GETTING TO GRIPS WITH TORTURE

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I. INTRODUCTION[1]

In October 2000 an informal working group of the United Nations Commission on Human Rights met to discuss the latest drafts of an Optional Protocol to the 1984 United Nations Convention against Torture. The Working Group itself met for its 9th session in February 2001 and its 10th session was held in January 2002.[2] The primary purpose of this Optional Protocol is to create a new international mechanism that will have a preventive role and which would operate by conducting visits to states and to places of detention within states and, in the light of such visits, enter into a 'dialogue' with the state concerned in order to help them ensure that torture does not occur. The origins of this initiative lie in a proposal formally tabled in the early 1980s during the negotiations that led up to the adoption of the UNCAT itself but at that time it was clear that so radical a move as the establishment of an international body with an automatic right of entry into any place of detention would be unacceptable within the broader international community.[3] However, the idea was taken up on a regional level within Europe and in 1987 the Council of Europe adopted the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment which established the European Committee of the same name (known as the CPT), very much by way of an example to the rest of the world, or so it was thought.[4]

[1] The origins of this article lie in the writer's Inaugural Lecture as Professor of Public International Law at the University of Bristol, delivered on 23 Nov 2000. As will be clear from the contents, it has been considerably updated but aims to retain the essential thrust of the lecture then delivered. It now covers developments to the end of Dec 2001. I am very grateful to the Airey Neave Trust for their support of research into the CPT in the mid-1990s and their current support of research into the UN Committee against Torture. This article is an outgrowth of this work. I am also very grateful for the support of the Society of Legal Scholars (formerly the SPTL), who generously funded a number of visits to Geneva.

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

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

[4] See ETS No 126. The ECPT was opened for signature of 26 Nov 1987 and entered into force on 1 Feb 1989. For the background to the adoption of the CPT see A Cassese, 'A New Approach to Human Rights: The European Convention for the Prevention of Torture', (1989) 83 AJIL 130 and M Evans and R Morgan, *Preventing Torture: A Study of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (Oxford: Oxford University Press, 1998), ch 4.

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The CPT now operates within forty-one of the forty-three member states of the Council of Europe[5] and has produced a large number of reports which have done much to deflate any smugness that there might have been at the time of its creation.[6] The CPT is not a judicial body and it is not able to 'apply' Article 3 of the Europan Convention on Human Rights (ECHR)—the prohibition on torture, inhuman or degrading treatment or punishment—in the sense of determining whether a state is in breach of that provision. That is the task of the Europan Court of Human Rights.[7] Rather, it is premised on the belief that 'the protection of persons deprived of their liberty against torture and inhuman or degrading treatment or punishment could be strengthened by non-judicial means of a preventive character based on visits'.[8] The work of the CPT has shown both the need for such a mechanism and that it can play a useful role in the prevention of torture at the European level.[9] At the UN level, however, there is still considerable controversy surrounding the creation of such an intrusive and powerful mechanism and it remains to be seen whether it is possible to make any progress on this.[10]

If it ever comes into being, it is envisaged that the body established will form a sub-committee of the 'CAT'. The CAT, or the Committee against Torture, is the body established under the 1984 UN Convention for the Prevention of Torture[11] and exercises a range of functions. It monitors the compliance of

[5] At the time of writing Armenia and Azerbaijan, which joined the Council of Europe in Jan 2001, are the only member states who are yet to ratify the ECPT. Armenia signed the Convention on 11 May 2001 and Azerbaijan on 21 Dec 2001.

[6] The CPT's 11th General Report records that as at 1 Sept 2001 it had drawn up 111 visit reports, and 74 of them had been published with the consent of the state. See CPT/Inf (2001) 16, para 13 and App 2.

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

[8] ECPT, Preamble.

[9] For overviews of the work of the CPT see Evans and Morgan, 'The European Convention for the Prevention of Torture: Operational Practice', (1992) 41 *ICLQ* 590 and 'The European Convention for the Prevention of Torture: 1992–1997' (1997) 46 *ICLQ* 633 and the essays by various contributors in Morgan and Evans (eds), *Protecting Prisoners: The Standards of the CPT in Context* (Oxford: Oxford University Press, 1999).

[10] At the 9th session of the Working Group in Feb 2001 Mexico, with the support of the Group of Latin American and Caribbean states (GRULAC) tabled a proposal which placed great emphasis upon the role to the played by national mechanisms and this has had the effect of galvanising thinking across a broad spectrum of issues. This prompted the tabling of new and revised articles to be included within the original Costa Rica draft by Sweden on behalf of the EU. Both sets of proposals are included as Annexes to the 9th Report of the Working Group, E/CN.4/2001/67. At the 10th session in Jan 2001 the Chair presented her own draft and the matter is currently before the UN Commission on Human Rights

[11] See UNGA Res 39/46, adopted 10 Dec 1984. The Convention entered into force on 26 June 1987 and there are 127 states party at the time of writing. For the background to the Convention and its drafting see J Burgers and H Danelius, *The United Nations Convention against Torture*

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states with their obligations under the UNCAT by receiving and examining state reports[12] and is also able to receive and consider communications under the optional individual[13] and interstate communication procedures.[14] It also has the capacity to initiate inquiries and produce reports on the situation in states party to the Convention.[15] Along with the other similar treaty monitoring bodies established by other UN human rights treaties, it is generally seen as acting in a 'quasi judicial' capacity in that it is empowered to express its views as to whether states are complying with their obligations but it is not able to make legally binding findings that this is the case. All these bodies have developed the practice of making 'General Comments', these being statements of what these bodies consider is required of states by the various articles of the Convention in question. The CAT has been particularly slow to take advantage of this opportunity and has so far adopted only one General Comment[16] but in

(Martinus Nijhoff, 1988) and for a recent exploration of the work of the CAT, see C Ingelse, *The UN Committee against Torture* (Kluwer, 2001).

[12] See UNCAT, Art 19. For a recent examination of practice of the CAT concerning reporting procedures see R Bank, 'Country-Oriented Procedures under the Convention against Torture: Towards a new dynamism', in P Alston and J Crawford (eds), *The Future of UN Human Rights Monitoring* (Cambridge: Cambridge University Press, 2000), ch 7. As at 18 May 2001 there were a total of 139 reports yet to be submitted to the Committee. See the Report of the Committee Against Torture (25th and 26th Sessions), A/56/44, para 23. For fuller details to 31 Mar 2001 see *Recent Reporting History Under the Principal International Human Rights Instruments* HRI/GEN/4/Rev 1. At the time of writing, according to the UN Website, 404 Reports have been submitted to the Committee and 136 Reports are outstanding.

[13] UNCAT, Art 22. Forty-three states have made a declaration accepting the right of individuals to submit communications to the CAT at the time of writing. The most recently published Report of the Committee Against Torture records that as of May 2001 183 communications had been made, yielding 20 findings of violations, with 40 cases still pending. See A/56/44, para 200. See also Ingelse, above, ch 5.

[14] UNCAT, Art 21. Forty-six states have currently made a Declaration under this Art, although no interstate communication has yet been made. Japan, UK, and the USA have made declarations under Art 21 but not Art 22. See also Ingelse, above, ch 7.

[15] UNCAT, Art 20. Nine States have declared that they do not recognise the competence of the Committee under this article, as they are entitled to do at the time of ratification or accession. These are: Afghanistan, Belarus, China, Cuba, Israel, Kuwait, Morocco, Saudi Arabia, and the Ukraine. For an examination of this procedure see Bank, above, at 166–72; Ingelse, above, ch 6. A similar mechanism is now found in Articles 8–10 of the Optional Protocol to the Convention on the Elimination of Discrimination against Women, GA Res A/54/4, adopted 6 Oct 1999 and in force 22 Dec 2000. Of the 30 states party, only 2 (Bangladesh and Cuba) have made the declarations permitted by Art 10 which permit states to opt out of the procedure at the time of signature or ratification.

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

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May 2000 members appear to have accepted the wisdom of moving towards formulating a series of general recommendations[17] and, in particular, to take forward the idea of moving towards drafting a General Comment on Article 1 of the UNCAT, which concerns the definition of torture.[18]

Thus at the moment developments are taking place on two separate fronts—the drafting of an optional protocol to establish a preventive mechanism and an attempt to elaborate in detail upon what torture is taken to be for the purposes of the Convention. One might think that these are complementary activities but there is in fact a very real danger that the work of elaborating upon the definition of torture found in the UN Convention may have potentially detrimental consequences for whatever practical use a visiting mechanism along the lines of the ECPT might ever actually have at the UN level. There are fundamental differences between the approaches to torture and ill-treatment found in the European system from those which are found in the UNCAT. The approaches found in the European system are better suited to a preventive function that those in the UNCAT and further elaboration of Article 1 in a general comment might exacerbate this problem.

The purpose of this article is to outline—albeit briefly—a number of different approaches to the prohibition of torture and ill-treatment[19] but, in summary, the argument is as follows: the ECHR (as well as Article 5 of the Universal Declaration on Human Rights and Article 7 of the International Covenant on Civil and Political Rights, although these will not be expressly considered here) does not provide any definition of torture but it does have

[17] See CAT/C/SR.435 (meeting of 17 May, 2000).

[18] During the 24th session of the CAT in May 2000 the possibilities of drawing up two general comments were discussed and committee members designated to prepare background papers for subsequent consideration. These concerned (1) the definition of torture appearing in Art 1 of the Convention and the need for its incorporation into domestic legislation of the state parties and (2) Interim Measures requested by the Committee, exercising its competence under Art 22 of the Convention. See ibid and GAOR A/55/44, para 21. As regards the second of these topics, a background paper was prepared by Committee member Mr Camara and a preliminary discussion took place at the 26th session in May 2001 (see CAT.C/SR.479/Add 1). Although some preparatory work has taken place, there does not appear to have been any further substantive consideration of either question at formal meetings of the Committee and so the process may fairly be described as being at an embryonic stage. Certainly, there is no mention of this work in its Report to the General Assembly for this session (A/56/44). Members of the CAT were present at an informal seminar on the definition of torture organised by the Association for the Prevention of Torture in Geneva in Nov 2001 (at which a version of this article was distributed and discussed). There does not appear to have been an occasion to discuss the prospects of drawing up a general comment on the definition of torture at the 27th session of the Committee which followed.

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

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what might be called an 'approach' and this involves its being linked with the notions of 'inhuman' and 'degrading' treatment. The UNCAT, however, does provide a definition of torture with very clearly marked elements. Although it does not define 'inhuman' and 'degrading' treatment directly, it does so indirectly and in a potentially restrictive fashion. More importantly, it formalises a distinction between torture on the one hand and inhuman and degrading treatment on the other by attributing different legal consequences to them. In other words, whilst the ECHR draws these concepts together, the UNCAT tends to drive them apart. Whilst either of these approaches is acceptable in a judicial or quasi-judicial context, when one is determining whether or not there is compliance with a given article of a convention, they are not equally useful in the preventive context.[20] The experience of the European system is that its relatively flexible and open-textured approach can work well in the preventive context since it makes it easier to 'ground' preventive recommendations. The linkage and potential for cross-fertilisation between the notions of torture and 'inhuman and degrading' treatment is very important in this process (even if, as will be suggested below, the manner in which the CPT uses these terms has, perhaps unwittingly, hampered this creative potential). However, such benefits as this provides in the European system may well be lost in the UN context because of the relative inflexibility of the definitions, and refining the definition of torture in Article 1 even further is unlikely to help. Recent judgments by the European Court of Human Rights are 'Janus faced' in this respect because they provide helpful examples that the UNCAT might draw on but they also—and unnecessarily—emphasise the very divisions which need to be overcome by the CAT in order the enhance its potential preventive dimension. The remainder of this article will add some flesh to this summary.

II. APPROACHES TO ARTICLE 3 IN THE EUROPEAN SYSTEM

A. The European Court of Human Rights

Article 3 of the ECHR provides that:

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

In the *Greek* case in 1969 the European Commission on Human Rights expressed the view that:[21]

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

[21] *Greek* case, Report of the European Commission on Human Rights, 5 Nov 1969, 12 *Yearbook of the European Convention on Human Rights* 1 at 186.

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

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

1. The torture threshold

It is notoriously difficult to determine at what point ill-treatment moves from being *inhuman* and becomes *torture*, most famously illustrated by the case brought by Ireland against the UK in which the Commission concluded that the interrogation techniques employed by the British security forces in Northern Ireland in the early 1970s—wall standing, hooding, restricted diets, subjection to noise and sleep deprivation—amounted to acts of torture,[22] whereas the European Court of Human Rights subsequently concluded that they fell short of the seriousness required and so amounted to 'only' inhuman and degrading treatment.[23] In Israel in the late 1990s the argument was still being run before the Supreme Court (unsuccessfully, it should be said) that the interrogation techniques used by the Israeli Security forces were 'inhuman and degrading' rather than acts of torture, and so Israel was not in breach of its international obligation to refrain from acts of torture.[24] The precise placing of the thresholds might change over time, but the basic approach itself remains and in the first case in which the Court found acts to comprise torture, *Aksoy v Turkey*, the Court stressed that:[25]

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

[23] *Ireland v UK*, Judgment, 18 Jan1978, ECHR Ser A, No 25 (2 EHRR 25), para 167.

[24] HCJ 5100/94 *Public Committee against Torture in Israel et al. v The State of Israel and the General Security Service* (GSS), Judgment of 6 Sept 1999 para 17 [nyr]. It was decided that all such use of physical force in the course of interrogation was beyond the powers of the interrogators and so could not be authorised. Nor could a defence of necessity to a criminal charge brought against an interrogator be accepted, save in certain exceptional circumstances. For a detailed examination of this judgment and its broader ramifications see A Reichman and T Kahana, 'Israel and the Recognition of Torture: Domestic and International Aspects', in Scott (ed), above, ch 24. See also the third period report of Israel to the CAT, which sets out the findings in the case and the Israeli response to it, including the Government's decision 'not to initiate legislation that would authorize the use of physical means in investigations' (CAT/C/54/Add.1, para 40).The judgment does not however cast any new light on the threshold between torture and inhuman and degrading treatment, the question of whether the practices in question being 'torture' as opposed to 'inhuman or degrading' treatment not being directly addressed (see ibid, paras 6–7).

[25] *Aksoy v Turkey*, Judgment, 18 Dec 1996, *RJD* 1996-VI, 2260 (23 EHRR 553), para 63.

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> this distinction would appear to have been embodied in the Convention to allow the special stigma of 'torture' to attach only to deliberate inhuman treatment causing very serious and cruel suffering.

However, in the recent past the Court seems to have shifted its position significantly. In *Selmouni v France* (1999) the Court said that:[26]

> certain acts which were classified in the past as 'inhuman and degrading' as opposed to 'torture' could be classified differently in future. [T]he increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.

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

2. The entry threshold

A further problem with this approach lies is determining where the 'entry threshold' into Article 3 lies—that is, are there any forms of ill-treatment which are too trivial to be classified as 'degrading'—and the related problem of determining the thresholds of seriousness between the three elements. If the deliberate infliction of physical or mental pain is involved, then it is likely to amount to at least degrading treatment, unless it is exceedingly trivial. A standard example is *Costello-Roberts v UK* in which the Court did indeed conclude that such a threshold had not been passed in the case of a 7-year-old boy being whacked three times with a slipper by a headmaster in a private school.[27] Other acts not involving the deliberate infliction of physical or mental suffering can also be deemed degrading, but these need to be assessed on different criteria. In deciding a case concerning the handcuffing of a detainee in public under Article 3, *Raninen v Finland*, the Court said that test was 'whether or not the treatment in question denotes contempt or lack of respect for the personality of the person subjected to it and whether it was designed to humiliate or debase him instead of, or in addition to, achieving other aims'.[28] Clearly, this is a

These words are derived from the judgment of the Court in *Ireland v UK*, Judgment, 18 Jan 1978, ECHR Ser A, No 25 (2 EHRR 25), para 167 and have frequently been used and endorsed by the Court. For a recent example see *Akkoc v Turkey*, Judgment, 10 Oct 2000, para 115 [nyr].

[26] *Selmouni v France* [GC] Judgment, 28 July 1999, 29 EHRR 403, para 101.

[27] *Costello Roberts v UK*, Judgment, 25 Mar 1993, ECHR Ser A, No 247-C (19 EHRR 112). For a recent example of a claim which fell beneath the threshold altogether see *Rehbock v Slovenia*, Judgment, 28 Nov 2000, paras 79–81 [nyr] (failure to provide a detainee with a pain killer).

[28] *Raninen v Finland*, Judgment, 16 Dec 1997, RJD 1997-VIII, 2804 (26 EHRR 563), para 55.

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subjective approach and this immediately casts doubt on the idea that Article 3 really is based on a 'severity of suffering' at all.[29]

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

The physical conditions in which a person is held also can be inhuman or degrading. This was established by the European Commission on Human Rights in the *Greek* case in which a combination of overcrowding, incommunicado detention, no access to open air, limited light, no exercise and prolonged detention whilst in police custody was considered to violate Article 3.[30] This has been confirmed and illustrated in many subsequent cases.[31] It is also well established that returning persons to a country where they will face a real risk of being subjected to torture or inhuman or degrading treatment is itself inhuman or degrading.[32] This is so even if the threat comes from private forces in lawless societies rather than from the organs of state authorities themselves.[33] It may also be a breach of Article 3 to return a person in circumstances where the result of the expulsion will have consequences of an inhuman or degrading nature for the person concerned, irrespective of whether the particular situation to which the person is being returned do not in themselves either engage the responsibility of the state or infringe the standards of Article 3.[34] But it again might be wondered if any of these practices could ever amount to torture?

In short, the variegated nature of ECHR jurisprudence appears to defy practical application of the approach which is most commonly associated with it.

[29] This is further supported by those cases in which discrimination, and particularly discrimination on the grounds of race, is seen as a form of degrading treatment. The origins of this approach are found in the *East African Asians v UK*, Commission Report, 14 Dec 1973, DR 78-A, 62 and *Abdulaziz, Cabales and Balkandali v UK*, Judgment, 28 May 1985, Ser A No 94 (7 EHRR 471) and more recently in *Cyprus v Turkey* [GC] Judgment, 10 May 2001, paras 302–11 [nyr] where the Court concluded that the overall conditions of living for the Greek Cypriot community in Karpas area of Northern Cyprus comprised discriminatory treatment of a degrading nature within the meaning of Art 3.

[30] *Greek* case, Report of the European Commission on Human Rights, 5 Nov 1969, 12 Yearbook of the European Convention on Human Rights 1 at 468–97.

[31] For recent examples see *Peers v Greece*, Judgment, 19 Apr 2001, paras 63–74 [nyr] and *Dougoz v Greece*, Judgment 6 June 2001, paras 42–9 [nyr].

[32] There now a long line of cases flowing from *Soering v UK*, Judgment, 7 July 1989, ECHR Ser A No 161 (11 EHRR 439) around which a complex jurisprudence has emerged. See generally K Reid, *A Practitioner's Guide to the European Convention on Human Rights* (Sweet and Maxwell, 1998), 220–3, 268–75.

[33] See, eg, *HLR v France*, Judgment, 29 Apr 1997, RJD 1997-III, 758 (26 (EHRR) 29).

[34] See, eg, cases concerning the availability of forms of medical care, *D v UK*, Judgment, 2 May 1997, RJD 1997-III, 777 (24 EHRR 423) and *Bensaid v UK*, Judgment, 6 May 2001 [nyr].

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Indeed, if one scratches beneath the surface of most of the cases, it becomes apparent that the Commission and Court have never fully subscribed to the severity of suffering approach, despite their mantra-like espousal of it over the years. Indeed, this has been the case from the outset. In an equally talismanic passage, the Court said in *Ireland v UK* that: [35]

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

This has always meant that the Court has had considerable flexibility in the application of its approach[36] and what seems to have happened is that as the range of situations that fall within the ambit of Article 3 has enlarged, then the need to take a more nuanced approach to its application has increased. This is now made manifest in the recent case of *Keenan v UK* where the Court accepts openly that the severity of suffering is only one element of an increasingly complex matrix, saying:[37]

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

B. The European Committee for the Prevention of Torture

The CPT has adopted a rather different approach to that of the European Court. The CPT works in a preventive, non-judicial context and its approach to the language of Article 3 is doubtless influenced by a variety of factors which have nothing to do with formal legal definition—though this is apparently sometimes lost on the Court when CPT Reports have been referred to in cases brought before it.[38] To oversimplify a complex practice, the reports of

[35] *Ireland v UK*, Judgment, 18 Jan 1978, ECHR Ser A, No 25 (2 EHRR 25), para 162.

[36] See W Peukert, 'The European Convention for the Prevention of Torture and the Europan Convention on Human Rights', in Morgan and Evans, *Protecting Prisoners*, above, ch 3 at 98.

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

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

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the CPT which are currently in the public domain suggest that their approach is largely as follows: The term 'torture' has been chiefly reserved for forms of physical or mental ill-treatment which are severe, is inflicted for a particular purpose and, at least hitherto, has required some form of 'preparation', such as the use of electric shock, falaka, suffocation with bags over heads, beating prisoners in tethered positions, etc.—what have elsewhere been called 'exotic' methods, for the want of any better description. This contrasts with their use of the terms 'inhuman' and 'degrading', which are not used to describe forms of physical or mental ill-treatment which simply 'fall short' of torture for whatever reason, but are used to describe what might be called 'custodial conditions' of detention or hybrid areas of organisational practice which bear upon the treatment of detainees either in general or in a particular instance.[39] In short, they describe different phenomena and so are not part of a hierarchy based on 'suffering', although it is clearly understood that 'inhuman and degrading' conditions of detention or practices are likely to generate the environment in which acts of torture can flourish. For the moment, the CPT's use of terms is such that 'inhuman' and 'degrading' does not blur into 'torture'—there is no scale to climb: they are parallel paths.

The practice of holding remand prisoners in solitary confinement might be taken as an example. The ECHR might describe such a practice as 'inhuman' or 'degrading' but whether it would categorise it as 'torture' should in theory depend upon how 'severe' the suffering was (whether objectively or subjectively is an interesting point, but need not detain us here). But one suspects it would have difficulty climbing over that threshold. The CPT appears willing to describe this as 'inhuman and degrading' but, in current CPT parlance, this all but precludes the possibility of its being described as torture.[40] One might take the view that if it is an 'inhuman and degrading' practice, then in those instances where there is the requisite purpose, such as encouraging a confession or extracting other information, then there would be no reason at all not to view it as an act of torture.

Neither the approach of the Europan Court nor that of the CPT is free of difficulty. The Court's 'vertical' approach tends to hide the true nature of issues affecting the classification. The CPT's version of a horizontal or parallel approach creates a problem for those examples of ill-treatment which fall below the 'severity' threshold. Thus in the case of acts of physical ill-treatment falling short of torture, it describes them as 'ill-treatment', but not

[39] For a detailed examination of the CPT's approach to these terms see Morgan and Evans, *Combatting Torture in Europe: The Work and Standards of the CPT* (Council of Europe Press, 2001), ch 3.

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

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'inhuman or degrading' treatment. This is apt to confuse. For example, it might, paradoxically, be considered encouraging if the CPT were to consider examples of solitary confinement on remand to be 'ill-treatment' rather than 'inhuman or degrading' treatment since this would suggest that in an appropriate case it might be prepared to consider it to amount to torture. ECHR watchers might, however, read this as suggesting it was not even 'inhuman or degrading'. The CPT, on the other hand, tends to use the word 'unacceptable' to describe conditions falling under that threshold. No-one ever claimed that the relationship between these strands of European practice would be simple, but it does seem to have become over complex.

III. THE UNCAT AND THE DEFINITION OF TORTURE

Against this background, it is with relief that one turns to the UNCAT, Article 1 which provides a definition:

> the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason 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 sanction.

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

> acts. . . which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

In other words, such acts fail to qualify as acts of torture for the purposes of the Convention either because they did not involve a sufficiently severe degree of pain or suffering or because they were not inflicted for a purpose. It follows from this that an act which does cause severe pain but is entirely without purpose (if this is possible) would be 'inhuman' or 'degrading' rather than an act of torture for the purposes of the UN Convention. This distinction is critical because under the UNCAT the state is obliged to establish its jurisdiction over acts of torture and either prosecute or extradite those suspected of committing such acts.[41] This obligation does not apply to those who have

[41] UNCAT, Arts 4, 5, and 7.

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committed acts which are 'inhuman' or 'degrading'.[42] Similarly, whilst there is an obligation to ensure that victims of torture have a right of redress and compensation,[43] and that evidence obtained by the use of torture is inadmissible,[44] these do not apply to 'inhuman' or 'degrading' acts.[45]

The most important points to note about this definition is that it is very closely tied to the idea of torture—and inhuman and degrading treatment—being a purposive official act.[46] The reason why the official nature of the act is so important under the UN Torture Convention is that its primary purpose is to require and facilitate the assertion of jurisdiction by states over acts of torture, including instances involving non-nationals in third states—that is, on the basis of a form of universal jurisdiction.[47] The justification for this is, ultimately, that since states are unlikely to take effective measures against their own agents someone else should be able to do so in order that torturers do not enjoy de facto impunity. Although it is generally understood as being a 'human rights instrument' the UNCAT definition embraces an approach that is clearly different to that of the ECHR and, it should be said, to other UN human rights instruments.

The primary purpose of the UNCAT is, then, to require states to assert jurisdiction over acts of torture, not to outlaw the practice of torture as a matter of international human rights protection, though it certainly reinforce this pre-existing outlawry as well. There is nothing inevitable about the definition of torture in Article 1 of the UNCAT being taken as the model in other contexts. Indeed, it increasingly widely recognized that the definition in Article 1 is not necessarily applicable in its totality in other spheres of international law [48] and, armed with that caveat, its dominance within the human rights sphere itself should not be taken for granted.

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

[43] UNCAT, Art 14. [44] UNCAT, Art 15. [45] See n 42 above.

[46] This, of course, assumed a great importance in House of Lords in the Pinochet case. In its first decision, two of the judgments stressed the idea that acts of torture could not be 'official acts' whilst in the second substantive decision it was seeming vital to the reasoning that they were.

[47] See J Burgers and H Danelius, *Handbook on the Convention against Torture and other Cruel and, Inhuman or Degrading Treatment of Punishment,* above 1 and 131. This point was stressed by a number of judgments in Pinochet No 3. See, eg, *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (Amnesty International and other intervening)* No 3 [1999] 2 All ER 97 at 109 (Lord Browne-Wilkinson), 150 (Lord Hope), 163–4 (Lord Hutton) and 177–8 (Lord Millet).

[48] This can be traced through the jurisprudence of the war crimes tribunals. In *Prosecutor v Akayesu*, Judgment, Case ICTR 96-4-T, 2 Sept 1998, para 593 the UNCAT definition was regarded as providing the relevant definition for the purposes of interpreting the Statute of the Court and this was endorsed by Trial Chambers of the ICTY in *Prosecutor v Delalic*, Case No IT-96-21-T, 16 Nov 1998, para 459 and *Prosecutor v Furundzija*, Case No. IT-95-17/1, 10 Dec 1998, at para 160. However, that latter judgment also went on to say that, though of general application, in the context of armed conflict there were a number of additional definitional elements (para 162)

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It is, then, at first sight surprising to see the European Court endorsing the UNCAT definitions in its most recent case-law. In 1999 in *Selmouni v France* the Court explicitly draws on the UNCAT definition and, having determined that the acts in question occasioned 'pain and suffering, and were inflicted by police officers in the course of their duties, went on to consider whether they were sufficiently severe to justify a finding of torture.[49] This approach has recently been followed by the Grand Chamber of the Court in, for example, *Ilhan v Turkey* and *Salman v Turkey* in which cases the Court expressly endorsed the purposive component of the UNCAT definition and stressed its relevance in distinguishing between 'torture' on the one hand and 'inhuman and degrading' treatment on the other.[50] Indeed, in subsequent cases, the Chambers of the Court have concluded that ill-treatment which would seem to qualify as torture on the *Selmouni* approach to the threshold is to be categorized as inhuman and degrading treatment because of the nature of the purpose underlying its infliction was not sufficiently closely linked to extracting a confession.[51] It is almost as if the Court is suddenly trying to drive a wedge between the categories. This is all very perplexing.

Is the European Court about to abandon its entire conceptual approach in favour of the UNCAT definition? I do not know but it may well be that the idea of 'purpose' has always been present within the Court's thinking but that the close proximity between the ideas of 'purpose' and 'legitimate' purpose and 'justification' have encouraged the Court to suppress this

and the logic of this approach was taken up in the Trial Chamber judgment in the case of *Prosecutor v Kunarac, Kovac and Vukovic*, Case No IT-96-23/1-T, 22 Feb 2001, para 482 in which it was concluded that 'the definition of torture contained in the torture convention cannot be regarded as the definition of torture under customary international law which is binding regardless of the context in which it is applied'. This has now been endorsed by the Trial Chamber judgment in the case of *Prosecutor v Kvocka, Kos, Radic, Zigic and Prcac*, Case No IT-98-30/1-T, 2 Nov 2001, paras 138–9, where it was decided that 'the state actor requirement imposed by International Human Rights law is inconsistent with the application of individual criminal responsibility for international crimes found in international humanitarian law and international criminal law'. For an appraisal—made before the *Kvocka* judgment and which concludes that the UNCAT definition remains reliable as far as the conduct prohibited is concerned—see A Cassese, *International Law* (Oxford: Oxford University Press, 2001), 254–6. It should also be noted that the Elements of Crime adopted by the Preparatory Commission for the International Criminal Court are also not necessarily *ad idem* with the UNCAT approach. See K Kittichchaisaree, *International Criminal Law* (Oxford: Oxford University Press, 2001), 110–12 and 143–7.

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

[50] *Ilhan v Turkey* [GC] Judgment of 27 June 2000, para 85–88 [nyr]; *Salman v Turkey* [GC] Judgment of 27 June 2000, paras 114–16 [nyr]. For a more recent endorsement of the UNCAT definition see *Akkoc v Turkey*, Judgment, 10 Oct 2000, para 115 [nyr]. The purposive element is also implicitly endorsed in the recent case of *Al-Adsani v UK* [GC] Judgment, 21 Nov 2001, para 58.

[51] *Egmez v Cyprus*, Judgment, 21 Dec 2000, para 78 [nyr]; *Denizci v Cyprus*, Judgment of 21 May 2001, paras 384–6 [nyr]. In both cases the Court also noted the lack of evidence of long-term consequences flowing from the ill-treatment.

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element of its thinking.[52] The use of the UNCAT definition of torture, with its express inclusion of purpose—certainly facilitates this being brought out into the open, but it does need to be recalled that under UNCAT Article 16 other forms of ill-treatment are not subject to the purposive element, whereas this has become an increasingly important element of at least the European court's approach to *degrading* treatment.

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

IV. RECENT TRENDS

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

The first concerns a dramatic broadening of what falls within the scope of an 'act of a public official'. This certainly includes being ill-treated by a police officer or prison warder but rather than focus on what officials of the state have 'done', there is an increased tendency to focus on what the state can legitimately be held responsible for and to present its reasoning through the lens of 'state responsibility'.[53] Some still cling to the notion that in order to amount to a violation of Article 3 ill-treatment must have been meted out by state actors themselves, but it is now quite clear that a state may in certain circumstances be in breach of Article 3 when it fails to prevent forms of ill-treatment that attain the requisite degree of seriousness from occurring. This has long been recognised in cases concerning extradition or expulsion, in which the state is in breach if it knowingly exposes a person to a real risk of ill-treatment, and the cases concerning corporal punishment in schools, but these can no longer be seen as exceptional categories.

The switch towards conceptualising and articulating the approach in the

[52] The *Greek* case had contained some hints that justifications for forms of ill-treatment might be relevant to its findings but this was recanted in *Ireland v UK* and it has been quite clear since then that there can be no justification for ill-treatment. See, eg, *Aksoy v Turkey*, Judgment, 18 Dec 1996, RJD 1996-VI, 2260 (23 EHRR 553) and *Chahal v UK*, Judgment, 15 Nov 1996, RJD 1996-V, 1831(23 EHRR 413). For the approaches to justification and purpose see Rodley, *The Treatment of Prisoners under International Law* , above, 78–85.

[53] See, eg, *A v UK*, Judgment, 23 Sept 1998, RJD 1998-VI, 2692 (27 EHRR 611), para 22; *Assenov v Bulgaria*, Judgment, 28 Oct 1998, RJD 1998-VIII, 3264 (28 EHRR 652), para 95; *Kudla v Poland* [GC] Judgment, 26 Oct 2000, para 97 [nyr].

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language of state responsibility means that the Court has been able to find a breach of Article 3 where a state fails to protect an individual from a *known risk* of ill-treatment by a non-state agent. Thus in *Mahmut Kaya v Turkey* the state was considered responsible for its failure to prevent the ill-treatment—and death—of the applicant's brother by unknown persons, when the authorities had been informed of the risk by the deceased himself.[54] Against this background , the finding of a violation of Article 3 in *Z v UK*, concerning the failure of a local authority to take steps to protect children known to be at risk from ill-treatment by their parents, is unsurprising, though its ramifications potentially far reaching: the Court says that states are required 'to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals'.[55] This seems to be the most far reaching pronouncement yet on the scope of state responsibility under Article 3.[56]

Where the state is, or is considered to be, unaware that there is a risk of ill-treatment by a non-state actor, it can hardly be held responsible for not preventing it. But it can be held responsible for failing to make adequate investigations in cases where allegations of ill-treatment by unknown parties are brought to its attention. This is now a well-established form of responsibility under Article 2 of the Convention[57] and the Court is now prepared to see in Article 3 a 'procedural obligation' to take steps to examine the truth of credible allegations, at least in those cases in which it is unable to find on the facts that ill-treatment did in fact occur.[58] However, it seems that in cases where the Court is unable to conclude that there is evidence of treatment for which the state is responsible, but that treatment which crosses the 'threshold' of ill-treatment for the purposes of Article 3 did none the less occur, it is inclined towards finding a breach of a 'procedural obligation' of that article as being 'the next best thing', registering higher in the scale of violations than other

[54] *Mahmut Kaya v Turkey*, Judgment, 28 Mar 2000, paras 115–16 [nyr]. The Court drew on the reasoning in *Osman v UK* [GC] Judgment 28 Oct 1998, RJD 1998-VIII, 3124 ((29 EHRR 245), paras 115–16, although that concerned Art 2 rather than Art 3 of the Convention.

[55] *Z v UK*, Judgment, 10 May 2001, para 73 [nyr].

[56] *Al-Adsani v UK* [GC] Judgement, 21 Nov 2001, para 38 confirms the existence of a positive obligation upon states, flowing from Arts 1 and 3, to take measures 'designed to prevent and provide redress for torture and other forms of ill-treatment'. Given the facts of the case it was not necessary to directly address the prevention of ill-treatment by non-state actors.

[57] See *McCann v UK*, Judgment, 27 Sept 1995, ECHR Ser A No 324 (25 EHRR 97), para 161 (as regards state actors) and *Yasa v Turkey*, Judgement, 2 Sept 1998, RJD 1998-VI, 2492 (28 EHRR 408), para 100 (as regards non-state actors). These are now drawn together in *Cyprus v Turkey* [GC] Judgment, 10 May 2001, para 131 [nyr] (where it is also made clear that a breach can arise by a failure to respond to an 'arguable claim that an individual, who was last seen in the custody of agents of the State, subsequently disappeared in a context which was life-threatening' (para 132).

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

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pertinent articles of the Convention. Thus in *Ilhan v Turkey* (2000), the Court says that procedural obligations in respect of allegations of torture should be considered under Article 13 rather than Article 3 but 'whether it is appropriate or necessary to find a procedural breach of Article 3 will therefore depend on the circumstances of the particular case'.[59] It is difficult to avoid the suspicion that it will be the inability to find a substantive breach that may make such a finding 'appropriate or necessary'.[60]

In a further line of development, the Court has expanded the categories of who is to count as a victim for the purposes of a violation in a series of cases flowing from *Kurt v Turkey*.[61] The applicant in *Kurt* not only claimed that her son's rights had been violated but that she herself was the victim of inhuman and degrading treatment on account of the anguish caused by the authorities' complacency in the face of her claims concerning her son's disappearance. The Court noted that she had witnessed the abduction herself and that the public prosecutor gave her claims no credence and that, in consequence, 'she has been left with the anguish of knowing that her son had been detained, that there is a complete absence of official information as to his subsequent fate. This anguish has endured over a long period of time.'[62] It therefore concluded that the mother was *herself* a victim of a violation of Article 3 'having regard to the circumstances . . . as well as to the fact that the complainant was the mother of the victim of a human rights violation and herself the victim of the authorities' complacency in the face of her anguish and distress'.[63]

The precise scope of this is approach is a matter of some controversy, but tort lawyers familiar with 'nervous shock' cases would find the tenor of subsequent cases very familiar, as shown by the comments of the Court in *Cakici v Turkey* that: 'the *Kurt* case does not . . . establish any general principle that a family member of a 'disappeared person' is thereby a victim of treatment contrary to Article 3'.[64] Rather, it stated at length a set of factors which will influence its consideration. These were:

[59] *Ilhan v Turkey* [GC] Judgment of 27 June 2000, para 92 [nyr].

[60] This approach should be kept within bounds. It origins lie in claims made on behalf of 'disappeared' persons and in this context it makes excellent sense. A state should not be able to hide behind unacknowledged detention or the activities of irregular groups with which it tacitly connives. If involvement or acquiescence cannot be shown, it might nevertheless be possible to demonstrate a failure to respond to the allegation. However, it should certainly not be used to upset the well-established principle that it is for the state to disprove its responsibility for injuries demonstrably sustained whilst in the custody of the state. In such cases, the involvement of the state is clear. Unfortunately the Court has recently started to find breaches of the 'procedural obligation' to investigate in cases where injuries have been sustained in custody but the cause of injury is in doubt, such as *Labita v Italy* [GC], Judgment, 6 Apr 2000, paras 125–9 [nyr] and *Sevtap Veznedaroglu v Turkey*, Judgment, 11 Apr 2000, paras 30–5 [nyr]. This is regrettable and unnecessary backtracking.

[61] *Kurt v Turkey*, Judgment, 25 May 1998, RJD 1998-III, 1152 (27 EHRR 373).

[62] Ibid, para 133.

[63] Ibid, para 134.

[64] *Cakici v Turkey* [GC] Judgment, 8 July 1999, 31 EHRR 133, para 98.

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> Whether a family member is such a victim will depend on the existence of special factors which gives the suffering of the applicant a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human rights violation. Relevant elements will include the proximity of the family tie—in that context, a certain weight will attach to the parent–child bond—, the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, the involvement of the family member in the attempts to obtain information about the disappeared person and the way in which the authorities responded to those enquiries. The Court would further emphasise that the essence of such a violation does not so much lie in the fact of the 'disappearance' of the family member but rather concerns the authorities' reactions and attitudes to the situation when it is brought to their attention. It is especially in respect of the latter that a relative may claim to be a victim of the authorities' conduct.[65]

Subsequent cases have added further detail to the outworking of this principle,[66] some of which may seem difficult to reconcile and the potential range of the principle seems to have been diminished in *Tanli v Turkey* where the Court stresses that it only operates in the particular context of disappearances.[67] Nevertheless, it remains a potent example of the potential for creative jurisprudential development and its final parameters remain undetermined.

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

V. CONCLUSION—AND A MODEST SUGGESTION

Just as the ECHR seems to be drifting towards the language of the UNCAT, the UNCAT through the Draft Optional Protocol may be moving towards a preventive function. The experience of the CPT suggests that in order to enhance the prevention of torture (whatever that may be) it is important to be able to focus on measures that prevent not just torture but 'ill-treatment' as an

[65] Ibid.

[66] Other cases exploring the application of this principle include *Timutas v Turkey*, Judgment, 13 June 2000 [nyr]; *Tas v Turkey*, Judgment, 14 Nov 2000 [nyr]; *Cicek v Turkey*, Judgment, 27 Feb 2001 [nyr]; *Cyprus v Turkey* [GC] Judgment, 10 May 2001 [nyr]; *Akdeniz v Turkey*, Judgment, 31 May 2001.

[67] *Tanli v Turkey*, Judgment, 10 Apr 2001, para 159 [nyr]. It may be that the real scope of the principle is restricted to the anguish caused by the refusal to pursue the question of the whereabouts of a person, rather than the manner in which they have been treated whilst in detention by persons unknown. However, it is difficult to see why it is less distressing to know that the authorities have remained inactive in the face of claims that your son or daughter has been tortured in an acknowledged period of official custody than held—and potentially torture and/or killed—in a period of unacknowledged detention by parties unknown.

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all-embracing concept. If the UNCAT can learn lessons from the European Court regarding the potential scope of Article 3 in the judicial sphere, it should also note the importance of emphasising the link between torture, inhuman and degrading treatment or punishment when it comes to prevention. It is, then, most unfortunate that the Court is currently emphasising the differences between them and that the CPT also accentuates the difference in its linguistic usage. The Court can afford to take that link for granted since it is in their governing text—Article 3—and cannot be disposed of. For the CAT, these terms are not only distinct, but have distinct legal consequences. It needs all the help and encouragement it can get to overcome this problem if it is to forge an approach—not a definition—that will assist it in developing a preventive function. It could help itself by deciding to draft a General Comment jointly on Articles 1 and 16.

It might also be worthwhile to dwell upon a modest suggestion for completely reconceptualizing the approach to the prohibition on torture, inhuman or degrading treatment or punishment as a matter on international human rights law. If we return to the origins of the contemporary approach in the *Greek* case, the Commission said that:[68]

> The notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation is unjustifiable.
>
> The word 'torture' is often used to describe inhuman treatment which has a purpose such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment.
>
> Treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others or drives him to act against his conscience.

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

[68] *Greek* case, Report of the European Commission on Human Rights, 5 Nov 1969, 12 *Yearbook of the European Convention on Human Rights* 1 at 186.

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purposive ill-treatment of individuals than of the non-purposive humiliation of individuals, then that is a moral and not a legal judgment.

Although there is little direct support for this approach in the jurisprudence, it is an approach that is entirely consistent with its underlying ethos. It would also address the problem posed by the multitude of claims that currently can be plausibly located at the lower or lowest end of the inhuman or degrading spectrum. It would inevitably raise the starting point for a finding of a violation, but this might not be a bad thing and it certainly need not have any negative impact upon the preventive context. It would also eliminate the rarely remarked upon linguistic nonsense of having to determine what is 'more severe' in terms of suffering than 'inhuman treatment'. Moreover, we should not again have to concern ourselves with the argument that 'It's not so bad: it's not torture, it's only inhuman. . .'.

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

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