

The Worst Scars are in the Mind

Deconstructing psychological torture

Diarmuid Cuniffe

Abstract: Mental Torture is an especially grave violation of human rights because, in its various forms, its ultimate objective is to annul the very identity and personality of the victim. While the physical injuries produced by torture are likely to heal, mental suffering is much more pervasive and likely to persist. The devastating health consequences of threats and fear, humiliation, sensory deprivation and social isolation are evident through the literature, observations of clinicians and reports from victims themselves. This paper adopts a multi-faceted approach to a multi-faceted problem, that is, understanding and interpreting psychological torture. It does so on the premise that there is no obstacle, in principle, as to why the law should not accommodate input from other disciplines. This paper attempts to address the issue of whether the definitions and interpretations of mental torture under international human rights law adequately reflect the psychological 'realities' as told by survivors and reflected in social, psychiatric and psychological research. Torture, in all its forms, is a complex phenomenon with interacting social, cultural, political, medical, psychological, and biological dimensions. If it is to be eradicated, it is important that a more universal consensus be reached on the assessment of mental suffering inflicted by the forms of ill-treatment considered in this study.

Keywords: assessment of suffering, definition of torture, humiliation, inter-american system of human rights, inter-disciplinarity of human rights, international human rights law, mental torture, psychological torture, threats, torture

I. Introduction

Torture is the most blatant negation of the essence of the human being...

*It is the ultimate in human corruption.*¹

Torture has been widely practiced during the entire recorded history of mankind. Aristotle, for example, listed torture alongside 'laws, witnesses, contracts... [and] oaths' as a 'non-technical means of persuasion'.² In Roman law, it was considered customary for torture to be applied to uncover the commission of a crime.³ Similarly, under Roman influence, English common law allowed torture as a means of eliciting a confession or simply for obtaining evidence from an uncooperative witness.⁴ Early European travellers to the kingdoms of the Asian monarchs also reported that in Japanese and Chinese criminal codes, for example, torture was permitted when a confession was a requirement for punishment.⁵ It was only in 1808 that Napoleon's *Code d'instruction criminelle* initiated the prohibition of torture.⁶

Nowadays, in a myriad of international Declarations, Treaties and Conventions the international community has made very clear its total disapproval of torture under any circumstances.⁷ Furthermore, an international

¹ *Juvenile Reeducation Institute v. Paraguay*, Inter-American Court of Human Rights (IACtHR) Series C No. 112 (2 September 2004) (Expert Testimony of Ana Clerico-Deutsch, Psychologist) 48.

² Johan D Van der Vyver, 'Torture as a Crime under International Law' (2004) 67 ALBLREV 427.

³ Ibid 428.

⁴ Ibid 429.

⁵ Elena Nightingale and others (ed), *The Breaking of Bodies and Minds: Torture, Psychiatric Abuse and the Health Professions* (W.H. Freeman, New York 1985) 8.

⁶ Ibid.

⁷ See for example Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 5; International Covenant on Civil and Political and Civil Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 7; Convention on the Rights of the Child

juridical system of absolute prohibition of all forms of torture – both physical and psychological – has been established and is now part of the sphere of international *jus cogens*. This has been recognised by both international criminal tribunals for Rwanda and the former Yugoslavia (ICTR and ICTY), by all three regional human rights regimes, by the United Nations Committee Against Torture (CAT), by judges in numerous domestic jurisdictions, by authoritative statements of international law, including the Third Restatement of Foreign Relations Law of the United States (US), and by the Universal Islamic Declaration of Human Rights.⁸

Torture may be physical or psychological or both. Jurists in the 13th Century, for example, spoke of the mental effects of torture based on the supposed derivation of *tormentum* from *torquens mentem* 'the twisting of the mind: since, by the suffering of the body, the mind is therefore turned'.⁹ It is thus not only a gross violation of the body, but also of the mind. While there may be a consensus that certain methods of physical ill-treatment amount to torture, the same cannot as readily be said for those that inflict mental suffering.¹⁰ The boundaries are less susceptible to definition than physical torture. This has also been recognised, for example, by the International Committee for the Red Cross (ICRC) which, after more than a century of visits to detainees, possesses a large body of knowledge on the subject of torture. Its Chief Medical Co-ordinator recently observed that interrogators often 'take pride in the fact that they do not resort to "crude physical methods" in their work, but rely only on psychological methods which they do not consider as torture'.¹¹ He then called for 'a discussion on what exactly is meant by the term "psychological torture"'.¹²

These observations are pertinent because, in spite of the abundance of legal rules outlawing torture, most fail to define it. It is as though we all assume we have the same working definition or conception of torture in mind. Moreover, where definitions exist, they are not the same. The definition contained in the Inter-American System (IAS), for example, contains some important differences from that contained in the United Nations Convention against Torture (UNCAT). This set of legal rules seems to have generated confusion about the definition of torture.¹³ This confusion manifests itself in different ways. The former UNSRT Manfred Nowak, for example, has pointed out that the definition of torture in national criminal codes often relates to the infliction of *injuries* only.¹⁴ Furthermore, while the definition of torture in UNCAT suggests otherwise, there is a lack of universal consensus as to whether 'mental suffering' alone may amount to torture. This has become apparent, for example, in the public discourse on torture in the US during the 'war on terror'.

In the course of this debate, practices such as solitary confinement, sleep and sensory deprivation, the infliction of threats or other humiliating tactics on detainees have been described as 'torture lite' or simply 'abuse'.¹⁵ Liberals argued that 'torture lite' techniques might be permissible in some circumstances such as fighting terrorism.¹⁶ They further argued that a distinction should be made between 'torture' and 'torture lite'.¹⁷ The argument goes that, as the victim is not assaulted, the 'severity of pain and suffering' criterion (here meaning physical only) is not met. This line of argumentation is effectively used to manipulate wider public opinion, which has largely come to consider torture to be mainly a 'physical phenomenon', thus accepting the (flawed) reasoning that without physical assault there is no torture. The American Red Cross, for example,

(adopted on 20 November 1989, entered into force on 2 September 1990) 1577 UNTS 3 (CRC) art 37(a); Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (European Convention on Human Rights, as amended) (ECHR), art 3; Charter of Fundamental Rights of the European Union 2000, art 4; Inter-American Convention on Human Rights (Adopted 22 November 1969, entered into force 18 July 1978) (ACHR) article 5(2).

⁸ Ronald Slye and others, *International Criminal Law and its enforcement: Cases and Materials* (Foundation Press, New York 2010) 544.

⁹ Edward Peters, *Torture* (B. Blackwell, New York 1985) 55.

¹⁰ Irfan Neziroglu, 'A Comparative Analysis of Mental and Psychological Suffering as Torture, Inhuman or Degrading Treatment or Punishment under International Human Rights Treaty Law' (2007) 4 EHRR 1.

¹¹ Hernan Reyes, 'The worst scars are in the mind: psychological torture' (2007) 89 IRRC 591.

¹² Ibid.

¹³ Paola Gaeta, 'When is the Involvement of State Officials a Requirement for the Crime of Torture' (2008) 6 JICJ 183.

¹⁴ UN Human Rights Council (UNHRC) 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak' (5 February 2010) UN Doc. A/HRC/13/39/Add.5 [74].

¹⁵ Jessica Wolfendale, 'The Myth of Torture Lite' (2009) 23 EIAJ 47.

¹⁶ Ibid.

¹⁷ Ibid.

recently conducted a poll which found that almost 60 percent of American teenagers felt techniques such as water-boarding or sleep deprivation are sometimes acceptable and that, overall, teenagers are 'significantly more in favor of torture than older adults'.¹⁸

The active use of psychological interrogation tactics is not limited to the above example. Their use has been frequently documented in other recent conflicts. These include, *inter alia*, the treatment of Tibetan prisoners in China and Palestinian detainees in Israel.¹⁹ The point is that psychological tactics generate considerable disagreement across jurisdictions. They are ambiguous almost by design and are the product of deliberate attempts to engineer tactics that provoke subtle forms of pain and at the same time leaving minimal evidence of brutality.²⁰ The misery such tactics produce is entirely 'in the mind'. Since many such tactics involve subjecting detainees to visceral sensations that people regularly experience to some degree or another (i.e. feeling fatigued, lonely), they are less recognisably painful than more shocking forms of physical brutality.²¹

The validity of the torture standard, however, depends on the accuracy with which courts and policy makers can determine the 'severity of pain' that a particular interrogation tactic provokes. Unfortunately, as will be seen, psychological research suggests that humans are extremely ill-equipped to make this judgment. The difficulty inherent in the assessment of psychological suffering has been observed by a former UNSRT, Nigel Rodley, who stated that 'the notion of "intensity of suffering" is not susceptible of precise gradation, and in the case of mainly *mental* as opposed to physical suffering, there may be an aura of uncertainty as to how... [to assess] the matter in any individual case'(emphasis added).²² The inter-disciplinary nature of human rights has the potential to make such tasks less daunting by integrating scientific knowledge from other disciplines, such as psychiatry and social psychology.

Finally, aside from interrogational tactics, the direct or indirect impact of trauma on other family members besides the index sufferer is another issue that requires ongoing assessment. Trauma does not occur in a vacuum and often a number of family members may be similarly traumatised. Even where family members are not directly victimised, the indirect effects on them may be severe as in the case of relatives of victims of the disappeared. The problem or difficulty, however, is that these scars are invisible. There are no objective signs, no measurable parameters, lab tests or x-rays that document such psychological wounds.

It is on the basis of the above observations that it is considered relevant and timely to embark on the present study.

A. Research Question, Scope and Objectives

This study is an attempt to address the issue of whether the definitions and interpretations of mental torture under international human rights law (IHRL) adequately reflect the psychological 'realities' as told by survivors and reflected in social, psychiatric and psychological research.

Space and time limitations prevent a scholarly analysis of each and every method of psychological torture. The author has chosen, for reasons outlined in the previous section, to focus on the following methods of mental suffering:

1. Solitary confinement;
2. Sleep Deprivation;
3. Sensory deprivation and Sensory bombardment;

¹⁸ Tom Jacobs, 'What Is Torture? We Know It (Only) When We Feel It' (12 April 2011), <<http://www.miller-mccune.com/culture-society/torture-we-know-it-only-when-we-feel-it-30144/#>> accessed 4 June 2011.

¹⁹ Human Rights First and Physicians for Human Rights, 'Leave no marks: Enhanced Interrogation Techniques and the Risk of Criminality' (Joint Report) (August 2007) <https://s3.amazonaws.com/PHR_Reports/leave-no-marks.pdf> accessed 24 May 2011, 112.

²⁰ George Loewenstein and others 'Torture in the Eyes of the Beholder: The Psychological Difficulty of Defining Torture in Law and Policy' (2011) 44 *VandJTransnatlJ* 87, 99.

²¹ Human Rights First and Physicians for Human Rights (n 19) 100.

²² Report of the UN Human Rights Committee, GAOR 37th Session Supp No 40 Annex V General Comment 7(16) (1982) U.N. Doc. A/37/40 [2].

4. The use of threats and phobias to induce fear of death or injury;
5. Sexual or cultural humiliation; and
6. Mental distress caused by the disappearance of a close relative.

This means that other, and sometimes related, methods of psychological suffering such as incommunicado detention, conditions of detention, deprivation of food and drink, the death row phenomenon, medical experimentation fall outside the scope of this study. Furthermore, this research focuses on the person being tortured, not the person inflicting the torture, and so the role of the torturer in the process of psychological torture is also beyond the scope of this study.

The last method may appear somewhat 'on its own' given that it is not an interrogational tactic, like the first five. It was considered, however, relevant to include it in the present study given that the mental suffering endured by this category of persons is often disregarded by relevant authorities and it remains an open question whether their suffering may be equated to mental torture. For the avoidance of doubt, the reader should note that the focus is directed only towards the *relatives* of the disappeared and not the primary victims of disappearances themselves.

Finally, there are also limitations in terms of jurisdiction. This study is only examining IHRL and so will not consider the relevant provisions of international humanitarian law or the jurisprudence from the International Criminal Tribunals. In terms of regional human rights systems, the author has omitted consideration of the African system and will only be examining the IAS and European System. This was considered prudent given the extensive case-law which both these systems have produced.

Overall, this research aims to fill an existing gap. Its purpose is to provide adjudicators, academics, lawyers, policy makers and other human rights professionals with a single piece of academic research encompassing both the non-legal and legal dimensions of psychological torture thereby contributing to a renewed appreciation of the concept.

B. Terminology

The terms 'psychological torture' or 'mental torture' can relate to two different aspects of the same entity.²³ On the one hand, it can designate methods (i.e. the use of *non-physical* methods). While *physical methods* of torture can be more or less self-evident, *non-physical* means a method that does not hurt, maim or even touch the body, but touches the mind instead. On the other hand, the term can also be taken to designate the psychological *effects* (as opposed to physical ones) of torture in general. There is sometimes a tendency to merge these two separate concepts into one, which leads to confusion.²⁴ For the avoidance of doubt, the use of the terms 'psychological torture' and 'mental torture' in this research is concerned with the former, the *non-physical methods* of torture. This distinction is made because this article is not dealing with the psychological effects of torture in general. It is focusing on the *effects of non-physical methods* of torture.

The above distinction, it may be noted, is in line with the reasoning of the first UN Special Rapporteur on Torture (UNSR), Peter Kooijmans, who noted that:

This distinction [between physical and psychological torture] seems to have more relevance for the *means* by which torture is practised than for its character. Almost invariably the effect of torture, by whatever means it may have been practised, is physical and psychological.²⁵ (emphasis added)

It should also be mentioned that, throughout this study, the adjectives 'mental', 'psychological' and 'non-physical' will all be used interchangeably to describe the forms of ill-treatment under review.

²³ Reyes (n 11) 594.

²⁴ Ibid 595.

²⁵ UN Commission on Human Rights (UNCHR) 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, Peter Kooijmans' (19 February 1986) U.N. Doc. No.E/CN.4 /1986/15 [4].

C. Structure of the Study

The first part of this study is dedicated to examining the scientific knowledge that exists in relation to psychological torture. Chapter 2 will take each of the methods and consider the historical background, survivor testimonies and focus, in particular, on the contributions of social and psychological research to our understanding of the effects of each method.

The second part of the study will examine the legal framework. In Chapter 3, the United Nations (UN) system of human rights protection will be discussed. This Chapter is divided into three sections. Firstly, the definition of mental torture under UNCAT and the jurisprudence and general observations from the CAT will be analysed. Secondly, the practice of the Human Rights Committee (HRC) will be discussed before finishing with an analysis of the contributions from the UNSRT. In Chapter 4, two regional human rights systems will be examined. This will begin with an analysis of the definition of mental torture and jurisprudence of the IAS. It will then do the same for the European system of human rights protection, focusing on the jurisprudence emanating from the European Commission of Human Rights (EComHR) and the European Court of Human Rights (ECtHR) and the interpretation of the ECHR. For ease of comparison, and where possible, these chapters will share a common structure.

Chapter 5, the final chapter, will compare and contrast the judicial consensus with existing research from the non-legal disciplines and draw a conclusion as to the level of protection offered by IHRL to victims of psychological ill-treatment.

D. Methodology

This research question is, in essence, a legal question. It is a normative issue. It is examining what the law is and what, in the author's view, it should say. While there is no one consensus on the correct methodology of 'normative legal scholarship', the author considers that human rights lawyers should more readily borrow from other disciplines, in the present case for example, the social sciences and psychology. The author's own background is multidisciplinary²⁶ and he will endeavour to adopt an interdisciplinary approach to this study.

The author considers that legal arguments, in the field of human rights, are not always sufficient. In this research, therefore, the author's legal arguments will be accompanied with the weight of arguments made by psychologists and social scientists. In the first part of this research, therefore, the author will refer to primary evidence – quantitative data – collected by psychologists and social scientists. It is proposed that our understanding of mental torture will be enhanced by this broad analysis, based on legal and non-legal arguments, to provide a picture that traditional legal analysis cannot. The author will not critically analyse the psychological or sociological data, given that he is not trained in these disciplines. Rather, he will integrate the findings into this research. This approach has been termed, by some commentators, as 'passive interdisciplinarity'.²⁷

The second part of this research will analyse the *positive* human rights law, that is, the human rights instruments and jurisprudence in relation to mental torture as it exists today. The author has chosen to take a comparative approach to this legal analysis. There are several reasons for this.

Human rights treaties are living instruments and the jurisprudence is continuously developing interpretations of definitions, such as mental torture. Furthermore, there is an increasing cross-fertilisation between the bodies of IHRL and beyond. To take just one example of this cross-fertilisation, the International Criminal Tribunals have referred to the UNCAT definition²⁸, the jurisprudence of the CAT²⁹, the HRC³⁰, the ECtHR³¹ and the

²⁶ The author is trained in the humanities at undergraduate level, law at postgraduate and professional level and is a legal practitioner in private practice.

²⁷ Eva Brems, 'Methods in Legal Human Rights Research' in F. Coomans, F. Grunfeld and M. Kamminga (eds), *Methods of Human Rights Research* (Intersentia, Antwerp 2009) 85.

²⁸ *Prosecutor v Kunarac, Kovač and Vuković* (Judgement) ICTY-96-23 and ICTY-96-23/1 (22 February 2001) [472]-[484].

²⁹ *Prosecutor v Furundžija* (Judgement) ICTY-95-17/1 (10 December 1998) [163].

³⁰ *Prosecutor v. Delalić* (Judgement) ICTY-96-21-T (16 November 1998) [461].

³¹ *Ibid* [462]-[466].

Inter-American Court (IACtHR) and Commission (IACoMHR)³². The comparative method will allow the author to determine the explicit or implicit arguments used in the courts or monitoring bodies.

In methodological terms, it has been suggested that existing jurisdictions may be considered as *empirical material* of how conflicting normative positions are being reconciled.³³ In this regard, the author considers that the various international and regional systems under review in this study may be considered as 'empirical material' and will be used to test whether arguments of mental torture concerning the methods in question have been used elsewhere and, if so, how such arguments were received by that court or body.

The author is aware that certain scholars, notably Fons Coomans, have noted that human rights lawyers have 'an unfortunate inclination...to show excessive deference towards the case law emanating from international human rights bodies'.³⁴ The reason that this deference exists, he suggests, is based on an assumption that international human rights monitoring mechanisms should simply be supported, especially when they are adopting progressive opinions. In his view, this approach confuses scholarship with activism and he argues that if the output of international bodies is below expectations, human rights scholars have a duty to point this out. It is in this spirit that this author will approach the second part of this study and adopt a critical approach to the jurisprudence emanating from such bodies. In doing so, the author will be mindful to clearly distinguish the law as it is (*lex lata*) from the law as it should be in the opinion of the author (i.e. *lex ferenda*).

The author has examined the whole body of judgments in each of the legal categories.

Apart from the classical legal sources such as book publications, articles in periodicals, conventions and declarations, legal judgments and quasi-legal judgments, the author will also refer extensively to NGO reports, press articles, secondary and internet sources and reports emanating from conferences and seminars where relevant experts have contributed their views. In essence, the legal methodology will consist of interpretation, systematisation and argumentation techniques.

II. THE SCIENTIFIC FRAMEWORK

A. The Psychology behind Psychological Torture

1. Introduction

This chapter will begin with some general observations on psychological torture, from the perspective of psychologists. It will then consider each method outlined in the Introduction and adopt a common structure for each one. This will consist of an 'introduction' where each method is further elaborated paying particular attention to terminology used. This will be followed by a section on 'historical background and survivor testimonies' which seeks to integrate the historical development of the interrogation method with personal accounts from torture survivors. This serves to contextualise the particular mode of ill-treatment. Finally, in the section on 'scientific knowledge', the author will present the findings of the relevant social scientific, psychiatric and psychological research that has been conducted in the particular area.

2. General Observations

This section has two objectives. Firstly, it is proposed to provide some brief perspectives on a non-legal understanding of psychological torture, to help set the context for the remainder of this Chapter. Secondly, it is proposed to discuss recent research relating to psychological interrogation techniques.

In general terms, psychologists have described mental torture as 'the systematic destruction of that which we normally can consider the building blocks of human mental health...a sense of worth and capability to form relationships with others, an experience of integrity and dignity...feeling some kind of predictability and future

³² Ibid [481]-[486].

³³ Jan Smits, 'Redefining Normative Legal Science: Towards an Argumentative Discipline' in F. Coomans, F. Grunfeld and M. Kamminga (eds), *Methods of Human Rights Research* (Intersentia, Antwerp 2009) 51.

³⁴ F. Coomans, F. Grunfeld and M. Kamminga 'A Primer' in F. Coomans, F. Grunfeld and M. Kamminga (eds), *Methods of Human Rights Research* (Intersentia, Antwerp 2009) 16.

perspective in life'.³⁵ This view considers psychological torture as a systematic attack on these basic elements of human lives. Others have spoken of how mental torture destroys the 'Self'. This is what one might term the central core of the individual and represents the organising function of our psychological world.³⁶ Nora Sveaass, a prominent psychologist and member of the CAT, has written that psychological torture or ill-treatment is 'the process by which psychological pain is transformed into humiliation and dehumanization, where the essence of being human- namely personal agency, values, emotions, hope, relationships, and trust- is under attack'.³⁷

Turning to interrogation techniques, psychologists have amassed significant evidence in recent years that people exhibit a 'cold-to-hot empathy gap'. This concept 'captures the insight, documented in numerous empirical studies, that people who are not currently experiencing a visceral hot state-herein defined as any compelling aversive emotional state such as fear, hunger, fatigue, or pain-regularly underestimate its intensity'.³⁸ Empathy gap effects have also been demonstrated for physical pain. Medical literature, for example, has repeatedly found that doctors underestimate the severity of their patients' pain.³⁹

In a very recent study, psychologists asked participants to evaluate three common interrogation techniques: exposure to cold temperatures, sleep deprivation and solitary confinement. Those involved were presented with a vignette describing one of the tactics and were asked to provide an assessment of the level of pain or discomfort induced by the tactic, the ethicality of the tactic and whether it should be categorised as questioning, interrogation, oppressive interrogation, or torture.⁴⁰ To test whether an empathy gap affected the participants' judgments, some made them without actually experiencing the distress of the interrogation tactic, while others made the judgments while experiencing a mild version of the pain produced by the tactic. The researchers found that the empathy gap affected participants' severity assessments in that those in a cold (i.e. pain free) state underestimated the severity of each interrogation tactic compared to participants who were directly experiencing pain. Second, the empathy gap affected participants' normative assessments in so far as those who were not experiencing any pain assessed the tactics as more ethical than those who were actively experiencing it.⁴¹

These series of experiments confirm that people 'suffer from innate empathic biases when assessing the severity of interrogation tactics'.⁴² The findings suggest that empathy gaps for physical and psychological pain undermine our ability to objectively evaluate interrogation practices.⁴³ By underestimating the pain of enhanced interrogation, people may perceive objectively torturous practices to be morally or legally acceptable. In addition, in practical terms, since judges evaluating interrogation tactics are unlikely to be experiencing a 'significantly elevated visceral state when making their evaluations, the findings suggest that they are at risk of systematically underestimating the severity of the tactics'.⁴⁴

Anecdotal evidence supports the empathy gap's sobering effects on evaluations of enhanced tactics. In one (now) famous example, at the bottom of a US Justice Department memorandum in which the use of a stress position involving prolonged standing is described, then Secretary of Defence Donald Rumsfeld wrote, 'I stand for 8-10 hours a day. Why is standing limited to 4 hours?'.⁴⁵

³⁵ Nora Sveaass, 'The Organized Destruction of Meaning' in Nils Lavik (ed) *Pain and Survival: Human Rights Violations in Mental Health* (Scandinavian University Press, Oslo 1994) 43.

³⁶ Shirley Spitz, 'The Psychology of Torture' (Seminar Paper delivered on 17 May 1989 at the University of the Witwatersrand, South Africa) <<http://www.csvr.org.za/wits/papers/papspitz.htm>>accessed 20 May 2011.

³⁷ Nora Sveaass, 'Destroying Minds: Psychological Pain and the Crime of Torture' (2008) 11 NYCtyLRev 303, 304.

³⁸ Loewenstein (n 20) 92; See also L. Nordgren and others 'What Constitutes Torture? Psychological Impediments to an Objective Evaluation of Enhanced Interrogation Tactics' (2011) 22 Psychological Science, 689-694.

³⁹ Ibid 110.

⁴⁰ Ibid 113.

⁴¹ Ibid 114.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Ibid 93.

⁴⁵ Ibid 115.

3. Solitary Confinement

a. Introduction

*Electricity torture is mere child's play in comparison to prolonged solitude.*⁴⁶

These were the words spoken by one of the members of the MLN-Tupamaro movement in Uruguay who, during the 1970s and 1980s, were imprisoned in harsh conditions of solitary confinement for several years without being allowed to communicate with anyone. Solitary confinement is perhaps one of the most well known methods of interrogation and used in many countries around the world and implies that a detainee is placed in a cell with no human contact whatsoever or sometimes only with interrogators, guards, and other personnel ancillary to the detention. It is also used in a punishment context. For the avoidance of doubt, the present analysis considers the use of the method only in an interrogational context and not in the context of 'lawful sanctions'.

In psychological terms, solitary confinement is seen as particularly harsh. As a psychologist from the Swedish Red Cross noted, 'man is intrinsically social and human nature is realised only through interaction and participation with others'.⁴⁷ This is the essence of what makes this technique one of the 'most internationally ubiquitous enhanced interrogation tactics employed in the modern era'.⁴⁸

b. Historical Background and Survivor Testimonies

Many victims of solitary confinement have spoken of their experiences and the purpose of this section is to present some of those accounts.

The journalist Terry Anderson, reflecting on his seven years as a hostage of Hezbollah in Lebanon, wrote that 'I would rather have had the worst companion than no companion at all'.⁴⁹ Indeed, it appears from survivors' testimonies that human companionship is as important as food or water. Reflecting on his experiences of several years as an American soldier in captivity in Northern Vietnam, Thomas Moe wrote that:

What I was not prepared for were the effects of solitary confinement. For the first nine months of my captivity, and sporadically later, I didn't see, hear or talk to another American. Although physical pain was inflicted on me deliberately and effectively, I would discover what an incredible burden mental pain would add to my suffering, how a dark fog slowly could creep over my consciousness, trying to rob me of my remaining power of reasoning.⁵⁰

Another Prisoner of War (POW), John McCain, wrote that solitary confinement 'crushes your spirit and weakens your resistance more effectively than any other form of mistreatment'.⁵¹ Just to put this in context, he had also been beaten regularly, denied adequate medical treatment for two broken arms, a broken leg and chronic dysentery.

The psychologist Hans-Eberhard Zahn, a dissident under the communist regime in East Germany, was held in special prisons of the Stasi from 1953 until 1960. He gave a detailed account of his symptoms from the methods of psychological torture practiced by the Stasi. As a result of the prolonged isolation, his longing for

⁴⁶ Reyes (n 11) 607.

⁴⁷ Enrique Bustos, 'Psychodynamic Approaches in the Treatment of Torture Survivors' in Metin Basoglu (ed.) *Torture and its consequences*, (Cambridge University Press, London 1992) 333, 344.

⁴⁸ Loewenstein (n 20) 112.

⁴⁹ A. Gawande, 'Hellhole' *The New Yorker* (New York 30 March 2009) <www.newyorker.com/reporting/2009/03/30/090330fa_fact_gawande> accessed 14 June 2011, 37.

⁵⁰ Thomas Moe, 'Pure Torture' *University of Notre Dame Magazine* (January 1996) <<http://magazine.nd.edu/news/13873-pure-torture>> accessed 29 May 2011, 2.

⁵¹ Gawande (n 49) 39.

human contact became so overwhelming that he started to desire being beaten by his guards and remembers breaking out in tears when a guard shook his hand to say hello.⁵²

Moving to more recent times, one Yemeni detainee in Guantánamo Bay was held in solitary confinement from December 2003 to late 2004. He described his mood during solitary confinement as 'deteriorating...encompassing frustration, rage (although...not violent), loneliness, despair, depression, anxiety, and emotional outbursts'.⁵³ His appointed counsel described his client's condition as 'initially agitated and withdrawn' and said that he witnessed in him significant mood swings, including 'uncontrollable weeping at inappropriate times, undirected anger, and unresponsiveness'.⁵⁴ Based on these descriptions, an expert psychiatrist concluded that he was 'at significant risk for future psychiatric deterioration, possibly including the development of irreversible psychiatric symptoms'.⁵⁵

Independent forensic experts have also spoken of their impressions of solitary confinement. Dr. Hernan Reyes, medical coordinator for detention-related activities at the ICRC, has visited countless detention centres around the world. When questioned what, in his view, was the worst form of torture, he said the following:

I remember distinctly some political prisoners telling me that for them the worst form of torture was solitary confinement. They said they had been severely beaten, they had been tortured with electricity and other niceties and they said the worst part was being in strict solitary confinement for months on end, for six, eight, nine, twelve months. For them that was much worse, and luckily these political prisoners happened to be very intellectually strong and so they devised methods to cope with that. I think that would be very, very, very difficult.⁵⁶

c. Scientific Knowledge

The alarm raised about the 'brainwashing' of political prisoners under the Soviet Union, Communist China and during the Korean War gave rise to a major body of medical and scientific literature concerning the effects of social isolation.⁵⁷ The purpose of this section is to summarise the findings of this literature.

Firstly, in general terms, some evidence exists that solitary confinement is potentially more psychologically damaging than physical torture.⁵⁸ Victims may even develop a unique syndrome. Research in the 1980s found that rigidly imposed solitary confinement could result in substantial psychopathological effects and may form a clinically distinguishable syndrome.⁵⁹ Others have argued that a person 'exposed to isolation for the first time develops...a predictable group of symptoms, which might almost be called a "disease syndrome"'.⁶⁰

It appears that the duration of isolation need not be prolonged for it to result in negative psychological effects. In the US, for example, a review of the studies of supermax facilities has revealed that 'there is not a single published study of solitary or supermax-like confinement in which non-voluntary confinement lasting for longer *than 10 days*... failed to result in negative psychological effects'⁶¹ (emphasis added). The findings of a Danish study of prisoners held in solitary confinement for *longer than four weeks* found that they were twenty

⁵² Physicians for Human Rights, 'Break them down: Systematic Use of Psychological Torture by U.S. forces' (Report) (May 2005) <<http://physiciansforhumanrights.org/library/reports/us-torture-break-them-down-2005.html>> accessed 13 June 2011, 64.

⁵³ Ibid 67.

⁵⁴ Ibid.

⁵⁵ Ibid 68.

⁵⁶ Harry Kreisler, 'Negotiating Prisoners Rights: Conversation with Hernan Reyes' (Institute of International Studies, University of California) (2 December 1999) <<http://globetrotter.berkeley.edu/people/Reyes/reyes-con0.html>> accessed 13 June 2011, 5.

⁵⁷ Stuart Grassian, 'Neuropsychiatric effects of Solitary Confinement' (Workshop on the Neurobiology of Psychological Torture, UC Davis Center for Mind and Brain) (30 September 2006) <<http://humanrights.ucdavis.edu/resources/library/documents-and-reports/Grassian.pdf>> accessed 2 June 2011, 3.

⁵⁸ Richard F Mollica and others, 'Overview: The Assessment and Diagnosis of Torture Events and Symptoms' in Metin Basoglu (ed), *Torture and its consequences* (Cambridge University Press, London 1992) 253, 255.

⁵⁹ Stuart Grassian, 'Psychopathological Effects of Solitary Confinement' (1983) 140 *AmJPsychiatry*, 1450-1454.

⁶⁰ Richard Singer, 'Confining Solitary Confinement: Constitutional Arguments for a "New Penology"', (1971) 56 *IowaLRev* 1251, 1269.

⁶¹ Craig Haney, 'Mental health issues in long-term solitary and "supermax" confinement' (2003) 49 *Crime and Delinquency* 124, 130.

times more likely to be admitted to a psychiatric hospital than a prisoner in a standard prison environment. It also noted that such detainees were at an increased risk of hospitalisation for psychiatric reasons.⁶²

It is established that the effects of solitary confinement are numerous. Declassified research conducted by the Central Intelligence Agency (CIA) during the 1950s and 1960s in the US suggests that the symptoms most commonly produced are superstition, intense love of any other living thing, perceiving inanimate objects as alive, hallucinations, and delusions.⁶³ One well known expert has written that 'there are few if any forms of imprisonment that appear to produce so much psychological trauma and in which so many symptoms of psycho-pathology are manifested'.⁶⁴ He summarised the health effects of isolation as including appetite and sleep disturbances, anxiety, panic, rage, loss of control, paranoia, hallucinations, self-mutilations, a sense of impending emotional breakdown, suicidal ideation and behaviour, and hypertension. Other medical experts have also identified the psychological effects to include depression, cognitive disturbances, obsessive thoughts and psychosis.⁶⁵

The effects of prolonged isolation may stretch into the long term. US POWs who were subjected to periods of solitary confinement by the Chinese during the Korean War suffered from persistent anxiety, suspiciousness, confusion, and depression up to 40 years after they were returned home.⁶⁶ It has also been shown that long term exposure to extreme isolation can lead to an increased withdrawal of prisoners into themselves. One study found that as prisoners become 'increasingly unfamiliar and uncomfortable with social interaction, they are further alienated from others and made anxious in their presence' and that in extreme cases this 'environment is so painful, so bizarre and impossible to make sense of, that they create their own reality- they live in a world of fantasy instead'.⁶⁷

There is also a disturbing contradiction to be found in the effects of solitary confinement. Many have described developing affectionate feelings toward those prison guards inflicting the treatment. The Centre for the Treatment of Torture Victims (CTTV) in Berlin has reported that ex-prisoners have felt affection and love for their perpetrators, who during the period of total isolation and solitude were their only human contact.⁶⁸ It has been suggested that this development may be impossible to integrate into one's value system and view of the world.⁶⁹ When the victim is deprived of contact with others and starved of human interactions, they bond with the torturer. In scientific terms, this is known as 'traumatic bonding'.⁷⁰ This perhaps sheds light on the experience described by Hans-Eberhard Zahn in Stasi prisons (above) and why, in George Orwell's *1984*, Winston Smith comes to love his torturer.

Staying with the theme of communication, even minor forms of communicating with others can help in a solitary confinement setting. For example, when a detainee alone in a cell manages to communicate with another detainee (e.g. by tapping on the wall), this takes on importance in terms of finding out what may happen and when. It serves to give the detainee the 'illusion of retaining some "control" and being able perhaps to "predict" what may happen'.⁷¹ A complete lack of any opportunity for such communication (i.e. in a modern high-security cell) will eliminate any such controllability.

Similarly, the ability to retain some of one's human values is equally important. One clinician explains how a client recalled when he himself was in prison and was being severely tortured, he comforted another victim whose torture he had witnessed. The client said 'Old man, I cannot defend you now. But whilst we are here in

⁶² D. Sestoft and others, 'Impact of Solitary Confinement on Hospitalization Among Danish Prisoners in Custody' (1998) 21 *IntJLawPsychiat* 99, 107-108.

⁶³ Central Intelligence Agency, 'Human Resource Exploitation Training Manual' (1983) <<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB122/CIA%20Human%20Res%20Exploit%20H0-L17.pdf>> accessed 14 June 2011, 48.

⁶⁴ Craig Haney (n 61) 124.

⁶⁵ Jeffrey Metzner and others, 'Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics' (2010) 38 *JAAPL* 104.

⁶⁶ Human Rights First and Physicians for Human Rights (n 19) 30.

⁶⁷ Craig Haney (n 61) 140.

⁶⁸ Physicians for Human Rights (n 52) 68.

⁶⁹ *Ibid.*

⁷⁰ José Saporta and others, 'Psychobiological Consequences of Severe Trauma' in Metin Basoglu (ed.) *Torture and its consequences* (Cambridge University Press, London 1992) 151, 154.

⁷¹ Reyes (n 11) 614.

prison I shall teach you to read and write, and that will be our victory'.⁷² The ability to retain such values is not possible in solitary confinement. Research also indicates that the availability of emotional support from other inmates may be a critical factor in speeding up recovery from the effects of torture, stressing the importance of sharing the traumatic experience.⁷³ In the view of another psychiatrist, complete isolation widens the gap between 'powerful authorities and helpless individuals and prevents the perception of any similarity of humanely qualities between the two sides'.⁷⁴ This has the effect of intensifying the torturer's hatred and contempt for the detainee and facilitates aggressive behaviour.

Finally, it may be observed that solitary confinement is usually categorised as a mental form of ill-treatment.⁷⁵ The severe effects of prolonged isolation, however, need not only be *mental*. A study of the self and its social brain, emerging from social neuroscience, has argued that human beings are neurologically far more interdependent than we might have realised before. This study traces the evolution of these traits by showing how for our primitive ancestors, survival depended not only on physical strength and cleverness but especially on greater commitments to and from one another. The pain of loneliness is so powerfully disruptive that even today persistent isolation can impair DNA transcription in our immune cells. The overall argument is that loneliness floods the body with stress hormones, raises blood pressure, accelerates aging, damages cognition and weakens the immune system.⁷⁶

4. Humiliation and Shame

a. Introduction

*Humiliation is worse than death; in times of war, words of humiliation hurt more than bullets – Old Somali Proverb.*⁷⁷

Humiliation is a complex notion. It has its origins in the Latin words *humus* (earth), *humilis* (low), and *humiliare* (to make low). On one level it may refer to three different aspects of the same experience: the perpetrator's act, the victim's feeling, and the social process.⁷⁸ Added to that is the inevitability that different cultures often disagree as to whether or not an experience rises to the level of a humiliation. In light of the subjective nature of such judgments, disputes will arise with one group insisting on applying the word to its own experience and denying it to the other.⁷⁹

Despite being a complex notion, it can however be broken down into plain language. Firstly, all human beings yearn for recognition and respect. When they perceive that this is withdrawn or denied, they may feel humiliation. This is the strongest force for creating rifts and destroying relationships.⁸⁰ This desire for recognition unites human beings and provides a platform for contact and cooperation.⁸¹

Humiliation shows some important differences compared to other 'shame-based phenomena'.⁸² Firstly, shame is an emotion and humiliation is 'an inner psychosocial effect of violence'.⁸³ Secondly, shame affects only

⁷² Stuart Turner and others, 'Psychological Sequelae of Torture' in John Wilson and Beverley Raphael (eds) *International Handbook of Traumatic Stress Syndromes* (Plenum Press, New York 1993) 8.

⁷³ Metin Basoglu and others, 'The role of Uncontrollable and Unpredictable Stress in Post-Traumatic Stress Responses in Torture Survivors' in Metin Basoglu (ed) *Torture and its consequences* (Cambridge University Press, London 1992) 182, 213.

⁷⁴ Ibid 201.

⁷⁵ David Luban and others, 'Mental Torture: A Critique of Erasures in U.S. Law' (2011) (Georgetown Public Law Research Paper No. 11-31) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1797806> accessed 2 June 2011, 18.

⁷⁶ John Cacioppo and others, *Loneliness: Human Nature and the Need for Social Connection* (W.W. Norton, New York 2008) 12, 105, 141.

⁷⁷ Evelin Lindner, *Making Enemies: Humiliation and International Conflict* (Greenwood/Praeger Security International, Connecticut 2006) xv.

⁷⁸ Ibid xiv.

⁷⁹ Ibid.

⁸⁰ Ibid 171.

⁸¹ Ibid.

⁸² Robert Oravec and others, 'Social transition, exclusion, shame and humiliation' (2004) 14 *Torture* (Online) <<http://www.irct.org/Default.aspx?ID=4740>> accessed 14 June 2011, 3, 13.

⁸³ Ibid.

part of an individual while humiliation 'hits the entire psychosocial self of a person'.⁸⁴ Other scholars have described humiliation as 'interpersonally situated' and shame as 'self-focused'.⁸⁵ This classification enables us to comprehend how techniques of torture are designed to produce their effects. They typically tend to work because they convert the humiliation of the act perpetrated by the torturer into a deep sense of shame of the tortured. It is the feeling of shame that is invoked that produces the silencing impact of the humiliating act, so that often victims are unable to relate their experiences of humiliation for they feel so shamed.⁸⁶

b. Historical Background and Survivor Testimonies

Humiliating tactics, according to some historians, are the creature of colonial policing and British and French police, in particular, have a long history of using cultural humiliation.⁸⁷

Sexual humiliation, such as locking a naked woman in a box with peep holes or female interrogators stripping in front of male prisoners, were methods used in Soviet interrogations.⁸⁸ The CIA, in the 1960s, highlighted sexual humiliation as an interrogation tactic which could be used to strip victims of their identities and make them feel powerless.⁸⁹

Many torture victims have reported humiliating treatment as being the most painful. The UK-based Medical Foundation for the Care of Victims of Torture (MFCVT) has conducted research into the persecution of Sikhs in India. It studied the effects of various forms of ill-treatment inflicted on a group of 95 men. Interestingly, it found that 'one particularly devout man had cigarette smoke and ash blown in his face, alcohol poured into his mouth and threats of having his beard and hair cut off. He remembered this as worse than his (very severe) physical abuse'.⁹⁰ Turning to testimonies from victims of sexual humiliation, a psychiatrist reported the following account from a South American patient (concerning the interrogations she received in prison):

I have been interrogated five times and every time I was completely naked...during each of the five interrogations I started menstruating even though it wasn't the right time for it; maybe it was due to nerves...they forced me to take my clothes off...always making me look them in the eyes...They then humiliated me verbally...saying that they would rape me while they mauled me all over my body. They then lined themselves up in a row making me walk in front of them ...still making me look them in the eyes...it felt so incredibly humiliating.⁹¹

Such experiences of humiliation and shame often persist for the rest of a woman's life.⁹²

In recent years, US interrogators used sexual torture techniques as a method of humiliating and manipulating the emotions and weaknesses of prisoners in Iraq and Guantánamo. In the Abu Ghraib prison in Iraq, sexual humiliation not only took the form of forced nudity. One detainee told how he was made to wear women's underwear for a total of 51 days while in isolation.⁹³ Sexual humiliation was also reportedly inflicted upon female detainees in Iraq. An elderly female detainee claimed that during her five days detention at an unknown location in Iraq, she was made to crawl on her hands and knees as a 'large man...straddled her and placed ropes in her mouth and across her eyes and attempted to ride her like a horse'.⁹⁴ It has also emerged that female interrogators used sexually provocative acts as part of interrogation in Guantánamo. One detainee has

⁸⁴ Ibid.

⁸⁵ Susmita Thukral, 'Understanding Shame and Humiliation in Torture' (Seminar Paper, Teachers College, Colombia University) (Fall 2004) <<http://www.humiliationstudies.org/documents/ThukralFinalHumiliation.pdf>> accessed 14 June 2011, 4.

⁸⁶ Ibid.

⁸⁷ Darius Rejali, *Torture and Democracy* (Princeton University Press, Princeton 2007) 383.

⁸⁸ Aleksander Solzhenitsyn, *The Gulag Archipelago 1918-1956: an Experiment in Literary Investigation*, Volume 1 (Harper & Row, New York 1974) 105-106.

⁸⁹ Human Rights First and Physicians for Human Rights (n 19) 28.

⁹⁰ Medical Foundation for the Care of Victims of Torture, 'Lives Under Threat' (July 1999) <<http://www.torturecare.org.uk/publications/reports/281>> accessed 2 May 2011, 4.

⁹¹ Mollica (n 58) 257-258.

⁹² Jose Quiroga and others, 'Politically-motivated torture and its survivors: a desk study review of the literature' (2005) 15 *Torture* (Online) <<http://www.irct.org/media-and-resourcesnew/library/torture-journal/archive/volume-15--no.-2-3--2005.aspx>> accessed 17 June 2011, 1, 64.

⁹³ Ibid 37.

⁹⁴ Ibid 38.

described how interrogators doctored pictures to make it appear like his wife was naked next to Osama bin Laden. Another spoke of how during one interrogation, a female interrogator said that 'You Muslim people don't like to see woman' after which she reached under her skirt and threw what appeared to be blood in his face.⁹⁵ Another detainee was forced to look at magazines he found offensive, to stand and face the American flag while the national anthem was played, and denied permission to pray.⁹⁶ The same detainee, after fifty straight days of interrogation, stated that he would talk about anything if his beard was left alone. His beard was shaven after which he began to cry when talking.⁹⁷ The specific nature of the treatment inflicted in these examples, in one psychologist's view, was rooted in the knowledge that shame and humiliation carry a very strong and different psychological meaning in the Arab world.⁹⁸

c. Scientific Knowledge

In terms of the clinical implications of humiliation and shame, such experiences profoundly affect one's capacity to relate to others and form intimate and healthy relationships. They can destroy a person's most basic capacities, such as the capacity to trust and form secure attachments.⁹⁹ According to one psychiatrist, the mistrust survivors feel may even carry over to the next generation, with children observing their parents keeping secrets and feeling shame.¹⁰⁰ Interrogation techniques which aim to inflict extreme humiliation have a significant impact in inducing loss of control and feelings of helplessness in the detainee.¹⁰¹ Moreover, the process of losing one's dignity through humiliation is a deeply destructive and devastating experience that attacks people at their cores. According to one psychologist, it is from this viewpoint that practices of humiliation once considered normal such as 'breaking the will' acquire medical labels such as *victimhood* or *trauma*.¹⁰² Humiliating people, in her view, hurts more than physical pain because equal dignity has become the essence of humanity.¹⁰³

Turning to sexual humiliation, in the opinion of one Harvard psychiatrist, the experience of forced nudity is comparable to rape since that in itself often carries an implicit threat of rape and mutilation.¹⁰⁴ Psychiatrists from the Treatment Centre for Traumatized Refugees and Migrants in Copenhagen (ETICA) have argued that:

...never having been exposed to a torture situation, people from the West cannot imagine that to be exhibited naked is torture at all. Of course, it might be humiliating, but not sexually so. This is not the viewpoint of the torture survivors. They all, independent of culture, had experienced forced nakedness as not only humiliating, but also as a sexual assault.¹⁰⁵

The same psychiatrists defined and categorised sexual torture as including mental sexual assault, that is forced nakedness, sexual humiliations, sexual threats and witnessing others being sexually tortured. This was based on what individuals reported as being for him or her sexual torture.¹⁰⁶

According to the US based Center for Victims of Torture (CVT), forced nakedness creates a power differential.¹⁰⁷ It strips the victim of their identity, induces immediate shame and creates an environment where the threat of sexual and physical assault is always present. In its experience, female Muslim clients find sexual

⁹⁵ Physicians for Human Rights (n 52) 25.

⁹⁶ Philippe Sands, *Torture Team: Deception, Cruelty and the Compromise of Law* (Allen Lane, London 2008) 14.

⁹⁷ Ibid 191.

⁹⁸ Thukral (n 85) 3.

⁹⁹ Ibid 5.

¹⁰⁰ Elizabeth Landau, 'Torture's psychological impact "often worse" than physical' CNN Health (22 May 2009) <http://articles.cnn.com/2009-05-22/health/torture.health.effects_1_torture-physical-symptoms-abu-ghraib?_s=PM:HEALTH> accessed 16 May 2011, 2.

¹⁰¹ Basoglu (n 73) 206.

¹⁰² Lindner (n 77) 29.

¹⁰³ Ibid 108.

¹⁰⁴ Judith Lewis Herman, *Trauma and Recovery: The Aftermath of Violence: from Domestic Abuse to Political Terror* (Basic Books, Glenview 1992) 33.

¹⁰⁵ Inge Lunge and others, 'Sexual Torture and the Treatment of its Consequences' in Metin Basoglu (ed) *Torture and its consequences* (Cambridge University Press, London 1992) 310, 313.

¹⁰⁶ Ibid 312.

¹⁰⁷ Center for Victims of Torture, 'Effects of Psychological Torture' <<http://www.cvt.org/page/36>> accessed 12 May 2011.

humiliation so shaming that they cannot admit it to their communities or families without fearing rejection. Similarly, in Indochinese societies, negative social sanctions and harsh punishment are handed down to women who lose their sexual purity, even under the most tragic of circumstances such as sexual torture.¹⁰⁸ In relation to male victims, the CVT finds that they feel degraded in their manhood, especially if the perpetrator was female.

The CVT's experience also indicates that sexual humiliation often leads to symptoms of Post Traumatic Stress Disorder (PTSD) and major depression. Other studies have also concluded that shame is a very strong predictor for PTSD.¹⁰⁹ In the CVT's experience, victims often relive the session of humiliation in the form of flashbacks and nightmares long after their detention. In fact, many of their clients who have been sexually humiliated report that their most enduring and disabling symptoms are related to reliving memories of the voices of their torturers using sexually degrading insults or threats.¹¹⁰

Finally, in the above situations, it is worth noting that the 'powerlessness' of the victim is always contrasted with the absolute power of the perpetrator. The relationship of torturer to victim is, in negative terms, also intimate in many of these situations. This 'shameful, unspeakable intimacy has a devastating effect on the personal, family and sexual life of the survivor'.¹¹¹

5. Threats and Fear

a. Introduction

*A living thing, I claimed, is essentially a system of activities meant to sustain itself through changes in its environment. In torture, this relation is reversed: The victim experiences himself as boundlessly threatened, but here there is little for that threatened self to be but simply that which is so threatened. If life calls for a special kind of respect or concern from us, then torture, insofar as it aims to transform life into a kind of anti-life, must be morally offensive in a way that is different from and perhaps greater than even killing.*¹¹²

This section consists of acts which imply threats or which create fear in the victim. This may be direct threats of torture or death to oneself or family, fear arising from mock executions and being forced to watch or listen to others being tortured. It may also consist in the exploitation of a known phobia.

A threat, according to the CIA's research, is 'a means for establishing a bargaining position by inducing fear in the subject'.¹¹³ It is often more effective at weakening resistance than the actual act itself and can trigger fears more damaging than the immediate sensation of pain.¹¹⁴ Threats and fear have been used in many different settings in an attempt to break the will of detainees and, as will be seen, are a particularly cruel form of psychological suffering.

b. Historical Background and Survivor Testimonies

Threats of torture have been used as interrogational techniques by a host of diverse countries. Jordan, for example, made the most notorious terrorist of the 1980s, Abu Nidal, talk by threatening his family.¹¹⁵ Traditionally, in Russian and Chinese captivity situations, psychological methods have often taken the forms of threats and 'contingency abuse'.¹¹⁶ This is a situation where captives are forced to witness the torture of other captives with the realisation that their own torture is contingent upon the compliance or lack thereof offered in the captive-captor relationship. Aleksandr Solzhenitsyn, who was detained in a Soviet Gulag for eleven years,

¹⁰⁸ Mollica (n 58) 256.

¹⁰⁹ Thukral (n 85) 6.

¹¹⁰ Physicians for Human Rights (n 52) 12.

¹¹¹ Gill Hinshelwood, 'Shame, the silent emotion' (1999) 22 IPMJ 9, 11.

¹¹² David Sussman, 'Defining Torture' (2006) 37 CaseWResJIntL 225, 230.

¹¹³ CIA (n 63) 15.

¹¹⁴ Ibid 50.

¹¹⁵ Marcy Strauss, 'Torture' (2004) 48 NYLSchLRev 201, 213.

¹¹⁶ Thomas W Miller, 'Long Term Effects of Torture in Former Prisoners of War' in Metin Basoglu (ed) *Torture and its consequences* (Cambridge University Press, London 1992) 107, 115.

considered threats so effective that 'one could break even a totally fearless person through his concern for those he loved'.¹¹⁷

Turning briefly to phobias, on the one hand, these may be cultural and affect an entire population. In many Arab populations, for example, a quasi-phobia exists in relation to dogs.¹¹⁸ This may be because dogs are considered to be unclean animals. The fear and revulsion of pigs has been used in other cultures to torment detainees.¹¹⁹ On the other hand, phobias may also be individual. This was memorably described, for example, in George Orwell's *1984* where it was the exploitation of Winston Smith's rat phobia (not physical torture) that finally broke him and made him betray his beliefs and his lover.

In recent times, the use of 'fear' has been an important tactic in US interrogations during the war on terror. In Afghanistan, one detainee claimed that during a forty-day period of detention, he was threatened with dogs and placed in a cage with a hook and a hanging rope.¹²⁰ After the US invasion of Iraq, one soldier later reported that he had observed staged executions of several detainees using M16 rifles and 9mm pistols. He described such events as a 'chamber of horrors'.¹²¹ A similar report described an incident in which a lieutenant 'charged his 9mm pistol, positioned it threateningly during his interrogation...and related he would kill [the detainee] if he did not provide the appropriate information'.¹²² The interrogator then proceeded to take the detainee outside where he was faced with six soldiers standing in a line with their weapons in hand, at which point he then placed the head of the detainee into a clearing barrel and discharged his weapon near the detainee's head. The detainee 'became hysterical and thought he was going to be killed'.¹²³ Detainees were also reportedly made to lie down on the extremely hot pavement while armoured vehicles were parked alongside to make the detainees think that they would be run over.¹²⁴ A Guantánamo detainee was also subject to 'threats of oblivion'.¹²⁵ The Interrogators told the detainee that they were sick of hearing the same lies over and over and were considering 'washing their hands of him'.¹²⁶ They then added that once this happened, he would disappear and never be heard from again. They suggested that physical pain was not the worst thing in the world. Finally, they assured him that he would very soon 'disappear down a very dark hole' after which his 'very existence will become erased'.¹²⁷

In Chile, former prisoners in Pinochet's prisons were forced to listen to tapes where their loved ones were allegedly being tortured.¹²⁸ Similarly, a group of torture victim's from the time of Brazil's military regime described one particularly distressing method suffered: 'seeing one's child dangled outside an upper story window with the threat to let it go'.¹²⁹ Elsewhere, it was reported in the 1980s, for example, that in the 'Evin jail' in Iran children were forced to watch their parents being tortured. Amnesty International reported that one woman signed a false confession 'when she could no longer stand the pain in her three-year old daughter's eyes'.¹³⁰

c. Scientific Knowledge

In a powerless situation such as torture, the expectation that something terrible is going to happen, the fear, uncertainty, confusion together with the lack of information associated with the circumstances all constitute an 'extreme and painful psychological event'.¹³¹ The sensation of fear or exposure to life-threatening situations and fear of death is, in psychological and psychiatric terms, described as a major 'stressor'. Furthermore,

¹¹⁷ Solzhenitsyn (n 88) 106.

¹¹⁸ Reyes (n 11) 604.

¹¹⁹ Ibid 605.

¹²⁰ Physicians for Human Rights (n 52) 21.

¹²¹ Ibid 29.

¹²² Ibid 30.

¹²³ Ibid.

¹²⁴ Ibid.

¹²⁵ Luban (n 75) 31.

¹²⁶ Ibid.

¹²⁷ Ibid.

¹²⁸ Sveaass (n 37) 317.

¹²⁹ Lawrence Weschler, *A miracle, a universe: settling accounts with torturers* (University of Chicago Press, Chicago 1998) 54.

¹³⁰ Amnesty International, *Torture in the Eighties* (Amnesty International Publications, London 1984) 98.

¹³¹ Sveaass (n 37) 314.

threat to life constitutes one of the central criteria when considering the severity of stressors in PTSD assessments.¹³² The Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) is the manual which describes the symptoms of psychological disorders. It includes as criteria for diagnosing PTSD 'events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others'.¹³³

This notion that the perception of a threat is closely linked to the risk of developing PTSD is backed up in studies on torture survivors.¹³⁴ In recent years, a study on survivors of war in the former Yugoslavia found that 'fear of threat to safety and loss of control over life appeared to be the most important mediating factors in PTSD and depression'.¹³⁵ In the view of another psychiatrist, it appears that the experience of a threat to one's life may 'trigger fundamental psychobiological mechanisms associated with the preservation of safety'.¹³⁶ Several other studies have referred to the fact that human beings are 'safety signal seekers'.¹³⁷ The reasoning behind this hypothesis is that those who are victims of captivity and torture will be afraid all of the time except where there exists a stimulus that can reliably predict their safety. In the absence of such a stimulus, they remain in a state of anxiety and in a chronic state of fear and apprehension. The longer they 'experience unpredictability and therefore stress, the more likely they will develop depressive features which show themselves through "learned helplessness"'.¹³⁸ This theory implies that, no matter what efforts are made, the individual will have no control over the outcome.

In situations of repeated sham executions, the victim is repeatedly subjected to 'an unreliable signal of the ultimate uncontrollable threat – his own death'.¹³⁹ From a psychological point of view, this chronic uncertainty over an uncontrollable threat might be expected to result in even greater distress and anxiety than for example knowledge of one's execution the following day. This is because this would be seen as an uncontrollable but *predictable* situation, which could be expected to induce a sense of hopelessness and depression.¹⁴⁰

Indeed, an unpredictable and uncontrollable event appears to be a key factor in determining the level of trauma in torture survivors. A recent psychiatric study examined 279 survivors of torture in the former Yugoslavia and tested, *inter alia*, whether exposure to physical forms of torture is more likely to be associated with PTSD and depression than stressors that do not involve severe physical pain. It also tested whether 'perceived distress and uncontrollability of the stressors, rather than mere exposure to them, would be associated with a greater likelihood of PTSD'.¹⁴¹ The authors found that sham executions, witnessing torture of others, threats of rape and other threats against self or family 'seemed to be as distressing as most physical torture stressors'.¹⁴² The findings suggested that physical pain *per se* is not the most important determinant of traumatic stress in survivors of torture.¹⁴³ The research also showed that what determines traumatic stress in torture survivors is *perceived* uncontrollability and stressfulness of the torture stressors and not mere *exposure* to them.

Moving from psychiatric studies to practical experience, the CVT has found that sham executions and serious death threats create a sense of complete unpredictability and induce chronic fear and helplessness in victims.¹⁴⁴ The victims have a sensation that they are already dead. The fearful experiences are often relived in their nightmares, flashbacks and intrusive memories. This reliving experience can provoke feelings of intense anxiety leading victims to act inappropriately in work, family settings and even cause injury to themselves.¹⁴⁵

¹³² Ibid 315.

¹³³ Physicians for Human Rights (n 52) 51.

¹³⁴ D. Silove, 'The Psychosocial Effects of Torture, Mass Human Rights Violations, and Refugee Trauma: Toward an Integrated Conceptual Framework' (1999) 187 JNervMentDis 200, 203.

¹³⁵ Metin Basoglu and others, 'Psychiatric and Cognitive Effects of War in former Yugoslavia: Association of Lack of Redress for Trauma and Posttraumatic Stress Reactions' (2005) 294 JAmMedAssoc 580, 590.

¹³⁶ Ibid.

¹³⁷ Miller (n 116) 116.

¹³⁸ Ibid.

¹³⁹ Basoglu (n 73) 204.

¹⁴⁰ Ibid.

¹⁴¹ Metin Basoglu and others, 'Torture versus other cruel, inhuman & degrading treatment: Is the distinction real or apparent?' (2007) 64 ArchGenPsychiatry 277, 278.

¹⁴² Ibid 283.

¹⁴³ Ibid.

¹⁴⁴ Physicians for Human Rights (n 52) 54.

¹⁴⁵ Ibid.

The CVT has come across victims of such threats who have 'pleaded with torturers to kill them, preferring real death over its constant threat and continued intolerable pain'.¹⁴⁶

The anticipatory stress following verbal threats or witnessing of torture is often reported as even more distressing than torture itself. One psychiatrist, for example, recalled a session with a torture victim who confessed that he 'almost felt relieved once electrical torture started'.¹⁴⁷ This is because he had learned to cope with it after several sessions and each time he realised it was not as bad as he had feared. From a psychological point of view, this phenomenon is apparently not surprising 'given that other non-human primates also react with high levels of distress when observing fear and distress in conspecifics'.¹⁴⁸ Furthermore, although research is not conclusive, it is possible that 'the conditioned release of endogenous opiates which may mediate habituation and the numbing experience during physical torture' may not occur in response to the simple sight of torture.¹⁴⁹ The absence of these endogenous opiates in these circumstances would help to explain why, for many victims, witnessing torture may be more distressing than torture itself.

On a final note for this section, it must be acknowledged that threats and fear may be used, and have additional implications, when they are inflicted outside of a traditional detention setting. Many victims of such threats are forced into making a choice to flee. The decision to leave everything has 'emotional, social, practical, cultural, and perhaps spiritual significance'.¹⁵⁰ It is forced on a person by threatened or impending death either of oneself or one's loved ones and it is in the spirit of survival that the person takes flight. For many such victims, the enormous stress involved is a significant trauma in itself.¹⁵¹ Outside of detention, when an individual faces threats of further torture and arrest, this can sometimes evoke 'panics and agoraphobia-like reactions with extensive avoidance of outdoor situations and even complete housebondage'.¹⁵² Even in situations where the environment is considered to be safe, other symptoms such as 'intrusive thoughts, emotional numbing, depressed mood, cognitive impairment, and somatic symptoms may be more salient'.¹⁵³ The former set of reactions can still ring through in a safe environment, such as a new country, when an individual overestimates the likelihood of re-arrest and further torture. For example, one psychiatrist reported meeting a refugee from an African country who 'presented with intense fear and anxiety evoked by an unrealistic thought of being hunted down by the government teams from her home country'.¹⁵⁴

6. Sleep Deprivation, Sensory Deprivation and Sensory Bombardment

a. Introduction

*It has been known since 1500 at least that deprivation of sleep is the most effective torture and certain to produce any confession desired.*¹⁵⁵

Sleep deprivation takes several forms. On the one hand, it may mean depriving a detainee of sleep through insisting he rest in uncomfortable positions. Detainees may also be left to rest with minimal protection from the cold and on hard or vermin-infested surfaces, thus preventing any likelihood of falling asleep. Lastly, it is often simply implemented by waking prisoners up for interrogation or 'bed-checks'. Sensory Deprivation may include the use of hooding, blindfolding, opaque goggles, darkness, sound proofing nasal masks and gloves. Sensory bombardment, otherwise known as overstimulation, may include the use of bright or stroboscopic lights, loud noise or music, shouting or using public address equipment at close range.

¹⁴⁶ Ibid.

¹⁴⁷ Basoglu (n 73) 206.

¹⁴⁸ Ibid 206.

¹⁴⁹ Ibid.

¹⁵⁰ Ron Baker, 'Psychosocial Consequences for Tortured Refugees Seeking Asylum and Refugee Status in Europe' in Metin Basoglu (ed) *Torture and its consequences* (Cambridge University Press, London 1992) 83, 88.

¹⁵¹ Ibid.

¹⁵² Basoglu (n 73) 206.

¹⁵³ Ibid.

¹⁵⁴ Ibid.

¹⁵⁵ *Ashcraft v. Tennessee*, 322 U.S. 143, 64 S. Ct. 921, 88 L. Ed. 1192 (1944) [6].

In practice, these three modes of ill-treatment are often used in combination to maximise the infliction of pain. In this regard, it is considered practical to address them in the same section. In each subsection below, sleep deprivation will be analysed first followed by sensory deprivation and bombardment.

b. Historical Background and Survivor Testimonies

Sleep deprivation has been used as a method of interrogation in many contexts and for many centuries. According to one historian, while we tend to associate sleep deprivation with the 'Inquisitional tortures', it is a technique that is practised on many more victims today than during the Inquisition times.¹⁵⁶ The Romans used it to extract information from their enemies, calling it 'tormentum vigilae' or 'tormentum insomniae'.¹⁵⁷ Many experts now agree that sleep is as basic to survival as food and drink.¹⁵⁸

Prolonged sleep deprivation has been described by people subjected to it as being horrendous. Menachem Begin, a former Israeli Prime Minister (1977–83), described his experience of it as a prisoner of the *Komitet Gosudarstvennoy Bezopasnosti* (KGB) in the following terms:

In the head of the interrogated prisoner, a haze begins to form. His spirit is wearied to death, his legs are unsteady, and he has one sole desire: to sleep, to sleep just a little, not to get up, to lie, to rest, to forget...Anyone who has experienced this desire knows that not even hunger and thirst are comparable with it. I came across prisoners who signed what they were order to sign, only to get what the interrogator promised them. He did not promise them their liberty; he did not promise them food to sate themselves. He promised them – if they signed – uninterrupted sleep!¹⁵⁹

The combination of 'interrogation in depth' tactics used by the British security services on suspected members of the Irish Republican Army (IRA) in Northern Ireland (NI) during the 1970s are well known. Lord Gardner, one of the three members of the Parker Commission set up to investigate the practices, said that medical experts who appeared before the Committee said that 'the foundation of the five techniques [used by the British forces] had been laid by the KGB in Russia, who had first tried sensory isolation as a method of inducing mental disorientation'.¹⁶⁰ Indeed, it is no secret that sensory isolation and bombardment with light and noise was routinely used as an interrogation tactic by the State police in the former Soviet Union.¹⁶¹ What is less well known about the NI example is that those who suffered the severest mental injuries were those who had been put through the 'hooding treatment'.¹⁶² 'Hooding' – a form of sensory deprivation – is the practice of fully covering the head of a person. According to recent forensic reports, it has been used in a number of countries with increasing frequency during the past 50 years.¹⁶³

Turning to the use of all three methods in more recent times, detainees remanded at US detention facilities in Afghanistan have reported how bright lights would be set up outside the cell and military personnel would keep them awake by banging on the metal walls of the cell.¹⁶⁴ One detainee told how he was forced to wear black goggles almost continuously for an entire month of his detention, in addition to soundblocking earphones.¹⁶⁵ They reported that the sleep deprivation, of several weeks duration, left them terrified and disoriented.¹⁶⁶ A spokesman for the US military operation in Afghanistan subsequently claimed that it was 'legitimate to use lights, noise and vision restriction, and to alter, without warning, the time between meals, to blur a de-

¹⁵⁶ Rejali (n 87) 290.

¹⁵⁷ Reyes (n 11) 609.

¹⁵⁸ Ibid.

¹⁵⁹ Menachem Begin, *White Nights: the Story of a Prisoner in Russia* (Harper and Row, New York 1979) 107.

¹⁶⁰ John Conroy, *Unspeakable Acts, Ordinary People: The Dynamics of Torture* (University of California Press, Berkeley 2000) 44.

¹⁶¹ Human Rights First and Physicians for Human Rights (n 19) 24.

¹⁶² Denis Faul and others, *The Hooded Men: British Torture in Ireland, August, October 1971* (Association for Legal Justice, Belfast 1974) 84.

¹⁶³ International Forensic Expert Group, 'Statement on Hooding' (28 June 2011) <<http://www.irct.org/news-and-media/irct-news/show-news.aspx?PID=13767&Action=1&NewsId=3238>>, accessed 3 July 2011.

¹⁶⁴ Human Rights First and Physicians for Human Rights (n 19) 22.

¹⁶⁵ Ibid 26.

¹⁶⁶ Ibid 22.

tainee's sense of time'.¹⁶⁷ He added that sleep deprivation was 'probably within the lexicon' and that a common method for keeping detainees awake was to keep bright lights on at all times or to wake detainees every fifteen minutes.¹⁶⁸ One Guantánamo inmate was kept awake twenty hours a day for 48 days out of 54, and the longest period of time for which any detainee has been deprived of sleep by the CIA is 180 hours.¹⁶⁹

c. Scientific Knowledge

There is an increasing amount of scientifically-based evidence pointing to the fact that depriving people of their sleep over time has 'severe and destructive effects on cognitive, emotional, and somatic functions of those exposed'.¹⁷⁰ Neuropsychological studies have shown that it leads to significant cognitive impairments such as deficits in memory, learning, logical reasoning and decision-making.¹⁷¹ Other research suggests that chronic insufficient sleep may affect health by compromising optimistic outlook and psychosocial functioning.¹⁷²

Clinicians have also spoken of the destructive effects of sleep deprivation. A psychotherapist from the MFVT stated that:

After two nights without sleep, the hallucinations start, and after three nights, people are having dreams while fairly awake, which is a form of psychosis. By the week's end, people lose their orientation in place and time – the people you're speaking to become people from your past; a window might become a view of the sea seen in your younger days. To deprive someone of sleep is to tamper with their equilibrium and their sanity.¹⁷³

Similarly, in the CVT's experience, sleep deprivation 'causes a host of negative psychological effects, the most prominent is cognitive impairment'.¹⁷⁴ Furthermore, individuals deprived of sleep take longer to respond to stimuli and may lead to attention deficits, speech impairments and inflexible thinking.¹⁷⁵ Sleep deprivation has profound physical effects also. It has specific effects on the body's physiological processes and reduces the body's tolerance for musculoskeletal pain causing deep aches in the lower part of the body which proceed to the upper part of the body.¹⁷⁶ This may lead to the body feeling hypersensitive.¹⁷⁷

Turning to sensory isolation and bombardment, the CIA's psychological research warned that 'extreme deprivation of sensory stimuli induces unbearable stress and anxiety and is a form of torture'.¹⁷⁸ In the NI example, medical experts who appeared before the Parker Commission took the view that sensory isolation was a method of 'inducing an artificial psychosis or episode of insanity'.¹⁷⁹ Lord Gardner, in his dissenting report as a member of the Parker Commission, referred to a sensory isolation experiment conducted in a UK hospital in the 1950s. Twenty volunteers from hospital staff were placed in a room with constant noise. They were made wear goggles that impaired vision and wear gloves of padded fur. They could walk about, lie on mattresses and were fed normal meals several times a day. During mealtimes, they could remove the goggles and gloves and speak to each other. They were all paid and asked to stick with the experiment for as long as possible. After forty-eight hours, two thirds of the group had quit citing 'unbearable anxiety, tension and panic attacks'.¹⁸⁰ Gardner emphasized that these were volunteers in their own hospital who knew they would not be mistreated, nor deprived of food or sleep.

Similar experiments were conducted at McGill University in the US also during the 1950s. The 'Bexton Study' involved a group of student volunteers who were required to live in conditions devoid of all external

¹⁶⁷ Ibid.

¹⁶⁸ Ibid.

¹⁶⁹ Luban (n 75) 11.

¹⁷⁰ Sveaass (n 35) 310.

¹⁷¹ D. Kim and others, 'The effect of total sleep deprivation on cognitive functions in normal adult male subjects' (2001) 109 *IntJNeurosci* 127, 137.

¹⁷² M. Haack and others, 'Sustained sleep restriction reduces emotional and physical well-being' (2005) 119 *JIASP* 56, 64.

¹⁷³ Reyes (n 11) 610.

¹⁷⁴ CVT (n 109).

¹⁷⁵ Ibid.

¹⁷⁶ Rejali (n 87) 290, 381.

¹⁷⁷ Luban (n 75) 11.

¹⁷⁸ CIA (n 63) 49.

¹⁷⁹ Ibid.

¹⁸⁰ Conroy (n 160) 45.

stimulation. They were simply required to sit in a comfortable cubicle deprived of sensory stimulation by goggles, gloves, and ear muffs. After just two to three days of such isolation, 'the subject's very identity had begun to disintegrate'.¹⁸¹ The students were found to have suffered from hallucinations and trance-like conditions.¹⁸²

There are also potential *physical* implications to sensory deprivation and bombardment.

Research has shown, for example, that the hearing of noises that might be perceived as danger signals (such as sensory bombardment with noise) induces the release of stress hormones and thereby increases cardiovascular risk.¹⁸³ In relation to sensory deprivation, hooding may 'disturb the normal physiology and metabolism of the body'.¹⁸⁴ It may also bring about an imbalance in the 'ratio of oxygen to carbon dioxide in the air breathed and this disturbs the efficiency of the respiratory mechanism'.¹⁸⁵ This in turn results in mental confusion. In the experience of the International Forensic Expert Group – an international body of 33 medical experts specialising in the evaluation and documentation of torture – hooding may prevent the observation of detainees' physical condition and 'contribute to respiratory distress and ultimately result in loss of consciousness, anoxic brain injury, and even death'.¹⁸⁶ It also increases the likelihood of severe physical pain and subsequent disability as it increases an individual's vulnerability to other methods of torture by preventing the anticipation of harm and a defensive response.¹⁸⁷

7. Relatives of the Disappeared

a. Introduction

An enforced disappearance is considered to be the: ...arrest, detention, abduction or any other form of deprivation of liberty committed 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.¹⁸⁸

This section will discuss the impact of such events on the relatives of those who have 'disappeared'.

b. Historical Background and Survivor Testimonies

Families of the disappeared in Latin America have long reported extraordinary mental anguish. They are the first to agree that such experiences are psychological torture of the worst kind. In the words of a widow whose husband disappeared in Guatemala, 'I would rather burn at the stake'.¹⁸⁹ This really sums up, at the outset, the intensity of suffering involved for such relatives.

The most well known example of the recognition that disappearances could constitute a potential form of mental suffering as regards the loved ones of the disappeared person was the *Pinochet* case. The magistrate examining the extradition case against General Pinochet ruled that, although the British House of Lords had limited the charges to torture and conspiracy to commit torture committed after December 1988, Spanish

¹⁸¹ Alfred McCoy, 'A Short History of Psychological Torture: Its Discovery, Propagation, Perfection, and Legalization' (University of California at Davis, Center for Mind and Brain) (30 September 2006) <<http://humanrights.ucdavis.edu/resources/library/documents-and-reports/McCoy.pdf>> accessed 2 June 2011, 3.

¹⁸² Human Rights First and Physicians for Human Rights (n 19) 31.

¹⁸³ H. Ising and others, 'Health effects caused by noise: evidence from the literature from the past 25 years' (2004) 6 NAH 5 <<http://www.noiseandhealth.org/text.asp?2004/6/22/5/31678>> accessed 28 June 2011.

¹⁸⁴ Faul (n 162) 87.

¹⁸⁵ Ibid 88.

¹⁸⁶ International Forensic Expert Group (n 163) 2.

¹⁸⁷ Ibid.

¹⁸⁸ The International Convention for the Protection of all Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) UNGA Res. 61/177 (ICCPED) art.2.

¹⁸⁹ The Torture Abolition and Survivor Support Coalition International (TASSC International), 'Torture by the United States of America: The Survivor's Viewpoint' (Report submitted to the United Nations Human Rights Committee, 15 June 2006) <www2.ohchr.org/english/bodies/hrc/docs/ngos/final_iccpr_tasscreport.doc> accessed 4 June 2011, 7.

prosecutors could argue that Pinochet's intention in making his opponents disappear before 1988, and concealing their whereabouts thereafter, was to inflict continuing mental torture on their relatives.

c. Scientific Knowledge

Alicia Neuburger, an Argentinean psychologist, gave the following overview in her evidence as an expert witness in a case before the IACtHR:

The psychological consequences of State violence...for the next of kin of the victim vary and they depend on the age of each person and his or her relationship with the victim. Such a violent death is not natural. Depressive states are quite frequent, and they often become chronic, with some type of remission, aggressiveness, and character changes. There are several symptoms, such as bursts of irritability and aggression, difficulty to concentrate, nightmares, problems sleeping, difficulties or alterations with respect to eating, a generally low motivation, extreme tiredness, and symptoms that are called psychosomatic, or directly related to the emotional state. All these consequences worsen when there is no justice. Lack of protection by the State interrupts and impedes the process of grieving of the whole family. Impunity causes a feeling of disbelief, first regarding institutions and then toward all of society, including the most intimate relations. There are feelings of powerlessness and indignation that affect the individuals' whole lives because they have to invest a great amount of energy to overcome that indignation, that powerlessness. Therefore, punishment of those responsible helps the grieving process take place. The fact that those responsible were not punished gave rise to a pattern of permanent grieving. For this reason, it is essential for those responsible to be punished for this not to become an eternal grieving.¹⁹⁰

The above opinion captures the essence of what is at the core of this type of suffering.

During the military rule in Argentina, one of the most frustrating situations for clinicians was attempting to treat patients reacting to the state's policy of disappearing people. The effect of this policy was that many individuals found themselves in a permanent condition of confusion with 'paranoid-schizoid anxieties that inhibited or limited mental functioning'.¹⁹¹ Those individuals who personally suffered the disappearance of loved ones could only partially work through the mourning process 'necessary for healthy mental functioning following traumatic loss'.¹⁹² This stands in contrast to the experience of a death of a relative or close friend, which would normally stimulate community recognition of the significance of the event. In cases of disappearances, relatives are left 'in a state of terrifying uncertainty, with no possibility of psychological closure'.¹⁹³ They remain in a sort of limbo for as long as the victim's fate remains uncertain. Until they obtain positive proof of death or survival, relatives will continue to live in a state of 'frozen mourning'.¹⁹⁴

The act of 'mourning' entails an acknowledgment of reality. It demands a separation from the individual who no longer exists. This kind of psychological separation, however, is impossible in the case of a disappearance. Relatives are trapped in a terrible contradiction. On the one hand, it is impossible to mourn 'without risking intense guilt, for without proof of death, to go on with one's life is tantamount to a kind of murder of the disappeared loved one'.¹⁹⁵ On the other hand, it is extremely difficult to continue as before and maintain the mental representation of the disappeared. The mental process of keeping the disappeared person alive 'imposes a profound form of mental suffering'.¹⁹⁶

The absence of knowledge about the actual fate of a disappeared person produces 'an intrapsychic elaboration that includes fantasies of the possible torments to the disappeared person's mind and body'.¹⁹⁷ These fan-

¹⁹⁰ *Myrna Mack Chang v. Guatemala*, Inter-American Court of Human Rights Series C No. 101 (25 November 2003) [51].

¹⁹¹ N.C. Hollander, 'Psychoanalysis and State Terror in Argentina' (1992) 52 *AmJPsychoanal* 273, 281.

¹⁹² *Ibid.*

¹⁹³ *Ibid.*

¹⁹⁴ Duncan Forrest (ed), *Amnesty International, A Glimpse of Hell: Reports on Torture Worldwide* (New York University Press, New York 1996) 120.

¹⁹⁵ *Ibid* 282.

¹⁹⁶ *Ibid.*

¹⁹⁷ *Ibid.*

tasies, in turn, cause extreme anxiety resulting in the wish to free the victim from such suffering through the fantasy of his or her death. This, of course, gives rise to feelings of intolerable guilt.

The family of those disappeared are frequently unable to make any 'life decisions'. The military dictatorship in Argentina, for example, demanded that the 'missing' person be pronounced dead by the family itself in a variety of subtle ways. If they wished to access any money in the name of the disappeared, they had to sign an official document declaring his or her death.¹⁹⁸ Those who found themselves in such situations of 'arrested mourning' suffered many unrelated symptoms such as 'psychosomatic illnesses, interpersonal conflicts, the inability to maintain healthy relationships, or a general alienation from one's immediate social group or the society at large'.¹⁹⁹

Research on the effect of enforced disappearances on the health of family members in Honduras found that 'constellations of stress-related symptoms commonly seen in post-traumatic stress disorder and other anxiety disorders' were twice as prevalent in families of the disappeared as compared to the two control groups (families who had lost a member due to accident or illness and families where nobody had died in the last ten years).²⁰⁰ The findings indicated that families of the disappeared suffer over and above what might be attributed to 'normal grieving'. The authors suggested that the atmosphere of fear and isolation experienced by families of the disappeared is 'a causative factor in the prolongation of stress-related disorders years after the traumatic event'.²⁰¹

More recently, in 2010, a similar study was conducted on two groups of women living in Bosnia and Herzegovina. These were women whose husbands were either confirmed as having been killed during the war or who, at the time of the study, were officially still listed as missing. The results showed that the group with unconfirmed losses had higher levels of traumatic grief and severe depression even when traumatic events and stressors were controlled for. In the words of the authors, the study 'represents one of the first empirical confirmations that, at least in a war context, suffering the unconfirmed loss of a family member has specific negative mental health consequences compared to suffering a confirmed loss'.²⁰² In addition, the authors were particularly concerned at the high levels of severe depression, including suicidal ideation, in this group.

8. Concluding Observations

First of all, emerging psychological research indicates that the 'empathy gap', for both physical and psychological pain, undermines human ability to objectively evaluate harsh methods of interrogation. Secondly, the effects of solitary confinement are much more serious than one might initially suspect. Many survivors of torture have found that solitary confinement was the worst form of ill-treatment they suffered. Human beings are, after all, social creatures and social interaction, even the most basic, would appear to be central to our long term mental health. Turning to humiliation, torture in any of its forms is inherently humiliating. This is because, by its very nature, it aims to strip the victim of all his dignity. This Chapter has shown, however, that there exists a category of treatment whose sole aim is to humiliate the victim. The voices of many torture victims indicate that there is good reason for terming humiliation 'the nuclear bomb of the emotions'.²⁰³ The scientific literature and experiences of Rehabilitation Centres suggest that its power to inflict long term psychological damage should not be underestimated.

It has also been seen that the sensation of fear or exposure to a life threatening situation is, in psychological terms, a major 'stressor'. For many victims, these situations are more painful than physical torture with some even voicing a preference for death itself.

¹⁹⁸ Ibid.

¹⁹⁹ Ibid.

²⁰⁰ G.J Quirk and others, 'Stress disorders of families of the disappeared: A controlled study in Honduras' (1994) 39 SOCSCIMED 1675.

²⁰¹ Ibid 1679.

²⁰² Steve Powell and others, 'Missing or killed: The differential effect on mental health in women in Bosnia and Herzegovina of the confirmed or unconfirmed loss of their husbands' (2010) 15 EurPsychol 185, 192.

²⁰³ Lindner (n 77) xiii.

Sensory deprivation and bombardment techniques are most often used in combination with the purpose of 'destroying the subject's capacity for psychological resistance'.²⁰⁴ Scientific research and survivor testimonies leave no doubt that depriving people of sleep is equivalent to depriving them of food and water. Finally, the mental anguish experienced by relatives of the disappeared is seen to be rooted in the silence and indifference maintained by the authorities involved in the disappearance of their loved one. The anguish also manifests itself in the inability to properly 'mourn' and make any life decisions.

This concludes the first part of the study.

III. THE LEGAL FRAMEWORK

A. United Nations System for Human Rights Protection

1. Introduction

The purpose of this chapter is to analyse the definition of mental torture applied within the UN system of human rights protection. This chapter is split into three sections. It will discuss, in the following order, the CAT which monitors compliance with the UNCAT, the HRC which monitors compliance with the International Covenant on Civil and Political Rights (ICCPR) and the position of the UNSRT.

In terms of methodology, the Chapter will primarily focus on the jurisprudence of the HRC and CAT, and where relevant, make reference to General Comments and Concluding Observations on State Reports. The final sub-section, devoted to the UNSRT, will refer to the body of reports from 1986 to present. The general approach in each sub-section will be to 'present' the *positive* law as it stands and reserve the critical analysis for the 'concluding observations' sub-section.

2. Committee against Torture

a. Introduction

The UNCAT is the only legally binding convention at the universal level concerned exclusively with the eradication of torture. Its principal aim is to strengthen the existing prohibition of torture by a number of supportive measures and eliminate torture committed by or under the responsibility of public officials.²⁰⁵

The CAT is the body of 10 independent experts that monitors implementation of the UNCAT by all ratifying States. All States parties are obliged to submit regular reports to the CAT and it examines each report and addresses its concerns and recommendations to the State party in the form of 'concluding observations'. In addition to the state reporting procedure, the CAT may also (under certain circumstances) consider individual complaints or communications from individuals.

This section will begin by making some general observations about the UNCAT definition of torture. It will then present a brief overview of the interpretation of 'mental suffering' before proceeding to examine the CAT's interpretation of each of the methods under review. It will not consider 'relatives of the disappeared' as this category of suffering has not come under consideration by the CAT. In terms of methodology, reference will be made to the decisions emanating from the individual complaint procedure and concluding observations emanating from the state reporting procedure.

b. UNCAT definition

Article 1 of the UNCAT defines torture as follows:

Torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, pun-

²⁰⁴ Central Intelligence Agency, 'Kubark Counterintelligence Interrogation Manual 1963' <<http://www.kimsoft.com/2000/kubark.htm>> accessed 12 April 2011, 92-93.

²⁰⁵ Richard Blakeley and others, 'Prolonged Mental Harm: The Torturous Reasoning Behind a New Standard for Psychological Abuse' (2007) 20 HarvHumRtsJ 263, 282.

ishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

c. General Observations on the UNCAT definition

The UNCAT definition follows the traditional pain centred concept of torture flowing from the medieval inquisition.²⁰⁶ The list of purposes in Article 1 was intended to be indicative rather than 'all inclusive'.²⁰⁷ The purpose behind agreeing that torture means only conduct causing severe pain or suffering was to avoid the term being used 'in an inflationary manner'.²⁰⁸ It has been argued that it is 'virtually impossible' to ascertain the level of severity required for an act to qualify as torture.²⁰⁹ It has been suggested by some that a key reason why the UNCAT's potential to curb torture has remained unfulfilled is the lack of a clear definition.²¹⁰

The UNCAT also requires States to prevent other acts of Cruel, Inhuman or Degrading Treatment (CIDT) which do not amount to torture. The formula 'CIDT' originates from UDHR. The UNCAT provides no definition of such acts. The CAT has itself recognised that in practice, the definitional threshold between CIDT and torture is often not clear.²¹¹ According to former UNSRT Manfred Nowak, the requirement of a specific purpose appears to be the most decisive criterion which distinguishes torture from CIDT.²¹² Furthermore, in his view, the powerlessness of the victim was the essential criterion which the drafters of the UNCAT had in mind when they introduced the legal distinction between the two terms.²¹³ He states that torture 'presupposes a situation of powerlessness of the victim, which usually means deprivation of personal liberty'.²¹⁴ Another former UNSRT, Nigel Rodley, identified three elements distinguishing torture from CIDT. These were the relative intensity of the pain or suffering inflicted, the purpose for inflicting the pain or suffering and the status of the perpetrator as a state or private actor.²¹⁵

The definition of torture is significant as greater legal consequences follow from an act of torture under UNCAT than follow from the perpetration of CIDT. A breach of Article 16 (CIDT), for example, does not attract the same consequences as a breach of Article 1.

d. Mental Pain and Suffering

The *Travaux préparatoires* indicate that the criteria as to what constitutes 'mental pain or suffering' were not debated by the Working Group during the drafting stages of the UNCAT.²¹⁶ One unidentified member submitted that the term 'mental torture' did not have sufficient clarity for the purpose of domestic criminal law. The UK agreed and emphasised that it would be difficult for courts to assess the concept of 'mental suffer-

²⁰⁶ Maxime Tardu, 'The United Nations Convention against Torture and other Cruel Inhuman or Degrading Treatment or Punishment' (1987) 56 Nordic JIL 303, 304.

²⁰⁷ Manfred Nowak and others, *The United Nations Convention against Torture, A Commentary* (Oxford University Press, New York 2008) 40.

²⁰⁸ Ibid 67.

²⁰⁹ Nigel Rodley and others, *The Treatment of Prisoners under International Law* (Oxford University Press, London 1999) 98.

²¹⁰ Gail Miller, 'Defining Torture' (Floersheimer Center for Constitutional Democracy Occasional Paper #3 2005) <<http://cardozo.yu.edu/cms/uploadedFiles/FLOERSHEIMER/Defining%20Torture.pdf>> accessed 25 March 2011, 36.

²¹¹ UN Committee against Torture (CAT), 'General Comment No 2' (Implementation of article 2 by States Parties) (23 November 2007) UN Doc. CAT/C/GC/2/CRP.1/Rev.4 [3].

²¹² Nowak (n 207) 74.

²¹³ Ibid 77.

²¹⁴ Manfred Nowak, 'What Practices Constitute Torture?: US and UN Standards' (2006) 28 HumRtsQ 809, 832.

²¹⁵ Nigel Rodley, 'The Definition(s) of Torture in International Law' (2002) 55 CLP 467, 468.

²¹⁶ Nowak (n 207) 38.

ing'.²¹⁷ The former German Democratic Republic noted that it could be interpreted in many different ways.²¹⁸ Commentators continue to stress that the concept remains unclear.²¹⁹

Interestingly, the most detailed description of the mental harm element has been provided by the US. It provided the following definition of mental torture in the process of its ratification of the UNCAT:

...mental pain or suffering refers to *prolonged mental harm* caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subject to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.²²⁰ (emphasis added)

This understanding defines mental pain and suffering by the source of the pain, as opposed to the actual feeling that is created. Confining mental pain or suffering to a closed set of enumerated actions thereby narrows the definition. For example, there may be instances in which an individual experiences severe mental pain or suffering but the harm did not arise from one of the stated causes. As such, the act would not be deemed torture under the US understandings even though applying the UNCAT directly may lead to a finding of torture. In addition, the requirement that the harm be 'prolonged' generates further uncertainty. In the absence of guidance differentiating between transient mental harm and prolonged mental harm, the understandings' use of the word 'prolonged' may serve to further narrow the definition. Internationally, usage of the term 'prolonged mental harm' is non-existent.²²¹ The phrase does not even appear in the most prominent discussions of the UNCAT's negotiation and drafting. It is not a term that is present in 'the relevant medical literature or elsewhere in the United States Code'.²²²

In any event, the CAT has since made clear that acts of psychological torture should not be limited to 'prolonged mental harm' as set out in the US understanding above but include a wider variety of acts which cause mental suffering irrespective of their prolongation or its duration.²²³ It also frequently points out to State Parties that torture may comprise mental suffering and that this must be reflected in national legislation.²²⁴

e. Solitary Confinement

The CAT has expressed strong views that solitary confinement may amount to torture and has become increasingly strict in its recommendations to states.

An example of its increasingly strict position can be seen from its Concluding Observations on Denmark. In 2002, it recommended that Denmark only continue to monitor the effects of solitary confinement on detainees and establish adequate review mechanisms relating to its determination and duration.²²⁵ A few years later, it was much more forceful in its recommendations urging the state to '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'.²²⁶ It further insisted that 'the level of psychological meaningful social contact for detainees while in solitary confinement' be increased.²²⁷ In an individual complaint, also against Denmark, the CAT noted that:

²¹⁷ Ibid.

²¹⁸ Ahcene Boulesbaa, 'The UN Convention on Torture and the Prospects for Enforcement' (Kluwer Law International, The Hague 1999) 18.

²¹⁹ Ibid.

²²⁰ Ibid 19.

²²¹ Blakley (n 205) 283.

²²² Ibid.

²²³ CAT, 'Conclusions and Recommendations, United States of America' (25 July 2006) U.N. Doc. CAT/C/USA/CO/2 [13].

²²⁴ Chris Inglese, *The UN Committee against torture: An Assessment* (Kluwer Law International, The Hague 2001) 226.

²²⁵ CAT, 'Concluding Observations on Denmark' (17 May 2002) UN Doc. A/57/44 [74(c)]–[74(d)].

²²⁶ CAT, 'Concluding Observations on Denmark' (16 July 2007) UN Doc. CAT/C/DNK/CO/5 [14].

²²⁷ Ibid.

...solitary confinement, particularly in cases of pre-trial detention, is considered to have extremely serious mental and psychological consequences for the detainee; States parties are encouraged to abolish the practice. Although abolition is preferable...solitary confinement should be applied only in exceptional cases and not for prolonged periods of time.²²⁸

In a report on systematic torture in Turkey, the CAT called on the Turkish 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.²²⁹

Similarly, the CAT recommended to Peru that 'sensorial deprivation and the almost total prohibition of communication caused persistent and unjustified suffering which amounted to torture,' and concluded that a period of two weeks detention to those cells amounted to CIDT with longer periods amounting to torture.²³⁰ The CAT places particular emphasis, therefore, on the duration of detention in determining how it categorises solitary confinement.

f. Threats, Fear and Humiliation

This section will consider how the CAT has approached allegations of severe threats, mock executions and other situations, such as witnessing torture, where fear is the main component used by the torturer. It will also consider any guidance it has given on situations involving psychological humiliation.

Beginning with the CAT's State Reports, it has made some general observations on threats and humiliating tactics. In its conclusions and recommendations to Israel, it stated that 'threats, including death threats' used as a systematic method of interrogation in addition to being CIDT also constitute torture.²³¹ In its consideration of the periodic report of Argentina, 'members of the Committee wished to know whether the prohibition of torture in Argentina was as broad as envisaged under the Convention, *especially in relation to threats to third parties*'(emphasis added).²³² It has also recommended to the US that it should rescind any interrogation technique including 'sexual humiliation, "waterboarding" ... and using dogs to induce fear, that constitutes torture or cruel, inhuman or degrading treatment or punishment, in all places of detention'.²³³ It is not clear from the recommendation but, presumably, it had 'waterboarding' in mind in its reference to torture and considers the others as forms of CIDT. In a report to Mexico, under the heading 'Torture Methods', the CAT noted that 'several interviewees said they had been taken to a river bank and threatened with drowning if they did not confess...[and] mock executions with firearms pointed at the head or fired near the ears'.²³⁴ While it did not explicitly state that such threats and mock executions amount to torture, this much is implicit in the recommendation.

Turning to the individual complaints procedure, the CAT has yet to make a finding of a violation of Article 1 of the UNCAT in any of its decisions. In the *T.P.S.* communication, the applicant alleged that he was the victim of mental torture. His submissions were that, after being deported from Canada to India, he was arrested immediately, forced to sign a confession at gunpoint and received threats from the police. He also alleged that his family had been harassed by the police to such an extent so that he was not able to see them anymore. After he filed a complaint with the national Human Rights Committee, he was forced to sign a statement absolving the police of any wrongdoing. It was submitted to the CAT that these acts constituted 'slow, methodical mental

²²⁸ *Jenson v. Denmark*, Communication No. 202/2002, CAT (11 May 2004) U.N. Doc. CAT/C/32/D/202/2002 [5.6].

²²⁹ CAT, 'Activities of the Committee against Torture pursuant to article 20 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment: Turkey' (15 November 1993) UN Doc A/48/44/ Add. 1 [52].

²³⁰ CAT, 'Summary account of the results of the proceedings concerning the inquiry on Peru' (18 June 2001) UN Doc.A/56/44 [186].

²³¹ CAT, 'Concluding Observations on Israel' (9 May 1997) UN Doc. A/52/44 [257].

²³² CAT, 'Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Argentina' (21 June 1990) UN Doc. A/45/44 [157].

²³³ CAT (n 223) [24].

²³⁴ CAT, 'Report on Mexico produced by the Committee under article 20 of the convention and reply from the Government of Mexico: Mexico' (26 May 2003) U.N.Doc. CAT/C/75 [143].

torture' and there was no need to wait for evidence of physical torture.²³⁵ In its conclusions, the CAT noted that the applicant had been living in India for more than two years and that although he claimed to have been harassed and threatened, along with his family, there has been no change in the manner in which he has been treated by the authorities. It concluded that 'in these circumstances, and given the substantial period of time that has elapsed since the author's removal, giving ample time for the fears of the author to have been realized, the Committee cannot but conclude that his allegations were unfounded'.²³⁶

In the *Dzemajl* communication against the former Yugoslavia, the 65 applicants of Romani origin alleged, *inter alia*, a violation of Article 1 of the UNCAT. A large gang of non-Roma residents had burned down the applicants' settlement in the presence of police officers who failed to intervene. The applicants submitted that 'they were subjected to acts of community violence inflicting on them great physical and mental suffering amounting to torture and/or cruel, inhuman and degrading treatment or punishment'.²³⁷ They further stated that 'this happened for the purpose of punishing them for an act committed by a third person' – the alleged rape of a non-Romani by a Romani.²³⁸ The CAT found that the legal qualification of the acts in question amounted to CIDT. It did not address why, in its view, such acts did not amount to mental torture. It has been suggested that one explanation for this finding could be that the victims were not in detention and that the purposive element of the definition of torture was not met.²³⁹

Perhaps the most interesting dimension of the above decision is the separate dissenting opinions of two members of the CAT. In their view, the facts of the case gave rise to 'a presumption of "severe suffering", certainly "mental" but also inescapably "physical" in nature even if the victims were not subjected to direct physical aggression' and their view was that it amounted to torture rather than CIDT.²⁴⁰

The applicant in a complaint against Tunisia alleged that, during his detention, he was subjected to intimidation by being forced to witness other detainees being tortured. In addition to non-physical ill-treatment, the applicant also alleged that he was subjected to eight brutal torture sessions and provided detailed description of these sessions.²⁴¹ On the day of his release, he was questioned about his plans and 'this questioning was followed by a session of mental harassment and threats'.²⁴² He submitted that he subsequently suffered from mental problems and produced 'a medical certificate attesting to a neuropsychiatric disorder and showing that he has received medical treatment and psychotherapy at a Swiss psychiatric centre'.²⁴³ Tunisia referred to the lack of obvious traces of violence in refuting the applicant's allegations of torture. The CAT found that this did not necessarily constitute a response to the allegations 'which...may leave non obvious but real traces of violence'.²⁴⁴ Nevertheless, it concluded that there was insufficient elements to make a finding on the alleged violation of torture and CIDT (finding instead that other provisions had been violated).²⁴⁵

g. Sleep Deprivation, Sensory Deprivation and Sensory Bombardment

It appears that the CAT has only considered the above methods under the State Reporting procedure. In its Concluding Observations on Israel, it considered 'hooding under special conditions... sounding of loud music for prolonged periods... sleep deprivation for prolonged periods'.²⁴⁶ It took the view that these methods amount to

²³⁵ *T.P.S. (name withheld) v. Canada*, Communication No. 99/1997, CAT (16 May 2000) U.N. Doc. CAT/C/24/D/99/1997 [14.2].

²³⁶ *Ibid* [15.4].

²³⁷ *Hajrizi Dzemajl et al. v. Yugoslavia*, Communication no. 161/1999, CAT (21 November 2002) UN Doc CAT/C/29/D/161/2000 [8.13].

²³⁸ *Ibid*.

²³⁹ Nowak (n 214) 824.

²⁴⁰ *Hajrizi Dzemajl et al. v. Yugoslavia* (n 239) [Annex: Individual opinion by Mr. Fernando Mariño and Mr. Alejandro González Poblete].

²⁴¹ *Mr. Bouabdallah LTAIEF v Tunisia*, Communication 189/2001, CAT (14 November 2003) U.N. Doc. CAT/C/31/D/189/2001 [2.2]-[2.8].

²⁴² *Ibid* [2.16].

²⁴³ *Ibid* [2.19].

²⁴⁴ *Ibid* [10.5].

²⁴⁵ *Ibid* [10.9].

²⁴⁶ CAT (n 233) [257].

'breaches of article 16 and also constitute torture as defined in article 1 of the Convention'.²⁴⁷ It emphasised that this was especially so where the methods were used in combination but did not suggest that their use in isolation should be treated any differently.

In its consideration of the Republic of Korea's Report, the CAT expressed its concern that many political suspects continued to endure sleep deprivation. It commented that 'the sleep deprivation practiced on suspects, which may *in some cases* constitute torture and which seems to be routinely used to extract confessions, is unacceptable'(emphasis added).²⁴⁸

3. The Human Rights Committee

a. Introduction

The HRC is the body of independent experts that monitors implementation of the ICCPR by its State parties. All parties are obliged to submit regular reports to the HRC on how the rights are being implemented and, like the CAT, it addresses its concerns and recommendations to the State party in the form of 'concluding observations'. In addition to the state reporting procedure, the First Optional Protocol to the ICCPR gives the HRC competence to examine individual complaints. The HRC is a quasi-judicial body and as such its decisions are not directly legally enforceable.

In this section, it is proposed to first of all consider the prohibition on ill-treatment contained in the ICCPR and make some general observations on how it has been approached by the HRC. As in the previous section, we will then proceed to consider solitary confinement, threats and fear, sleep and sensory deprivation and finally relatives of the disappeared. In terms of methodology, this section will draw for the most part on the large body of jurisprudence emanating from the HRC, with occasional reference to general comments and concluding observations.

b. ICCPR Definition and Interpretation

Article 7 of the ICCPR provides that:

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.

The first observation to make is that torture and other ill-treatment are not defined. A study of the *Travaux Préparatoires* reveals that the state representatives did not make any proposal about 'mental suffering'. The Commission on Human Rights did, however, emphasise that the word 'torture' was understood to mean both mental and physical torture.²⁴⁹ The HRC also subsequently confirmed its view that the aim of Article 7 is 'to protect both the dignity and the physical *and mental integrity* of the individual' (emphasis added).²⁵⁰ Furthermore, it has stated that this Article relates 'not only to acts that cause physical pain but also to acts that cause mental suffering to the victim'.²⁵¹

The prohibition of torture and CIDT is complemented by positive requirements in Article 10, which says provides that:

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

The HRC's approach has avoided establishing sharp distinctions between the different forms of treatment. Furthermore, neither the State reports nor the HRC's General Comments make any such distinction. It takes the view that any distinction, if made, will depend on 'the nature, purpose and severity of the treatment ap-

²⁴⁷ Ibid.

²⁴⁸ CAT, 'Concluding Observations: Republic of Korea' (13 November 1996) U.N. Doc. A/52/44 [56].

²⁴⁹ M.J Bossuyt, *Guide to the 'Travaux Préparatoires' of the International Covenant on Civil and Political Rights* (Martinus Nijhoff Publishers, Dordrecht 1987) 150.

²⁵⁰ UN Human Rights Committee (HRC), 'General Comment 20' in 'Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' (10 March 1992) U.N. Doc. HRI/GEN/1/Rev.1 [2].

²⁵¹ Ibid [5].

plied'.²⁵² It has taken this position given that no legal consequences derive from the precise qualification of a particular practice under the ICCPR.

c. Solitary Confinement

The HRC's General Comment indicates its position on the use of solitary confinement. It states that 'prolonged solitary confinement ... may amount to acts prohibited by article 7'.²⁵³ It does not provide any further guidance.

In *Polay Campos v. Peru*, under the individual complaints procedure, the HRC found that solitary confinement for over three years infringed Article 7, without pointing to torture or CIDT.²⁵⁴ In a subsequent decision, however, where the applicant was held for 13 years, the HRC did not find a breach of Article 7 (but only Article 10).²⁵⁵ It may be noted that the applicant in this case did not raise Article 7 so perhaps this is why it was not addressed by the HRC.

d. Threats, Fear and Humiliation

There is a large body of jurisprudence from the HRC regarding threats, witnessing torture and humiliation.

Beginning with the well known *Estrella* decision, the applicant in that complaint was subjected to death threats, threats of violence to relatives and threats of being dispatched to his home country to be executed. In particular, and 'for hours upon end', the applicant was submitted to a mock amputation with an electric saw.²⁵⁶ It was also alleged that 'up to three times a day during alarms, detainees have to lie down on the floor wherever they are, face downward, hands over their heads and any movement could mean being shot by a prison guard'.²⁵⁷ He also suffered severe physical torture such as electric shocks. The physical effects of the torture were extreme in that the victim lost sensitivity in both arms and hands for a period of eleven months. In concluding, the HRC found that the victim was subjected to 'severe physical and psychological torture, including the threat that the author's hands would be cut off by an electric saw'.²⁵⁸ It did not go on to make any detailed comment about the specific methods of psychological torture.

On another occasion, involving serious levels of physical and mental suffering, the HRC made a finding of CIDT. The victim in this case, who had been on death row for some time, had complained that the prison guards 'are taunting me with death threats and some of them keep on telling me that they are the ones who will be taking me to the gallows and what size rope will fit my neck and how much weight it will take to take my head off my body'.²⁵⁹ He went on to claim that he had sustained ulcers 'as a result of this psychological torture'.²⁶⁰ The death threats were constant and this was not denied by the State party. Nevertheless, the HRC considered this was not in the realm of psychological torture but rather CIDT.

In another case against Uruguay, the applicant suffered both physical and mental ill-treatment. He was kept hooded and sitting up straight day and night. He was blindfolded and his wrists were bound with wire at all times. The only opportunity he had to sleep was on the cement floor when he fell unconscious from the chair. He was also given hallucinogenic substances. Interestingly, bearing the physical ill-treatment in mind, the applicant submitted that:

...the method chiefly used in my case was mental torture. For many hours at a time I could hear piercing shrieks which appeared to come (and perhaps did come) from an interrogation under torture; the shrieks were

²⁵² Ibid [4].

²⁵³ Ibid [6].

²⁵⁴ *Polay Campos v. Peru*, Communication 577/1994, HRC (6 November 1997) U.N. Doc CCPR/C/61/D/577/1994 [8.7].

²⁵⁵ *Kang v. Republic of Korea*, Communication No. 878/1999, HRC (15 July 2003) U.N. Doc CCPR/C/78/D/878/1999 [7.3].

²⁵⁶ *Estrella v. Uruguay*, Communication No. 74/1980, HRC (17 July 1980) U.N. Doc. CCPR/C/ OP/2 [1.6].

²⁵⁷ Ibid [1.12].

²⁵⁸ Ibid [8.3].

²⁵⁹ *Hylton v. Jamaica*, Communication No. 407/1990, HRC (24 July 1990) U.N. Doc. CCPR/C/51/D/407/1990 [8.1].

²⁶⁰ Ibid.

accompanied by loud noises and by music played at a very high volume. I was repeatedly threatened with torture and on several occasions I was abruptly transferred to other places, amid threats and ill-treatment.²⁶¹

The HRC made a finding of torture and CIDT. Presumably, the torture finding was based on the physical ill-treatment and that the mental suffering amounted to CIDT.

In the *Mukong* decision, the applicant alleged that:

...he was subjected to intimidation and mental torture, in that he was threatened that he would be taken to the torture chamber or shot, should any unrest among the population develop...[The applicant] took these threats seriously, as two of his opposition colleagues, who were detained with him, had in fact been tortured.²⁶²

The HRC found that the applicant had been 'detained incommunicado, was 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'.²⁶³ In its view, this amounted to CIDT. Similarly, in the *Titiahonjo* case, the applicant suffered beatings while in detention in addition to 'moral and psychological torture' in that he was repeatedly told that he would never see his new born children for he was going to be killed.²⁶⁴ He also had to provide for himself and live on his own supplies. The HRC judged this to be CIDT. In *Linton v. Jamaica*, the applicant alleged that during the years he spent on death row, he experienced physical abuse and psychological torture. The HRC found that 'the physical abuse inflicted, the *mock execution* set up by prison warders and the denial of adequate medical care' amounted to CIDT (emphasis added).²⁶⁵

In the above cases, the HRC has made findings of torture and/or CIDT. On many other occasions, however, it simply finds a violation of Article 7. In the *Njaru* case, the applicant suffered 'threats against his life by the police, often accompanied by acts of brutality' which caused him 'grave psychological suffering'.²⁶⁶ The applicant submitted that 'in light of the systematic practice of torture and unlawful killings in Cameroon, he was fully justified in fearing that those threats would be acted upon'.²⁶⁷ In considering the alleged 'physical and mental torture by the security forces', the HRC simply decided that Article 7 had been violated.²⁶⁸ The applicant in a case against Georgia submitted that he was beaten upon his arrest and still had scars on his face as a result. During his interrogation, 'he was put under psychological pressure, and the interrogators threatened the members of his family'.²⁶⁹ A violation of Article 7 was found.

There have been fewer complaints in relation to humiliation although several against Uruguay involved elements of sexual humiliation. In the *Gilboa* case, it was alleged that the torture methods which involved, *inter alia*, having to 'remain naked with the torturers, threats and insults and promises of further acts of cruelty' were intended to gradually 'destroy the personalities of detainees by continuously assaulting their psychological equilibrium and undermining their physical integrity'.²⁷⁰ As with the majority of the cases against Uruguay in the 1980s, the HRC made a finding of torture and CIDT without further comment on distinction.

²⁶¹ *Cariboni, v. Uruguay*, Communication No. 159/1983, HRC (27 October 1987) U.N. Doc. CCPR/ C/OP/2 [4].

²⁶² *Womah Mukong v. Cameroon*, Communication No. 458/1991, HRC (21 July 1994) U.N. Doc. CCPR/C/51/D/458/1991 [2.5].

²⁶³ *Ibid* [9.4].

²⁶⁴ *Titiahonjo v. Cameroon*, Communication No. 1186/2003, HRC (26 October 2007) U.N. Doc. CCPR/C/91/D/1186/2003 [2.5].

²⁶⁵ *Linton v. Jamaica*, Communication No. 255/1987, HRC (22 October 1992) U.N. Doc. CCPR/C/46/D/255/1987 [8.5].

²⁶⁶ *Njaru v. Cameroon*, Communication No. 1353/2005, HRC (3 April 2007) U.N. Doc. CCPR/C/89/D/1353/2005 [3.1].

²⁶⁷ *Ibid*.

²⁶⁸ *Ibid* [6.1].

²⁶⁹ *Domukovsky, Tsiklauri, Gelbakhiani and Dokvadze v. Georgia*, Communication No.s 623/1995, 624/1995, 626/1995, 627/1995, HRC (6 April 1998) U.N. Doc. CCPR/C/62/D/623/1995, CCPR/C/62/D/624/1995, CCPR/C/62/D/626/1995, CCPR/C/62/D/627/1995 [15.2].

²⁷⁰ *Gilboa v. Uruguay*, Communication No. 147/1983, HRC (1 November 1985) U.N. Doc. CCPR/ C/OP/2 [4.3]-[4.4].

e. Sleep Deprivation, Sensory Deprivation and Sensory Bombardment

The HRC has commented very little on these methods. In its concluding observations regarding Israel's compliance with the ICCPR, the HRC noted that the 'methods of handcuffing, *hooding*, shaking and *sleep deprivation* have been and continue to be used as interrogation techniques, either alone or in combination...the use of these methods constitutes a violation of article 7...in any circumstances' (emphasis added).²⁷¹

f. Relatives of the Disappeared

The HRC has been particularly vocal when it comes to relatives of the disappeared.

In the *Quinteros* case, the applicant (whose daughter had been disappeared) alleged that she herself was 'a victim of...psychological torture...because she does not know where her daughter is'.²⁷² The HRC noted its understanding of 'the anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts' and found that she was a victim of a violation of Article 7.²⁷³ It did not signal whether it agreed with her allegation that her suffering amounted to psychological torture as opposed to CIDT. In several cases against Uzbekistan, the HRC expressed its understanding of 'the continued anguish and mental stress caused to the author, as the mother of the condemned prisoners, by the persisting uncertainty of the circumstances that led to their execution, as well as the location of their gravesite' and took into account the 'secrecy surrounding the date of execution, and failure to disclose the place of burial have the effect of intimidating or punishing families by intentionally leaving them in a state of uncertainty and mental distress'.²⁷⁴ It ruled that the authorities' failure to notify the applicant of the execution of her sons amounted to inhuman treatment. It has adopted the same language and reasoning in several other cases.²⁷⁵

4. The UN Special Rapporteur on Torture

a. Introduction

The international and regional bodies increasingly draw inspiration from independent expert bodies. In particular, they refer more and more to the reports and findings of the UNSRT. This 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 in 2006.

The UNSRT has made a significant influence on the development of IHRL. For example, recognition at the international level that rape constitutes an act of torture began with comments from the UNSRT who listed rape as a physical method of torture as early as 1986.²⁷⁶ The influence of the UNSRT also extends to the International Criminal Tribunals. The ICTY, for example, in one of its seminal judgments ruled that the prohibition of torture was a norm of *jus cogens* citing the UNSRT as authority for the proposition.²⁷⁷

As will be seen, the UNSRTs have often provided the clearest interpretations and tested the limits of the UNCAT definition of torture. This section will begin with an overview of the general observations made by the UNSRTs on psychological torture (in general). It will then follow the same pattern as previous sections of this

²⁷¹ HRC, 'Concluding Observations of the UN Human Rights Committee: Israel' (18 August 1998) U.N. Doc. CCPR/C/79/Add.93 [19].

²⁷² *Quinteros v. Uruguay*, Communication No. 107/1981, HRC (17 September 1981) U.N. Doc. CCPR/C/OP/2 [1.9].

²⁷³ *Ibid* [14].

²⁷⁴ *Ruzmetov v. Uzbekistan*, Communication No. 915/2000, HRC (30 March 2006) U.N. Doc. CCPR/C/86/D/915/2000 [7.10]; *Bazarov v. Uzbekistan*, Communication No 959/2000, HRC (14 July 2006) U.N. Doc. CCPR/C/87/D/959/2000 [8.5].

²⁷⁵ *Schedko v Belarus*, Communication No. 886/1999, HRC (3 April 2003) U.N. Doc. CCPR/C/77/D/886/1999 [10.2]; *Sankara v. Burkina Faso*, Communication No. 1159/2003, HRC (28 March 2006) U.N. Doc. CCPR/C/86/D/1159/2003 [12.2].

²⁷⁶ UN Commission on Human Rights (UNCHR) 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, Peter Kooijmanns' (19 February 1986) U.N. Doc. No.E/CN.4 /1986/15 [119].

²⁷⁷ *Delalić case* (n 32) [454].

Chapter and consider the specific methods under review. The methodology used for this section is the body of UNSRT reports from 1986 to present.

b. General Observations on Psychological Torture

The position of the UNSRT was established in 1985, with a mandate to examine allegations of torture in any country in the world. One year later, the first UNSRT Peter Kooijmans noted that 'there are two main types of torture: physical and psychological, or mental...In the psychological or mental torture the aim is to injure the psyche. The two types are interrelated and ultimately, both have physical and psychological effects'.²⁷⁸ Following up on this distinction, he subsequently pointed out that:

...this seems to have more relevance for the means by which torture is practised than for its character. Almost invariably the effect of torture, by whatever means it may have been practised, is physical and psychological. Even when the most brutal physical means are used, the long-term effects may be mainly psychological, even when the most refined psychological means are resorted to, there is nearly always the accompanying effect of severe physical pain. A common effect is the disintegration of the personality.²⁷⁹

A more recent UNSRT, Manfred Nowak, noted that 'the establishment of psychological torture methods is a particular challenge. Mock executions, sleep deprivation, the abuse of specific personal phobias, prolonged solitary confinement, etc. for the purpose of extracting information, are equally destructive as physical torture methods' and that the suffering of victims of mental abuse 'is very often aggravated by the lack of acknowledgement, due to the lack of scars, which leads to their accounts very often being brushed away as mere allegations'.²⁸⁰ His predecessor, Theo Van Boven, stressed the psychological impact of torture on victims and the need for this to be reflected in treatment methods. In his words:

...the infliction of pain is also frequently accompanied by mental pressure, such as verbal abuse, mocking, degrading treatment, threats or sham executions. Whether it is accompanied by mental pressure or not, the infliction of physical pain invariably leads to mental suffering as well. Thus, treating only the physical signs of torture cannot be sufficient.²⁸¹

Manfred Nowak highlighted the fact that many countries fail to consider that torture may occur without leaving any apparent physical injuries. He found that:

...time and again, my counterparts were surprised when I emphasized that the definition of torture does not require any bodily injuries, let alone any lasting impairment. The particular evil of torture is the deliberate infliction of severe pain or suffering on a powerless person, and not the infliction of injuries. Injuries can be an aggravating factor, but it is impermissible to reduce torture to such a concept. Many methods of torture...do not lead to any injuries.²⁸²

He stressed the importance of having a domestic legal definition of torture 'to explicitly include psychological torture, which is by no means less severe than physical abuse. A limitation to physical torture would provide loopholes for the perpetrators and encourage them to resort to psychological torture'.²⁸³

The difficulty in assessing non-physical injuries was emphasized by another UNSRT, Nigel Rodley. In his view, an objective assessment of psychological suffering is especially difficult because the notion of "intensity of suffering" is not susceptible of precise gradation, and in the case of mainly mental as opposed to physical suffering, there may be an aura of uncertainty as to how ... to assess the matter in any individual case'.²⁸⁴

²⁷⁸ UNCHR (n 276) [118].

²⁷⁹ Ibid [4].

²⁸⁰ UN Human Rights Council (UNHRC) 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak' (5 February 2010) UN Doc. A/HRC/13/39/Add.5 [57].

²⁸¹ UNCHR (n 25) [45].

²⁸² UNHCR (n 280) [74].

²⁸³ Ibid [119].

²⁸⁴ Rodley (n 209) 94.

c. Solitary Confinement

According to the first UNSRT, prolonged total isolation entails 'serious psychosomatic, intellectual and emotional problems that are frequently irreversible' and, in his view, were methods of psychological torture.²⁸⁵ Theo Van Boven considered that prolonged solitary confinement in conditions of severe material deprivation and with no or little activity could have a serious impact on the psychological and moral integrity of the prisoner.²⁸⁶ In his view, the use of solitary confinement 'in itself may constitute a violation of the right to be free from torture'.²⁸⁷ Nigel Rodley noted a specific limitation in its use and in a report to Chile said 'Judges should not have the power to order solitary confinement, other than as a measure in cases of breach of institutional discipline, for more than two days'.²⁸⁸

d. Sleep Deprivation, Sensory Deprivation and Sensory Bombardment

The first UNSRT included 'prolonged denial of rest, sleep' under the list of *physical* torture methods in his first report.²⁸⁹ Successors also defined sleep deprivation as a form of torture in several reports.²⁹⁰ In relation to sensory deprivation, the first UNSRT considered that it (in addition to prolonged isolation) entails 'serious psychosomatic, intellectual and emotional problems that are frequently irreversible' and was a method of psychological torture.²⁹¹ He considered 'exposure to excessive light or noise' as a method of physical torture.²⁹²

e. Threats and Fear

The first UNSRT included 'threats to kill or torture relatives, being forced to help torture relatives.... being kept in constant uncertainty, in terms of space or time' in his list of psychological torture methods.²⁹³ Simulated executions were also included. Nigel Rodley, in particular, greatly expanded on this. He reminded governments that the prohibition of torture relates also to acts that 'cause mental suffering to the victim, such as intimidation and other forms of threats'.²⁹⁴ He explicitly drew the attention of governments to the HRC's decision in *Estrella* in addition to several provisions of the Geneva Conventions and the ICRC Commentary. He noted that 'information on threats and intimidation a person may have been subjected to, especially while in the hands of law enforcement officials, is an often crucial element in assessing whether the person is at risk of torture'.²⁹⁵ He concluded that 'serious and credible threats, including death threats, to the physical integrity of the victim or a third person can amount to cruel, inhuman or degrading treatment or even to torture, especially when the victim remains in the hands of law enforcement officials'.²⁹⁶

In the aftermath of his fact-finding mission to Azerbaijan, he also observed that torture 'is believed by so many to be automatic, that the mere threat or hint of adverse consequences for failure to comply with investigators' wishes (such as to sign a confession) is assumed to mean torture. For some, the mere fact of detention has the same implication'.²⁹⁷ He went on to say that he would have needed 'substantially more time in the country to be able to corroborate whether this perception is well founded, but it was clear that the detainees

²⁸⁵ UNCHR (n 276).

²⁸⁶ UNCHR (n 25) [46].

²⁸⁷ Ibid 20.

²⁸⁸ UNCHR, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, Nigel Rodley, Visit to Chile' (4 December 1996) U.N. Doc. E/CN.4/ 1996/35/Add.2 [76(c)].

²⁸⁹ UNCHR (n 276) 119.

²⁹⁰ UNCHR, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, Nigel Rodley, Visit to Pakistan' (15 October 1996) UN Doc. E/CN.4/ 1997/7/Add.2 [14].

²⁹¹ UNCHR (n 276).

²⁹² Ibid.

²⁹³ Ibid.

²⁹⁴ UNCHR, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, Nigel Rodley' (3 July 2001) UN Doc A/56/156 [3].

²⁹⁵ Ibid [6].

²⁹⁶ Ibid [8].

²⁹⁷ UNCHR, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, Nigel Rodley, Visit to Azerbaijan' (14 November 2000) UN Doc. E/CN.4/2001/66/Add.1 [114]-[115].

and investigating authorities frequently did nothing to dispel the association. *The Special Rapporteur points out that the fear of physical torture may itself constitute mental torture*' (emphasis added).²⁹⁸

f. Humiliation

Following the revelations about the ill-treatment inflicted on detainees at Guantánamo Bay, Manfred Nowak stated that stripping detainees naked 'particularly in the presence of women, and taking into account cultural sensitivities, can in individual cases cause extreme psychological pressure and can amount to degrading treatment, or even torture'.²⁹⁹ The same reasoning was applied to 'the use of dogs, especially if it is clear that an individual phobia exists'.³⁰⁰

g. Relatives of the Disappeared

Nigel Rodley emphasised that disappearances are 'an intentional act directly affecting close family members' and considered that 'being fully aware they are hurling family members into a turmoil of uncertainty, fear and anguish regarding the fate of their loved one(s), public officials are said to maliciously lie to the family, with a view to punishing or intimidating them and others'.³⁰¹ He lent his outright support for equating enforced disappearances with torture, both on the part of the victim as well as on the part of the families of the victims. After explicitly drawing the attention of governments to the HRC's *Quinteros* decision, he expressed his view that 'to make someone disappear is a form of prohibited torture or ill-treatment, *clearly* as regards the relatives of the disappeared person and arguably in respect of the disappeared person him/herself' (emphasis added).³⁰² This interpretation was continued by his successors. For example, Theo Van Boven stated that '...the practice of disappearance may be considered a form of torture both for the victim and for the relatives'.³⁰³

5. Concluding Observations

The UNCAT does not define what is meant by mental pain or suffering, nor was it considered at length in the drafting stages. On a few occasions, allegations of psychological torture, based on threats and fear, have been made under the individual complaints procedure. In these circumstances, the CAT has not interpreted the level of mental suffering required to reach the threshold of torture. There is scope for the CAT to play a more active role in this regard and, more generally, to clarify inconsistent interpretations and applications of the UNCAT.

Despite the lack of jurisprudential guidance from the CAT, it has made some very strong statements in the State Reports particularly in relation to solitary confinement. It has, for example, acknowledged in very clear terms the mental suffering that may be inflicted on detainees and has become increasingly strict in its recommendations to states. This suggests that it is aware of the destructive effects of social isolation, as outlined in Chapter 2. Its observations in relation to sleep deprivation, sensory deprivation and bombardment have been less clear and there is room for clearer elaboration in its recommendations taking the vast body of scientific knowledge that exists into account.

It is important to acknowledge here that the UNCAT was not drafted with the aim of merely prohibiting torture. Unlike other human rights instruments such as the ICCPR, it does not specifically grant an individual the human right *not* to be subjected to torture. This helps to explain why no violation of Article 1 has been found under the individual complaints procedure and why its decisions are of limited value for the present study.

²⁹⁸ Ibid.

²⁹⁹ UNHRC, 'Joint Report by the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy; the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak; the Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir and the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Paul Hunt: Situation of detainees at Guantánamo Bay' (15 February 2006) UN Doc.E/CN.4/2006/120 [51].

³⁰⁰ Ibid.

³⁰¹ UNCHR (n 294) [12].

³⁰² Ibid [14].

³⁰³ UNCHR (n 25) [51].

A thorough review of the HRC's jurisprudence has found only one instance in which it clearly mentions the application of psychological torture. That was the *Estrella* decision, which was at the top of the scale in terms of extremeness of both physical and mental torture. It would therefore have been very surprising if any other conclusion had been reached. In that decision, it did not go on to make any detailed comment about the specific methods of psychological torture in what was perhaps its best opportunity and, regrettably, its subsequent rulings regarding threats and mock executions have not been consistent in this regard. There appears to be a default tendency, in subsequent decisions, to classify severe sensations of fear as CIDT. It seems that the threshold of suffering required for non-physical acts to amount to torture is exceedingly high and, in the absence of any detailed reasoning, it is difficult to know why. There is, for example, a substantial body of scientific research linking the sensation of threatened death with a likelihood of developing PTSD. Moreover, the anticipatory stress following threats of torture, according to survivors, is often more distressing than physical torture itself.

Although difficult to draw general conclusions, the HRC's jurisprudence may hint at a willingness to make findings of torture against certain countries rather than others. For instance, in most of the cases against Uruguay, a finding of 'torture and cruel and inhuman treatment' was made. As the former UNSRT Nigel Rodley has noted, however, particularly regarding the cases against Uruguay, it is 'impossible to infer anything of significance in the distinction between those cases where the word torture figured and those where no category was used'.³⁰⁴

It is also noteworthy that, in many of the cases reviewed, applicants submitted that they were victims of mental torture. The majority of these instances resulted in a finding of CIDT. On other occasions, it might find a violation of Article 7. The inconsistent use of terminology is somewhat unhelpful for the present analysis in that it is exceptionally difficult to determine its interpretation of the level of suffering required for mental torture. Moreover, the decisions usually do not include a specific comment or explanation about the level of psychological suffering. It is extremely difficult, therefore, to say that a certain form of mental or psychological suffering *per se* constitutes torture according to the HRC.

Both the HRC and the CAT face difficulties in effectively determining the facts of a case before them, partly due to severe time constraints on the examination of individual cases. This is exacerbated by the absence of clear criteria for evidence evaluation and the practice of the CAT of not using expert witnesses. The CAT has recently established a working group on evaluation of facts and evidence.³⁰⁵ On this note, while the scientific findings presented in Chapter 2 cannot replace expert evidence in individual cases, they do provide objective indicators which should be taken into account by adjudicators when assessing whether a given form of mental ill-treatment amounts to torture or CIDT. This takes on particular importance, for example, in the case of the CAT given the absence of expert witnesses.

In light of the lack of legal enforceability of the HRC's decisions, the broad wording of Article 7 of the ICCPR and the absence of any definition of torture, it is arguable that the HRC is perhaps best placed to develop the criteria applicable to mental torture. It can interpret more freely and its hands are less tied than those of the CAT, restricted as that body is by the precise definition in UNCAT. If the HRC were to make use of this leeway, it would be of benefit to the wider judicial and quasi-judicial human rights mechanisms which are increasingly referring to each others own interpretations in this regard. It is likely, for example, that the CAT will be influenced by the precedents of the HRC in areas where it has not yet itself commented on a relevant issue. There is also scope for developing the observations of the UNSRT. It is unclear, for example, why the suffering endured by relatives of the disappeared is never regarded as mental torture by the HRC. The UNSRT takes the view that it may amount to torture.

On that note, both in general observations on psychological torture and on specific methods, the UNSRTs have made a lasting contribution to IHRL with many international and regional mechanisms often referring to

³⁰⁴ Rodley (n 215) 473.

³⁰⁵ Henrik Marcussen (ed), 'Desk study: Combating torture with medical evidence' (2010) 20 Torture (Online) <<http://www.irct.org/library/torture-journal/back-issues/volume-20--no.-3--2010.aspx>> accessed 28 June 2011, 117, 155.

their findings. According to the UNSRT reports, solitary confinement, stripping detainees, death threats and prolonged denial of sleep may all amount to torture. As mentioned above, the suffering endured by relatives of the disappeared may also amount to torture. In one sense, it is easier for the UNSRT to make such observations given that there is no legal case for adjudication. Furthermore, the UNSRT's opinions and recommendations are not binding and have been too frequently ignored by States. This should not take away from the significance of the UNSRT's Reports, however, which lies in the fact that they open the door for the Treaty bodies to take up and develop these observations when faced with a particular set of facts.

Finally, it may be noted that both the CAT and HRC 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 mental torture.

B. Regional Mechanisms for Human Rights Protection

1. Introduction

The purpose of this chapter is to analyse the definition and interpretation of mental torture in the jurisprudence of both the IAS and European System of human rights protection. As noted in the Introduction, it will not discuss the African system. It is therefore split into two sections.

In terms of methodology, the Chapter will focus on the relevant conventions and, in particular, on the jurisprudence of the IAComHR, the IACtHR and the EComHR and the ECtHR.

As in the previous Chapter, the general approach in each sub-section will be to 'present' the *positive* law as it stands reserving the primary critical observations for the 'concluding observations' section.

2. Inter-American System of Human Rights

a. Introduction

The IAComHR and the IACtHR are the two organs of the Organization of American

States which examine individual complaints regarding human rights violations. Petitioners must first bring complaints to the IAComHR. It is only once this has been completed that the complaint may reach the IACtHR, provided that standing and jurisdiction conditions are met. In the following sections, it is proposed to begin with an overview of the definition of torture in the IAS followed by some general observations on how it has been interpreted. The jurisprudence of both bodies will then be considered under the usual headings. Most of the jurisprudence emanates from the IACtHR.

b. Definition of Torture and Other Ill-Treatment

The prohibition of torture and CIDT is well-established in various IAS' legal instruments. Firstly, the American Declaration of the Rights and Duties of Man (ADRDM) provides that 'Every individual who has been deprived of his liberty ...has the right to humane treatment during the time he is in custody' and that 'every person accused of an offense has the right...not to receive cruel, infamous or unusual punishment'.³⁰⁶ Although this instrument does not contain a *specific* prohibition of torture, it guarantees the right to personal security. The IAComHR has consistently ruled that the right to personal security includes the right to humane treatment and personal integrity.

Secondly, the American Convention on Human Rights (ACHR) guarantees the right to 'humane treatment', affords every person 'the right to have his physical, mental, and moral integrity respected' and provides that

³⁰⁶ American Declaration of the Rights and Duties of Man, OAS Res XXX adopted by the Ninth International Conference of American States (1948) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992), art XXV and XXVI.

'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'.³⁰⁷

Finally, and most importantly, torture is prohibited under the Inter-American Convention to Prevent and Punish Torture (IACPPT). It 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 to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.³⁰⁸

A couple of points are worthy of mention. Firstly, it is evident that this definition is considerably wider than the definition contained in UNCAT. The inclusion of the words 'for any purpose' suggest that the IAS, unlike the UNCAT, considers *every* purpose sufficient. Moreover, the second limb clearly puts more emphasis on the importance of *mental* pain. This has been acknowledged by the IACtHR which has commented that by 'institutionalizing the right to personal integrity, the [IACPPT] makes explicit reference to respect for the psychological and moral integrity of the person'.³⁰⁹ Lastly, the second limb provides that the methods are included independently of whether they cause pain or suffering. Subsequent case law has, however, held that the pain or suffering inflicted must be severe or intense to classify an act as torture.³¹⁰

c. General Observations on the Interpretation of Torture

Both the IAComHR and the IACtHR take objective elements and subjective elements into account, in deciding what acts amount to torture. The IACtHR, staying true to the text of the IACPPT, has given a broad interpretation to the 'purposive' element of torture. In one case, for example, it considered that in situations of massive human rights violations, the 'purpose' of the systematic use of torture was to intimidate the population – thereby bringing all such cases within the scope of the IACPPT.³¹¹ On another occasion, it ruled that 'purpose' may refer to 'domination, discrimination, sadism, or to achieve an act or omission by the victim'.³¹² One Judge has even made reference to the purpose of causing 'social fear'.³¹³ In terms of the distinction between torture and other ill-treatment, the IACtHR has followed the European approach and concluded that the essential criterion is the intensity of the suffering.³¹⁴ The 'intensity' of the suffering is relative and requires a case-by-case analysis that encompasses all the circumstances of the particular situation.

Both the IAComHR and the IACtHR have made a number of general remarks in relation to the mental ingredient of torture. For example, the IAComHR has stated that the right to personal integrity 'encompasses far more than a ban on...treatment that leaves traces or visible marks on the victim'.³¹⁵ The IACtHR has recognised that torture is not limited to physical violence and may also be perpetrated through "acts that produce severe...psychological or moral suffering in the victim".³¹⁶

It should be mentioned that the IAComHR has displayed its willingness to 'be the first' to tackle controversial areas. It judged, for example, that the act of Rape not only constituted physical torture but also amounted to *mental* torture. In its view, 'the fact of being made the subject of abuse of this nature...causes a psychologi-

³⁰⁷ Inter-American Convention on Human Rights (Adopted 22 November 1969, entered into force 18 July 1978) art 5(1) and (2).

³⁰⁸ Inter-American Convention to Prevent and Punish Torture (adopted at Cartagena de Indias, Colombia 9 December 1985) OAS Treaty Series No. 67, art 2.

³⁰⁹ *Cantoral-Benavides v. Peru*, IACtHR Series C No. 69 (18 August 2000) [101].

³¹⁰ *Luis Lizardo Cabrera v. Dominican Republic*, IAComHR Report No. 35/96 Case 10.832 OEA/Ser.L/V/II.98 Doc. 6 rev (19 February 1998) [85].

³¹¹ *Gómez-Paquiyaury brothers v. Peru*, IACtHR Series C No. 110 (8 July 2004) [116].

³¹² *Blake v. Guatemala*, IACtHR Series C No. 36 (24 January 1998) [3].

³¹³ *Tibi v. Ecuador*, (Separate Opinion of Judge A.A. Cancado Trindade) IACtHR Series C No. 114 (7 September 2004) [22].

³¹⁴ *Lori Berenson-Mejía v. Peru*, IACtHR Series C No. 119 (25 November 2004) [68].

³¹⁵ *Loren Laroye Riebe Star, Jorge Alberto Baron Guttlein and Rodolfo Izal Elorz v. Mexico*, IAComHR Report No. 49/99 Case 11.610 OEA/Ser.L/V/II.95 Doc. 7 rev (5 May 1998) [91].

³¹⁶ *Cantoral-Benavides v. Peru* (n 309) [100].

cal trauma that results, on the one hand, from having been humiliated and victimized, and on the other, from suffering the condemnation of the members of their community if they report what has been done to them'.³¹⁷

d. Solitary Confinement

In the early 1980s, the IACtHR found that:

...prolonged isolation and deprivation of communication are in themselves cruel and inhuman punishment, harmful to the psychological and moral integrity of the person and a violation of the right of any detainee to respect for his inherent dignity as a human being...[and] violates Article 5 of the Convention.³¹⁸

Subsequent decisions indicate its view that solitary confinement 'produces moral and psychological suffering in the detainee, places him in a particularly vulnerable position, and increases the risk of aggression and arbitrary acts in detention centres'.³¹⁹

On the other hand, the IAComHR's case law regarding prolonged solitary confinement has been somewhat contradictory. In *Lizardo Cabrera*, it found that the isolation of the victim constituted torture reasoning that it 'was deliberately imposed...under circumstances in which Mr. Lizardo's health was in a delicate state'.³²⁰ The victim had previously been involved in a hunger strike and was suffering from a gastrointestinal illness. It found that the 'solitary confinement lasted longer than was prudent (seven days) and was extreme in that he was deprived of food and drink and was not allowed access to sunlight...[and] understands that the measure was imposed for the purpose of personal punishment'.³²¹ It noted the IACtHR's decision in *Velásquez Rodríguez* qualifying solitary confinement *per se* as CIDT but considered 'given the specific circumstances of this case, Mr. Lizardo's solitary confinement falls within the concept of torture'.³²²

In the subsequent *Congo v. Ecuador* case, however, the victim was 'moved to an isolation cell...apparently owing to his mental state...[and] remained in virtual isolation for approximately 40 days until he died'.³²³ The IAComHR expressed the view that 'isolation can in itself constitute inhumane treatment...[and] when the person kept in isolation in a penitentiary institution has a mental disability, this could involve an even more serious violation'.³²⁴ Nevertheless, it considered the treatment to constitute CIDT and not torture.

e. Threats, Fear, Humiliation, Sensory Deprivation and Sensory Bombardment

The IACtHR has recognised that, in principle, the threat of physical harm *may* amount to mental torture. In general terms, it has stated that 'the threat or real danger of subjecting a person to physical harm produces, under determined circumstances, such a degree of moral anguish that it may be considered "psychological torture"'.³²⁵ On another occasion, it stated that:

...the mere threat of conduct prohibited by Article 5 of the American Convention, when sufficiently real and imminent, can itself be in conflict with that article. In other words, creating a threatening situation or threatening an individual with torture may, in some circumstances, constitute inhumane treatment.³²⁶

Turning to specific examples, on one occasion the IACtHR heard that the applicant witnessed the torture of a relative during his detention and received death threats after his release resulting in him having to flee his country. It decided that 'at least some of the acts of aggression...can be classified as physical and psychological

³¹⁷ *Raquel Martí de Mejía v. Perú*, IAComHR Report No. 5/96 Case 10.970 OEA/Ser.L/V/II.91 Doc. 7 (1 March 1996) [V(B)(2)].

³¹⁸ *Velásquez-Rodríguez v. Honduras*, IACtHR Series C No. 4 (29 July 1988) [156].

³¹⁹ *Bámaca-Velásquez v. Guatemala*, IACtHR Series C No.70 (25 November 2000) [150].

³²⁰ *Luis Lizardo Cabrera v. Dominican Republic* (n 310) [86(a)] –[86(b)].

³²¹ *Ibid* [86(b)] –[86(c)].

³²² *Ibid* [87].

³²³ *Víctor Rosario Congo v. Ecuador*, IAComHR Report No. 63/99 Case 11.427 OEA/Ser.L/V/II.95 Doc. 7 rev (13 April 1999) [55].

³²⁴ *Ibid* [58].

³²⁵ *Maritza Urrutia v. Guatemala*, IACtHR Series C No. 103 (27 November 2003) [119].

³²⁶ *Juvenile Reeducation Institute v Paraguay*, IACtHR Series C No. 112 (2 September 2004) [167].

torture'.³²⁷ It did not specify which acts it considered in this regard. It may be deduced that either the witnessing of torture or the subsequent death threats were sufficiently serious to amount to mental torture.

The recent *Valle Jaramillo* case concerned the execution of Colombian lawyer who had been active in denouncing crimes committed by paramilitaries in conjunction with members of the Colombian army. At the time of his execution, his sister and friend were tied, dragged across the office, and threatened with death. The threat inflicted was 'revealed in the most extreme manner possible, as it was a direct threat of death'.³²⁸ Both applicants were tied up and underwent an agonizing situation ultimately resulting in the death of the lawyer. The treatment was brutal and violent and 'the extrajudicial execution...permits the inference that [both] could fear and anticipate that they would be arbitrarily and violently deprived of their life also'.³²⁹ The IACtHR found that this amounted to a breach of their right to 'mental and moral integrity' under Article 5 of the ACHR. The IAComHR has ruled likewise in cases with similar facts.³³⁰

In the *Martiza Urrutia* case, the applicant carried out political tasks for the revolutionary organization *Ejército Guerrillero de los Pobres* (the Guerrilla Army of the Poor). She was arbitrarily detained in a clandestine place of detention for eight days and obliged to issue to a communiqué, which her captors had prepared previously, announcing her withdrawal from the organization. During interrogations, her captors 'turned on the radio as loud as possible and continued the interrogation until the early morning [and] when the men went, they left the light and the radio'.³³¹ The IAComHR found that she was subjected to:

...psychological torture arising from the threat and continual possibility of being assassinated, physically tortured or raped, of losing her young son, and that violent acts would be carried out against her family; in addition to the application, by military intelligence agents, of methods tending to obliterate or diminish her personality, such as sleep deprivation, exposure to constant noise, incessant interrogation and recordings.³³²

The IACtHR agreed and considered that:

...according to the circumstances of each particular case, some acts of aggression inflicted on a person may be classified as mental torture, particularly acts that have been prepared and carried out deliberately against the victim to eliminate his mental resistance and force him to accuse himself of or confess to certain criminal conducts.³³³

It decided that the applicant was subjected to 'acts of mental violence by being exposed intentionally to a context of intense suffering and anguish... prepared and inflicted deliberately to obliterate the victim's personality and demoralize her, which constitutes a form of mental torture'.³³⁴ While the duration of mental suffering inflicted in this case was only eight days, the IAComHR found that effects of the psychological torture had continued for a considerable time. It noted that she had suffered from 'fear, nightmares, and a permanent feeling of vulnerability because she had been identified by members of a State agency, who had "abused" her, protected by the cloak of impunity' and at the time of the application continued to 'suffer the effects of the trauma, manifested by periods of anxiety'.³³⁵ She had also subsequently fled her home country and spent several years in both Mexico and the US as a refugee.

In practice, outside of detention or custody, serious threats of death have amounted to a violation of the right to 'mental and moral integrity', rather than psychological torture. Even where the IACtHR has found that a victim's family has been caused 'constant anguish, feelings of... powerlessness and a deep fear of suffering the same pattern of violence fostered by the State', this has not been considered as torture.³³⁶ This has also been the case where the quest for justice by family members of victims has lead to them receiving very serious

³²⁷ *Cantoral-Benavides v Peru* (n 309) [104].

³²⁸ *Jesus Maria Valle Jaramillo v. Colombia*, IACtHR Series C No. 192 (27 November 2008) [109].

³²⁹ *Ibid.*

³³⁰ *Tomas Porfirio Rondin v. Mexico*, IAComHR Report N° 49/97 Case 11.520 OEA/Ser.L/V/II.95 Doc. 7 rev (18 February 1998) [76].

³³¹ *Maritza Urrutia v. Guatemala* (n 325) [51].

³³² *Ibid* [78b].

³³³ *Ibid* [93].

³³⁴ *Ibid* [94].

³³⁵ *Ibid* [162b].

³³⁶ *Myrna Mack Chang v. Guatemala*, IACtHR Series C No. 101 (25 November 2003) [232].

death threats including serious and systemic acts of harassment resulting in them having to request asylum in a neighbouring country.³³⁷

f. Relatives of the Disappeared

In 1980, the IACoHR issued a special report on the situation of human rights in Argentina. In relation to the practice of disappearances, it reiterated an observation it had made several years earlier that a "disappearance" is...a true form of torture for the victims' family and friends, because of the uncertainty they experience as to the fate of the victim and because they feel powerless to provide legal, moral and material assistance'.³³⁸

The IACtHR has consistently held that family members of victims of disappearance experience a violation of their right not to be subjected to torture or CIDT, as a direct consequence of the treatment of their loved ones.

The *19 Merchants* case concerned the disappearance of 19 tradesmen whose bodies were dismembered and thrown into a river, in order to make them disappear. The State authorities failed to provide support for the initial search of the first 17 victims, which meant that their next of kin had to form search parties and put their lives in danger by traveling through the same regions that the tradesmen had passed through, where they were threatened by paramilitary groups to make them desist from seeking their next of kin. Two of the next-of-kin conducting the search then suffered the same fate, bringing the final number to 19. The IACtHR noted that these circumstances:

...caused the victims' next of kin to feel utter impotence, insecurity and anguish, because the days passed and the authorities did not conduct a genuine search for those who had been disappeared; they had no news of their next of kin and, at the same time, they could not travel to the region where the events had taken place to look for them because they could be killed.³³⁹

It had been 16 years since the events took place and during that time they had suffered 'profound grief and anguish, to the detriment of their mental and moral integrity'.³⁴⁰ It characterised the suffering as CIDT and restricted the definition of 'family member' to those with a close relationship to the victim.³⁴¹ The nephew and the niece of two of the victims, for example, were not considered family members.

In the *De la Cruz* case, the victim was forced from his home by heavily armed men in the early hours of the morning while he and his family slept. The abductors threatened other family members, and beat the victim's brother and sister. They tied the victim's hands behind his back and took him away on foot. Local residents pursued them and spotted the victim with them several hours later after which he was presumably killed. The IACoHR considered that:

...a disappearance by its nature causes great anxiety and suffering for the victim's loved ones. The victim's family is unable to come to his aid, unable to clarify his fate, and unable to find any sense of closure with respect to the victim's fate. The passage of time gives rise to a presumption that the victim was killed, but family members have no means to locate the remains or to provide a proper burial.³⁴²

Its finding was that the State had breached the general right to humane treatment of the relatives.

The *Bámaca-Velásquez* case concerned the disappearance of the leader of an opposition group by members of the Guatemalan Army. The IACtHR stated that:

...in a case involving the forced disappearance of a person, the...violation of the mental and moral integrity of the next of kin is precisely a direct consequence of the forced disappearance...[and] the circumstances of

³³⁷ *Gonzalez ("Cotton Field") v. Mexico*, IACtHR Series C No. 205 (16 November 2009) [440].

³³⁸ IACoHR, 'Report on the Situation of Human Rights in Argentina' OEA/Ser.L/V/II.49 Doc. 19 corr.1 (11 April 1980) Chapter 3A(2).

³³⁹ *19 Merchants v. Colombia*, IACtHR Series C No. 109 (5 July 2004) [213].

³⁴⁰ *Ibid* [211].

³⁴¹ *Ibid* [218].

³⁴² *Samuel De La Cruz Gómez v. Guatemala*, IACoHR Report No. 11/98 Case 10.606 OEA/ Ser.L/V/II.98 Doc. 6 rev (7 April 1998) [47].

such disappearances generate suffering and anguish, in addition to a sense of insecurity, frustration and impotence in the face of the public authorities' failure to investigate.³⁴³

It noted the continued obstruction of next-of-kin's efforts to learn the truth of the facts, the concealment of the corpse and the obstacles to the attempted exhumation procedures that various public authorities created and considered that it constituted CIDT. It has made the same finding in several cases with similar facts and has emphasised the 'suffering and powerlessness' of the immediate next of kin.³⁴⁴

3. The European System of Human Rights

a. Introduction

The ECHR was the first international human rights treaty with enforceable mechanisms.

Originally, a two-tier system of rights protection was envisaged to include both the ECtHR and the EComHR. The latter has been obsolete, since 1998, with the restructuring of the ECtHR. Nevertheless, it held an important role in assisting the ECtHR and issued several key reports giving its opinion on whether or not a violation had occurred.

This section will follow the same structure as in the previous section drawing on the jurisprudence of both of the above-mentioned bodies. There is one change in terminology to note: The ECHR does not refer to CIDT but to 'inhuman and degrading treatment' (IDT).

b. Definition of Torture and Other Ill-Treatment

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

This is the text of the prohibition on torture contained in Article 3 of the ECHR. On the one hand, the minimal wording of the provision has meant that the ECtHR has had considerable flexibility in terms of its approach. On the other hand, it has been one of the most difficult provisions of the ECHR to interpret and apply. This is because it both prohibits in very strong terms the use of torture but at the same time gives no 'clue as to the meaning and purport of the proscribed actions'.³⁴⁵ There is also very little that can be deduced from the *Travaux Préparatoires*.³⁴⁶ They do suggest, however, that what the drafters had in mind for the definition of ill-treatment in the ECHR was 'a very sweeping ban'.³⁴⁷

c. General Observations on the Interpretation of Torture

In the European system, there is a hierarchy between torture and IDT. Humiliation and debasement are two fundamental concepts in the definition of 'degrading treatment'. The EComHR defined degrading treatment as an action that 'lowers [the victim] in rank, position, reputation or character, whether in his own eyes or in the eyes of other people' with the condition of reaching a certain level of severity.³⁴⁸ Inhuman treatment is 'at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation is unjustifiable'.³⁴⁹ It has been noted that, at the time of drafting, the inclusion of the word 'degrading' and the omission of the word 'cruel' were not seen as significant by any of those involved.³⁵⁰ Torture stands 'at the apex

³⁴³ *Bámaca-Velásquez v. Guatemala* (n 319) [160].

³⁴⁴ *Gómez-Paquiyaury Brothers v Peru* (n 311) [118]; *Juan Humberto Sánchez v. Honduras*, IACtHR Series C No. 99 (7 June 2003) [101].

³⁴⁵ Antonio Cassese, 'Prohibition of Torture and Inhuman or Degrading Treatment or Punishment' in R. MacDonald and others (eds) *The European System for the Protection of Human Rights* (Martinus Nijhoff Publishers, Dordrecht 1993) 225.

³⁴⁶ *Ibid* 227.

³⁴⁷ *Ibid* 228.

³⁴⁸ *East African Asians v. United Kingdom*, European Commission of Human Rights (EComHR), Commission Reports CM DH 77 (14 December 1973) [189].

³⁴⁹ *Denmark, Norway, Sweden and Netherlands v. Greece*, ('The Greek Case') EComHR 12 A Yearbook (5 November 1969) 186.

³⁵⁰ Malcolm Evans and others, *Preventing torture: a study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (Oxford University Press, London 1998) 69-73.

of a pyramid of suffering'.³⁵¹ It has been defined as a 'deliberate inhuman treatment causing very serious and cruel suffering'.³⁵² It has a purpose, such as obtaining information or a confession, or to punish the victim.³⁵³

A violation of Article 3 does not depend solely on the victim's subjective appreciation. The suffering must reach an objective minimum level of severity. The assessment of this minimum is relative and depends on all the circumstances of the case including the duration of treatment, its physical or mental effects and the sex, age and state of health of the victim.³⁵⁴ The former UNSRT, Manfred Nowak, disagrees with ECtHR's rulings that torture requires a higher severity threshold than IDT.³⁵⁵ He argues that 'purpose' is the distinguishing characteristic and not severity of pain. Other scholars suggest that both the EComHR and ECtHR have 'never fully subscribed to the severity of suffering approach, despite their mantra-like espousal of it over the years'.³⁵⁶ They submit that the ECtHR openly acknowledges that the severity of suffering is only 'one element of an increasingly complex matrix'.³⁵⁷

d. General Observations on Mental Suffering

Unlike the ACHR in the IAS, the ECHR does not explicitly mention 'mental suffering' in the prohibition on ill-treatment. Interestingly, it did come up for discussion during the drafting of the ECHR. The Teigen Report was considered by the Consultative Assembly of the Council of Europe in 1949. A British member of the Assembly suggested the following addition to the proposed wording of the prohibition on torture: 'No person shall...be subjected to imprisonment with such an excess of light, darkness, noise, or silence as to cause mental suffering'.³⁵⁸ It was subsequently withdrawn and did not arise for discussion again.

It became crystal clear after the *Greek* case that the prohibition contained in the ECHR does not refer exclusively to the infliction of physical suffering. The EComHR found that:

...the notion of non-physical torture is...used to cover the infliction of mental suffering by creating a state of anguish and stress by means other than bodily assault. Many witnesses before the Sub-Commission have spoken of the effects of prolonged isolation and the impact of threats to themselves or their families. Descriptions have also been given of psychological attacks on a detainee's personal feelings or his or her feelings for others.³⁵⁹

Subsequent cases from the ECtHR also emphasised that torture does not require a 'physical act or condition'.³⁶⁰ The ECtHR has also shown itself willing to find a violation of Article 3 solely on the basis of psychological evidence.³⁶¹

e. Solitary Confinement, Sensory Deprivation and Sensory Bombardment

In the seminal *Ireland v. UK* case, the Irish government contested the use of certain interrogation techniques on suspected members of the I.R.A. in NI in the early 1970s. The so-called 'five techniques' consisted of wall-standing, *hooding*, *subjection to noise*, *deprivation of sleep* and deprivation of food and drink. The EComHR examined the psychological effects and unanimously decided that the combined use of these techniques constituted torture, representing a landmark decision. The ECtHR, on the other hand, conscious of the 'special stigma' associated with the term 'torture' concluded that they amounted to IDT due to lack of se-

³⁵¹ Ibid 82.

³⁵² *Ireland v. United Kingdom* (App No. 5310/71) (1978) 2 EHRR 25 [167].

³⁵³ *The Greek case* (n 349) 186.

³⁵⁴ *Ireland v. United Kingdom* (n 352) [162].

³⁵⁵ Manfred Nowak, 'Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' in Oxford Handbook of International Law in Armed Conflict (Oxford University Press, London 2011) (forthcoming). <<http://www.adh-geneva.ch/academy-lecture-series/2010/torture-and-other-cruel-inhuman-or-degrading-treatment-or-punishment>> accessed 4 May 2011, 6.

³⁵⁶ Malcom Evans, 'Getting to grips with Torture' (2002) 51 ICLQ 365, 373.

³⁵⁷ Ibid.

³⁵⁸ Evans and others (n 350) 70-71.

³⁵⁹ *The Greek Case* (n 349) 461.

³⁶⁰ *East African Asians v. United Kingdom* (n 348) [191].

³⁶¹ *Akkoc v. Turkey* (App Nos. 22947/93 and 22948/9310) ECHR 2000-X [107], [116]; *Salmanoglu and Polattas v. Turkey* (App No. 15828/0317) ECHR 17 March 2009 [85]-[95].

verity. There were dissenting opinions pointing to the 'acute psychiatric disturbances' caused by the techniques which were 'a typical example of torture' in their view.³⁶² The judgment has been widely criticised for various reasons. The assertion, for example, that the techniques did not cause suffering sufficiently intense to constitute torture was not explained. The concept of torture used by the ECtHR also appears to be inconsistent with the *travaux préparatoires*.³⁶³ In any case, suffice to say here that the outcome would most likely be different if the same set of facts were before the ECtHR today.

Turning specifically to solitary confinement, the EComHR expressed its opinion in 1978 that:

...prolonged solitary confinement is undesirable, especially where the person is detained on remand ...However, in assessing whether such a measure may fall within the ambit of Article 3...regard must be had to the particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned. Complete sensory isolation coupled with complete social isolation can no doubt ultimately destroy the personality; thus it constitutes a form of inhuman treatment which cannot be justified by the requirements of security.³⁶⁴

This has been followed by the ECtHR which has added the caveat that 'the prohibition of contacts with other prisoners for security, disciplinary or protective reasons does not in itself amount to inhuman treatment or punishment'.³⁶⁵

Let us move on to assess how the above principles have been applied in practice. The events in *Mathew v. the Netherlands* took place on the Caribbean island of Aruba (part of the Netherlands). The applicant, a Dutch National, had been arrested on a charge of grievous bodily harm and detained on remand from 2001 to 2004. During this time, he was kept 'in solitary confinement for an excessive and unnecessarily protracted period... for at least seven months in a cell that failed to offer adequate protection against the elements...in a location from which he could not gain access to outdoor exercise and fresh air without unnecessary and avoidable physical suffering'.³⁶⁶ The ECtHR found that this must have 'caused him both mental and physical suffering, diminishing his human dignity and amounting to inhuman treatment'.³⁶⁷

In *Ilascu and Others v. Moldova and Russia*, the applicants had been detained in Transdniestria (a region of Moldova which declared its independence in 1991). They were accused of anti-Soviet activities, two murders with one applicant being sentenced to death. The Court which had passed the sentence on them had been set up by an entity which was illegal under international law, and had not been recognised by the international community. One detainee spent several years in solitary confinement without contact with other prisoners. He had been detained in an unheated, badly ventilated cell without natural light, and had not received the treatment required by his state of health.³⁶⁸ The ECtHR reiterated that the 'prohibition of contacts with other prisoners for security, disciplinary or protective reasons does not in itself amount to inhuman treatment or punishment. On the other hand, 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'.³⁶⁹ In the ECtHR's opinion, the treatment of the detainee was apt to 'engender pain or suffering, both physical and mental, which could only be exacerbated by the applicant's total isolation and were calculated to arouse in him feelings of fear, anxiety and vulnerability likely to humiliate and debase him and break his resistance and will' and amounted to torture.³⁷⁰

In a subsequent case, *Ramirez Sanchez v France*, the applicant had been sentenced to life imprisonment for the murder of three police officers. For over eight years he was detained in solitary confinement, in a cell measuring 6.84 metres squared which was dilapidated and poorly insulated. He had no contact with other pris-

³⁶² *Ireland v. United Kingdom* (n 352) Separate Opinion of Judge Zekia [A].

³⁶³ P. Duffy, 'Article 3 of the European Convention on Human Rights' (1983) 32 ICLQ 316, 342.

³⁶⁴ *Ensslin, Baader and Raspe v. Germany* (App Nos. 7572/76, 7586/76 and 7587/76) (1978) EcomHR Yearbook XXI, 64.

³⁶⁵ *Ilascu and Others v. Moldova and Russia* (App No. 48787/99), ECHR 8 July 2004 [432].

³⁶⁶ *Mathew v. the Netherlands* (App No. 24919/03) ECHR 29 September 2005 [217].

³⁶⁷ *Ibid* [216].

³⁶⁸ *Ilascu and Others v. Moldova and Russia* (n 365) [435].

³⁶⁹ *Ibid* [432].

³⁷⁰ *Ibid* [446].

oners and was authorised to leave his cell only for a two-hour daily walk. He further alleged that his only recreation was provided by newspapers and the television which he rented, and that he received no visits except for those from his lawyers and a monthly visit by a cleric. In the ECtHR's view, the applicant could not be considered to 'have been in complete sensory isolation or total social isolation. His isolation was partial and relative'.³⁷¹ In terms of the duration, it said it was 'concerned by the particularly lengthy period' but noted he had been held under the ordinary prison regime.³⁷² It found no violation of Article 3.

f. Threats, Humiliation and Fear

The EComHR, in the *Greek Case*, found a number of threats and humiliating acts to amount to 'non-physical torture.' These included mock executions, threats of death, various humiliating acts and threats of reprisals against a detainee's family. One detainee, for example, stated that 'the police officers ...threatened to throw him out of the window in a room situated on the fourth floor of the building'.³⁷³ Another detainee was blindfolded, told he would be executed and had shots fired at him.³⁷⁴ Others were threatened with being thrown over the terrace by police.³⁷⁵ While being interrogated, one woman was told it depended on her whether her family would be executed or not, following which she attempted suicide.³⁷⁶ Another, hearing the cries of others being tortured, told how he suffered a nervous collapse.³⁷⁷

Turning to more recent decisions, the applicant in the *Tekin* case was blindfolded while being aggressively interrogated, assaulted and threatened with death and also stripped naked, hosed with cold water in addition to being physically assaulted. The EComHR, taking the treatment as a whole, found that the 'conditions of detention and the treatment to which he had been subjected constituted *at least inhuman and degrading treatment* within the meaning of Article 3' (emphasis added).³⁷⁸

The victim in *Akkoc* was 'stripped naked on numerous occasions and, on one occasion, forced to walk a gauntlet, naked, between officers who touched her and abused her verbally'.³⁷⁹ She also had photographs taken of her naked and cold water hosed on her 'with such force that she could hardly stand'.³⁸⁰ She was handcuffed to a door for two days and nights and forced to listen to the sounds of others being ill-treated and was told that her children had been brought into detention and were being tortured. There was also physical ill-treatment inflicted on her. The ECtHR characterised the overall treatment as torture and noted that:

...the elements of psychological pressure suffered by the applicant, in particular the threats made concerning the ill-treatment of her children, which caused the applicant intense fear and apprehension. This treatment left the applicant with long-term symptoms of anxiety and insecurity, diagnosed as post-traumatic stress disorder and requiring treatment by medication.³⁸¹

In the *Aydin* case, the (17 year old) applicant was subjected to a series of humiliating experiences in the hands of the security forces. She was detained over a period of three days 'during which she must have been bewildered and disoriented by being kept blindfolded'.³⁸² She was also 'paraded naked in humiliating circumstances thus adding to her overall sense of vulnerability and on one occasion she was pummelled with high-pressure water while being spun around in a tyre'.³⁸³ As in most such cases, these acts were accompanied with severe physical ill-treatment (including rape). The interesting aspect of the ECtHR's finding of torture in this case is its statement that it would have reached that conclusion on *either* of the grounds taken separately.

³⁷¹ *Ramirez Sanchez v France* (App No. 59450/00) ECHR 4 July 2006 [135].

³⁷² *Ibid* [150].

³⁷³ *The Greek Case* (n 349) 461.

³⁷⁴ *Ibid*.

³⁷⁵ *Ibid* 462.

³⁷⁶ *Ibid* 464.

³⁷⁷ *Ibid*.

³⁷⁸ *Tekin v. Turkey* (App No. 22496/93) ECHR 1998-IV [51].

³⁷⁹ *Akkoc v. Turkey* (n 361) [25].

³⁸⁰ *Ibid*.

³⁸¹ *Ibid* [116].

³⁸² *Aydin v. Turkey* (App No. 23178/94) ECHR 1996 VII, [84].

³⁸³ *Ibid*.

The applicant in *Dikme v. Turkey* had blows repeatedly inflicted on him during the lengthy interrogation sessions throughout his time in police custody. In addition, he alleged to have been constantly threatened and abused, blindfolded while violence was inflicted on him, left naked on the concrete floor after interrogation sessions and endured a mock execution in a forest. The ECtHR observed that such acts were 'likely to cause mental suffering' and 'depending on the circumstances, such assaults may fall within the scope of Article 3...even though they may not necessarily leave medically certifiable physical or psychological scars'.³⁸⁴ As it established that the physical blows amounted to torture, it did not deem it 'necessary to assess whether the other allegations of psychological violence are true, particularly in view of the difficulty of proving such treatment'.³⁸⁵

The very recent *Gäfgen* Judgment was a tragic case involving the kidnapping and murder of an 11 year old boy in Germany in 2002. The Frankfurt deputy police chief, believing the boy to be alive, ordered a subordinate to threaten the kidnapper (who had been arrested after he collected the ransom). He was threatened with severe pain if he did not reveal the child's whereabouts after which he subsequently confessed and told the police where to find his body. One of the key issues before the ECtHR was whether the threat of torture or other ill-treatment infringes Article 3. It made explicit reference to the UNSRT's reasoning that 'the fear of physical torture may itself constitute mental torture'.³⁸⁶ It considered that the 'real and immediate threats of deliberate and imminent ill-treatment...must be regarded as having caused him considerable fear, anguish and mental suffering' but then qualified this by noting the applicant 'did not submit medical certificates to establish any long-term adverse psychological consequences suffered or sustained as a result'.³⁸⁷ It went on to acknowledge that the threat 'was premeditated and calculated in a deliberate and intentional manner' and 'made in the context of the applicant being in the custody of law-enforcement officials, apparently handcuffed, and thus in a state of vulnerability'.³⁸⁸

In following the guidance of the UNSRT, it concluded that 'a threat of torture can amount to torture, as the nature of torture covers both physical pain and mental suffering...In particular, the fear of physical torture may itself constitute mental torture'.³⁸⁹ This was followed by the caveat that the classification of 'whether a given threat of physical torture amounted to psychological torture or to inhuman or degrading treatment depends upon all the circumstances of a given case, including, notably, the severity of the pressure exerted and the intensity of the mental suffering caused'.³⁹⁰ It ruled that the method of interrogation used in this case was sufficiently serious to amount to inhuman treatment but did not reach the level of cruelty required to attain the threshold of torture.³⁹¹

In *Selmouni v. France*, the applicant was a Dutch and Moroccan national who was imprisoned in France. Apart from being kicked and punched, he experienced the following: being forced to kneel down in front of a young woman to whom an officer had said 'Look, you're going to hear somebody sing'; having a police officer show him his penis, saying 'Here, suck this', before urinating over him; being threatened with a blowlamp and then with a syringe.³⁹² The applicant also complained that he had been raped with a small black truncheon after being told 'You Arabs enjoy being screwed'.³⁹³ The ECtHR reasoned that the 'acts complained of were such as to arouse in the applicant feelings of fear, anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical and moral resistance...[and] are sufficiently serious to render such treatment inhuman and degrading'.³⁹⁴ It went on to observe that such acts would be 'heinous and humiliating for anyone, irrespective of their condition'.³⁹⁵ It concluded that the physical and mental violence, taken as a whole,

³⁸⁴ *Dikme v. Turkey* (App no. 20869/92) ECHR 2000-VIII [80].

³⁸⁵ *Ibid* [83].

³⁸⁶ *Gäfgen v Germany* (App No. 22978/05) ECHR 1 June 2010 [67].

³⁸⁷ *Ibid* [103].

³⁸⁸ *Ibid* [104], [106].

³⁸⁹ *Ibid* [108].

³⁹⁰ *Ibid*.

³⁹¹ *Ibid*.

³⁹² *Selmouni v. France* (App No. 25803/94) ECHR 1999-V [82].

³⁹³ *Ibid*.

³⁹⁴ *Ibid* [99].

³⁹⁵ *Ibid* [103].

amounted to torture and took the additional step of declaring that the severity test articulated in previous cases was to be interpreted within the meaning of Article 1 of the UNCAT, and not solely on the basis of the ECHR. It is interesting to note that it gave due weight to the mental suffering in this case despite the absence of psychological evidence.

Turning our attention specifically to cases where humiliation is at the core, the ECtHR has a number of principles unique to it alone. It considers treatment to be 'degrading' when it arouses in victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance, or when it had been such as to drive the victim to act against his will or conscience.³⁹⁶ In the *Ireland v. UK* case, a separate opinion from Judge Fitzmaurice argued that degrading treatment should be 'seriously humiliating, lowering as to human dignity or disparaging, like having one's head shaved, being tarred, feathered, smeared with filth, pelted with muck, paraded naked in front of strangers, forced to eat excreta, deface the portrait of one's sovereign or head of State, or dress up in a way calculated to provoke ridicule or contempt'.³⁹⁷

The applicant in a case against Lithuania was a detainee forced to strip naked in the presence of a female police officer allegedly 'with the intention of humiliating him'.³⁹⁸ He was then ordered to squat, and 'his sexual organs and the food he had received from his visitor were examined by guards who were not wearing gloves'.³⁹⁹ In considering whether the treatment was 'degrading', the ECtHR had regard to whether the object was to 'humiliate and debase the person concerned and whether...it adversely affected his or her personality in a manner incompatible with Article 3'.⁴⁰⁰ It took the view that this showed a clear lack of respect for the applicant, and 'diminished... his human dignity. It must have left him with feelings of anguish and inferiority capable of humiliating and debasing him'.⁴⁰¹

g. Relatives of the Disappeared

The ECtHR has taken the view that family members of victims of disappearances may themselves be considered victims of ill-treatment. This depends, however, on the existence of special factors which give the suffering of the applicant a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives in these circumstances. In several cases against Turkey, both the EComHR and the ECtHR examined the mental distress and anguish caused to relatives by the disappearance of their loved ones.

The case of *Kurt v. Turkey* involved the disappearance of the applicant's son during an unacknowledged detention. While the applicant had witnessed the detention of her son, the public prosecutor insisted that he had been kidnapped by an armed group. The applicant specifically relied on the HRC's decision in *Quinteros*. The EComHR found that 'the uncertainty, doubt and apprehension suffered by the applicant over a prolonged and continuing period of time caused her severe mental distress and anguish' which amounted to IDT.⁴⁰² The ECtHR, in turn, noted that the 'anguish has endured over a prolonged period of time' and confirmed that the State was 'in breach of Article 3' without elaborating further.⁴⁰³

In a subsequent decision, the ECtHR was quick to confirm that the *Kurt* case 'does not however establish any general principle that a family member of a "disappeared Person" is thereby a victim of treatment contrary to Article 3'.⁴⁰⁴ It elaborated on some of the objective factors it takes into account, such as the:

...proximity of the family tie...the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, the involvement of the family member in the attempts to obtain information about the disappeared person and the way in which the authorities responded to those enquiries.⁴⁰⁵

³⁹⁶ *Keenan v. United Kingdom* (Application No. 27229/95) ECHR 2001-III [110].

³⁹⁷ *Ireland v. United Kingdom* (n 354) (Separate opinion of Judge Fitzmaurice) [27].

³⁹⁸ *Valasinas v. Lithuania* (App No. 44558/98) ECHR 2001-VIII [114].

³⁹⁹ *Ibid.*

⁴⁰⁰ *Ibid* [101].

⁴⁰¹ *Ibid* [117].

⁴⁰² *Kurt v. Turkey* (App no 24276/94) ECHR 1998-III [131].

⁴⁰³ *Ibid* [133].

⁴⁰⁴ *Çakıcı v. Turkey* (App no 23657/94) ECHR 1999-IV [98].

It went on to emphasise that the essence of such a violation does not so much lie in the fact of the 'disappearance' of the family member but rather concerns the 'authorities' reactions and attitudes to the situation ...It is especially in respect of the latter that a relative may claim directly to be a victim of the authorities' conduct'.⁴⁰⁶ The applicant in this instance was the brother of the disappeared person and did not witness the security forces taking him away. Furthermore, his father engaged more with the authorities than he did and no 'aggravating features arising from the response of the authorities' were found.⁴⁰⁷ The ECtHR took the view therefore that the applicant was not a victim of ill-treatment under Article 3.

In *Taş v. Turkey*, the applicant was the father of the disappeared person, but was absent at the time of detention. The public prosecutor prevented him from seeing his son and later told him that his son had escaped. The father expressed his fear that his son had probably been killed, and wanted the public prosecutor to investigate the case. The ECtHR emphasised the authorities' indifference and the applicant's suffering of 'acute anguish and uncertainty'.⁴⁰⁸ It concluded that there had been a violation of Article 3 and has maintained this approach in subsequent cases against Turkey.⁴⁰⁹ It has also continued to apply this approach in the very recent judgments against Russia involving the disappearance of family members in Chechnya.⁴¹⁰

4. Concluding Observations

The jurisprudence from the IAS is rich in allegations of psychological torture. In general terms, the IACoMHR and the IACtHR have shown a willingness to expand the definition of mental torture. The IACoMHR, for example, became the first international body to recognise rape as psychological torture. The judgments often place emphasis on the purpose of 'humiliation' and 'demoralisation' of victims, a positive development in this author's view, since these are often the overriding purposes when it comes to mental torture. The bodies in the IAS are also the ones taking the most comprehensive approach to evidence evaluation, including forensic medical evidence. This is partly due to the extensive use of witnesses, including expert witnesses, but also to the very systematic approach to evidence evaluation taken by IACtHR.⁴¹¹

While the jurisprudence is not clear enough to categorically decide which forms of mental or psychological ill-treatment amount to torture, a number of observations can be drawn. The IACtHR has qualified solitary confinement *per se* as CIDT and the IACoMHR has, on one occasion, found that it reached the threshold of torture. The IACtHR has also made several general remarks about the potential for threats and fear to constitute torture. On the one hand, it has been faced with many allegations of mental torture on the premise of threats and fear and has more often than not made a finding of CIDT. On the other hand, in the *Maritza Urrutia* case, it made a finding of psychological torture in circumstances where no direct physical torture was inflicted. It is perhaps more likely to make a finding of mental torture when death threats are accompanied by the use of other interrogational methods. This judgment also acknowledged the severity inflicted by sleep deprivation and sensory bombardment and suggested an advanced appreciation of their destructive effects.

It is hoped that the IAS will use its demonstrated flexibility to explore whether mental torture encompasses acts such as severe intimidation and threats to life when they occur outside of traditional detention. The definitional requirements of torture are often met in these circumstances and victims often feel under the control of the person inflicting the mental harm and experience deep sensations of 'powerlessness', as it has rightly acknowledged in its decisions.

The European jurisprudence has, from a very early stage, greatly influenced other regional and international bodies in relation to definitions of ill-treatment. In particular, it has played a significant role in broadening the scope of mental torture. The *Greek Case* in the 1970s, for example, had a significant impact upon the drafting

⁴⁰⁵ Ibid.

⁴⁰⁶ Ibid.

⁴⁰⁷ Ibid [99].

⁴⁰⁸ *Taş v. Turkey* (App no. 24396/94) ECHR 14 November 2000 [80].

⁴⁰⁹ *İpek v Turkey* (App no 25760/94) ECHR 2004-II [183].

⁴¹⁰ *Khakiyeva, Temergeriyeva and Others v. Russia* (App nos 45081/06 and 7820/07) ECHR 17 February 2011 [231]-[233]; *Murtazov v. Russia* (App no 11564/07) ECHR 29 March 2011 [109]-[113].

⁴¹¹ Marcussen (n 305) 155.

of the UN Declaration against Torture (1975) and the subsequent definition of torture contained in the UNCAT. It also established a broad base for considering the many forms of psychological torture. The EComHR's decision in the *Ireland v. UK* case also indicated an advanced understanding of the psychological effects of the techniques in question and it was regrettable that the ECtHR downgraded the classification to IDT. If the EComHR's decision had been approved, it could have had led to a knock-on effect in the other regional and international mechanisms and strengthened the prohibition on psychological torture in general.

While the ECtHR has explicitly acknowledged that mental suffering alone may amount to torture, its approach to certain of the psychological methods reviewed could benefit from further judicial insight. Its treatment of solitary confinement, for example, is arguably 'an easy way out'.⁴¹² It has opted for allowing 'ordinary' solitary confinement with the caveat that 'it is undesirable'.⁴¹³ Furthermore, on the one hand, it has repeatedly stated that solitary confinement leads to a destruction of the personality. Nevertheless, it appears that solitary confinement on its own will, at most, amount to IDT. It remains unclear why the destruction of one's personality should not be considered as capable of amounting to torture. There have also been instances of dubious reasoning, such as the *Ramirez Sanchez* case, where social isolation of several years duration did not amount to even IDT.

In the *Greek* case, the EComHR specifically referred to 'psychological attacks on a detainee's personal feelings or his or her feelings for others' in formulating its definition of psychological torture. This suggested that tactics aimed at inducing humiliation and shame could come within the ambit of psychological torture. The ECtHR, in turn, has developed a sophisticated understanding of humiliation but, arguably, underestimates the severity of the consequences of suffering severe humiliation. Humiliation is, for example, central to 'degrading treatment' which is the lowest category on the ladder in terms of 'severity' of ill-treatment. There is room therefore for further exploring the link between humiliation and torture.

It has been particularly proactive in addressing the suffering inflicted by threats and fear. In the *Akkoc* case, for example, it placed particular emphasis on the suffering endured by the threats to the applicant's children which lead to her developing PTSD which, justifiably, amounted to torture. The *Aydin* case also provides strong authority that the ECtHR is receptive to allegations of psychological suffering alone. In some instances, the absence of psychological evidence has been a determining factor in preventing it from reaching such a conclusion. On other occasions, it has not been put off by the absence of such evidence. There is, therefore, considerable unpredictability when it comes to the outcome of individual cases and clarification on the role of psychological evidence would be helpful.

In relation to relatives of the disappeared, on the one hand, it has helpfully adopted clear criteria which clarify that it is the attitude and reactions of the authorities which is the decisive factor in making any finding of ill-treatment in such circumstances. On the other hand, the ECtHR's case-law suggests that IDT is the highest classification that could be reached in such circumstances. This may be contrasted with the views of the UNSRT, for example, who has considered the severity of suffering of such persons as at least capable of amounting to torture. It appears somewhat arbitrary to classify such suffering as IDT without at least occasionally indicating why it does not reach the level of torture.

The ECtHR is, however, well placed to re-evaluate its previous decisions. Firstly, the looseness of the drafting of Article 3 has left it maximum flexibility and encouraged an open-ended and innovative approach.⁴¹⁴ Secondly, it has long considered the ECHR as 'a living instrument' to be interpreted in the light of present day conditions.⁴¹⁵ There is always the explicit possibility, therefore, that any form of ill-treatment which is accepted as IDT may be classified differently in the future. This is a positive attribute and ensures that the system is able to adapt to the challenges brought by less dramatic and less conspicuous forms of ill-treatment, such as those considered in this study.

⁴¹² Cassesse (n 345) 237.

⁴¹³ Ibid.

⁴¹⁴ Fionnuala Ní Aoláin, 'The European Convention on Human Rights and its Prohibition on Torture' in Sanford Levinson (ed) *Torture: A Collection* (Oxford University Press, New York 2004) 213, 219.

⁴¹⁵ *Tyrer v. United Kingdom* (App no 5856/72) (1978) ECHR Series A no 26 [31]; *Selmouni v. France* (n 392) [101].

IV. Conclusion

*In recent years governments that practice torture increasingly have sought to devise methods that cause intense pain but leave no marks. The era of psychological torture appears to be ahead of us.*⁴¹⁶

This study has adopted a multi-faceted approach to a multi-faceted problem, that is, understanding and interpreting psychological torture. It has done so on the premise that there is no obstacle, in principle, as to why the law should not accommodate input from other disciplines.⁴¹⁷ At the same time, the author is aware of scholarly warnings that 'the lawyer should not strive to "practice social science without license"'.⁴¹⁸ That is not what has been attempted here. The author has rather presented the many views that exist from the sciences and sought to contrast these with the views coming from IHRL, in the guise of definitions and judicial interpretations. In doing so, this study also shown that access to scientific knowledge is not beyond the reach of legal professionals in the field of human rights.

Nowadays, torture is often practiced according to scientific methods by which the psychological effects are usually experienced as being the worst. To be 'burned with cigarettes, to be beaten and kicked, to be suspended or exposed to electrical torture are not so hard as to witness the torture of others such as one's own child, spouse, or parent'.⁴¹⁹

Mental Torture is an especially grave violation of human rights because, in its various forms, its ultimate objective is to annul the very identity and personality of the victim. The devastating health consequences of threats and fear, humiliation, sensory deprivation and social isolation are evident through the literature, observations of clinicians and reports from victims themselves. The forms of ill-treatment considered in this study are perhaps less recognisably painful than more shocking forms of physical suffering. In this context, it is important to remember that it is the *physical* injuries produced by torture that are likely to heal. Most people actually underestimate their capacity to withstand physical pain, which creates only resentment, hostility and further defiance.⁴²⁰ Furthermore, the evidence presented in Chapter 2 also suggests that physical pain *per se* is not the most important determinant of traumatic stress in survivors of torture. Mental suffering, on the other hand, is much more pervasive and likely to persist. Moreover, psychologists view the death of the 'self' as a far greater concern than the death of the body.⁴²¹ As outlined in Chapter 2, the suffering induced by psychological interrogation tactics can be just as harmful as more obvious forms of torture. In the case of relatives of those who have disappeared, it has been seen that they are forced to live with the great pain inflicted by the silence and indifference of others and often remain in a state of 'frozen mourning' until they obtain proof of positive death. The scientific research on the suffering of this category of persons is not as well developed as, for example, certain interrogational methods and is an area that could benefit from further scientific input.

On one level, this study has recognised that there are inherent difficulties involved in trying to infer from the jurisprudence of international bodies which acts constitute mental torture. This is because, in practice, they are rarely confronted with isolated acts. Jurisprudence that fails to spell out '*what constitutes what*' may simply reflect the reality of ill-treatment. The facts of the case-law are often very crude and clearly reveal excessive ill-treatment which renders a careful judicial analysis redundant. In the end of the day, each case comes down to its own facts.

⁴¹⁶ Statement by Human Rights Watch, 'Convention against Torture: Hearing Before the US Senate Committee on Foreign Relations' 101st Cong. 16 (1990) 94.

⁴¹⁷ Koen De Feyter, 'Treaty Interpretation and the Social Sciences' in F. Coomans, F. Grunfeld and M. Kamminga (eds) *Methods of Human Rights Research* (Intersentia, Antwerp 2009) 213.

⁴¹⁸ J. Klabbers, 'The Relative Autonomy of International Law or The Forgotten Politics of Interdisciplinarity' (2004) 1 JILIR 35, 45.

⁴¹⁹ Peter Elsass, *Treating Victims of Torture and Violence, Theoretical, Cross-Cultural and Clinical Implications* (New York University Press, New York 1997) 11.

⁴²⁰ CIA (n 63) 50.

⁴²¹ Elsass (n 419) 10.

Nevertheless, and although inherently difficult to draw such conclusions, the bulk of the empirical data considered in Chapters 3 and 4 shows that psychological interrogation methods and mental suffering of relatives of the disappeared tends to predominantly fall into the category of CIDT, unless also accompanied by severe physical ill-treatment. On the one hand, this is a positive sign in that it shows that mental forms of ill-treatment are recognised violations of IHRL. On the other hand, it may indicate an underestimation of the severity of ill-treatment (in so far as 'severity' appears to be the main guiding factor for the regional bodies in distinguishing between torture and CIDT). The content of Chapter 2 provides support for the contention that the effects of the psychological methods considered are often 'severe'.

Similarly, as has been shown, our ability to recognise torture is more psychologically complex than simply 'knowing it when you see it' which may also contribute to an underestimation.⁴²² Taking one example, a US Judge has written that:

What I think is clearly true...is that the infliction of actual physical pain to extract information is torture. When, however, there is no touching, though there may be sleep deprivation, close confinement in chilly or dirty cells, bright lights...threats...I think it becomes an option whether to call the interrogation torture or merely coercive.⁴²³

Indeed, research outlined in Chapter 2 indicates that human beings have a psychological constraint that encourages an under-inclusive understanding of torture. When this factor is combined with the already acknowledged difficulty involved in the assessment of mental suffering, there is a clear risk that IHRL underestimates the severity of the forms of ill-treatment considered in this study.

Aside from considerations of 'severity', it is important to link in the concept of 'powerlessness'. The former UNSRT Manfred Nowak has identified 'powerlessness' as being the central ingredient of torture. Interestingly, the notion of 'powerlessness' or 'helplessness' has also been used in the language of many of the scientific studies reviewed. Sexual and cultural humiliation, for example, is designed to demonstrate to the victim his utter powerlessness. Furthermore, social isolation deprives detainees of 'safety signals' and may intensify feelings of helplessness. The next of kin of victims of enforced disappearances are also victims of powerlessness. In light of this prevalence of the term in the scientific findings, the notion that powerlessness is at the core of torture lends further weight to the view that many of the forms of ill-treatment considered in this study satisfy crucial definitional requirements of torture, and assuming other definitional requirements are met, should be capable of constituting torture in their own right and in the absence of further physical ill-treatment.

Admittedly, this study does not answer the question of precisely where the line should be drawn between torture and CIDT and nor should it attempt to do so. Deciding on the threshold between different types of ill-treatment is subjective, 'evolving along with society's conceptions' and so it will always be open to criticism.⁴²⁴ Equally, it does not advocate, for example, that a 'threat' should always amount to mental torture. As has been seen, assessing whether any ill-treatment amounts to torture requires a careful analysis of several criteria and is done on a case by case basis. Instead, this study shows that the line between torture and CIDT is much more difficult to decipher than decision makers are likely to assume and risks being drawn in an under-inclusive way. In this regard, the findings support a movement towards a more comprehensive jurisprudential definition of mental torture.

That is not to say that the notion of torture should be diluted. Rather, there is a need to preserve flexibility in understanding what constitutes treatment that falls within the scope of its definitional elements such as forms of humiliation or new knowledge about the traumatic effects of certain acts previously not considered torture. If such suffering is underestimated, escaping the reach of 'torture', it creates a situation whereby the victim's suffering is minimised and doubted and the torturer's responsibility is diminished. The author submits that, continued over a prolonged period of time, such a tendency is likely to encourage the normalisation of psychological torture.

⁴²² Loewenstein (n 20) 114.

⁴²³ Richard Posner, 'Torture, Terrorism and Interrogation' in Sanford Levinson (ed) *Torture: A Collection* (Oxford University Press, New York 2004) 291, 292.

⁴²⁴ Julie Lantrip, 'Torture and Cruel, Inhumane and Degrading Treatment in the Jurisprudence of the Inter-American Court of Human Rights' (1999) 5 ILSA JIntl&CompL 551, 565.

Torture, in all its forms, is a complex phenomenon with interacting social, cultural, political, medical, psychological, and biological dimensions. If it is to be eradicated, it is important that a more universal consensus be reached on the assessment of mental suffering inflicted by the forms of ill-treatment considered in this study. The assessment of mental suffering is extremely difficult but can be enhanced by embracing the interdisciplinarity of human rights. It is hoped that the perspectives of this study, and its integrated approach to the problem, will contribute to achieving some synthesis between the divergent views in the field.

Diarmuid Cunniffe: practising lawyer and member of the Law Society of Ireland, cunniffe@campus.ie

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