercive solitary confinement are, in themselves, cruel and inhuman treatments, damaging to the person’s psychic and moral integrity and the right to respect of the dignity inherent to the human person.*”⁵²⁷ In addition to the suffering inherent in solitary confinement, it places individuals “*in a particularly vulnerable position, and increases the risk of aggression and arbitrary acts in detention centers.*”⁵²⁸ Thus, in *Montero-Aranguren v Venezuela*, the Court held that “*solitary confinement cells must be used as disciplinary measures or for the protection of persons only during the time necessary and in strict compliance with the criteria of reasonability, necessity and legality,*” and specifically stated that minimum standards for conditions of detention must still be met.⁵²⁹ Furthermore, even the threat of solitary confinement may be enough to constitute inhuman treatment under Article 5 of the ACHR.⁵³⁰

Where the detention is in addition unlawful, the Court has held that “*it is possible to infer, even when there is no other evidence in this respect, that the treatment received during solitary confinement is inhuman and degrading.*”⁵³¹

The Inter-American Commission has gone further than the Court, finding that solitary confinement constituted torture within the definition of the IACPTT in the specific circumstances of *Lizardo Cabrera v Dominican Republic*.⁵³² In that case, the solitary confinement was deliberately imposed by State agents for the purpose of personal punishment, and included aggravating treatment

⁵²⁷ *De la Cruz Flores v Peru* (2004), *op. cit.*, §128; *Urrutia v Guatemala* (2003), *op. cit.*, §87; *Bamaca-Velásquez v Guatemala* (2000), *op. cit.*, §150; *Miguel Castro-Castro Prison v Peru*, IACHR (Series C) No. 160, judgement of 25 November 2006, §323.

⁵²⁸ *Bamaca-Velásquez v Guatemala* (2000), *op. cit.*, §150. See also *De la Cruz Flores v Peru* (2004), *op. cit.*, §129; *Urrutia v Guatemala* (2003), *op. cit.*, §87; *Castillo Petruzzi and Others v Peru* (1999), *op. cit.*, §195; *Suárez-Rosero v Ecuador*, IACHR (Series C) No. 35, judgement of 12 November 1997, §90; *Miguel Castro-Castro Prison v Peru* (2006), *op. cit.*, §323.

⁵²⁹ *Montero-Aranguren and Others v Venezuela* (2006), *op. cit.*, §94. The Inter-American Court specifically referred to other international instances in this regard, including the report of the UN Committee against Torture on Turkey, the UN Standard Minimum Rules for the Treatment of Prisoners, and the findings of the European Court in *Mathew v the Netherlands* (2005), *op. cit.*

⁵³⁰ *Juvenile Reeducation Institute v Paraguay* (2004), *op. cit.*, §167. See also section 3.1.1 above.

⁵³¹ *Urrutia v Guatemala* (2003), *op. cit.*, §87. See also *Sánchez v Honduras* (2003), *op. cit.*, §98; *Bamaca-Velásquez v Guatemala* (2000), *op. cit.*, §150; *Cantoral-Benavides v Peru* (2000), *op. cit.*, §§83, 84, 89; *Gómez-Paquiyaury Brothers v Peru* (2004), *op. cit.*, §108.

⁵³² *Lizardo Cabrera v Dominican Republic* (1998), *op. cit.*

including the deprivation of food and drink, despite the applicant's delicate state of health following a hunger strike.⁵³³ However, this finding would appear to be limited to the circumstances of that case. In the more recent case *Rosario Congo v Ecuador*, the Commission found that solitary confinement amounted to inhuman and degrading treatment.⁵³⁴

3.3.5 Incommunicado detention and enforced disappearances

As discussed in section 3.3.1, the prohibition of torture and ill-treatment is absolute. States must adopt measures to reinforce this prohibition, including prohibiting, in exceptional and any other circumstances, long periods of confinement without communication or legal means and remedies to assert rights.⁵³⁵

Facilitating communication with the outside world is one of the most effective methods of preventing and detecting torture and ill-treatment in places of detention. As the Inter-American Court stated in *Suárez-Rosero v Ecuador*, "*isolation from the outside world produces moral and psychological suffering in any person, places him in a particularly vulnerable position, and increases the risk of aggression and arbitrary acts in prisons.*"⁵³⁶ The Court has therefore consistently held that: "*Incommunicado detention is an exceptional measure the purpose of which is to prevent any interference with the investigation of the facts. Such isolation must be limited to the period of time expressly established by law. Even in that case, the State is obliged to ensure that the detainee enjoys the minimum and non-derogable guarantees established in the Convention and, specifically, the right to question the lawfulness of the detention and the guarantee of access to effective defense during his incarceration.*"⁵³⁷

While incommunicado detention is not absolutely prohibited by the ACHR, it may constitute cruel, inhuman or degrading treatment where it is arbitrary, prolonged, or in violation of domestic laws.⁵³⁸ In such cases, the mere fact that

⁵³³ *Ibid.* §86.

⁵³⁴ *Rosario Congo v Ecuador*, IACommHR, Case 11427, Report No. 63/99, 13 April 1999, §59.

⁵³⁵ Habeas Corpus in Emergency Situations (Articles 27(2), 25(1) and 7(6) of the American Convention on Human Rights), Advisory Opinion OC-8/87 of 30 January 1987, IACHR (Series A) No. 8, §36.

⁵³⁶ *Suárez-Rosero v Ecuador* (1997), *op. cit.*, §90. See also *Castillo Petruzzi and Others v Peru* (1999), *op. cit.*, §195; *Cantoral-Benavides v Peru* (2000), *op. cit.*, §84; *Bamaca-Velásquez v Guatemala* (2000), *op. cit.*, §150; *Urrutia v Guatemala* (2003), *op. cit.*, §87.

⁵³⁷ *Ibid.* §51.

⁵³⁸ See, for example, *Cantoral-Benavides v Peru* (2000), *op. cit.*, §§82–83; *Bamaca-Velásquez v Guatemala* (2000), *op. cit.*, §150; *Urrutia v Guatemala* (2003), *op. cit.*, §87; *Suárez-Rosero v*

the detainee is deprived of communication with the outside world will allow the Court to conclude that he or she was subjected to ill-treatment.⁵³⁹

The Inter-American Commission has applied the Court's approach,⁵⁴⁰ and has additionally established that even the reduction or limitation of visits is prohibited, as this constitutes an arbitrary form of additional punishment.⁵⁴¹

The provisions of the ACHR and jurisprudence of the Inter-American Court and Commission concerning incommunicado detention and enforced disappearances are complemented by the Inter-American Convention on Forced Disappearance of Persons, Article 2 of which defines a forced disappearance as:

“the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.”

Article 11 of the Convention lays out measures which must be taken to prevent enforced disappearances and incommunicado detention, providing:

“Every person deprived of liberty shall be held in an officially recognized place of detention and be brought before a competent judicial authority without delay, in accordance with applicable domestic law.

The States Parties shall establish and maintain official up-to-date registries of their detainees and, in accordance with their domestic law, shall make them available to relatives, judges, attorneys, any other person having a legitimate interest, and other authorities.”

Furthermore, Article 10 requires among other things that even in emergency situations,

“the competent judicial authorities shall have free and immediate access to all detention centers and to each of their units, and to all places where there is

Ecuador (1997), *op. cit.*, §90; *Berenson-Mejía v Peru* (2004), *op. cit.*, §103.

⁵³⁹ *Suárez-Rosero v Ecuador* (1997), *op. cit.*, §91. See also *De la Cruz Flores v Peru* (2004), *op. cit.*, §130; *Gómez-Paquiyaury Brothers v Peru* (2004), *op. cit.*, §108.

⁵⁴⁰ See, for example, *Garces Valladares v Ecuador*, IACommHR, Case 11778, Report No. 64/99, 13 April 1999; *Levoyer Jiménez v Ecuador*, IACommHR, Case 11992, Report No. 66/01, 14 June 2001.

⁵⁴¹ See the Situation of Human Rights in Uruguay, Annual Report of the Inter-American Commission on Human Rights 1983-1984, OEA/Ser.L/V/II/63, doc.10, 28 September 1984.

reason to believe the disappeared person might be found including places that are subject to military jurisdiction.”

Both the Court and the Commission consider unresolved enforced disappearances to constitute an ongoing violation of Article 5 of the ACHR, together with several other articles of the ACHR, in particular Articles 4 (the right to life), 7 (the right to personal liberty) and 8 (the right to a fair trial).⁵⁴² Enforced disappearances carried out by or with the tolerance of State agents frequently involve concealment of evidence, so if it has been proven that the State promotes or tolerates the practice, “*circumstantial or indirect evidence, or ... pertinent logical inference*” will suffice to prove that an enforced disappearance has occurred in a particular case.⁵⁴³ Similarly, where there is a systematic practice of ill-treatment and the State fails to investigate particular cases, the Court may infer that the disappeared experienced, at minimum, “*deep feelings of fear, anxiety and defenselessness in violation of Article 5.*”⁵⁴⁴

3.3.6 Relatives of victims of human rights violations

The Court frequently considers the suffering of relatives of victims at the reparations stage, after a violation has been found as regards the direct victim of ill-treatment.⁵⁴⁵ But the Court has gone further, showing an increasing willingness to consider the suffering of the direct victim’s relatives as coming within the scope of Article 5 of the ACHR. This tendency has been most apparent in cases involving enforced disappearances and extrajudicial killings perpetrated by State security forces. In *Gómez-Paquiayauri Brothers v Peru*, for example, the Court found that the “*suffering and powerlessness*” of the immediate next of kin of the murder victims vis-à-vis the State authorities amounted to cruel, inhuman and degrading treatment.⁵⁴⁶ This applies especially where the State

⁵⁴² See *Bamaca-Velásquez v Guatemala* (2000), *op. cit.*, §128; *Blake v Guatemala*, IACHR (Series C) No. 36, judgement of 24 January 1998, §65; *Godínez-Cruz v Honduras* (1989), *op. cit.*, §§163, 166; *Fairén-Garbi and Solís-Corrales v Honduras*, IACHR (Series C) No. 6, judgement of 15 March 1989, §147; *Velásquez-Rodríguez v Honduras* (1982), *op. cit.*, §§155, 158.

⁵⁴³ *Bamaca-Velásquez v Guatemala* (2000), *op. cit.*, §130. See also *Villagrán Morales and Others v Guatemala* (1999), *op. cit.*, §69; *Castillo Petruzzi and Others v Peru* (1999), *op. cit.*, §62; *Paniagua Morales and Others v Guatemala* (1998), *op. cit.*, §72; *Blake v Guatemala* (1998), *op. cit.*, §§47, 49; *Gangaram-Panday v Suriname*, IACHR (Series C) No. 16, judgement of 21 January 1994, §49; *Fairén-Garbi and Solís-Corrales v Honduras* (1989), *op. cit.*, §130–133; *Godínez-Cruz v Honduras* (1989), *op. cit.*, §§127, 130, 133–136; *Velásquez-Rodríguez v Honduras* (1982), *op. cit.*, §124, 127–130.

⁵⁴⁴ *La Cantuta v Peru* (2006), *op. cit.*, §113.

⁵⁴⁵ See, for example, *Suárez-Rosero v Ecuador* (1997), *op. cit.*, §102.

⁵⁴⁶ *Gómez-Paquiayauri Brothers v Peru* (2004), *op. cit.*, §118. See also *Sánchez v Honduras* (2003), *op. cit.*, §101; *Bamaca-Velásquez v Guatemala* (2000), *op. cit.*, §160; *Cantoral-Benavides v Peru* (2000), *op. cit.*, §105; *Villagrán Morales and Others v Guatemala* (1999), *op. cit.*, §§175–176;

fails adequately to investigate the violation, or refuses to supply the relatives with information on it.⁵⁴⁷

It is not clear how close the relationship must be with the primary victim for the Court to find a distinct violation. “[C]lose ties to the victims” must be demonstrated, so, in the past, parents have normally qualified.⁵⁴⁸ In *La Cantuta v Peru*, the Court found violations in regard of family members with whom the victims had lived prior to their deaths, or who had taken an active role in searching for them, but found that some siblings of the victims had not shown sufficient evidence of actual damage.⁵⁴⁹ Nonetheless, in *Moiwana Community v Suriname*, the Court found a violation in respect of the direct victims’ entire community.⁵⁵⁰ In that case, thirty-nine community members had been killed in a military operation, survivors had abandoned the village, and thus been unable to bury the dead according to their traditions, and the State had failed to conduct an investigation or punish those responsible. Given that this case was decided prior to *La Cantuta v Peru*, it seems likely that the extension of the group of indirect victims beyond the immediate family of the primary victims will apply only to similarly extensive violations.

3.3.7 Extradition and expulsion

Article 22(8) of the ACHR provides:

“In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.”

Article 13 of the IACPPT provides in part:

“Extradition shall not be granted nor shall the person sought be returned when there are grounds to believe that his life is in danger, that he will be subjected to torture or to cruel, inhuman or degrading treatment, or that he will be tried by special or ad hoc courts in the requesting State.”

Castillo-Páez v Peru, op. cit., §59; *Servellón-García v Honduras* (2006), op. cit., §§126–128; *Baldeón-García v Peru* (2006), op. cit., §129; *Goiburú and Others v Paraguay* (2006), op. cit., §102.

⁵⁴⁷ See, for example, *Vargas Areco v Paraguay* (2006), op. cit., §95; *La Cantuta v Peru* (2006), op. cit., §123; *Goiburú and Others v Paraguay* (2006), op. cit., §97; *Ituango Massacres v Colombia* (2006), op. cit., §340; *Gómez-Palomino v Peru*, IACHR (Series C) No. 136, judgement of 22 November 2005, §61.

⁵⁴⁸ *19 Tradesmen v Colombia* (2004), op. cit., §218.

⁵⁴⁹ *La Cantuta v Peru* (2006), op. cit., §128.

⁵⁵⁰ *Moiwana Community v Suriname* (2005), op. cit., §§94–100.

Neither the Court nor the Commission has specifically addressed these provisions in its jurisprudence. However, the Commission did consider the principle of *non-refoulement* in *The Haitian Centre for Human Rights and Others v United States*.⁵⁵¹ This case concerned the repatriation of Haitian citizens against their will by the United States. While the US has ratified neither the ACHR nor the IACPPT, the Commission nonetheless found that “*the United States Government’s act of interdicting Haitians on the high seas, placing them in vessels under their jurisdiction, returning them to Haiti, and leaving them exposed to acts of brutality by the Haitian military and its supporters constitute[d] a breach of the right to security of the Haitian refugees*” under Article I of the American Declaration of the Rights and Duties of Man.⁵⁵²

In its Report on the Situation of Human Rights of Asylum Seekers Within the Canadian Refugee Determination System, the Commission laid out some of the requirements which must be fulfilled before any expulsion is carried out.⁵⁵³ Once again, the Commission’s conclusions were based on the American Declaration Rights and Duties of Man, as Canada has also not ratified the ACHR and IACPPT. These requirements include access to judicial and administrative review of decisions, as well as a review of merits of individual cases and country situations, up to the point of removal.⁵⁵⁴

3.3.7.1 Diplomatic assurances

The Inter-American Court and Commission have not yet considered a case involving diplomatic assurances. However, in his separate opinion in *Goiburú and Others v Paraguay*, Judge Cañado Trindade favourably referred to a report of the European Parliament which considered “*unacceptable the practices of certain governments consisting in limiting their responsibilities by asking for diplomatic assurances from countries in respect of which there is strong reason to believe they practice torture*.”⁵⁵⁵ Given this opinion, and the willingness of the Court to take inspiration from other international instances, should a case involving diplomatic assurances come before it, it seems probable that, in similar circumstances, the Inter-American Court would adopt a similar position

⁵⁵¹ *Haitian Centre for Human Rights and Others v United States*, IACommHR, Case 10675, Report No. 51/96, 13 March 1997.

⁵⁵² *Ibid.* §171.

⁵⁵³ IACommHR, Report on the Situation of Human Rights of Asylum Seekers Within the Canadian Refugee Determination System, Inter-Am. C.H.R., OEA/Ser.L/V/II.106, Doc. 40 rev. (2000).

⁵⁵⁴ *Ibid.* §111-116.

⁵⁵⁵ *Goiburú and Others v Paraguay* (2006), *op. cit.*, §58, citing European Parliament, doc. A6-0213/2006, pp. 1–6, §10.

to the UN Committee against Torture, UN Human Rights Committee and European Court in this regard.

Conclusion

The Inter-American Court and Commission have arguably shown the greatest bravery of the international bodies, with a willingness to expand not only the definitions of torture and ill-treatment and the scope of State obligations, but also their own jurisdiction. Furthermore, the Court has ordered a wider range of reparations than its international and regional counterparts, considering not only the damage done to the direct and indirect victims of torture, but also the need for societies to remember what has been done in their name, through the erection of monuments, the naming of streets, and the introduction of items on school curricula. Given the recent history of a number of South American countries, such a wide-ranging approach is perhaps to be expected. However, this makes it no less welcome.

The African Regional System

4

Introduction	126
4.1 Definitions	126
4.2 State Parties' Obligations	129
4.3 Scope of Application	137
Conclusion	144

Introduction

The African system for the protection of human rights, like its Inter-American and, in the past, European, counterparts consists of a Commission and a Court. Unlike the other regional systems, provision for a Court is not made in the major regional human rights treaty itself, but rather in a Protocol thereto, which entered into force in January 2004. The Court's first sessions have been concerned with procedural issues, and at the time of writing it had yet to issue a judgement, so this chapter will be concerned exclusively with the work of the Commission, which will continue to function.

It should be noted from the outset that there is no enforcement mechanism for the Commission's decisions and recommendations, which have been widely ignored by States. As the Commission has noted, "*The main goal of the communications procedure before the Commission is to initiate a positive dialogue, resulting in an amicable resolution between the complainant and the state concerned, which remedies the prejudice complained of. A pre-requisite for amicably remedying violations of the Charter is the good faith of the parties concerned, including their willingness to participate in a dialogue.*"⁵⁵⁶ Unfortunately, such willingness on the part of States has been notably absent in a number of cases.

The African system is the youngest of the three regional systems, and some of the issues considered below have been examined in only a small number of cases. The African Commission has, however, made increasing reference to the jurisprudence of the other international and regional bodies, and it is to be hoped that it will continue in this vein of referring and contributing to a coherent system of international law.

4.1 Definitions

Article 5 of the African Charter on Human and Peoples' Rights (ACHPR) provides:

"Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."

Thus, unlike in other systems, torture and other forms of ill-treatment are listed as examples under a more general prohibition of exploitation and degra-

⁵⁵⁶ *Organisation Mondiale Contre La Torture and Others v Rwanda*, AfrCommHPR, Communication Nos. 27/1989, 46/1991, 49/1991, 99/1993, 20th session, 21–31 October 1996, §19.

dation. They appear in the same category as slavery, which is one of only a few practices treated as seriously as torture under international law. However, this difference in approach between the ACHPR and other international instruments arises largely from historical context, and has thus far had no perceptible effect on the nature and extent of the prohibition.

4.1.1 Dignity

As noted above, in the African system, the right not to be subjected to torture or other forms of ill-treatment is part of the positive right to have one's dignity respected. The Commission considers human dignity as an "*inherent basic right to which all human beings, regardless of their mental capabilities or disabilities as the case may be, are entitled to without discrimination.*"⁵⁵⁷ This right may be violated where the State exposes individuals to "*personal suffering and indignity,*"⁵⁵⁸ which can take many forms, and will depend on the particular circumstances of each case.⁵⁵⁹

4.1.2 Torture

The Commission has not sought to draw clear distinctions between failure to respect an individual's dignity, cruel, inhuman or degrading treatment,⁵⁶⁰ and torture. Some authors argue that the particular gravity of the violations of Article 5 that have been found by the Commission have made such distinctions unnecessary.⁵⁶¹ However, the Commission clearly considers torture to be an aggravated or particularly serious form of ill-treatment. In *International Pen and Others (on behalf of Ken Saro-Wiwa Jr.) v Nigeria*, it held that "*Article 5 prohibits not only torture, but also cruel, inhuman or degrading treatment. This includes not only actions which cause serious physical or psychological suffering, but which humiliate the individual or force him or her to act against his will or conscience.*"⁵⁶² While this statement is ambiguous, it does suggest that, as in

⁵⁵⁷ *Purohit and Moore v The Gambia*, AfrCommHPR, Communication No. 241/2001, 33rd session, 15–29 May 2003, §57.

⁵⁵⁸ *Modise v Botswana*, AfrCommHPR, Communication No. 97/1993, 28th session, 23 October 6 November 2000, §91.

⁵⁵⁹ *Purohit and Moore v The Gambia* (2003), *op. cit.*, §58. In that case, branding persons with mental illness as 'lunatics' or 'idiots' was found to "*dehumanise and deny them any form of dignity in contravention of Article 5 [ACHPR]*" (§59).

⁵⁶⁰ For the purposes of this chapter, 'treatment' should be read so as to include 'punishment.'

⁵⁶¹ See Evelyn A. Ankumah, *The African Commission on Human and Peoples' Rights: Practice and Procedures*, Martinus Nijhoff, The Hague, 1996, p. 118.

⁵⁶² *International Pen and Others (on behalf of Ken Saro-Wiwa Jr.) v Nigeria*, AfrCommHPR, Communication Nos. 137/1994, 139/1994, 154/1996 and 161/1997, 24th session, 22–31 October 1998, §79. See the Commission's statement in a later case that "*Article 5 of the Charter prohibits not only cruel but also inhuman and degrading treatment. This includes not only actions*

other systems, a finding of torture will require ‘serious’ suffering. Furthermore, such a finding will require evidence of specific instances of physical and mental abuse; allegations phrased in general terms will not suffice.⁵⁶³

Articles 60 and 61 of the ACHPR provide that, in interpreting the provisions of the Charter, the Commission is to draw inspiration from other sources of international law, including UN treaties and customary international law. Thus, the Commission has on occasion adopted the definition of torture contained in the UNCAT,⁵⁶⁴ and, in *Democratic Republic of Congo v Burundi, Rwanda and Uganda*, considered the provisions against torture contained in international humanitarian law.⁵⁶⁵

While the definition of torture has not yet been discussed in any depth by the Commission, its recent findings have been more rigorously substantiated than in the past. This development and the establishment of the African Court raise expectations that the definition of torture under the African Charter will be analysed in more depth in the future.

4.1.3 Cruel, inhuman or degrading punishment and treatment

In *Huri-Laws v Nigeria*, the African Commission adopted the reasoning of the European Court to find that, to qualify as cruel, inhuman or degrading, treatment must reach a ‘minimum level of severity,’ the assessment of which 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.⁵⁶⁶ However, once this minimum standard has been met, the concept of cruel, inhuman or degrading punishment or treatment should

which cause serious physical or psychological suffering, but which humiliate or force the individual against his will or conscience.’: Doebller v Sudan, AfrCommHPR, Communication No. 236/2000, 33rd session, 15–29 May 2003, §36. This statement may suggest that the gravity of the suffering will not be a deciding factor in distinguishing between torture and other forms of ill-treatment.

⁵⁶³ *Ouko v Kenya*, AfrCommHPR, Communication No. 232/1999, 28th session, 23 October 6 November 2000, §26.

⁵⁶⁴ See, for example, *Zimbabwe Human Rights NGO Forum v Zimbabwe*, AfrCommHPR, Communication No. 245/2002, 39th session, 11–15 May 2006, §180.

⁵⁶⁵ *Democratic Republic of Congo v Burundi, Rwanda and Uganda*, Communication No. 227/1999, 33rd session, 15–29 May 2003, §70.

⁵⁶⁶ *Huri-Laws v Nigeria*, AfrCommHPR, Communication No. 225/1998, 28th session, 23 October–6 November 2000, §41, quoting the ECHR case *Ireland v UK* (1978), *op. cit.*

be interpreted “so as to extend... the widest possible protection against abuses, whether physical or mental.”⁵⁶⁷

4.2 States Parties’ Obligations

The African Commission has made it clear that different means are at a State’s disposal in choosing how to provide effective protection of human rights.⁵⁶⁸ Nonetheless, some minimum requirements exist, and the Commission considers that “*It could well be assumed that for non-derogable human rights [including the right not to be subjected to torture] the positive obligations of States would go further than in other areas.*”⁵⁶⁹ This section will examine the nature of the States Parties’ positive obligation to ensure the right not to be subjected to torture and other cruel, inhuman or degrading treatment.

Many of these obligations are laid out in the Robben Island Guidelines, which were adopted by a resolution of the Commission.⁵⁷⁰ However, these guidelines, unlike the African Charter, are non-binding, and therefore offer only an interpretive aid to the Commission and Court, as well as political leverage to States and NGOs.

4.2.1 Duty to protect from ill-treatment by private actors

The ACHPR places a greater emphasis on the duties of individuals than do other international and regional human rights instruments, with Chapter II of the Charter (Articles 27–29) specifically enumerating such duties. The African Commission has held that “*Human dignity is... an inherent right which every human being is obliged to respect by all means possible and on the other hand it confers a duty on every human being to respect this right.*”⁵⁷¹ However, only States may be held liable for violations under the individual communications procedure, and State liability requires some link to the State machinery or an individual acting in an official capacity.

⁵⁶⁷ *Media Rights Agenda v Nigeria*, AfrCommHPR, Communication No. 224/1998, 28th session, 23 October–6 November 2000, §71. See also *Huri-Laws v Nigeria* (2000), *op. cit.*, §40; *Purohit and Moore v The Gambia* (2003), *op. cit.*, §58.

⁵⁶⁸ *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006), *op. cit.*, §155.

⁵⁶⁹ *Ibid.*

⁵⁷⁰ Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (“Robben Island Guidelines”), adopted by AfrCommHPR, Res.61(XXXII)02: Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (2002).

⁵⁷¹ *Purohit and Moore v The Gambia* (2003), *op. cit.*, §57.

In *Commission Nationale des Droits de l'Homme et des Libertés v Chad*, the Commission found that the requirement in Article 1 of the ACHPR that States Parties not only recognise the rights in the Charter, but also “undertake... measures to give effect to them” implies that “if a state neglects to ensure the rights in the African Charter, this can constitute a violation, even if the State or its agents are not the immediate cause of the violation.”⁵⁷² Thus, failure by the Chadian government to secure the safety of its citizens from non-State actors or to investigate violations by non-State actors led the Commission to find that the State had breached its duties under Article 5.⁵⁷³

The Commission reiterated the State obligation to protect individuals from ill-treatment by non-State actors in later cases,⁵⁷⁴ but it was not until *Zimbabwe Human Rights NGO Forum v Zimbabwe* that the extent of State responsibility for acts of non-State actors was discussed in detail.⁵⁷⁵ That case concerned, among other things, allegations of torture and extra-judicial executions by ZANU (PF) (the ruling political party) and the Zimbabwe Liberation War Veterans Association. Despite their close links to the government, the Commission found that these organisations and their members were non-State actors. In this context, the Commission once again noted the importance of Article 1 of the ACHPR, reiterating that the State may be held responsible only for impairments of rights which can be attributed to the action or omission of a public authority.⁵⁷⁶

The Commission, citing the jurisprudence of the Inter-American Court in particular,⁵⁷⁷ held that “human rights law imposes obligations on States to protect citizens or individuals under their jurisdiction from the harmful acts of others. Thus, an act by a private individual and therefore not directly imputable to a State can generate responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or for not taking the necessary

⁵⁷² *Commission Nationale des Droits de l'Homme et des Libertés v Chad*, AfrCommHPR, Communication No. 74/1992, 18th session, 2–11 October 1995, §20.

⁵⁷³ *Ibid.* §22.

⁵⁷⁴ See, for example, *Purohit and Moore v The Gambia* (2003), *op. cit.*, §61; *Mouvement Burkinabé des Droits de l'Homme et des Peuples v Burkina Faso*, AfrCommHPR, Communication No. 204/1997, 29th session, 23 April–7 May 2001, §42.

⁵⁷⁵ *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006), *op. cit.*

⁵⁷⁶ *Ibid.* §142.

⁵⁷⁷ The African Commission made extensive reference to the due diligence requirement elaborated by the Inter-American Court in *Velásquez-Rodríguez v Honduras* (1982), *op. cit.*: *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006), *op. cit.*, §144–146. It also made reference to the ECHR case *X and Y v the Netherlands* (1985), *op. cit.* (at §153) and UN treaties and mechanisms (at §159, footnote 50).

*steps to provide the victims with reparation.*⁵⁷⁸ However, the African Commission appears to interpret this standard more strictly than the international instances from which it drew inspiration. It explicitly stated that “[i]ndividual cases of policy failure or sporadic incidents of non-punishment would not meet the standard to warrant international action;” rather, it considered that a State can be held complicit only in case of systematic failure to provide protection against violations by private actors.⁵⁷⁹

In *Zimbabwe Human Rights NGO Forum v Zimbabwe*, the Commission found that, as the State had investigated allegations of torture brought to its attention, and the complainant had not adduced evidence to show that State organs were responsible for or had acquiesced in specific acts of violence, there was no violation of Articles 1 or 5 as regards violence perpetrated by non-State actors,⁵⁸⁰ although a violation of Article 1 was found on other grounds.

– Protocol on the Rights of Women

The Protocol to the ACHPR on the Rights of Women in Africa (Protocol on the Rights of Women) requires that States Parties protect women against all forms of violence, which it defines as “*all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life...*”⁵⁸¹ The level of State responsibility for ill-treatment by private actors is therefore greater under the Protocol than under the Charter as interpreted by the Commission in *Zimbabwe Human Rights NGO Forum v Zimbabwe*.

States Parties should include information on legislative and other measures taken to ensure protection of women, including women in detention, against violence in their reports to the African Commission.⁵⁸² The new African Court on Human and Peoples’ Rights has competence to interpret the Protocol.⁵⁸³

⁵⁷⁸ *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006), *op. cit.*, §143, footnote omitted.

⁵⁷⁹ *Ibid.* §§159–160.

⁵⁸⁰ *Ibid.* §§164, 183.

⁵⁸¹ Article 1(j) Protocol on the Rights of Women.

⁵⁸² Article 26 Protocol on the Rights of Women, read in conjunction with Articles 3, 4, 5 and 11.

⁵⁸³ Article 27 Protocol on the Rights of Women.

4.2.2 Duty to investigate

As part of measures to give effect to the rights in the Charter, States are under an obligation to investigate allegations of torture or ill-treatment.⁵⁸⁴ However, this duty to investigate has been interpreted more restrictively by the African Commission than by other regional bodies. In *Zimbabwe Human Rights NGO Forum v Zimbabwe*, the Commission indicated that an ineffective investigation will not automatically lead to a finding of a violation; it considers that “*just one investigation with an ineffective result does not establish a lack of due diligence by a State. Rather, the test is whether the State undertakes its duties seriously. Such seriousness can be evaluated through the actions of both State agencies and private actors on a case-by-case basis.*”⁵⁸⁵ Similarly, the Commission does not consider that the State is obliged to investigate every allegation, particularly where a number of violations have occurred; it “*suffices for the State to demonstrate that the measures taken were proportionate to deal with the situation.*”⁵⁸⁶ Nonetheless, where the State is aware of allegations of torture or ill-treatment and does not investigate at all, it seems that a violation will be found.⁵⁸⁷

For the purposes of cases before the Commission, the mere fact of investigation will not, however, suffice. The results of the investigation must be made public, or at least communicated to the Commission.⁵⁸⁸ Where allegations of abuses are not contested by the accused State, the Commission will treat the submissions of the complainant as facts.⁵⁸⁹

4.2.3 Duty to enact and enforce legislation criminalising torture

Article 1 of the ACHPR provides:

⁵⁸⁴ See, for example, *Commission Nationale des Droits de l'Homme et des Libertés v Chad* (1995), *op. cit.*, §22; *Amnesty International and Others v Sudan*, AfrCommHPR, Communication Nos. 48/1990, 50/1991, 52/1991, 89/1993, 26th session, 1–15 November 1999, §56; *Law Office of Ghazi Suleiman v Sudan*, AfrCommHPR, Communication Nos. 222/1998 and 229/1999, 33rd session, 15–29 May 2003, §46; *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006), *op. cit.*, §146

⁵⁸⁵ *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006), *op. cit.*, §158.

⁵⁸⁶ *Ibid.* §210.

⁵⁸⁷ *Ibid.* §186.

⁵⁸⁸ *Mouvement Burkinabé des Droits de l'Homme et des Peuples v Burkina Faso* (2001), *op. cit.*, §42.

⁵⁸⁹ *Ibid.* §42. See also, for example, *Free Legal Assistance Group and Others v Zaire*, AfrCommHPR, Communication Nos. 25/1989, 47/1990, 56/1991, 100/1993, 18th session, 2–11 October 1995, §40; *International Pen and Others (on behalf of Ken Saro-Wiwa Jr.) v Nigeria* (1998), *op. cit.*, §81; *Constitutional Rights Project and Civil Liberties Organisation v Nigeria*, AfrCommHPR, Communication Nos. 143/1995 and 150/1996, 26th session, 1–15 November 1999, §28.

“The Member States of the Organisation of African Unity, parties to the present Charter shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them.”

Read in conjunction with Article 5, this article creates a duty on States parties to criminalise torture and other ill-treatment. The African Commission has confirmed that State obligations under the ACHPR include a positive obligation to “*prosecute and punish private actors who commit abuses.*”⁵⁹⁰ However, the mere “*existence of a legal system criminalizing and providing sanctions for assault and violence would not in itself be sufficient; the Government would have to perform its functions to effectively ensure that such incidents of violence are actually investigated and punished.*”⁵⁹¹ The Commission has yet to comment on the importance of creating a specific criminal offence of ‘torture,’ as opposed to related offences of causing physical or psychological harm.

4.2.4 Duty to exclude statements obtained by torture or other ill-treatment

The African Commission has yet to consider the issue of exclusion of evidence in its jurisprudence. However, the Robben Island Guidelines advise States to “*Ensure that any statement obtained through the use of torture, cruel, inhuman or degrading treatment or punishment shall not be admissible as evidence in any proceedings except against persons accused of torture as evidence that the statement was made.*”⁵⁹² It therefore seems likely that the African Commission will take a similar line to other regional and international bodies in finding that States have a duty to exclude statements obtained by torture or ill-treatment.

4.2.5 Duty to train personnel and provide procedural safeguards

The ACHPR, like other regional and international human rights instruments, contains a number of procedural safeguards. Article 6 of the ACHPR provides:

“Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions

⁵⁹⁰ *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006), *op. cit.*, §159. See also *Amnesty International and Others v Sudan* (1999), *op. cit.*, §56; *Law Office of Ghazi Suleiman v Sudan* (2003), *op. cit.*, §45–46; *Mouvement Burkinabé des Droits de l’Homme et des Peuples v Burkina Faso* (2001), *op. cit.*, §42.

⁵⁹¹ *Ibid.* §159. Internal quotation omitted.

⁵⁹² Robben Island Guidelines, *op. cit.*, §29.

previously laid down by law. In particular, no one may be arbitrarily arrested or detained.”

This provision is given detail and effect by Article 7 of the ACHPR:

“1. Every individual shall have the right to have his cause heard. This comprises:

- a) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
- b) The right to be presumed innocent until proved guilty by a competent court or tribunal;
- c) The right to defence, including the right to be defended by counsel of his choice;
- d) The right to be tried within a reasonable time by an impartial court or tribunal.

2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.”

The African Commission expounded further on the components of the right to a fair trial in its Resolution on the Right to Recourse and Fair Trial, which provides, among other things, that persons who are arrested must be informed promptly of any charges against them, that the accused should have adequate time to prepare a defence, the right to appeal, and that States should provide legal aid as needed.⁵⁹³ In *Rights International v Nigeria*, the African Commission emphasised that it considers this resolution to form part of the rights guaranteed under Article 7.⁵⁹⁴

Rights International v Nigeria was considered at the twenty-sixth session of the Commission, during which the Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa were adopted.⁵⁹⁵ These principles provide further detail on the essential requirements of a fair trial, with provisions that the trial be held in public, before an independent and impartial tribunal,

⁵⁹³ AfrCommHPR, Res.4(XI)92: Resolution on the Right to Recourse and Fair Trial (1992).

⁵⁹⁴ *Rights International v Nigeria*, AfrCommHPR, Communication No. 215/98, 26th session, 1–15 November 1999, §29.

⁵⁹⁵ AfrCommHPR, Res.41(XXVI)99: Resolution on the Right to Fair Trial and Legal Aid in Africa (1999).

and that the accused have access to trained and independent lawyers. Furthermore, the Principles explicitly recognise the right to *habeas corpus*,⁵⁹⁶ the right to be detained in a place recognised by law, the right of women detainees to special protection, and the need for independent inspections of places of detention to ensure the strict observance of all relevant standards. The Commission has explicitly taken these principles into account in subsequent decisions.⁵⁹⁷

The Principles are complemented by the Robben Island Guidelines, which provide a number of procedural and other safeguards, in particular for persons deprived of their liberty. These include the right to inform a relative of detention,⁵⁹⁸ the right to an independent medical examination,⁵⁹⁹ the right of access to a lawyer,⁶⁰⁰ and the keeping of comprehensive records of interrogations⁶⁰¹ and deprivation of liberty.⁶⁰² Furthermore, the guidelines provide that States should establish independent complaint mechanisms for persons deprived of their liberty,⁶⁰³ and establish, support and strengthen independent national institutions with the mandate to conduct visits to all places of detention.⁶⁰⁴ While these guidelines are not strictly binding on States in the manner of the ACHPR, they do aid interpretation of that instrument, and the African Commission encourages States to include measures taken to implement the Guidelines in their periodic reports.⁶⁰⁵

Thus, the African system provides in great detail for a comprehensive system of procedural guarantees. However, it should be noted that the Commission does on occasion interpret these restrictively. In *Purohit and Moore v The Gambia*, for example, the Commission found that the inability of persons institutionalised on mental health grounds to appeal their detention, while falling short of international standards, did not violate the provisions of Article 6 of

⁵⁹⁶ This right, along with a number of the other provisions of the Principles and Guidelines, had previously been affirmed by the Commission. See, for example, *Constitutional Rights Project and Civil Liberties Organisation v Nigeria* (1999), *op. cit.*, §20–34.

⁵⁹⁷ See, for example, *Zegveld and Ephrem v Eritrea*, AfrCommHPR, Communication No. 250/2002, 34th session, 6–20 November 2003, §56

⁵⁹⁸ The Robben Island Guidelines, *op. cit.*, §20(a).

⁵⁹⁹ *Ibid.* §20(b).

⁶⁰⁰ *Ibid.* §20(c).

⁶⁰¹ *Ibid.* §28.

⁶⁰² *Ibid.* §30.

⁶⁰³ *Ibid.* §40.

⁶⁰⁴ *Ibid.* §41.

⁶⁰⁵ AfrCommHPR, Res.61(XXXII)02: Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (2002), §5.

the ACHPR, as this provision “*was not intended to cater for situations where persons in need of medical assistance or help are institutionalised.*”⁶⁰⁶ This restrictive interpretation is in marked contrast to the international trend of expansion of the effective protection of all persons deprived of their liberty. As regards more ‘traditional’ categories of detainees, the Commission has recognised the importance of procedural guarantees, finding for example that “*states parties to the Charter cannot rely on the political situation existing within their territory or a large number of cases pending before the courts to justify excessive delay*” in bringing the accused before a judge.⁶⁰⁷

There is no jurisprudence of the African Commission specifically dealing with training of personnel, although the Robben Island Guidelines provide that States should “[d]evise, promote and support codes of conduct and ethics and develop training tools for law enforcement and security personnel, and other relevant officials in contact with persons deprived of their liberty such as lawyers and medical personnel.”⁶⁰⁸ The Commission has included training of various State officials on human rights issues in general in its programme of activities, but has not specifically stated that training against torture forms part of States’ obligations under the ACHPR.

4.2.6 Duty to grant redress and compensate victims

The Commission interprets States Parties’ undertakings under Article 1 of the ACHPR as requiring that effective and enforceable remedies be available to individuals in cases of violations. States are under an obligation to respect, protect and fulfil the human rights of all persons on their territory. As the Commission noted in *Zimbabwe Human Rights NGO Forum v Zimbabwe*, “*To fulfil the rights means that any person whose rights are violated would have an effective remedy as rights without remedies have little value.*”⁶⁰⁹ The Robben Island Guidelines indicate the extent of this obligation; it exists independently of whether a criminal prosecution has or can be brought, extends to victims and their dependents, and covers medical care, social and medical rehabilitation, compensation and support.⁶¹⁰

⁶⁰⁶ *Purohit and Moore v The Gambia* (2003), *op. cit.*, §68.

⁶⁰⁷ *Article 19 v Eritrea*, AfrCommHPR, Communication No. 275/2003, 41st session, 16–30 May 2007, §99.

⁶⁰⁸ The Robben Island Guidelines, *op. cit.*, §46.

⁶⁰⁹ *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006), *op. cit.*, §171.

⁶¹⁰ The Robben Island Guidelines, *op. cit.*, §50.

4.3 Scope of Application

The Commission's early decisions were characterised by a lack of detailed reasoning; often it would merely state whether or not a violation had occurred after a brief summary of the facts and applicable provisions. Determining the precise scope of application of the prohibition on torture and ill-treatment in the African system is therefore difficult. A number of recent cases have included deeper analysis, but uncertainty remains as to the scope of application applied by the Commission, and whether the decisions of the Commission will be approved by the Court when it begins consideration of the substance of the ACHPR.

4.3.1 The absolute nature of the prohibition of torture and other ill-treatment

In contrast to other international human rights treaties, the African Charter does not contain a derogation clause. The Commission has therefore held that limitations on the rights contained within the ACHPR cannot be justified by a situation of war, emergency or other special circumstances.⁶¹¹ Furthermore, the Commission is of the view that *“Even if it is assumed that the restriction placed by the Charter on the ability to derogate goes against international principles, there are certain rights such as... the right to freedom from torture and cruel, inhuman and degrading treatment, that cannot be derogated from for any reason, in whatever circumstances.”*⁶¹²

The Commission considers that, to be legitimate, any restriction on rights guaranteed under the ACHPR must aim to fulfil the condition in Article 27(2) that the rights *“be exercised with due regard to the rights of others, collective security, morality and common interest.”*⁶¹³ Any such limitation must be *“strictly proportionate with and absolutely necessary for the advantages which follow. Most important, a limitation may not erode a right such that the right itself becomes illusory.”*⁶¹⁴ Any domestic laws limiting rights must be in compliance with the

⁶¹¹ See, for example: *Constitutional Rights Project and Civil Liberties Organisation v Nigeria* (1999), *op. cit.*, §41; *Commission Nationale des Droits de l'Homme et des Libertés v Chad* (1995), *op. cit.*, §21; *Zegveld and Ephrem v Eritrea* (2003), *op. cit.*, §60; *Article 19 v Eritrea* (2007), *op. cit.*, §87, 108.

⁶¹² *Article 19 v Eritrea* (2007), *op. cit.*, §98.

⁶¹³ *Constitutional Rights Project and Civil Liberties Organisation v Nigeria* (1999), *op. cit.*, §41.

⁶¹⁴ *Ibid.* §42. See also *African Institute for Human Rights and Development (on behalf of Sierra Leonean refugees in Guinea) v Republic of Guinea*, AfrCommHPR, Communication No. 249/2002, 36th session, 23 November–7 December 2004, §71–72.

Charter,⁶¹⁵ and limited application of such laws will not constitute an excuse; “*To deny a fundamental right to a few is just as much a violation as denying it to many.*”⁶¹⁶ Given the absolute nature of the prohibition of torture and other ill-treatment, it is clear that any purported restriction of the rights under Article 5 of the ACHPR, or of the procedural guarantees necessary to ensure these rights, would be in violation of the Charter.

Amnesties for torture or other serious violations of human rights are contrary to the prevention of impunity and the victim’s right to an effective remedy, and are therefore absolutely prohibited in the African system.⁶¹⁷ Furthermore, as in other jurisdictions, a change of government will not extinguish responsibility for past abuses, including the duty to provide reparation.⁶¹⁸

4.3.2 Lawful sanctions

Article 5 of the ACHPR contains no explicit exceptions, but it is clear that the Commission considers that there are circumstances under which treatment which would otherwise be prohibited may be justified.

4.3.2.1 The death penalty

Article 4 of the ACHPR reads:

“Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.”

While no express reference is made to the death penalty, it is clear that the Commission does not consider its application following a fair trial to violate Article 4,⁶¹⁹ although in case of procedural irregularities, imposition of the

⁶¹⁵ See, for example: *Media Rights Agenda v Nigeria* (2000), *op. cit.*, §75; *Jawara v The Gambia*, AfrCommHPR, Communication Nos. 147/1995 and 149/1996, 27th session, 27 April–11 May 2000, §59; *Article 19 v Eritrea* (2007), *op. cit.*, §90–92; *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006), *op. cit.*, §190.

⁶¹⁶ *Constitutional Rights Project and Civil Liberties Organisation v Nigeria* (1999), *op. cit.*, §32. This is in sharp contrast to the Commission’s views as regards State responsibility for violations by private actors. See section 4.2.1, above.

⁶¹⁷ *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006), *op. cit.*, especially at §211, 215. The Commission made extensive reference to international and regional jurisprudence in reaching this conclusion. See also Robben Island Guidelines, *op. cit.*, §16.

⁶¹⁸ *Achutan (on behalf of Banda) and Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi*, AfrCommHPR, Communication Nos. 64/1992, 68/1992, and 78/1992, 18th session, 2–11 October 1995, §12.

⁶¹⁹ In 1999, the Commission adopted a resolution calling on States Parties to consider a moratorium on the death penalty, or to apply it only for the most serious crimes. It is therefore clear that the Commission does not consider the penalty in itself to violate either Article 4 or Article

sentence will be considered an arbitrary deprivation of the right to life in violation of this Article.⁶²⁰

The Commission was invited to consider the death penalty in the context of Article 5 in *Interights and Others (on behalf of Bosch) v Botswana*.⁶²¹ The complainant in that case argued that the “*cruel method of death by hanging [would expose her]... to unnecessary suffering, degradation and humiliation.*”⁶²² The Commission failed to address this issue in its findings, although it did dismiss the argument that imposition of the death penalty was disproportionate to the crime, and therefore constituted a violation of Article 5, “*noting that there is no rule of international law which prescribes the circumstances under which the death penalty may be imposed.*”⁶²³ The complainant further argued that failure to give reasonable notice of the date and time of execution amounted to cruel, inhuman and degrading treatment. The Commission explicitly declined to consider this issue in its findings, stating that the respondent State had not been given sufficient notice of the argument in order to respond. However, the Commission did note the need for a justice system to “*have a human face in matters of execution of death sentences,*” indicating that it is at least possible for circumstances surrounding the imposition of the death penalty to breach Article 5.⁶²⁴

4.3.2.2 Corporal punishment

In *Doebbler v Sudan*, the African Commission made it unequivocally clear that corporal punishment is strictly prohibited under Article 5 of the ACHPR, holding: “*There is no right for individuals, and particularly the government of a country to apply physical violence to individuals for offences. Such a right would be tantamount to sanctioning State sponsored torture under the Charter and contrary to the very nature of this human rights treaty.*”⁶²⁵ While the Commission has not yet considered a case of corporal punishment by a private actor, it is

5. AfrCommHPR, Res.42(XXVI)99: Resolution Urging the State to Envisage a Moratorium on Death Penalty (1999).

⁶²⁰ See, for example: *International Pen and Others (on behalf of Ken Saro-Wiwa Jr.) v Nigeria* (1998), *op. cit.*, §103; *Forum of Conscience v Sierra Leone*, AfrCommHPR, Communication No. 223/98, 28th session, 23 October–6 November 2000, §19.

⁶²¹ *Interights and Others (on behalf of Bosch) v Botswana*, AfrCommHPR, Communication No. 240/2001, 34th session, 6–20 November 2003.

⁶²² *Ibid.* §5.

⁶²³ *Ibid.* §31.

⁶²⁴ *Ibid.* §41.

⁶²⁵ *Doebbler v Sudan* (2003), *op. cit.*, §42. The Commission referred to the ECHR case *Tyler v UK* in its judgement: §38.

likely that the conditions outlined in section 4.2.1, above, would apply to a finding of State liability.

4.3.3 Conditions of detention

The African Commission, like other regional and international bodies, has found that conditions of detention may in themselves amount to cruel, inhuman or degrading treatment. Violations have been found as regards overcrowding,⁶²⁶ unhygienic conditions,⁶²⁷ insufficient or poor quality food,⁶²⁸ lack of access to medical care,⁶²⁹ deprivation of light,⁶³⁰ excessive light,⁶³¹ lack of fresh air,⁶³² and shackling within cells.⁶³³ The findings of the Commission in this regard are supplemented by the Kampala Declaration on Prison Conditions in Africa.⁶³⁴ The Commission has also made explicit reference to the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment in a number of its decisions, specifically to principles 1 and 6, which provide that detainees shall be treated in a humane manner, and not subjected to torture or other ill-treatment.⁶³⁵

4.3.4 Solitary confinement

The Commission has found solitary confinement to violate Article 5 of the ACHPR on a number of occasions.⁶³⁶ While in the existing jurisprudence, the

⁶²⁶ *Achutan (on behalf of Banda) and Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi* (1995), *op. cit.*, §7; *Malawi African Association and Others v Mauritania* (2000), *op. cit.*, §§116, 118.

⁶²⁷ *Huri-Laws v Nigeria* (2000), *op. cit.*, §§40–41; *Malawi African Association and Others v Mauritania* (2000), *op. cit.*, §§116, 118; *Media Rights Agenda v Nigeria* (2000), *op. cit.*, §§70–72.

⁶²⁸ *Civil Liberties Organisation v Nigeria*, AfrCommHPR, Communication No. 151/1996, 26th session, 1–15 November 1999, §27; *Achutan (on behalf of Banda) and Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi* (1995), *op. cit.*, §7; *Malawi African Association and Others v Mauritania* (2000), *op. cit.*, §§116, 118.

⁶²⁹ *Civil Liberties Organisation v Nigeria* (1999), *op. cit.*, §27; *Achutan (on behalf of Banda) and Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi* (1995), *op. cit.*, §7; *Malawi African Association and Others v Mauritania* (2000), *op. cit.*, §§116, 118.

⁶³⁰ *Civil Liberties Organisation v Nigeria* (1999), *op. cit.*, §27.

⁶³¹ *Ouko v Kenya* (2000), *op. cit.*, §22–23.

⁶³² *International Pen and Others (on behalf of Ken Saro-Wiwa Jr.) v Nigeria* (1998), *op. cit.*, §§80–81.

⁶³³ *Achutan (on behalf of Banda) and Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi* (1995), *op. cit.*, §7; *International Pen and Others (on behalf of Ken Saro-Wiwa Jr.) v Nigeria* (1998), *op. cit.*, §§80–81; *Media Rights Agenda v Nigeria* (2000), *op. cit.*, §§70–72.

⁶³⁴ Adopted by consensus at the Kampala Seminar on prison conditions in Africa, 21 September 1996, and appended to ECOSOC Resolution 1997/36, 21 July 2007.

⁶³⁵ See, for example, *Huri-Laws v Nigeria* (2000), *op. cit.*, §40; *Ouko v Kenya* (2000), *op. cit.*, §24–25.

⁶³⁶ See, for example, *Achutan (on behalf of Banda) and Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi* (1995), *op. cit.*, §7; *Malawi African Association and Others v Mau-*

solitary detention has always been accompanied by other violations of Article 5, the Commission considers that “[o]f itself, prolonged... solitary confinement could be held to be a form of cruel, inhuman or degrading punishment and treatment.”⁶³⁷ However, it is not clear how long the solitary confinement must be to qualify as prolonged.

4.3.5 Incommunicado detention and enforced disappearances

Like its international and regional counterparts, the African Commission considers that incommunicado detention both creates a situation where torture or ill-treatment are likely to occur and, at least where prolonged, itself constitutes cruel, inhuman or degrading treatment.

The Commission stated its view unambiguously in *Zegveld and Ephrem v Eritrea*: “Incommunicado detention is a gross human rights violation that can lead to other violations such as torture or ill-treatment or interrogation without due process safeguards. Of itself, prolonged incommunicado detention and/or solitary confinement could be held to be a form of cruel, inhuman or degrading punishment and treatment. The African Commission is of the view that all detentions must be subject to basic human rights standards. There should be no secret detentions and States must disclose the fact that someone is being detained as well as the place of detention. Furthermore, every detained person must have prompt access to a lawyer and to their families.”⁶³⁸ However, the Commission found no violation of Article 5 in that case despite the fact that the eleven political dissidents in question had been held incommunicado for two years. In the later case *Article 19 v Eritrea*, which concerned journalists detained at the same time as these dissidents, the Commission found that “Eritrea has violated Article 5, by holding the journalists and political dissidents incommunicado without allowing them access to their families.”⁶³⁹ The Commission did not refer in that case to its failure explicitly to find an violation of Article 5 in the previous case, so it is unclear whether this was a mere oversight, or whether it considers the definition of ‘prolonged’ to fall somewhere between two and six years.

In addition to the potential violation of Article 5, the Commission considers that denying a detainee access to a lawyer violates Article 7(1)(c) of the

ritania (2000), *op. cit.*, §115; *Media Rights Agenda v Nigeria* (2000), *op. cit.*, §70.

⁶³⁷ *Zegveld and Ephrem v Eritrea* (2003), *op. cit.*, §55.

⁶³⁸ *Ibid.* See also *Amnesty International and Others v Sudan* (1999), *op. cit.*, §54; *Huri-Laws v Nigeria* (2000), *op. cit.*, §§40–41; *Law Office of Ghazi Suleiman v Sudan* (2003), *op. cit.*, §44.

⁶³⁹ *Article 19 v Eritrea* (2007), *op. cit.*, §102.

ACHPR, which provides for the right to defence, and preventing a detainee from seeing his or her family is in violation of Article 18 of the ACHPR, which provides for the rights of the family.

In *Mouvement Burkinabé des Droits de l'Homme et des Peuples v Burkina Faso*, the Commission made it clear that enforced disappearances violate Articles 5 and 6 of the ACHPR.⁶⁴⁰ To support this conclusion, the Commission made explicit reference to the Declaration on the Protection of all Persons against Forced Disappearances.⁶⁴¹

4.3.6 Relatives of victims of human rights violations

As regards incommunicado detention, the Commission has stated that “[b]eing deprived of the right to see one’s family is a psychological trauma difficult to justify, and may constitute inhuman treatment.”⁶⁴² It is therefore unsurprising that the Commission has stated that families of victims of enforced disappearances or incommunicado detention are themselves victims of a violation of Article 5,⁶⁴³ as well as of Article 18, which provides for the rights of the family.⁶⁴⁴

It is possible that this victim status may in the future be extended beyond family members to include the wider community. The Robben Island Guidelines specifically provide that “*there should... be a recognition that families and communities which have... been affected by the torture and ill-treatment received by one of its members can also be considered as victims.*”⁶⁴⁵

4.3.7 Extradition and expulsion

While the Commission has yet to explicitly state that Article 5 includes a prohibition on expulsions to a country where an individual may face torture, its case law on this issue, read in conjunction with general principles of State responsibility, suggests that such a prohibition does exist. In particular, the Commission has made it clear that due process guarantees must be strictly

⁶⁴⁰ *Mouvement Burkinabé des Droits de l'Homme et des Peuples v Burkina Faso* (2001), *op. cit.*, §44.

⁶⁴¹ *Ibid.*

⁶⁴² *Civil Liberties Organisation v Nigeria* (1999), *op. cit.*, §27.

⁶⁴³ See, for example: *Amnesty International and Others v Sudan* (1999), *op. cit.*, §54; *Law Office of Ghazi Suleiman v Sudan* (2003), *op. cit.*, §44. The Commission has cited the views of the Human Rights Committee in this respect. See *Article 19 v Eritrea* (2007), *op. cit.*, §101.

⁶⁴⁴ *Article 19 v Eritrea* (2007), *op. cit.*, §103.

⁶⁴⁵ Robben Island Guidelines, *op. cit.*, §50.

applied before asylum seekers may be removed.⁶⁴⁶ This is in conformity with Article 12 of ACHPR, which provides in part:

“3. Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions.

4. A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law.”

The principle of non-refoulement is also included in Article 2(3) of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, which provides:

“No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2.”

Furthermore, the Robben Island Guidelines specifically provide that “States should ensure no one is expelled or extradited to a country where he or she is at risk of being subjected to torture”⁶⁴⁷ Thus, it would seem that the right to non-refoulement can be read into the African Charter.

In contrast with the other international bodies, most of the cases of expulsion which have come before the Commission have concerned mass expulsions. Article 12(5) of the ACHPR provides:

“The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.”

As the Commission has noted, “Clearly, the drafters of the Charter believed that mass expulsion presented a special threat to human rights.”⁶⁴⁸

It appears from the reasoning in *Modise v Botswana* that this protection will also apply to forced internal displacement. In this unusual case, the Botswana government had revoked the complainant’s nationality and repeatedly

⁶⁴⁶ *Organisation Mondiale Contre La Torture and Others v Rwanda* (1996), *op. cit.*, §34; *Rencontre Africaine pour la Defense des Droits de l’Homme v Zambia*, AfrCommHPR, Communication No. 71/1992, 20th session, 21–31 October 1996, §31; *Union Inter Africaine des Droits de l’Homme, Federation Internationale des Liges des Droits de l’Homme and Others v Angola*, AfrCommHPR, Communication No. 159/1996, 22nd session, 2–11 November 1997, §20.

⁶⁴⁷ *Robben Island Guidelines*, *op. cit.*, §15.

⁶⁴⁸ *Rencontre Africaine pour la Defense des Droits de l’Homme v Zambia* (1996), *op. cit.*, §20.

deported him. He was forced to live in the ‘homeland’ of Bophuthatswana for eight years, and then in a specially created ‘no man’s land’ between this homeland and Botswana for a further seven years. The Commission found that “*Not only did this expose him to personal suffering, it deprived him of his family, and it deprived his family of his support. Such inhuman and degrading treatment offends the dignity of a human being and thus violates Article 5.*”⁶⁴⁹ This reasoning would clearly apply equally to a case of purely internal forced displacement.

Conclusion

The African Commission’s decisions as to the definition of the prohibited acts, and the scope of the prohibition have been more restrictive than its international and regional counterparts. However, this is in part due to the nature of the body. With no mechanism for enforcing its decisions and recommendations, it relies in a large part on the good faith of States, and therefore is perhaps obliged to take a more pragmatic approach. It is nonetheless to be hoped that the newly-established Court, which has the power to make binding judgements, will proceed with more consistency, bravery, and regard to international standards than has been the case with the Commission.

International Tribunals

Introduction	146
5.1 Definitions	146
5.2 Scope of Application	169
5.3 The International Criminal Court	174
Conclusion	176

5

Introduction

As was discussed above, the prohibition of torture is embodied in several international human rights instruments, notably the International Covenant on Civil and Political Rights, the Convention against Torture, the European Convention on Human Rights and Fundamental Freedoms, the American Convention on Human Rights, and the African Charter on Human and Peoples' Rights. These instruments share one important characteristic; they are concerned with the right to be free from torture as a human right to be guaranteed by the State and, accordingly, deal with *State* responsibility. The Statutes of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda take a different approach. Under these instruments, torture is considered a crime for which *individuals* are responsible.

This difference in perspective does not impede these bodies from taking inspiration from one another as regards both the definition of torture and the scope of application of its prohibition. Thus, the purpose of this chapter is to analyse the definition of torture, as a war crime and as a crime against humanity, given by the International Criminal Tribunals. As the Tribunals often define the crime of torture by contrasting it with the other offences of ill-treatment contained in the Statutes or developed in the case law, the definition of these offences will also be analysed. The crime of torture is considered so serious in international law that it need not be embodied in a Statute to be prohibited, so the customary nature of the prohibition will also be considered. Finally, the relevant provisions of the Rome Statute of the International Criminal Court (ICC) will be examined.

This chapter has a slightly different structure from chapters 1 to 4. As the International Criminal Tribunals deal with individual and not State responsibility for the crime of torture and other offences of ill-treatment, the duties of the State will not be examined in detail. Nonetheless, it is important to note that the Tribunals do occasionally refer to the extent of State responsibility. The Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia has held that “*States are obliged not only to prohibit and punish torture, but also to forestall its occurrence... Consequently, States are bound to put in place all those measures that may pre-empt the perpetration of torture. It follows that international rules prohibit not only torture, but (i) the failure to adopt the national measures necessary for implementing the prohibition and (ii) the maintenance in force or passage of laws which are contrary to the prohibition.*”⁶⁵⁰ Furthermore, it

⁶⁵⁰ *Prosecutor v Furundžija* (1998), *op. cit.*, §148.

has stated that “*the prohibition of torture imposes obligations... owed towards all the other members of the international community [which] give rise to a claim for compliance to each and every member.*”⁶⁵¹ Such statements serve to strengthen the moral force behind State obligations, but they are not in themselves binding on States and therefore will not be considered in detail.

5.1 Definitions

Under the Statutes of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda, the crime of torture is considered both as a war crime and as a crime against humanity.

As regards war crimes, both Statutes rely heavily on the 1949 Geneva Conventions, but they do not cover exactly the same crimes. This difference is due to the difference between the conflicts themselves; the conflicts in the former Yugoslavia were both international and internal, whereas the conflict in Rwanda was wholly internal. Therefore, the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) gives the Tribunal jurisdiction over grave breaches of the Geneva Conventions of 1949⁶⁵² and other violations of the laws or customs of war.⁶⁵³ On the other hand, the Statute of the International Criminal Tribunal for Rwanda (ICTR) covers violations of Article 3 common to the Geneva Conventions and Additional Protocol II of 1977, both of which apply to internal armed conflict.⁶⁵⁴ The Statutes of the Tribunals thus took into account the particularities of the situations they were created to address. In any case, the qualification of a crime as a ‘war crime’ ultimately depends on the existence of an armed conflict.

The Statutes also differ as regards crimes against humanity. The definition in the ICTR Statute is the most widely accepted, and corresponds to the definition under customary international law. It provides that the Tribunal shall have the power to prosecute persons responsible for the crimes of murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution and

⁶⁵¹ *Ibid.* §151. Such obligations are known as obligations erga omnes.

⁶⁵² Article 2 ICTY Statute. Article 2(b) specifically provides that “*torture or inhuman treatment, including biological experiments*” is a crime falling within the jurisdiction of the Tribunal when perpetrated “*against persons or property protected under the provisions of the relevant Geneva Convention.*”

⁶⁵³ Article 3 ICTY Statute.

⁶⁵⁴ Article 4 ICTR Statute. Article 4(a) provides that torture, which is listed as an example of “*cruel treatment,*” constitutes a “*serious violation of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977.*”

other inhumane acts “when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.”⁶⁵⁵ The ICTY Statute departed from customary international law by requiring that the crimes be “committed in armed conflict, whether international or internal in character” rather than as part of a widespread or systematic attack.⁶⁵⁶ This requirement may appear to restrict the scope of application, but in fact it has had no practical consequence, as all crimes over which the Tribunal has jurisdiction were in any case committed during an armed conflict. Furthermore, in *Prosecutor v Tadić*, the Chamber abandoned the armed conflict requirement altogether, holding that “the armed conflict requirement is a jurisdictional element, not ‘a substantive element of the mens rea of crimes against humanity’.”⁶⁵⁷ The ICTY Statute further differs from that of the ICTR by omitting the requirement that the criminal acts have a national, political, ethnic, racial or religious motivation.⁶⁵⁸

It must be emphasised from the outset that this “double qualification” of the crime of torture has little consequence as regards the definition of torture. As Trial Chamber II of the ICTY unequivocally specified, “[t]he definition of the offence of torture is the same regardless of the Article under which the acts of the Accused have been charged.”⁶⁵⁹

⁶⁵⁵ Article 3 ICTR Statute.

⁶⁵⁶ Article 5 ICTY Statute.

⁶⁵⁷ *Prosecutor v Tadić*, Case No. IT-94-1-T, ICTY Appeals Chamber, judgement of 15 July 1999, §249. In its earlier ruling on a Defence Motion in the same case, the ICTY Chamber had held that “[i]t is now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict,” *Prosecutor v Tadić*, Case No. IT-94-I-AR72, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 20 October 1995, §141.

⁶⁵⁸ Having compared the provisions of Article 3 of the ICTR Statute with Article 5 of the ICTY Statute, the ICTR Trial Chamber in *Prosecutor v Musema* held that “although the provisions of both aforementioned Articles pertain to crimes against humanity, except for the offence of persecution, there is a material and substantive difference in the respective elements of the offences, that constitute crimes against humanity. The difference stems from the fact that Article 3 of the ICTR Statute expressly requires ‘national, political, ethnic, racial or religious’ discriminatory grounds with respect to the offences of murder, extermination, deportation, imprisonment, torture, rape, and other inhuman acts, whereas Article 5 of the ICTY Statute does not stipulate any discriminatory grounds with respect to these offences.” *Prosecutor v Musema*, Case No. ICTR-96-13-A, ICTR Trial Chamber I, judgement of 27 January 2000, §211.

⁶⁵⁹ *Prosecutor v Krnojelac*, Case No. IT-97-25-T, ICTY Trial Chamber II, judgement of 15 March 2002, §178. See also *Prosecutor v Kvočka and Others*, Case No. IT-98-30/1, ICTY Trial Chamber I, judgement of 2 November 2001, §158, *Prosecutor v Simić, Tadić and Zarić*, Case No. IT-95-9, ICTY Trial Chamber II, judgement of 17 October 2003, §79. In *Prosecutor v Naletilić and Martinović*, the ICTY Trial Chamber noted the overlap between the two crimes of torture: “[i]n the Čelebići Trial Judgment, torture was considered as both a grave breach of the Geneva Conventions and a violation of the laws and customs of war, [i]n the Furundžija Trial Judgment it was considered as a violation of the laws and customs of war, [i]n the Kunarac Trial Judgment

Neither Statute provides a specific definition of torture or other forms of ill-treatment, so definitions have been elaborated through the jurisprudence of the Tribunals, which have taken inspiration from other international instruments and bodies. In particular, the Tribunals have referred to the UNCAT definition⁶⁶⁰ and the jurisprudence of the Committee against Torture,⁶⁶¹ the Human Rights Committee,⁶⁶² the European Court of Human Rights,⁶⁶³ and the Inter-American Court and Commission.⁶⁶⁴ Analysis of the Tribunals' jurisprudence reveals the main elements of their definition of torture; a purposive element, the intentional infliction of severe pain or suffering, and, in the case of the ICTR, perhaps also an official capacity requirement.

5.1.1 The purpose requirement

Both the ICTR and the ICTY have imported the purpose requirement of the definition of torture given in Article 1 of the UNCAT, which was discussed in detail in chapter 1.

– ICTR

In *Prosecutor v Akayesu*, Trial Chamber I of the ICTR explicitly adopted the UNCAT definition of torture, and accordingly held that, to qualify as torture, the infliction of pain or suffering must be for one of the following purposes:

- “(a) to obtain information or a confession from the victim or a third person;
- (b) to punish the victim or a third person for an act committed or suspected of having been committed by either of them;
- (c) for the purpose of intimidating or coercing the victim or the third person;
- (d) for any reason based on discrimination of any kind.”⁶⁶⁵

it was considered as crime against humanity and violation of the laws and customs of war and in the Kvočka Trial Judgment it was considered as crime against humanity and violation of the laws and customs of war.” *Prosecutor v Naletilić and Martinović*, Case No. IT-98-34-T, ICTY Trial Chamber, judgement of 31 March 2003, §336.

⁶⁶⁰ See *Prosecutor v Furundžija* (1998), *op. cit.*, §§159–163; *Prosecutor v Kunarac, Kovač and Vuković*, Case Nos. IT-96-23 and IT-96-23/1, ICTY Trial Chamber II, judgement of 22 February 2001, §§142, 146.

⁶⁶¹ See *Prosecutor v Furundžija* (1998), *op. cit.*, §163.

⁶⁶² See *Prosecutor v Delalić and Others (the Čelebići case)* (1998), *op. cit.*, §461; *Prosecutor v Kunarac, Kovač and Vuković* (2001), *op. cit.*, §§480–481; *Prosecutor v Kvočka and Others* (2001), *op. cit.*, §146.

⁶⁶³ See *Prosecutor v Delalić and Others (the Čelebići case)* (1998), *op. cit.*, §462–466, 487–489; *Prosecutor v Kunarac, Kovač and Vuković* (2001), *op. cit.*, §§478–479; *Prosecutor v Kvočka and Others* (2001), *op. cit.*, §150; *Prosecutor v Krnojelac* (2002), *op. cit.*, §181.

⁶⁶⁴ See *Prosecutor v Delalić and Others (the Čelebići case)* (1998), *op. cit.*, §§481–486.

⁶⁶⁵ *Prosecutor v Akayesu* (1998), *op. cit.*, §§593–594.

However, the ICTR does not consider this list to be exhaustive. In *Prosecutor v Akayesu*, the Chamber examined rape under the offence of torture, holding: “[l]ike torture rape is 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 investigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”⁶⁶⁶ Thus, degradation, humiliation and control or destruction of a person also come within the prohibited purposes for the offence of torture under the jurisdiction of the ICTR. Furthermore, in *Prosecutor v Musema*, the Trial Chamber quoted the definition in Article 1 of the UNCAT in its entirety. The phrase “for such purposes as” within this definition makes it clear that the list of purposes given in UNCAT is not exhaustive.⁶⁶⁷

– ICTY

The Appeals Chamber of the ICTY has found that the definition of torture contained in Article 1 of the UNCAT represents customary international law.⁶⁶⁸ Furthermore, in *Prosecutor v Kronjelic*, Trial Chamber II emphasised that the purpose requirement is one of the elements that “sets torture apart from other forms of mistreatment. Torture as a criminal offence is not a gratuitous act of violence; it aims, through the infliction of severe mental or physical pain, to attain a certain result or purpose. Thus, in the absence of such purpose or goal, even very severe infliction of pain would not qualify as torture pursuant to Article 3 or Article 5 of the Tribunal’s Statute.”⁶⁶⁹ However, while such a purpose must be present, it “must simply be part of the motivation behind the conduct and need not be the predominating or sole purpose.”⁶⁷⁰

Some acts may automatically fulfil the purpose requirement, particularly where a public official is involved. The ICTY Trial Chamber in *Delalić and*

⁶⁶⁶ *Ibid.* §597.

⁶⁶⁷ *Prosecutor v Musema* (2000), *op. cit.*, §285. See also section 1.1.2.2.

⁶⁶⁸ *Prosecutor v Furundžija*, Case No. IT-95-17/1, Appeals Chamber, judgement of 21 July 2000, §111; *Prosecutor v Kunarac, Kovač and Vuković*, Case Nos. IT-96-23 and IT-96-23/1, Appeals Chamber, judgement of 12 June 2002, §146; *Prosecutor v Brđanin*, Case No. IT-99-36, Appeals Chamber, judgement of 3 April 2007, §246.

⁶⁶⁹ *Prosecutor v Kronjelic*, *op. cit.*, §180. See also *Prosecutor v Brđanin*, Case No. IT-99-36, Trial Chamber II, judgement of 1 September 2004, §486; *Prosecutor v Delalić and Others (the Čelebići case)* (1998), *op. cit.*, §442.

⁶⁷⁰ *Prosecutor v Delalić and Others (the Čelebići case)* (1998), *ibid.* §470. See also *Prosecutor v Kvočka and Others* (2001), *op. cit.*, §140; *Prosecutor v Simić, Tadić and Zarić* (2003), *op. cit.*, §81; *Prosecutor v Brđanin* (2004), *ibid.* §487.

*Others held that “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 an official, could be considered as occurring 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.”*⁶⁷¹

While Article 1 of the UNCAT explicitly gives an illustrative list of prohibited purposes under international human rights law, it is unclear from the jurisprudence whether the ICTY considers the list to be exhaustive as regards the crime of torture under customary international humanitarian law. In *Prosecutor v Delalić and Others*, Trial Chamber II explicitly stated that “*The use of the words ‘for such purposes’ in the customary definition of torture [in Article 1 of the UNCAT], indicate that the various listed purposes do not constitute an exhaustive list, and should be regarded as merely representative.*”⁶⁷² However, in the later case *Prosecutor v Kunarac, Kovać and Vuković*, the same Chamber took the view that, to qualify as torture under customary international law, an act or omission “*must aim at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person,*”⁶⁷³ with no other purpose qualifying. The Appeals Chamber in *Kunarac* did not specifically address the issue of purpose, although it did note the Trial Chamber’s failure to take into account the Appeals Chamber judgement in *Prosecutor v Furundžija*. In that case, the list of purposes had been extended to include humiliation of the victim or a third person.⁶⁷⁴ As the reasoning behind judgements of the Appeals Chamber is binding on the Trial Chambers,⁶⁷⁵ it would seem that the list of prohibited purposes is not exhaustive, although other purposes may need to be closely related to those which are explicitly prohibited.⁶⁷⁶ In any case, a more recent judgement of Trial Chamber II held that “[t]he prohibited purposes... do not constitute an exhaustive list.”⁶⁷⁷

⁶⁷¹ *Prosecutor v Delalić and Others (the Čelebići case)* (1998), *ibid.* §495.

⁶⁷² *Prosecutor v Delalić and Others (the Čelebići case)* (1998), *ibid.* §470. See also *Prosecutor v Brđanin* (2004), *op. cit.*, §487.

⁶⁷³ *Prosecutor v Kunarac, Kovać and Vuković* (2001), *op. cit.*, §497; *Prosecutor v Delalić and Others (the Čelebići case)* (1998), *op. cit.*, §494; *Prosecutor v Furundžija* (2000), *op. cit.*, §111.

⁶⁷⁴ *Prosecutor v Furundžija* (2000), *ibid.* §111.

⁶⁷⁵ *Prosecutor v Aleksovski*, Case No. IT-95-14/1, Trial Chamber I, judgement of 25 June 1999, §113; *Prosecutor v Kunarac, Kovać and Vuković* (2002), *op. cit.*, §143.

⁶⁷⁶ *Prosecutor v Furundžija* (1998), *op. cit.*, §162.

⁶⁷⁷ *Prosecutor v Brđanin* (2004), *op. cit.*, §487.

Thus, the jurisprudence of the ICTY as a whole suggests that the list of purposes is not exhaustive. In any case, the fact that the explicitly prohibited purposes need not be the predominant or unique purposes ensures that the purpose requirement does not unduly restrict the ability of the International Criminal Tribunals to prosecute and punish individuals for the crime of torture.

5.1.2 Intentional infliction of severe pain or suffering

In *Prosecutor v Kunarac, Kovač and Vuković*, the Appeals Chamber of the ICTY reiterated the distinction between ‘intent’ and ‘motivation.’ The Chamber, discussing rape as a form of torture, held that “*even if the perpetrator’s motivation is entirely sexual, it does not follow that the perpetrator does not have the intent to commit an act of torture or that his conduct does not cause severe pain or suffering, whether physical or mental, since such pain or suffering is a likely and logical consequence of his conduct. In view of the definition, it is important to establish whether a perpetrator intended to act in a way which, in the normal course of events, would cause severe pain or suffering, whether physical or mental, to his victims.*”⁶⁷⁸ Thus, the notion of ‘intention’ applies to reasonably foreseeable consequences of the conduct of the perpetrator.

The crime of torture may be committed by a positive act or by omission, provided that “*the act or omission was intentional, that is an act which, judged objectively, is deliberate and not accidental.*”⁶⁷⁹ It has not yet been decided whether the related offence of aiding and abetting torture may also be committed by omission.⁶⁸⁰

Consistent with the definition in customary international law, the ICTY has held that “*the severity of the pain or suffering is a distinguishing characteristic of torture that sets it apart from similar offences.*”⁶⁸¹ However, the level of pain and suffering required to meet this threshold of severity is not clearly defined, nor can it be determined by listing past findings of the Tribunals. The ICTY Trial Chamber in *Prosecutor v Delalić and Others* agreed with Sir Nigel Rodley, a former UN Special Rapporteur on Torture, that “*a juridical definition cannot depend upon a catalogue of horrific practices; for it to do so would simply provide a challenge to the ingenuity of the torturers, not a viable legal prohibition.*”⁶⁸²

⁶⁷⁸ *Prosecutor v Kunarac, Kovač and Vuković* (2002), *op. cit.*, §153.

⁶⁷⁹ *Prosecutor v Delalić and Others (the Čelebići case)* (1998), *op. cit.*, §468.

⁶⁸⁰ The Appeals Chamber in *Prosecutor v Brđanin* declined to rule on this point: *Prosecutor v Brđanin* (2007), *op. cit.*, §274.

⁶⁸¹ *Prosecutor v Kvočka and Others* (2001), *op. cit.*, §142. See also *Prosecutor v Delalić and Others (the Čelebići case)* (1998), *op. cit.*, §468;

⁶⁸² *Prosecutor v Delalić and Others (the Čelebići case)* (1998), *ibid.* §469, quoting Sir Nigel Rodley, former UN Special Rapporteur on Torture. The ICTR has also followed this reasoning: see

Thus, the degree of pain or suffering required to meet the threshold for torture will be assessed on a case-by-case basis, taking into account all the specific circumstances of the case, including “[s]ubjective criteria, such as the physical or mental effect of the treatment upon the particular victim and, in some cases, factors such as the victim’s age, sex or state of health.”⁶⁸³ Other relevant factors may include “the premeditation and institutionalisation of the ill-treatment, the physical condition of the victim, the manner and method used, and the position of inferiority of the victim” or the length of time for which the treatment occurred.⁶⁸⁴

The infliction of physical pain is not necessary for the act to amount to torture. In *Prosecutor v Kvočka and Others*, the ICTY Trial Chamber expressly stated that “abuse amounting to torture need not necessarily involve physical injury, as mental harm is a prevalent form of inflicting torture. For instance, the mental suffering caused to an individual who is forced to watch severe mistreatment inflicted on a relative would rise to the level of gravity required under the crime of torture. Similarly, the *Furundžija* Trial Chamber found that being forced to watch serious sexual attacks inflicted on a female acquaintance was torture for the forced observer. The presence of onlookers, particularly family members, also inflicts severe mental harm amounting to torture on the person being raped.”⁶⁸⁵

5.1.3 The official capacity requirement

It should be noted from the outset that criminal responsibility for torture and other offences of ill-treatment does not apply only to the person who actually commits the prohibited acts. Article 7 of the ICTY Statute and Article 6 of the ICTR Statute share the following language:

“A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in... the present Statute, shall be individually responsible for the crime.”

Prosecutor v Kayishema and Ruzindana, ICTR Case No. ICTR-95-1-T, Trial Chamber, judgement of 21 May 1999, §149.

⁶⁸³ *Prosecutor v Kvočka and Others* (2001), *op. cit.*, §143. See also *Prosecutor v Brđanin* (2004), *op. cit.*, §484; *Prosecutor v Simić*, Case No. IT-95-9/2, Trial Chamber II, judgement of 17 October 2002, §34.

⁶⁸⁴ *Prosecutor v Krnojelac*, *op. cit.*, §182.

⁶⁸⁵ *Prosecutor v Kvočka and Others* (2001), *op. cit.*, §149. See also *Prosecutor v Naletilić and Martinović* (2003), *op. cit.*, §345–380, confirmed in the 2006 Appeals Chamber judgement in the same case at §§291–300; *Prosecutor v Furundžija* (2000), *op. cit.*, §114.

– ICTR

Once again, the majority of the jurisprudence on this issue is from the ICTY. As regards the ICTR, the leading case is *Prosecutor v Akayesu*. In that case, the Trial Chamber expressly listed among “*the essential elements of torture*” the requirement that “[t]he perpetrator was himself an official, or acted at the instigation of, or with the consent or acquiescence of, an official or person acting in an official capacity.”⁶⁸⁶ This position was reiterated in the 2000 *Prosecutor v Musema* judgement.⁶⁸⁷

– ICTY

The jurisprudence of the ICTY on the official capacity requirement was until recently contradictory on the question of whether the crime of torture required that the perpetrator act in an official capacity, or with the consent or acquiescence of an official. In *Prosecutor v Delalić and Others*, Trial Chamber II held that the official capacity requirement did apply, even if it could be interpreted broadly in the context of international humanitarian law to include “*officials of non-State parties to a conflict, in order for the prohibition to retain significance in situations of internal armed conflicts or international conflicts involving some non-State entities.*”⁶⁸⁸ In its 2000 decision in *Prosecutor v Furundžija*, the Appeals Chamber also stated that the official capacity requirement formed part of the definition of torture to be applied.⁶⁸⁹

Despite this statement by the Appeals Chamber, the Trial Chamber in *Prosecutor v Kunarac, Kovač and Vuković* found that “*the definition of torture under international humanitarian law does not comprise the same elements as the definition of torture generally applied under human rights law. In particular, the Trial Chamber is of the view that the presence of a state official or of any other authority-wielding person in the torture process is not necessary for the offence to be regarded as torture under international humanitarian law.*”⁶⁹⁰ The Trial Chamber took this position in a number of subsequent cases,⁶⁹¹ before the Appeals Chamber adopted the same line in its 2002 decision in *Prosecutor v Kunarac, Kovač and Vuković*. In that case, the Appeals Chamber specifically stated that the UNCAT

⁶⁸⁶ *Prosecutor v Akayesu* (1998), *op. cit.*, §594.

⁶⁸⁷ *Prosecutor v Musema* (2000), *op. cit.*, §285.

⁶⁸⁸ *Prosecutor v Delalić and Others (the Čelebići case)* (1998), *op. cit.*, §473.

⁶⁸⁹ *Prosecutor v Furundžija* (2000), *op. cit.*, §111.

⁶⁹⁰ *Prosecutor v Kunarac, Kovač and Vuković* (2001), *op. cit.*, §496.

⁶⁹¹ See *Prosecutor v Kvočka and Others* (2001), *op. cit.*, §139; *Prosecutor v Kunarac, Kovač and Vuković* (2002), *op. cit.*, §148; *Prosecutor v Brđanin* (2004), *op. cit.*, §488; *Prosecutor v Simić, Tadić and Zarić* (2003), *op. cit.*, §82.

was “addressed to States and sought to regulate their conduct, and it is only for that purpose and to that extent that the Torture Convention deals with the acts of individuals acting in an official capacity.”⁶⁹² The Appeals Chamber limited its previous finding in *Prosecutor v Furundžija*, in which it had apparently stated the opposite, to the facts of that case, explicitly stating that “a statement that the definition of torture in the Torture Convention reflects customary international law as far as the obligation of States is concerned, must be distinguished from an assertion that this definition wholly reflects customary international law regarding the meaning of the crime of torture generally.”⁶⁹³ Thus, for the ICTY at least, there is no ‘official capacity’ requirement regarding the crime of torture.

While the jurisprudence of the International Tribunals borrows heavily from the definition of torture given in UNCAT, it does not yield precisely the same definitions. This is mainly due to the difference in legal regimes: UNCAT forms part of international human rights law, whereas the Tribunals are mandated to address questions of international humanitarian and criminal law. Human rights law regulates the relationship between the State and individuals, defining the limits of State power, whereas humanitarian law aims to restrain the conduct of warfare so as to diminish its effect on the victims of hostilities. Thus, a link to the State must be proven in human rights law, but not where someone is held individually responsible for a breach of humanitarian law.⁶⁹⁴ Furthermore, this difference is now reflected in the Rome Statute of the International Criminal Court, which does not require that an individual act in an official capacity to be held criminally liable for torture.

5.1.4 The distinction between torture and other ill-treatment

The Statutes of the ICTR and ICTY list a series of ‘lesser’ crimes which bring other forms of ill-treatment within the scope of the Tribunals. The Tribunals consider that the distinction between torture and other offences of ill-treatment lies in the purpose of the act, and its gravity. The existence of a prohibited purpose will allow the Tribunals to qualify acts as ‘torture,’ but where such a purpose is lacking, the acts will fall under other categories of ill-treatment.

On the issue of cumulative convictions, i.e. being convicted of two distinct offences for the same conduct, the Appeals Chamber of the ICTY in *Prosecutor*

⁶⁹² *Prosecutor v Kunarac, Kovać and Vuković* (2002), *ibid.* §146.

⁶⁹³ *Ibid.* §147.

⁶⁹⁴ See *Prosecutor v Kunarac, Kovać and Vuković* (2001), *op. cit.*, §470.

v Delalić and Others held that “reasons of fairness to the accused and the consideration that only distinct crimes may justify multiple convictions, lead to the conclusion that multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other.”⁶⁹⁵ Thus, for example, the same conduct may be charged as both rape and torture, as the crime of rape includes an element of penetration which is absent in the definition of torture, and the crime of torture requires a purposive element which is absent in the definition of rape.⁶⁹⁶

In criminal law, crimes are defined as containing both a factual element related to the physical act, known as the *actus reus*, and a mental element related to the state of mind of the perpetrator, known as the *mens rea*. If either of these elements are lacking, the accused will be found not guilty. The inclusion of a mental element in this context can lead to a divergence between the application of the concept of cruel, inhuman or degrading treatment in human rights law, and its application in criminal law.

As with the crime of torture, criminal responsibility for the other offences of ill-treatment does not apply only to the person who actually commits the prohibited acts; Article 7 of the ICTY Statute and Article 6 of the ICTR Statute provide that persons involved in or aiding and abetting the planning, instigation, ordering or commission of the crimes are individually responsible for them.

5.1.4.1 Inhuman treatment

Inhuman treatment is a specific offence under Article 2(b) of the ICTY Statute, but it is not explicitly included in the ICTR Statute.

Article 2 of the ICTY Statute provides in part:

“The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention: ...

⁶⁹⁵ *Prosecutor v Delalić and Others (the Čelebići case)*, Case No. IT-96-21, Appeals Chamber, judgment of 20 February 2001, §412.

⁶⁹⁶ See, for example, *Prosecutor v Kunarac, Kovač and Vuković* (2002), *op. cit.*, §179.

(b) *torture or inhuman treatment, including biological experiments; ...*”

Inhuman treatment as a grave breach of the Geneva Conventions will only be prosecuted by the Tribunal if committed against persons protected under the provisions of those Conventions.⁶⁹⁷ Thus, its scope is narrower than that of torture, which is also included in the Statute as a crime against humanity.

The ICTY has defined inhuman treatment as “*an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental harm or physical suffering or injury or constitutes a serious attack on human dignity.*”⁶⁹⁸ The Tribunal has accepted the ICRC definition of the intention required for the offence of inhuman treatment; “*the perpetrator must have acted deliberately or deliberately omitted to act but deliberation alone is insufficient. While the perpetrator need not have had the specific intent to humiliate or degrade the victim, he must have been able to perceive this to be the foreseeable and reasonable consequence of his actions.*”⁶⁹⁹

All acts of torture constitute inhuman treatment,⁷⁰⁰ but inhuman treatment is a wider offence which also includes “*treatment which deliberately causes serious mental and physical suffering that falls short of the severe mental and physical suffering required for the offence of torture.*”⁷⁰¹ Thus, the distinction between torture and inhuman treatment is based on the severity of the suffering inflicted as well as the purpose for which it is inflicted. The concept of inhuman treatment also extends to “*acts which violate the basic principle of humane treatment, particularly the respect for human dignity.*”⁷⁰² The ICTY thus defines inhuman treatment in relation to its antonym; treatment which is not humane is necessarily inhuman.⁷⁰³ Whether any particular act is “*inconsistent with the principle of humane treatment, and thus constitutes inhuman(e) treatment*” will be determined based on all the circumstances of the case.⁷⁰⁴

⁶⁹⁷ See, for example, *Prosecutor v Kordić and Čerkez*, Case No. IT-95-14/2-T, ICTY Trial Chamber III, judgement of 26 February 2001, §256.

⁶⁹⁸ *Prosecutor v Delalić and Others (the Čelebići case)* (1998), *op. cit.*, §543. See also *Prosecutor v Kordić and Čerkez* (2001), *op. cit.*, §256; *Prosecutor v Kunarac, Kovač and Vuković* (2001), *op. cit.*, §502.

⁶⁹⁹ *Prosecutor v Aleksovski* (1999), *op. cit.*, §56.

⁷⁰⁰ *Prosecutor v Delalić and Others (the Čelebići case)* (1998), *op. cit.*, §442.

⁷⁰¹ *Ibid.* §542.

⁷⁰² *Ibid.* §442.

⁷⁰³ *Prosecutor v Kunarac, Kovač and Vuković* (2001), *op. cit.*, §497

⁷⁰⁴ *Ibid.* §518.

5.1.4.2 Cruel treatment

Cruel treatment does not explicitly appear as an offence in the Statute of the ICTY, but it is explicitly mentioned in the ICTR Statute.

– ICTR

Article 4 of the ICTR provides in part:

“The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:

(a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment...”

Thus, it is clear that torture, for the purposes of the ICTR, is an aggravated form of cruel treatment. However, the Tribunal has yet to specifically address the relation between the two offences, and the precise definition of cruel treatment.

– ICTY

Cruel treatment is not specifically mentioned as an offence in the ICTY Statute. Nonetheless, the ICTY considers that the offence of cruel treatment comes within the scope of Article 3 of the ICTY Statute, as a violation of the laws or customs of war.⁷⁰⁵ The characteristics of the offence of cruel treatment and that of inhuman treatment are identical.⁷⁰⁶ This is also true of their relation to the crime of torture: all torture qualifies as cruel treatment, but cruel treatment also includes acts which lack the severity or purposive element to qualify as torture.⁷⁰⁷

⁷⁰⁵ *Prosecutor v Delalić and Others (the Čelebići case)* (1998), *op. cit.*, §440. See also *Prosecutor v Blaškić*, Case No. IT-95-14, Trial Chamber I, judgement of 3 March 2000, §186; *Prosecutor v Strugar “Dubrovnik”*, Case No. IT-01-42, Trial Chamber II, judgement of 31 January 2005, §261; *Prosecutor v Orić*, Case No. IT-03-68, Trial Chamber II, 30 July 2006, §351; *Prosecutor v Simić, Tadić and Zarić* (2003), *op. cit.*, §78; *Prosecutor v Limaj and Others*, Case No. IT-03-66, Trial Chamber II, judgement of 30 November 2005, §653-658.

⁷⁰⁶ *Prosecutor v Delalić and Others (the Čelebići case)* (1998), *ibid.* §443; *Prosecutor v Simić*, Case No. IT-95-9/2, Trial Chamber II, judgement of 17 October 2002, §74; *Prosecutor v Krnojelac* (2002), *op. cit.*, §130; *Prosecutor v Orić*, *ibid.* §350.

⁷⁰⁷ See, for example, *Prosecutor v Simić, Tadić and Zarić* (2003), *op. cit.*, §71.

The sole distinguishing element between the offence of cruel treatment and the offence of inhuman treatment is the persons who are protected. An act may constitute cruel treatment under Article 3 of the ICTY Statute only where it is committed against a person not taking active part in hostilities.⁷⁰⁸ In contrast, acts may be defined as inhuman treatment when they are directed against any person protected under the relevant provisions of the Geneva Conventions.⁷⁰⁹

5.1.4.3 Outrages upon personal dignity

Like cruel treatment, the offence of outrages upon personal dignity does not explicitly appear as an offence in the Statute of the ICTY, but it is explicitly mentioned in the ICTR Statute.

– ICTR

Article 4 of the ICTR Statute gives the Tribunal jurisdiction over serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II to the Geneva Conventions. Article 4(e) specifically prohibits:

“Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault.”

The ICTR has yet to give a detailed analysis of the characteristics of this offence, although in *Prosecutor v Musema*, Trial Chamber I indicated that outrages upon personal dignity “*may be regarded as a lesser forms of torture; moreover ones in which the motives required for torture would not be required, nor would it be required that the acts be committed under state authority.*”⁷¹⁰ In the same case, humiliating and degrading treatment were defined as “*treatment designed to subvert... self-regard.*”⁷¹¹

⁷⁰⁸ See common Article 3 of the Geneva Conventions, which reads:

“(1) 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, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;...”

See also *Prosecutor v Tadić*, Case No. IT-94-1-T, Trial Chamber II, judgement of 7 May 1997, §723; *Prosecutor v Delalić and Others (the Čelebići case)* (1998), *op. cit.*, §546.

⁷⁰⁹ *Prosecutor v Delalić and Others (the Čelebići case)* (1998), *ibid.* §426. See also *Prosecutor v Naletilić and Martinović* (2003), *op. cit.*, §246.

⁷¹⁰ *Prosecutor v Musema* (2000), *op. cit.*, §285.

⁷¹¹ *Ibid.*

– ICTY

As noted above, the offence of outrages upon personal dignity does not explicitly appear in the ICTY, but is included by virtue of that Statute's reference to the Geneva Conventions. In *Prosecutor v Aleksovski*, Trial Chamber I relied on the jurisdictional decision in *Prosecutor v Tadić*⁷¹² to find that Article 3 of the ICTY Statute incorporates Article 3 common to the Geneva Conventions, and thus Article 3(1)(c), which prohibits outrages upon personal dignity, and, in particular, humiliating and degrading treatment.⁷¹³

In *Prosecutor v Aleksovski*, ICTY Trial Chamber I defined an outrage upon personal dignity as “*an act which is animated by contempt for the human dignity of another person. The corollary is that the act must cause serious humiliation or degradation to the victim. It is not necessary for the act to directly harm the physical or mental well-being of the victim. It is enough that the act causes real and lasting suffering to the individual arising from the humiliation or ridicule. The degree of suffering which the victim endures will obviously depend on his/her temperament.*”⁷¹⁴ However, the Chamber, in order to avoid “*unfairness to the accused [which] would result because his/her culpability would depend not on the gravity of the act but wholly on the sensitivity of the victim,*”⁷¹⁵ tempered these subjective criteria with an objective requirement that “*the humiliation to the victim must be so intense that the reasonable person would be outraged.*”⁷¹⁶

It is not necessary, however, that the humiliation be caused by a single act; “*the seriousness of an act and its consequences may arise either from the nature of the act per se or from the repetition of an act or from a combination of different acts which, taken individually, would not constitute a crime within the meaning of Article 3 of the Statute. The form, severity and duration of the violence, the intensity and duration of the physical or mental suffering, shall serve as a basis for assessing whether crimes were committed. In other words, the determination to be made on the allegations presented by the victims or expressed by the Prosecution largely rest with the analysis of the facts of the case.*”⁷¹⁷ Thus, repeated harassment may be as much an outrage upon personal dignity as a single more severely violent act.

⁷¹² See *Prosecutor v Tadić* (1995), *op. cit.*

⁷¹³ See *Prosecutor v Aleksovski* (1999), *op. cit.*, §48.

⁷¹⁴ *Ibid.* §56.

⁷¹⁵ *Ibid.*

⁷¹⁶ *Ibid.*

⁷¹⁷ *Ibid.* §57.

As for any crime, the factual result is not sufficient; the Tribunals must also determine whether the accused acted with the required intention or recklessness. In this respect, the ICTY Trial Chamber referred to the ICRC Commentary on the Geneva Conventions, holding that “*the accused must have committed the act with the intent to humiliate or ridicule the victim... the perpetrator must have acted deliberately or deliberately omitted to act but deliberation alone is insufficient. While the perpetrator need not have had the specific intent to humiliate or degrade the victim, he must have been able to perceive this to be the foreseeable and reasonable consequence of his actions.*”⁷¹⁸

5.1.4.4 Wilfully causing great suffering or serious injury to body or health
Article 2 of the ICTY Statute, which deals with breaches of the Geneva Conventions, provides in part:

*“The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention: ...
(c) wilfully causing great suffering or serious injury to body or health; ...”*

This offence is listed among the grave breaches of the Geneva Conventions of 1949 in Article 2(c) of the ICTY Statute, but it is not explicitly mentioned in the ICTR Statute. Like the offence of inhuman treatment, its scope of application is narrower than that of torture as, to fall under the Tribunal’s jurisdiction, it must be committed against persons protected under the Geneva Conventions.

The ICTY has defined wilfully causing great suffering or serious injury to body or health as “*an act or omission that is intentional, being an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury. It covers those acts that do not meet the purposive requirements for the offence of torture, although clearly all acts constituting torture could also fall within the ambit of this offence.*”⁷¹⁹ Thus, while the crime of torture has a purposive element (see section 5.1.1), the offence of wilfully causing great suffering “*could be inflicted for other motives such as punishment, revenge or out of sadism.*”⁷²⁰

⁷¹⁸ *Ibid.*

⁷¹⁹ *Prosecutor v Delalić and Others (the Čelebići case)* (1998), *op. cit.*, §511.

⁷²⁰ *Prosecutor v Naletilić and Martinović* (2003), *op. cit.*, §340.

This definition is similar to that of inhuman treatment (see section 5.1.4.1). In fact, ICTY Trial Chamber III in *Prosecutor v Kordić and Čerkez* stated that this crime “*is one of a group of crimes falling under the general heading of inhuman treatment.*”⁷²¹ The distinction between the crime of wilfully causing great suffering or serious injury to body and health and the crime of inhuman treatment is slight, and many acts fall within both definitions. However, the former crime “*is distinguished from that of inhuman treatment in that it requires a showing of serious mental or physical injury. Thus, acts where the resultant harm relates solely to an individual’s human dignity are not included within this offence.*”⁷²² So this offence ranks between torture and inhuman treatment on a scale of severity of the harm; “*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. However, this third category of offence is not limited to those acts already incorporated in the foregoing two, and extends further to acts which violate the basic principle of humane treatment, particularly the respect for human dignity.*”⁷²³

In *Prosecutor v Krstić*, the ICTY Trial Chamber examined how serious the injury or suffering must be to fulfil the requirements of the offence. It found that “[s]erious harm need not cause permanent and irremediable harm, but it must involve harm that goes beyond temporary unhappiness, embarrassment or humiliation. It must be harm that results in a grave and long-term disadvantage to a person’s ability to lead a normal and constructive life.”⁷²⁴ The Tribunal will determine the gravity of the suffering on a case-by-case basis, taking into account the circumstances of the case.⁷²⁵

5.1.4.5 Violence to life, health and physical or mental well-being

The offence of violence to life, health and physical or mental well-being is explicitly mentioned in the ICTR Statute, but may also be read into the ICTY Statute. However, this remains a controversial issue.

⁷²¹ *Prosecutor v Kordić and Čerkez* (2001), *op. cit.*, §243.

⁷²² *Ibid.* §245.

⁷²³ *Prosecutor v Delalić and Others (the Čelebići case)* (1998), *op. cit.*, §442.

⁷²⁴ *Prosecutor v Krstić*, Case No. IT-98-33-T, Trial Chamber I, judgement of 2 August 2001, §511. In this case, the Chamber was dealing with the related question of ‘causing serious bodily or mental harm to the members of the group’ as an act which can, where the required intent is present, constitute genocide. See section 5.1.5.

⁷²⁵ *Prosecutor v Naletilić and Martinović* (2003), *op. cit.*, §343; *Prosecutor v Krstić* (2001), *op. cit.*, §513.

– ICTY

In *Prosecutor v Blaškić*, Trial Chamber I of the ICTY recalled that “[t]his offence appears in Article 3(1)(a) common to the Geneva Conventions,”⁷²⁶ and further held that “It is a broad offence which... encompasses murder, mutilation, cruel treatment and torture and which is accordingly defined by the cumulation of the elements of these specific offences. The offence is to be linked to those of Article 2(a) (wilful killing), Article 2(b) (inhuman treatment) and Article 2(c) (causing serious injury to body) of the Statute.”⁷²⁷ The Chamber further stated that it must be established that the accused acted with intention or recklessness.⁷²⁸ In a subsequent case, Trial Chamber III, confirming that it agreed with the judgement in *Prosecutor v Blaškić*, specified that “where the act did not result in the death of the victim, it may be better characterised as ‘wilfully causing great suffering’ or ‘inhuman treatment’ under Article 2 of the Statute.”⁷²⁹ Thus, there would appear to be considerable overlap between violence to life and other offences explicitly included in the ICTY Statute.

However, a more recent decision of ICTY Trial Chamber II seems to contradict these findings. In *Prosecutor v Vasiljević*, the Chamber refused to recognise the existence of an offence of violence to life on which the Tribunal could exercise jurisdiction, stating that, “In the absence of any clear indication in the practice of States as to what the definition of the offence of ‘violence to life and person’... may be under customary law, the Trial Chamber is not satisfied that such an offence giving rise to individual criminal responsibility exists under that body of law.”⁷³⁰ This finding is surprising not only because it breaks with previous jurisprudence, but also because the offence of violence to life and person is listed in common Article 3 of the Geneva Conventions as one of the acts which must be prohibited at any time and any place in the case of non-international armed conflicts. In *Prosecutor v Tadić*, the ICTY Appeals Chamber unequivocally stated that “customary international law imposes criminal liability for all serious violations of common Article 3.”⁷³¹ It remains to be seen what position the Appeals Chamber will adopt on the offence of “violence to life and person.”

⁷²⁶ *Prosecutor v Blaškić* (2000), *op. cit.*, §182.

⁷²⁷ *Ibid.*

⁷²⁸ *Ibid.*

⁷²⁹ *Prosecutor v Kordić and Čerkez* (2001), *op. cit.*, §260.

⁷³⁰ *Prosecutor v Vasiljević*, Case No. IT-98-32-T, Trial Chamber II, judgement of 29 November 2002, §203. For an offence to be considered part of customary international law, States must, through their practice, indicate that they consider themselves bound by the provision.

⁷³¹ *Prosecutor v Tadić* (1995), *op. cit.*, §134.

– ICTR

Article 4(a) of the ICTR Statute lists among the violations of Article 3 common to the Geneva Conventions and of the Additional Protocol II;

“Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment.”

Thus, under the ICTR Statute, the offence of torture as a war crime can be considered as part of the wider offence of violence to life.⁷³² The Trial Chamber has declined to enter into discussion as to whether this offence should be considered as customary international law triggering criminal liability, holding that *“such an analysis is superfluous because... Rwanda became a party to the Conventions of 1949... and to the Protocol II.”*⁷³³

5.1.4.6 Other inhumane acts

Both Statutes provide that ‘other inhumane acts’ may constitute crimes against humanity. This category encompasses a number of different criminal acts which are not explicitly enumerated. In other words, it provides a safety net which allows for the prosecution and punishment of acts not expressly mentioned in the Statutes. However, the notion is rather wide and imprecise, so assessment of its content is difficult.

– ICTR

Article 3(i) of the ICTR Statute qualifies ‘other inhumane acts’ as crimes against humanity over which the Tribunal has jurisdiction where they are committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds. In *Prosecutor v Kayishema and Ruzindana*, the Chamber noted that *“Since the Nuremberg Charter, the category ‘other inhumane acts’ has been maintained as a useful category for acts not specifically stated but which are of comparable gravity... It is always dangerous to try to go into too much detail – especially in this domain. However much care were taken in establishing a list of all the various forms of infliction, one would never be able to catch up with the imagination of future torturers who wished to satisfy their bestial instincts; and the more specific and complete a list tries to be, the more restrictive it becomes. The form of wording adopted is flexible*

⁷³² *Prosecutor v Ntakirutimana*, Cases No. ICTR-96-10 and ICTR-96-17-T, Trial Chamber I, judgement of 21 February 2003, §859.

⁷³³ *Prosecutor v Kayishema and Ruzindana* (1999), *op. cit.*, §156.

and, at the same time, precise.”⁷³⁴ Thus, other inhumane acts is not “an all-encompassing, catch-all category”⁷³⁵ for lesser offences, but includes offences of similar gravity to those explicitly listed (murder, extermination, enslavement, deportation, imprisonment, torture, rape and persecutions on political, racial and religious grounds).

The ICTR Trial Chamber in *Prosecutor v Kayishema and Ruzindana* therefore held that inhumane acts are, “*inter alia, acts or omissions intended to cause deliberate mental or physical suffering to the individual.*”⁷³⁶ In *Prosecutor v Bagilishema*, the same Chamber gave a concrete example, finding that “the confinement of a large number of people on exposed ground without water, food or sanitary facilities will amount to an inhumane act if the act is deliberate and its consequences are serious mental or physical suffering or a serious attack on human dignity.”⁷³⁷ Thus, it seems that this offence is similar to the concept of inhuman treatment, which is not explicitly mentioned in the ICTR Statute.

– ICTY

Article 5 of the ICTY Statute, which lists crimes against humanity, provides that the ICTY has jurisdiction over “other inhumane acts,” when they are committed in armed conflict and directed against a civilian population.

The ICTY, like the ICTR, has found that this category of offences includes acts that do not fall within any of the other sub-clauses of Article 5 of ICTY Statute but are similar in gravity to the enumerated crimes.⁷³⁸ This lack of precision appears to violate the fundamental principle that a person should not be punished for an act which was not clearly defined as a criminal offence at the time it was committed.⁷³⁹ ICTY Trial Chamber II considered this in *Prosecutor v Kupreškić and Others*, noting: “*There is a concern that this category lacks precision and is too general to provide a safe yardstick for the work of the tribunal and hence, that it is contrary to the principle of the ‘specificity’ of criminal law. It is thus imperative to establish what is included within this category. The phrase ‘other inhumane acts’ was deliberately designed as a residual category, as it was felt to be undesirable for this category to be exhaustively enumerated. An exhaus-*

⁷³⁴ *Ibid.* §149.

⁷³⁵ *Prosecutor v Kayishema and Ruzindana* (1999), *op. cit.*, §583.

⁷³⁶ *Ibid.* §151.

⁷³⁷ *Prosecutor v Bagilishema*, Case No. ICTR-95-1A, Trial Chamber I, judgement of 7 June 2001, §490.

⁷³⁸ *Prosecutor v Naletilić and Martinović* (2003), *op. cit.*, §247.

⁷³⁹ This principle is referred to by the Latin phrase *nullum crimen sine lege certa*. See *Prosecutor v Stakić*, Case No. IT-97-24, Trial Chamber II, judgement of 31 July 2003, §719.

tive categorization would merely create opportunities for evasion of the letter of the prohibition.”⁷⁴⁰

Consequently, the ICTY Trial Chamber tried to identify conduct that would constitute other inhumane acts by reference to international human rights instruments, notably UNCAT. Thus, the Chamber found that “serious forms of cruel or degrading treatment of persons belonging to a particular ethnic, religious, political or racial group, or serious widespread or systematic manifestations of cruel or degrading treatment with a discriminatory or persecutory intent no doubt amount to crimes against humanity.”⁷⁴¹ In its jurisprudence, the ICTY has held that the crime encompasses the forcible transfer of groups of civilians,⁷⁴² enforced prostitution,⁷⁴³ enforced disappearances,⁷⁴⁴ “serious physical and mental injury,”⁷⁴⁵ “mutilation and other types of severe bodily harm, beatings and other acts of violence.”⁷⁴⁶ To qualify as crimes against humanity, “all these, and other similar acts, must be carried out in a systematic manner and on a large scale. In other words, they must be as serious as the other classes of crimes provided for in the other provisions of Article 5.”⁷⁴⁷

For an act to qualify under this category, “the offender, at the time of the act or omission, [must have] had the intention to inflict serious physical or mental suffering or to commit a serious attack on the human dignity of the victim, or [known] that the act or omission was likely to cause serious physical or mental suffering or a serious attack upon human dignity and [been] reckless thereto.”⁷⁴⁸

Definitions for this category are further complicated by the fact that the offence often merges and overlaps with other crimes under the Statute. As regards the relationship between inhuman acts as a crime against humanity under Article 5(i) and cruel treatment as war crime under Article 3, Trial Chamber II has stated that the “two are clearly presented as alternatives... and should

⁷⁴⁰ *Prosecutor v Kupreškić and Others*, Case No. IT-95-15, Trial Chamber II, judgement of 14 January 2000, §563.

⁷⁴¹ *Ibid.* §566.

⁷⁴² *Ibid.*

⁷⁴³ *Ibid.*

⁷⁴⁴ *Ibid.*

⁷⁴⁵ *Prosecutor v Blaškić* (2000), *op. cit.*, §239.

⁷⁴⁶ See *Prosecutor v Kordić and Čerkez* (2001), *op. cit.*, §270.

⁷⁴⁷ *Prosecutor v Kupreškić and Others* (2000), *op. cit.*, §566. See also *Prosecutor v Blaški* (2000), *op. cit.*, §239.

⁷⁴⁸ *Prosecutor v Vasiljević* (2002), *op. cit.*, §236. This definition has subsequently been confirmed by Trial Chambers in *Prosecutor v Simić, Tadić and Zarić* (2003), *op. cit.*, §76; *Prosecutor v Galić*, Case No. IT-98-29-T, Trial Chamber I, judgement of 5 December 2003, §154; *Prosecutor v Dragomir Milošević*, Case No. IT-98-29/1, Trial Chamber III, judgement of 12 December 2007, §935.

be considered as such. Except the element of widespread or systematic practice required for crimes against humanity, each of them does not require proof of elements not required by the other. In other words, it is clear that every time an inhuman act under article 5(i) is committed, *ipso facto* cruel treatment under article 3 is inflicted. The reverse however is not true: cruel treatment under article 3 may not be covered by article 5(i) if the element of widespread or systematic practice is missing. Thus if evidence proves the commission of the facts in question, a conviction should only be recorded for one of these two offences: inhuman acts, if the background conditions for crimes against humanity are satisfied, and if they are not, cruel treatment as a war crime.⁷⁴⁹ Cruel treatment in turn corresponds to inhuman treatment under Article 2, which lists grave breaches of the Geneva Conventions.⁷⁵⁰ In *Prosecutor v Krnojelac*, the Trial Chamber concluded that “it is apparent from the jurisprudence of the Tribunal that cruel treatment, inhuman treatment and inhuman acts basically require the same elements.”⁷⁵¹

5.1.4.7 Summary

From the jurisprudence of the Tribunals, it is clear that they consider offences against detainees to lie on a continuum of severity, with each an aggravated form of another. “Torture” is the most serious offence, requiring a purposive element. This is followed in gravity by the offence of “*wilfully causing great suffering or serious injury to body or health.*” Acts that cause less severe suffering, or injury to dignity, will fall under the labels of “inhuman treatment”, “cruel treatment” or “other inhumane acts” depending on the surrounding circumstances. Finally, treatment that is not sufficiently severe to constitute inhuman treatment may be classified as humiliating or degrading treatment under the offence of an outrage upon personal dignity. If it is accepted, the category of violence to life encompasses a number of these offences, but its use will generally be restricted to cases where death has occurred.

5.1.5 Torture and other ill-treatment within the crime of genocide

Offences of ill-treatment may, in certain circumstances, be constituent elements of the crime of genocide. Both Statutes contain identical provisions,

⁷⁴⁹ *Prosecutor v Kupreškić and Others* (2000), *op. cit.*, §711. See also *Prosecutor v Jelisić*, Case No. IT-95-10-T, Trial Chamber, judgement of 14 December 1999, §52.

⁷⁵⁰ *Prosecutor v Delalić and Others (the Čelebići case)* (1998), *op. cit.*, §551.

⁷⁵¹ *Prosecutor v Krnojelac*, *op. cit.*, §130, *Prosecutor v Vasiljević* (2002), *op. cit.*, §234, *Prosecutor v Galić* (2003), *op. cit.*, §152, *Prosecutor v Kayishema and Ruzindana* (1999), *op. cit.*, §151, 153.

based on the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, with Article 2(2) of the ICTR Statute and Article 4(2) of the ICTY Statute providing:

“Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: ...

(b) causing serious bodily or mental harm to members of the group ...”

Thus, to qualify as serious bodily or mental harm under this article, the prohibited acts must be directed against persons based on national, ethnic, racial or religious affiliation, with an intention on the part of the perpetrator to destroy that group.

– ICTR

In *Prosecutor v Akayesu*, Trial Chamber I of the ICTR took “*serious bodily or mental harm, without limiting itself thereto, to mean acts of torture, be they bodily or mental, inhumane or degrading treatment, persecution.*”⁷⁵² It is not necessary that the harm be permanent or irremediable.⁷⁵³ In *Prosecutor v Kayishema and Ruzindana*, the same Chamber expanded on its earlier definition, applying the term serious bodily harm to “*harm that seriously injures the health, causes disfigurement or causes any serious injury to the external [or] internal organs or senses.*”⁷⁵⁴ The ICTR has yet to give a detailed definition of serious mental harm, although it has noted that, like serious bodily harm, the determination of whether this has in fact occurred should be made on a case-by-case basis.⁷⁵⁵

– ICTY

In *Prosecutor v Krstić*, a Trial Chamber of the ICTY held that the definition of serious bodily or mental harm “can be informed by the Tribunal’s interpretation of the offence of wilfully causing great suffering or serious injury to body or health.”⁷⁵⁶ The Chamber, drawing on the jurisprudence of both the ICTY and the ICTR, gave a detailed definition of serious bodily or mental harm as “*an intentional act or omission causing serious bodily or mental suffering. The gravity of the suffering must be assessed on a case-by-case basis and with due regard for the particular circumstances. In line with the Akayesu Judgment, the*

⁷⁵² *Prosecutor v Akayesu* (1998), *op. cit.*, §504. See also *Prosecutor v Gacumbtsi*, Case No. ICTR-2001-64-T, Trial Chamber III, judgement of 17 June 2004, §291.

⁷⁵³ *Ibid.* §502.

⁷⁵⁴ *Prosecutor v Kayishema and Ruzindana* (1999), *op. cit.*, §109.

⁷⁵⁵ *Ibid.* §113.

⁷⁵⁶ *Prosecutor v Krstić* (2001), *op. cit.*, §511. See section 5.1.4.4.

Trial Chamber states that serious harm need not cause permanent and irremediable harm, but it must involve harm that goes beyond temporary unhappiness, embarrassment or humiliation. It must be harm that results in a grave and long-term disadvantage to a person's ability to lead a normal and constructive life. In subscribing to the above case-law the Chamber holds that inhuman treatment, torture, rape, sexual abuse and deportation are among the acts which may cause serious bodily or mental injury.⁷⁵⁷

5.2 Scope of Application

In their judgements, both Tribunals have applied and contributed to an increasingly coherent body of international law outlining types of act which may constitute torture, and the absolute nature of the prohibition of torture.

5.2.1 The absolute nature of the prohibition of torture and other ill-treatment

The absolute nature of the prohibition of torture under the Statutes of the International Tribunals derives from its status as customary international law. The prohibition of torture, along with those against slavery and genocide, features among the strongest prohibitions in customary international law, referred to as peremptory norms or *jus cogens*. This has been confirmed by the ICTY in a number of decisions,⁷⁵⁸ with the Trial Chamber in *Prosecutor v Furundžija* explaining as follows:

“Because of the importance of the value it protects, [the prohibition of torture] has evolved into a peremptory norm or jus cogens, that is, a norm that enjoys a higher rank in the international hierarchy than treaty laws and even “ordinary” customary rules. The most conspicuous consequences of this higher rank is that the principle at issue cannot be derogated from by State through international treaties or local or special customs or even general customary rules not endowed with the same normative force... the jus cogens nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community. Furthermore, this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the indi-

⁷⁵⁷ *Ibid.* §513. As regards the case-by-case assessment, see also *Prosecutor v Blaškić* (2000), *op. cit.*, §243. For the scope of the crime, see also *Prosecutor v Karadžić and Mladić*, Review of the Indictments pursuant to Rule 61 of the Rules of Procedure and Evidence, Case Nos. IT-95-5-R61 and IT-95-18-R61, 11 July 1996, §93.

⁷⁵⁸ See, for example, *Prosecutor v Delalić and Others (the Čelebići case)* (1998), *op. cit.*, §454; *Prosecutor v Kunarac, Kovač and Vuković* (2001), *op. cit.*, §466; *Prosecutor v Simić*, *op. cit.*, §34.

*viduals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate.*⁷⁵⁹

The peremptory and erga omnes character of the principle also leads to universal jurisdiction for the prosecution of torturers.⁷⁶⁰

5.2.2 Lawful sanctions

In *Prosecutor v Musema*, the ICTR explicitly excluded “*pain or suffering only arising from, inherent in or incidental to, lawful sanctions*” from its definition of torture, based on the definition contained in Article 1 of the UNCAT.⁷⁶¹ The ICTY has also frequently quoted this part of the definition, although neither Tribunal has explicitly applied it. The definition in the Rome Statute of the International Criminal Court also contains this exception.⁷⁶²

5.2.2.1 The death penalty

The death penalty as such may be imposed only by competent tribunals in those States which have not yet outlawed it. Deaths ordered, or incited, by other bodies or persons in the context of the conflicts in Rwanda and the former Yugoslavia have been considered by the Tribunals under the offences of genocide, extermination, murder, and wilful killing.⁷⁶³ Any exception regarding imposition of the death penalty, the manner of execution, or conditions on death row is therefore not relevant in the context of the International Tribunals. However, it is worth noting that neither the ICTR nor ICTY were given authority to impose the death penalty as a sentence.

5.2.2.2 Corporal punishment

– ICTR

Article 4 of the ICTR Statute gives the ICTR the power to prosecute persons committing or ordering serious violations of Article 3 common to the Geneva Conventions, including, in Article 4(a), “*any form of corporal punishment.*” Threatening corporal punishment, or any of the other offences prohibited under Article 4, is also an offence under the Statute.⁷⁶⁴

⁷⁵⁹ *Prosecutor v Furundžija* (1998), *op. cit.*, §§153-154.

⁷⁶⁰ *Ibid.*, §§153-157.

⁷⁶¹ *Prosecutor v Musema* (2000), *op. cit.*, §285.

⁷⁶² Article 7(2)(e) Rome Statute.

⁷⁶³ See, for example: *Prosecutor v Milošević*, Case No. IT-02-54-T, indictment of 22 November 2002; *Prosecutor v Bagilishema*, Case No. ICTR-95-1A, indictment of 17 September 1999.

⁷⁶⁴ Article 4(h) ICTR Statute.

– ICTY

Corporal punishment is not explicitly mentioned in the ICTY Statute, although it is prohibited under Article 2 as inhuman treatment, in grave breach of the Geneva Conventions,⁷⁶⁵ and under Article 3 as a violation of the laws and customs of war, usually under the specific charge of cruel treatment.⁷⁶⁶ Inhuman treatment and cruel treatment are discussed in detail in sections 5.1.4.1 and 5.1.4.2, above.

5.2.3 Conditions of detention

Unlawful confinement of a civilian is a grave breach of the Geneva Conventions recognised under Article 2(g) of the ICTY Statute. Article 2(g) of the ICTR Statute similarly recognises the passing of sentences without due process of law as a grave breach of the Geneva Conventions. While many detentions in the context of the conflicts in Rwanda and the former Yugoslavia were in themselves illegal, in common with the other international and regional mechanisms, the Tribunals have found that conditions of detention can constitute cruel, inhuman or degrading treatment, or one of the other offences coming under their jurisdiction.

– ICTY

In *Prosecutor v Delalić and Others*, Trial Chamber II of the ICTY applied the legal standards applicable to the offences of wilfully causing great suffering or serious injury to body or health, and cruel treatment, to the factual conditions of detention in the Čelebići prison camp,⁷⁶⁷ ultimately concluding that it would be more appropriate to consider conditions of detention under the offence of inhuman treatment.⁷⁶⁸ The Trial Chamber in *Prosecutor v Simić, Tadić and Zarić* listed examples of conditions of detention which could amount to inhuman treatment, or, with the appropriate mental element, to cruel and inhuman treatment as a persecutory act, as including “*harassment, humiliation, the creation of an atmosphere of fear through torture or other forms physical or psychological abuse, an insufficient supply of food and water, lack of space, unhygienic detention conditions, and insufficient access to medical care.*”⁷⁶⁹ Thus,

⁷⁶⁵ See, for example, *Prosecutor v Delalić and Others (the Čelebići case)* (1998), *op. cit.*, §§526–528.

⁷⁶⁶ In this context, corporal punishment would constitute cruel treatment. See, for example, *Prosecutor v Delalić and Others (the Čelebići case)* (1998), *ibid.* §548.

⁷⁶⁷ *Prosecutor v Delalić and Others (the Čelebići case)* (1998), *op. cit.*, §556.

⁷⁶⁸ *Ibid.* §558.

⁷⁶⁹ *Prosecutor v Simić, Tadić and Zarić* (2003), *op. cit.*, §97. See also: *Prosecutor v Limaj and Others* (2005), *op. cit.*, §652; *Prosecutor v Blagojević and Jokić*, Case No. IT-02-60-T, Trial Chamber,

inhuman conditions are not limited to material conditions of detention, but may include psychological violence. The ICTY has considered an atmosphere of terror or fear,⁷⁷⁰ threats to life,⁷⁷¹ or permanent intimidation⁷⁷² as inhuman treatment. Where suffering is sufficiently severe and the purposive element is met, conditions of detention may also amount to torture.⁷⁷³

– ICTR

Given the context of the conflict in Rwanda, detention of groups of civilians has thus far been considered by the ICTR primarily as an element of other crimes, including genocide, with civilians deliberately grouped together prior to massacres. However, the ICTR shares the view of other international bodies that conditions of detention may themselves amount to inhuman treatment or come within the offence of other inhumane acts. In *Prosecutor v Bagilishema*, for example, Trial Chamber I stated that “*the confinement of a large number of people on exposed ground without water, food or sanitary facilities will amount to an inhumane act if the act is deliberate and its consequences are serious mental or physical suffering or a serious attack on human dignity.*”⁷⁷⁴

5.2.4 Solitary confinement

The issue of solitary confinement is of greater relevance to the circumstances of the conflict in the former Yugoslavia, and therefore has been considered in detail only by the ICTY. The Tribunal has followed similar reasoning to other international and regional bodies, holding in *Prosecutor v Krnojelac* that: “*Solitary confinement is not, in and of itself, a form of torture. However, in view of its strictness, its duration, and the object pursued, solitary confinement could cause great physical or mental suffering of the sort envisaged by this offence. To the extent that the confinement of the victim can be shown to pursue one of the prohibited purposes of torture and to have caused the victim severe pain or suffering, the act of putting or keeping someone in solitary confinement may amount to torture.*”⁷⁷⁵

judgement of 17 January 2005, §609.

⁷⁷⁰ *Prosecutor v Kupreškić and Others* (2000), *op. cit.*, §150.

⁷⁷¹ *Ibid.* §1089.

⁷⁷² *Prosecutor v Kupreškić and Others* (2000), *op. cit.*, §150.

⁷⁷³ See, for example, *Prosecutor v Krnojelac* (2002), *op. cit.*, §183.

⁷⁷⁴ *Prosecutor v Bagilishema* (2001), *op. cit.*, §490.

⁷⁷⁵ *Prosecutor v Krnojelac* (2002), *op. cit.*, §183.

5.2.5 Incommunicado detention and enforced disappearances

In considering the types of acts which may constitute torture, the ICTY referred to a decision of the Human Rights Committee that incommunicado detention may be a factor in a finding of torture.⁷⁷⁶ Furthermore, the enforced disappearance of persons has been recognised by both Tribunals, as well as the Statute of the International Criminal Court, as constituting a crime against humanity where accompanied by the relevant mental element.⁷⁷⁷

5.2.6 Relatives of victims of human rights violations

It is well-established that witnesses of acts of torture or ill-treatment may themselves be victims of ill-treatment or, in severe cases, torture, and both Tribunals take into account the effects of trauma on witnesses. Like the international bodies that assess State responsibility for torture, the Tribunals also consider the effects of torture and ill-treatment on relatives of immediate victims. Indeed, it is one of the purposes of the Tribunals to bring justice to both victims and their relatives.⁷⁷⁸

– ICTY

In *Prosecutor v Blagojević and Jokić*, an ICTY Trial Chamber found that “*at the moment of the separation, the sense of utter helplessness and extreme fear for their family and friends’ safety... is a traumatic experience from which one will not quickly – if ever – recover.*”⁷⁷⁹ This fear was sufficiently severe to constitute serious mental harm. The ongoing trauma suffered by relatives of victims of enforced disappearances, who lacked information establishing with certainty whether their relatives were dead, and the exact circumstances of their death, was also considered to reach the threshold to constitute serious mental harm.⁷⁸⁰

In addition to recognising relatives as victims in their own right, the ICTY Appeals Chamber has ruled that “*the effects of the crime on relatives of the imme-*

⁷⁷⁶ *Prosecutor v Delalić and Others (the Čelebići case)* (1998), *op. cit.*, §461. The case referred to was *Luciano Weinberger Weisz v Uruguay*, HRC Communication No. 28/1978, U.N. Doc. CCPR/C/OP/1 at 57 (1984). In that case, the victim was held blindfolded, bound and incommunicado for three months.

⁷⁷⁷ See, for example, *Prosecutor v Musema* (2000), *op. cit.*, §200; *Prosecutor v Kupreškić and Others* (2000), *op. cit.*, §566.

⁷⁷⁸ See, for example, *Prosecutor v Nikolić*, Case No. IT-94-2-S, ICTY Trial Chamber II, judgement of 18 December 2003, §120.

⁷⁷⁹ *Prosecutor v Blagojević and Jokić* (2005), *op. cit.*, §647.

⁷⁸⁰ *Ibid.* §653.

diate victims may be considered as relevant to the culpability of the offender and in determining a sentence.”⁷⁸¹ Furthermore, such considerations do not apply only to blood relatives: “The Appeals Chamber considers that, even where no blood relationships have been established, a trier of fact would be right to presume that the accused knew that his victim did not live cut off from the world but had established bonds with others.”⁷⁸²

– ICTR

Due in part to the much smaller number of cases on which it has given judgement, the ICTR has yet directly to address the issue of relatives of immediate victims as victims of torture or ill-treatment in their own right. However, given the high degree of cross-fertilisation between the Tribunals, it seems likely that the ICTR will follow the jurisprudence of the ICTY in this regard.

5.3 The International Criminal Court

The Rome Statute of the International Criminal Court (ICC) is similar to the Statutes of the International Tribunals for Rwanda and the former Yugoslavia, so it is likely that the ICC will take inspiration from the jurisprudence of the ad-hoc Tribunals. Any analysis of the jurisprudence of the International Criminal Tribunals would not therefore be complete without a brief overview of the Rome Statute. That Statute, like those establishing the ICTY and ICTR, addresses torture both as a crime against humanity and as a war crime.

5.3.1 Torture as a crime against humanity

Article 7(1)(f) of the Rome Statute explicitly lists torture as a crime against humanity that falls under the jurisdiction of the ICC “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.” Article 7(2)(e) defines the crime of torture as:

“the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.”

This definition reproduces neither the purposive requirement nor the official capacity requirement of Article 1 of the UNCAT. Under the Rome Statute, as in the jurisprudence of the ICTY, individuals acting outside a legal or official

⁷⁸¹ *Prosecutor v Blaškić*, Case No. IT-95-14, ICTY Appeals Chamber, judgement of 29 July 2004, §683.

⁷⁸² *Prosecutor v Krnojelac*, Case No. IT-97-25, ICTY Appeals Chamber, 17 September 2003, §260.

framework may be held liable for acts of torture. The Statute provides for a lawful sanctions exception, which, like that in other jurisdictions, can be seen as a practical provision to distinguish treatment that is an unavoidable part of a penal system, in particular the suffering inherent in deprivation of liberty. In any case, such lawful sanctions cannot be inconsistent with the spirit of the absolute prohibition of torture.

The definition of torture in the Rome Statute is, in one respect, more restrictive than those contained in earlier international instruments. The Statute imposes a new requirement, namely that torture be inflicted “*upon a person in the custody or under the control of the accused.*” This condition could impede judicial action against individuals who participate in, or assist, acts of torture on an “irregular” basis, even if they could still be charged with complicity in the commission of such acts. This restriction also ignores the reality of the suffering endured by victims who, while not in the custody or under the control of the perpetrator of the crime, could endure immense suffering on being informed of physical pain inflicted on their loved ones.

5.3.2 Torture as a war crime

Article 8(2)(a)(ii) lists “*torture or inhuman treatment, including biological experiments*” among the grave breaches of the Geneva Conventions which are punishable under the Statute as war crimes. While this article is considerably less precise than Article 7 as regards the scope and definition of the crime of torture, the Preparatory Commission gave the following criteria for the definition of torture as a war crime:

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.*⁷⁸³

Thus, while there is no requirement that the act or omission be carried out for a prohibited purpose to qualify as a crime against humanity, such a purpose must be shown where torture is charged as a war crime. Indeed, the Preparatory Commission considered that the only difference between the crime of inhuman treatment and that of torture lies in the purposive element.⁷⁸⁴

War crimes fall under the jurisdiction of the Court only “*when committed as part of a plan or policy or as part of a large-scale commission of such crimes.*” In other words, a single act of torture will fall outside the jurisdiction of the ICC.

Under the Rome Statute, the ICC may also prosecute acts of torture when perpetrated in an armed conflict not of an international character and “*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.*” Furthermore, the Rome Statute gives the ICC jurisdiction over a number of related offences. Article 8(2)(c)(i) prohibits “[v]iolence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture,” and Article 8(2)(c)(ii) prohibits the commission of “*outrages upon personal dignity, in particular humiliating and degrading treatment.*” However, Article 8(2)(d) expressly provides that such acts will not be prosecuted by the ICC if perpetrated during “*internal disturbances and tensions, such as riots, isolated and sporadic, acts of violence or other acts of a similar nature.*”

Conclusion

In the Statutes of the International Criminal Tribunals, torture is simply listed as one of the crimes over which the Tribunals have jurisdiction. Neither Statute defines the term ‘torture,’ so the Tribunals have made extensive reference to definitions developed in other instruments and by other bodies. However, despite these references, the jurisprudence of the International Criminal Tribunals on definitional issues has not been entirely consistent, with notable differences not only between the two Tribunals, but also among different Trial

⁷⁸³ Report of the Preparatory Commission for the International Criminal Court, Finalized draft text of the elements of the crimes, UN Doc. PCNICC/2000/1/Add.2, 2 November 2000, p. 19, Article 8(2)(a)(ii)-1.

⁷⁸⁴ *Ibid.*

Chambers of the same Tribunal. For example, the jurisprudence is far from settled on whether the list of purposes given in the UNCAT is to be interpreted as exhaustive or merely illustrative under customary international law. While the contribution of the International Criminal Tribunals to the definition of torture should not therefore be over-estimated, neither should it be disregarded, as the ICC will doubtless draw on the experience of the Tribunals.

One of main contributions of the jurisprudence of the ad-hoc tribunals has been the recognition that the prohibition of torture “*has evolved into a peremptory norm or ius cogens, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even ‘ordinary’ customary rules.*”⁷⁸⁵ The judicial statement of the universality of this prohibition is to be welcomed as a great step towards the effective protection of human rights.

⁷⁸⁵ *Prosecutor v Furundžija* (1998), *op. cit.*, §153.

Conclusion

The prohibition of torture and other ill-treatment in the Universal Declaration of Human Rights came only three years after the end of the Second World War, a very short time for the gestation of such a revolutionary document. It was a direct response to the atrocities of that war, adopted in the hope that opening a State's conduct at the national level to international scrutiny would ensure that such violations of basic human rights would never occur again.

The jurisprudence considered in this guide provides great reason for optimism. Since the adoption of the Universal Declaration of Human Rights, the prohibition of torture contained in that proclamation has acquired legal force at the international and regional levels, and has been recognised as customary international law. An increasing number of states are signing treaties prohibiting torture and accepting the jurisdiction of the treaties' supervisory mechanisms, and individuals responsible for massive violations can be brought to justice before international tribunals. However, enforcement mechanisms at the international and regional level remain relatively weak, or altogether lacking, so non-legal measures are required to back up and consolidate progress.

A by-product of the increasing number of legal sources of the prohibition of torture has been an increased willingness of international and regional bodies to borrow from one another's jurisprudence. This cross-fertilisation has contributed to the construction of a rich, detailed and, most vitally, increasingly consistent body of international law. Comparison between thematic sections of this guide demonstrates that universal prohibition is finally leading to universal standards. As pointed out in the introduction, the influence of non-judicial bodies and experts in this process should not be underestimated. When lawyers, NGOs and individuals appeal to courts, commissions or committees to expand the definition of torture or ill-treatment, they support their arguments with references to academic literature and the reports and stated opinions of respected international experts such as UN or regional Special Rapporteurs.

While the overall trend in each system considered here has been towards increased protection of the individual, vigilance is required to ensure the consolidation of these gains. Just as courts and international bodies can expand the scope of application of the prohibition through their interpretation of broadly-worded instruments, so too can they restrict its scope. Whereas it was once an absolute taboo to call into question the absolute prohibition of torture, this prohibition is now the subject of news items and political debates, with creative arguments employed in order to avoid adherence to established inter-

national human rights standards.⁷⁸⁶ The absolute legal prohibition of torture, like the prohibition of slavery or genocide, remains securely entrenched at the international level. In this context, it is vital to ensure that all aspects of the prohibition are fully reflected at the national level. Progress towards the realisation of human rights is incremental, but losses can be swift.

Of course, laws are often useful only after the fact. State obligations to investigate, to exclude evidence obtained by torture or ill-treatment, and to grant redress and compensate victims, by definition apply only at this stage. Laws must therefore be complemented by effective prevention mechanisms which protect the most vulnerable. Only by ensuring that independent visitors can expose conditions at detention facilities, that police and law enforcement officials are fully trained, and that those responsible for ill-treatment are held responsible at the national level can we prevent future occurrences of torture.

⁷⁸⁶ For a full discussion of, and response to, these arguments, see the APT publication *The Ticking Bomb Scenario: Why we must say No to torture, always*, available at www.apr.ch.

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The APT and CEJIL would like to thank Uta Richter for the use
of her painting to illustrate this publication.

Torture is universally prohibited. But just what, exactly, is torture? Is the definition the same worldwide? What must States do to protect their populations from torture or cruel, inhuman or degrading treatment or punishment? And how can an individual be held responsible for this heinous crime?

This guide to international jurisprudence on the question of torture and other cruel, inhuman or degrading treatment or punishment gives experts, human rights advocates and others the resource they need to answer these and other questions. The Guide has a global scope, examining jurisprudence from UN bodies, regional human rights systems in Europe, the Americas and Africa, and the International Criminal Tribunals for Rwanda and the former Yugoslavia. It provides an overview of the evolving definition of torture, the duties incurred by States, the scope of the prohibition of torture and other forms of ill-treatment, and the extent of individual responsibility for the international crime of torture.

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