

**An Assessment of the United Kingdom's Implementation of the
United Nations Convention against Torture and Other Cruel,
Inhuman or Degrading Treatment or Punishment**

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Abstract

This thesis will assess the United Kingdom's implementation of the United Nations Convention Against Torture and other Cruel Inhuman and Degrading Treatment or Punishment. It will first focus on a contextual analysis of the problem of torture, examining the circumstances in which it has historically been used, philosophical and theoretical perspectives on the practice and the political aspects of torture, including its effect on international relations. This will illustrate the circumstances in which torture is used, the motivation behind it and the way in which it affects its victims. The argument will then be made that, in view of the uniquely grave nature of the practice of torture, it is insufficient for States to merely criminalise it and punish the offenders. They must actively seek to eradicate it from society and ultimately prevent it from occurring.

It is against this aim that the thesis will examine the compliance of the United Kingdom with its obligations under the Convention. This examination will look first at the international regime for the prevention of torture, focusing on the work of the United Nations Committee Against Torture. The engagement of the United Kingdom with this body will be explored in detail and the argument made that more needs to be done in order to ensure that the Committee's recommendations are put into effect and that treatment contrary to the Convention is prevented from taking place.

The final part of the thesis will assess the United Kingdom's State practice with a focus on key institutions of the State including the courts and the legislature. This part of the thesis will seek to explore the extent to which the practices of these institutions is consistent with an overall aim of preventing torture and the extent to which they show awareness of the Convention and its requirements of the Convention in the discharge of their functions.

The conclusion will be drawn that, while the Human Rights Act has gone some way towards improving compliance, more needs to be done to insure a complete implementation by the United Kingdom of its obligations under the Convention and full prevention of torture. The State must actively engage with the Committee and the organs of the State must consider the Convention Against Torture in the discharge of all of their functions to ensure that these aims are achieved.

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Introduction

Torture, in the modern age is widely accepted to be one of the gravest crimes which can be committed against an individual. It violates their dignity and subjects them to extreme pain and suffering with, often life-long, after effects. It has been committed against countless human beings throughout history for the purposes of punishment, the extraction of information, the preservation of the position of governments and religious bodies and the putting down of opposition movements through destruction or the spread of fear.

International law, especially since 1945 and largely as a consequence of the horrific abuses of the holocaust, has sought to prohibit States from engaging in the practice. This has been done, primarily, through a number of regional and international treaties. These include the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,¹ the International Covenant on Civil and Political Rights² and regionally, the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms,³ the Organisation of American States' American Convention on Human Rights⁴ and the African Charter on Human and Peoples' Rights.⁵ While none of the international conventions, are able to boast universal membership, the UN Torture Convention and the Covenant on Civil and Political Rights have both now been ratified by the majority of States currently in existence⁶ and the prohibition is accepted as a *jus cogens* norm or a norm of peremptory international law.⁷

The preamble of the UN Torture Convention begins with the statement:

¹ 10 December 1984, in force 26 June 1987 1465 UNTS 85

² 16 December 1966, in force 23 March 1976 999 UNTS 171

³ 4 November 1950, in force 3 September 1953 ETS No. 5

⁴ 22 November 1969, in force 18 July 1978 OAS Treaty Series No.36

⁵ 27 June 1981, in force 21 October 1986 1520 UNTS 363

⁶ See United Nations Office of the High Commissioner for Human Rights website at: <http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx>

⁷ See e.g. Shaw M *International Law* 6th edition (CUP) 2008 p326

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

*Recognizing that those rights derive from the inherent dignity of the human person,*⁸

This illustrates how the basic human dignity of the human person, the protection of which is the aim of human rights laws cannot be compatible with the practice of torture. Torture subjects individuals to extreme suffering and indignity for their own personal ends and it is this that must be eradicated. The Convention goes on to define the concept of torture,⁹ something not done by previous treaties, and places States parties under a positive obligation to take necessary steps to ensure the prevention of torture within their jurisdiction¹⁰ before imposing further specific obligation relating to the prevention and punishment of torture.

While the uniquely grave character of the practice of torture and the absolute nature of its prohibition are widely accepted by many individuals and, at least in their public pronouncements¹¹, most governments around the world, it is clear that the practice remains widespread and prevalent to this day. It is for this reason that this thesis will seek to explore the level of compliance with the requirements of the prohibition and, in particular, with UN Torture Convention which is the most significant and complete legal response of the international community to the problem. The aim of the research is to examine how effective United Kingdom state practice has been at fulfilling the obligations arising from the Convention and proposing any changes which may be necessary in order to ensure that individuals are protected from the practice of torture. This will require more than a reactive response to the problem. Where torture exists, it must be addressed through eradication. Here a State will be aware of the existence of the problem and will take measures to stop it

⁸ Op cit. UNCAT preamble

⁹ *Ibid* Article 1

¹⁰ *Ibid* Article 2

¹¹ 153 States are currently party to the Convention including the above preamble. See: http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?Treaty=CAT&Lang=en

from taking place. This must, however, be combined with a preventive approach which assesses the danger of torture before it is able to occur and takes steps to prevent this from happening. Punishment of torturers may, for example, help to contribute to the eradication of torture by removing those who are responsible from the public service whereas prevention may include such measures as monitoring of places of detention and training of officials in order to create a situation in which torture becomes impossible. Any State in which torture occurs must use both approaches in order to achieve a total elimination of the practice.

(a) Objectives of the Thesis

The thesis will focus on the need for the focus of the fight against torture to shift from being very reactive in nature, seeking to outlaw and to punish acts of torture to one that, while viewing torture as a threat takes measures to prevent it from occurring. In view of the effects of the practice on its victims, this can be the only appropriate aim of United Kingdom policy. It is on the basis of this objective that aspects of UK State practice will be analysed. The aim of the thesis will be to determine the extent to which the operation of the UK's State institutions act in a manner reflecting the requirements of the Convention and the increasing focus of the Committee Against Torture on the issue of prevention, both in their conduct within the United Kingdom and in their dealings with the Committee. This will also involve an examination of the extent to which UK institutions are aware and show consideration of the Convention and its requirements in the course of their activities and the effect that this is likely to have on the UK's ability to discharge its obligations under the Convention.

(b) Structure of the Thesis

The thesis will focus first in Part A on a contextual analysis of the practice of torture. This will examine in Chapter 1 how torture has been committed throughout history, by whom and for what purposes. This will serve to provide some background on the issue that the prohibition

and UK policy are intended to combat and to assist in the assessment of their ability to do this. This will shed light on the nature of the problem of torture, when and how it has taken place and, therefore, how it may be prevented, thus providing a background against which the United Kingdom's compliance can be measured. The history and evolution of the prohibition of torture will also be considered as well as the nature, composition and procedures of international monitoring bodies and enforcement mechanisms with a focus on the Committee Against Torture established by the UN Torture Convention.¹²

In chapter 2, the philosophical aspects of the practice of torture will be examined as will the, often devastating, effect the practice has on its victims. The aim of this chapter will be to explore some theories of why torture takes place and how it operates to harm its victims. Again, the understanding of the reasons behind the use of torture and the way in which it affects its victims will guide the assessment of how the practice may be prevented

Chapter 3 will assess the political aspects of torture focusing on the issue of why it is both committed and condemned by States and of the effect it has on international relations. The aim of this chapter will, once again, be to explore the circumstances of the commission of torture and to examine why it committed and its impact on relationships between governments as well as the way the practice is used by governments on the international level in order identify the issues which need to be addressed to prevent it from occurring.

In this Part, the argument will be made that, given these grave effects, the prohibition and punishment of torture is not enough to safeguard individuals' human rights and that the only acceptable approach to the issue of torture is to seek to eradicate it from society and, ultimately, to arrive at a situation in which it is prevented from occurring. This historical and theoretical analysis will then assist in the assessment of UK practice and international mechanisms against this aim.

Part B of the thesis will examine the work of the Committee Against Torture, its membership and functions before analysing and evaluating the United Kingdom's

¹² Op cit. UNCAT Article 17

engagement with this body and its procedures. The United Kingdom's most recent appearances before the Committee will be examined along with the resulting recommendations of the Committee and the extent to which these have been followed. The aim of this chapter will be to determine how diligently and zealously the United Kingdom engages with the Committee and the extent to which it can be described as only 'paying lip service' to the requirements of the Convention. It will also assess the 'constructive dialogue'¹³ between the Committee and its States parties, in this case the UK, which aims to ensure, through continuous discussion, examination and dissemination of best practice, a continuing and steady improvement in the standard of human rights protection across the world through the encouragement of greater understanding of the problem of torture and how it may be addressed as well as the proper role of governments and other entities in this context.

Part C, comprising Chapters 6-10 will focus on internal aspects of United Kingdom state practice and their compatibility or otherwise with the requirements of the Convention. While many areas of State practice have been analysed and assessed, including by the Committee Against Torture and the governments non-governmental organisations who report to it, the focus of this chapter will be on the level of awareness of and consideration given to the Convention by various key organs of the State including the courts, Parliament and the executive, focusing on the role of the secretary of State for the Home Department and its scope for conflict with Convention requirements. Aspects of the operation of the police and the military will also be examined as these bodies and their adherence to fundamental procedural safeguards recommended by the Committee are key to the aim of preventing torture and ill-treatment from occurring. The impact of the Human Rights Act 1998 will also be considered. The argument will be made that this legislation has forced public bodies to act in a manner more compatible with the UN Torture Convention by making them consider the overlapping provisions of the European Convention on Human Rights. This, however, is insufficient to ensure the complete eradication of torture and ill-treatment from society. Cases will be outlined in which the interpretation of the European Convention by United Kingdom

¹³ United Nations Committee Against Torture Working Methods paragraph III(B) at: <http://www.ohchr.org/EN/HRBodies/CAT/Pages/WorkingMethods.aspx>

public bodies has failed to provide the same level of protection as the of the Strasbourg court. There are also situations where the European Convention, as interpreted by the Strasbourg court does not provide the level of protection demanded by the UN Torture Convention and the recommendations of the Committee Against Torture. This will lead to the conclusion that full compliance with the UN Convention can only be achieved with the prevention of torture which, in turn, is only possible through direct engagement by all UK public authorities with this Convention and the work of the Committee. Legislation similar to the Human Rights Act may be required to achieve this.

(c) Engagement with existing Literature

The thesis will engage with the literature which has already been published in this area. There are numerous books and other publications detailing the use of torture throughout history as well as a significant number of sources detailing theoretical perspectives on the practice, although these are not applied to the question of UK compliance with the UN Torture Convention. There are a number of publications relating to the Convention and to the work of the Committee Against Torture, the most significant of these being Manfred Nowak and Elizabeth MacArthur's commentary on the Convention.¹⁴ There are a small number of other publications in this area¹⁵ but these are not focused on the issue of UK compliance and predate the Committee's General Comment No.2¹⁶ in which it set out its standard on the issue of the prevention of torture.

As to the question of the UK's compliance as assessed by the Committee, State party periodic reports are published online by the Office of the High Commissioner for Human Rights together with shadow reports from non-governmental organisations, the Concluding Observations and Recommendations of the Committee and summary records of the

¹⁴ Nowak M and McArthur E *The United Nations Convention Against Torture: A Commentary* (OUP) 2008

¹⁵ See e.g. Ingelse C *The UN Committee Against Torture: An Assessment* (Martinus Nijhoff) 2001

¹⁶ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee Against Torture, General Comment No. 2, *Implementation of article 2 by States parties* 24 January 2008 UN Doc: CAT/C/GC/2

meetings. These provide a good indicator of the level of progress towards compliance but are limited in their value by the limits of the Committee's resources and, in particular, the limited time available for the examination of such reports. Consideration of a periodic report is typically limited to four and, more recently, five hours with two hours reserved for the examination of the report and a further two or three hours for the replies of the delegation. This severely restricts the number of issues which can be considered in adequate depth. The interval between reports is at least four years.¹⁷ The UK Parliament's Joint Committee on Human Rights considered the issue of compliance with the Convention in its 19th report in 2006.¹⁸ The testimony received from various organisations, both within and outside the government was similar in content to the State party report and shadow reports with the final recommendations being very similar to those issued by the Committee shortly beforehand. This report, however, predates numerous relevant developments both internationally and within the UK and so cannot be viewed as definitive in determining the level of compliance with the Convention. It, like the periodic reports to the Committee, does not go into detail on issues concerning the general approach of the courts or Parliament to the Convention. Other international monitoring bodies, courts and tribunals publish information similar to that released by the Committee Against Torture. Judgements of the European Court of Human Rights are very useful in demonstrating the approach taken by that court to the prohibition of torture and inhuman or degrading treatment as it is set out in Article 3 of the European Convention on Human Rights. There is also significant academic literature in this area.

There are many judgments of various domestic courts which demonstrate the approach taken by the judiciary to the UK's obligations under the UN Torture Convention. There is academic literature which discusses these at length but not focusing on the theme of compliance with the Convention. Hansard reports are available which document the extent to which Parliament deals with this issue. There is significant academic commentary on the provisions of the Police and Criminal Evidence Act 1984 which forms the basis of the United Kingdom's implementation of many of the safeguards recommended by the Committee

¹⁷ Op cit. UNCAT Article 19

¹⁸ At: <http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/185/18502.htm>

Against Torture but, again, this does not address the question of the extent to which these satisfy the requirements of the Convention which is what that section of this thesis will seek to explore.

The aim of this thesis will be to examine all of the above literature as well as the direct evidence of State practice and to apply all of this to the question of whether, and to what extent the United Kingdom is satisfying its obligations under the UN Torture Convention. It will seek to analyse where the measures adopted by the UK have been successful in protecting individuals' rights and preventing torture and ill-treatment and why this is the case. It will also highlight any failures in this aim and the reasons for these before proposing improvements which, if implemented, may be able to increase the level of compliance with the Convention to provide further protection to individuals at risk and contribute to the eradication of the practice of torture and other ill-treatment from society as well as to move towards the ultimate stated aim of the total prevention of torture and other cruel, inhuman or degrading treatment or punishment.

(d) Methodology

The thesis will first explore the nature and context of the practice of torture with reference to the extensive literature described above. This will serve to provide some explanation as to why torture and other treatment contrary to the Convention occurs and to develop the argument that addressing the problem in a purely reactive manner is insufficient and that torture must be prevented from occurring. It is against this background that the international mechanisms for the prevention of torture will be assessed with focus on the Committee Against Torture and its dialogue with the United Kingdom.

The United Kingdom's interactions with the Committee Against Torture will be examined in detail in order to determine the extent to which the State has been active in seeking to fulfil its obligations under the Convention and how well it has responded to the comments of the Committee. The aim of this will be to review both the level of dialogue the State is prepared

to enter into with the Committee and its willingness to engage with international procedures to combat torture rather than viewing the issue as an internal one.

Aspects of the activities of various key State institutions will also be examined with reference to judgments, legislation, published reports and statements in order to determine both whether these institutions are sufficiently aware of the requirements of the Convention and are giving them appropriate consideration in all areas of their activities and also whether these institutions are acting in a way which is compatible with the aim of the complete prevention of torture. It is with reference to these two questions that the thesis will seek to assess the United Kingdom's compliance with the Convention.

(e) Original Contribution

While the issue of implementation of the Convention has been considered in the past both in relation to individual issues and more generally by the Committee and the government in its Periodic Reports as well as the Parliamentary Joint Committee on Human Rights, This thesis will seek to provide an analysis focused on the issues of prevention and eradication as discussed above and will also provide a greater insight into the level of consideration given by the State institutions to the requirements of the Convention. It will also refer back to the contextual analysis which will form its first part so as to determine how effective UK State practice is in addressing the situations which have previously been shown to lead to torture. This will provide a more comprehensive picture of the effectiveness of the UK's implementation of the Convention and its consistency with the ultimate aim of the full eradication from society and its prevention in the future.

This thesis will reflect the law as it stands on 1st December 2013.

Part A: The Nature and Context of Torture

This section will examine the use of torture throughout the world. It will examine its history as well as seeking to explore the reasons behind its use as well as its continued existence today.

Chapter 1 will examine the history of the commission of torture. It will detail how individuals were tortured and in the circumstances in which this was done. This will provide a clear understanding of the situations in which torture has occurred as background to the discussion on its prevention. Through awareness of the circumstances in which torture has taken place, it may be possible for a State to take measures to avoid the practice in these situations. The extent to which the United Kingdom has achieved this will be set out in Part C. This chapter focuses on specific themes and contexts in which torture has taken place in addition to providing a chronological account. It will also explore the development of the prohibition of torture.

Chapter 2 will examine the published theoretical and philosophical discussions of torture. It will seek to explain why individuals commit torture as well as the way in which it affects its victims. Again, an exploration of the way in which torture operates to cause suffering and the reasons for its use are essential to the development of an understanding of how to combat the issue.

Chapter 3 will explore the role which torture has played in the global political climate. Once again it will examine the political aspects of the reasons torture is committed but it will also assess the impact of the practice on international diplomacy and the relationship between States who use torture with the international community.

Through a thorough examination of the context of torture it will be possible to explain why the practice is so uniquely damaging to its victims and yet continues to exist. It is only with a comprehensive understanding of the methodology of torture and the motivation behind it that it will be possible to assess the compliance of the United Kingdom with any prohibition of the practice and determine how best to prevent it from occurring. Here, again the initial focus must be on eradication where it is possible to learn from this analysis where and how torture is taking place and to take measures to stop it. There must also be a preventive approach, learning from how torture has taken place in the past and predicting where potential future dangers exist before taking steps to prevent it by safeguarding those in dangerous positions.

Chapter 1

The History of Torture

This chapter will seek to provide an historical overview of the practice of torture. It will discuss its origins, the reasons for its use and the various methods used to torture individuals throughout history around the world. It will also examine gradual social and legal moves against torture and the expanding body of international human rights law which developed throughout the twentieth century, seeking to deal with the problem. The aim of the chapter will be to provide a thorough understanding of how and why torture has been committed in the past and to examine the situations which should be avoided to prevent its use in the future.

(i) The Origins of Torture

It is very difficult, if not impossible, to pinpoint a single specific origin of the practice which would now be defined as torture. For the purposes of this chapter, this can be viewed as being consistent with the definition set out in the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984.¹⁹ This requires torture to take the form of an act committed by a public official or with their consent or acquiescence,²⁰ which causes severe pain or suffering. The precise extent of this definition will be considered in greater detail in Chapter 4. In the case of early civilizations, the practice was frequently carried out by an authority figure in the community who may be described as a public official for these purposes. As Scott notes in *A History of Torture*, “[t]here is scarcely for the finding a savage or primitive race which does not employ torture either in its religious

¹⁹ United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, in force 26 June 1987) 1465 UNTS 85

²⁰ *Ibid* Article 1

rites or its code of punishment.”²¹ While many would now take issue with the use of such terminology, there is considerable evidence that most, if not all early civilizations, engaged in practices which would now be considered to amount to torture. It should be noted that such civilizations would, due to the limited communications of the time, have had little or no contact with each other. This would suggest that each region’s practices would have been largely their own and that the concept of torture may have independently evolved in a number of areas and over a number of time periods. This would point to the existence of torture as a psychological phenomenon or an aspect of human nature, rather than any kind of aberration. This could make it difficult to eradicate the practice from society as it would be difficult to counter any predisposition to torture and would suggest that the focus of the battle against torture should be on prevention, through which the risk of torture can be anticipated and appropriate action taken to avoid its commission, a matter which will be discussed in detail in Part 2.

While it is difficult for these reasons to pinpoint any specific origins of torture, Scott does point to developing historical patterns of changes in the reasons for and context of its use. This is especially evident in the trend of the practice of torture developing from a religious act or initiation rite to a punishment or tool of interrogation.²² Exactly how this was executed varied considerably as will be discussed below, but there are parallels to be drawn between a variety of civilizations in this evolution of the practice. Generally early civilizations used torture, particularly in the context of sacrifice²³ and also, according to Scott, initiation rites such as genital mutilation,²⁴ before it spread into early legal systems. Most areas of the world have seen some kind of movement from ritual to judicial torture.

²¹ Scott G A *History of Torture* (Senate) 1995 p35

²² *Ibid* p35

²³ *Ibid* p36

²⁴ *Ibid* p37

(ii) Torture in Ancient Civilisations

While a multitude of ancient civilizations practiced torture, the methods used to do so varied widely. Examples of very early torture, as noted by Scott, included Native American practices such as the removal of the victim's eyes and their replacement with hot embers,²⁵ roasting the victim over a fire²⁶ or tying them to a tree and removing a limb or piece of flesh each day until their cumulative injuries became fatal.²⁷ It is suggested that the motive behind such action was the punishment both of members of rival tribes and of European settlers, but also of members of the torturer's own tribe for a variety of minor crimes.²⁸

Throughout history, the practice of torture has been incorporated into capital punishment, the extreme nature of these punishments may have served as an end in itself in order to exact retribution against the offender but would often have been motivated by a desire to preserve the authority of the government or sovereign as will be discussed in section (b). This was done in order to subject the victim to a painful death rather than to coerce them to do or say anything. Possibly the most brutal method of execution including the use of torture to be practiced in ancient China was *ling-chy* or 'Death by the Thousand Cuts'²⁹ This method of subjecting a prisoner to a torturous death is described in detail by Scott and entailed a collection of knives, each labelled with the name of a body part. The executioner would select one of these at random and use it to cut away this part of the body until death occurred.³⁰ While this was intended to be a random selection, it has been suggested that the order of the knives used was often determined by secret instructions given to the executioner to ensure the desired level of retribution or by the payment of a bribe by the family of

²⁵ *Ibid* p41

²⁶ *Ibid* p41

²⁷ *Ibid* p42

²⁸ *Ibid* p37

²⁹ *Ibid* p105

³⁰ *Ibid* p106

the victim to allow for a quick and less painful death.³¹ Another such method of employing torture as a means of execution was crucifixion. This method dates back thousands of years, at least as far as Biblical times. As Scott notes, the execution of Jesus on a cross was probably the most common form of this punishment at that time, but that it had also consisted of impalement on a tree trunk.³² Other early examples of combining torture with the execution of a condemned person included the projection of the victim from a height.³³ This was practiced in a variety of nations including Ancient Greece.³⁴ Another more unusual form of torture involved flaying the victim alive, removing the skin from a part of, or all of their body whilst they were still alive. While unusual in Europe, this method was commonly used in Turkey.³⁵

Peters describes how, in early Roman law, only slaves could be tortured. Initially only if they were suspected of a crime, but also later to extract evidence.³⁶ This would suggest a greater focus on torture as a tool of the authorities in the discharge of their duties rather than a form of suffering to be reserved for culpable parties. Lord Hope, however, notes that a slave could never be tortured to extract evidence against their master.³⁷ As time went on, freemen also became eligible for torture in cases of alleged treason and other serious crimes.³⁸ Peters also observes that, as in Greece, there were no legal restrictions on the private torture of slaves in the home, a practice continuing until 240CE.³⁹ While it is noted that the principle method of torture used by the Romans was the rack,⁴⁰ other methods were also used. These included various

³¹ *Ibid* p106

³² *Op cit.* Scott p153

³³ *Ibid* p186

³⁴ Peters E *Torture* (Blackwell) 1985 p35

³⁵ *Op cit.* Scott p216

³⁶ *Op cit.* Peters p18

³⁷ Hope D *Torture* (2004) 53 ICLQ 807 p810

³⁸ *Op cit.* Peters p18

³⁹ *Ibid* p18

⁴⁰ *Ibid* p35

forms of beating and burning.⁴¹ Peters notes that, unlike the Greeks, the Romans “...reserved crucifixion for slaves and particularly despicable criminals.”⁴² This is an example of the trend described above, of the expansion of the practice of torture from slaves to various increasing classes of criminal.

(iii) Torture During The Middle Ages

In medieval Europe, there is evidence that the use of torture was widespread. One of the best known examples of the mass use of torture was what has now become known as the Inquisition. This practice seems to have spread from ecclesiastical to lay courts in the twelfth century.⁴³ Peters suggests that these origins can be explained by the greater use in the religious courts of the doctrine of *mala fama*⁴⁴ or “bad reputation” of a person and the infamy of certain crimes,⁴⁵ permitting a judge to commence proceedings unilaterally without the necessity of the existence of an accuser in a number of circumstances.⁴⁶

From these roots the inquisition developed into a group of sophisticated tribunals established pursuant to orders from the Vatican for the purpose of dealing with those accused of the crime of heresy, the use of these interrogation bodies being specifically sanctioned by Pope Innocent IV in 1252.⁴⁷ These tribunals tended to have their own specific procedures and operated in a manner distinct from any other judicial process in Europe at the time. Lord Hope notes that one of the reasons the ecclesiastical authorities may have felt it necessary to resort to torture in dealing with alleged heresy were the requirements of the law of evidence at the time.⁴⁸ In relation

⁴¹ *Ibid* p35

⁴² *Ibid* p35

⁴³ *Ibid* p44

⁴⁴ *Op cit.* Scott p64

⁴⁵ *Op cit.* Peters p44

⁴⁶ *Ibid* p45

⁴⁷ *Op cit.* Hope p810

⁴⁸ *Ibid* p810

to capital crimes, a confession or the testimony of two eye witnesses was required to secure a conviction.⁴⁹ Ironically, a law which should have served to protect those accused of such crimes incited the Inquisition to use increasingly disturbing means to extract the required confession or testimony from their victims, including potentially false evidence.

As Peters, notes, there is some considerable discrepancy between the laws regulating the conduct of the inquisition and its actual practice.⁵⁰ While it is true that some procedural safeguards were incorporated into the law,⁵¹ these had limited effect. There are many recorded examples of people, especially on the Iberian Peninsula, being subjected to torture on the orders of ecclesiastical courts. Scott cites the example of an English man receiving two hundred lashes “through the public streets” for his protestant faith,⁵² and also notes some unique methods of torture which were used by the Inquisition. These included such instruments as the *Virgin Mary*, a large, mechanical, moving model of the Virgin Mary which would open up and encase the victim, its interior being lined with spikes.⁵³ In some cases the device would then drop the victim from a height onto a set of spikes in a room below the torture chamber resulting in the victim’s death.⁵⁴ The naming of these instruments indicates their specific use on persons accused of religious offences. Other, more common, methods such as the rack were also used.⁵⁵ In these cases the torture appears to have been used to protect the Church. This was to be done by the elimination and intimidation of any person perceived as an opponent to the ecclesiastical authorities in order to preserve their position and to deal with any ‘heretic’ or group thereof seen to be a danger.

⁴⁹ *Ibid* p810

⁵⁰ *Op cit.* Peters p62

⁵¹ *Ibid* p62

⁵² *Op cit.* Scott p83-84

⁵³ *Ibid* p225

⁵⁴ *Ibid* p226

⁵⁵ *Op cit.* Scott p169

One of the main targets for torture in medieval England, where the effects of the inquisition were less severe, were those accused of witchcraft. Not only were such people often the victims of persecution by the general public,⁵⁶ but they also found themselves victims of a number of methods of torture reserved specifically for such offences, in addition to the employment of many of the other forms of torture in common use at that time. Among the most notable of these appears to have been the practice of repeatedly pricking a suspect all over their body in order to find an area which would not bleed, or the *devil's mark*, seen as conclusive evidence of guilt.⁵⁷ The persecution of 'witches' is of particular interest as it reveals a different motive for torture than those discussed previously. While punishment may have been one aim of such cruel treatment, so may the fear of witchcraft among the general population, prompting acts of torture as described above.⁵⁸

(iv) Judicial Torture

In the United Kingdom, despite numerous reports of torture taking place throughout the middle ages, judicial torture appears to have been most commonly used in the sixteenth and seventeenth centuries when, as noted by Scott, it could be ordered by the King or the Privy Council.⁵⁹ Lord Hope notes that the earliest evidence of the issue of 'warrants for torture' dates back to the mid-sixteenth century, with the earliest known warrant for torture dating from 1551 and some evidence of such orders being issued by the Privy Council as early as 1540.⁶⁰ While the English justice system had undoubtedly used torture for many centuries prior to this, as described above, this is the first example of its authorisation by the express order of a court. While it was still

⁵⁶ *Ibid* p95

⁵⁷ *Ibid* p97

⁵⁸ *Ibid* p95

⁵⁹ *Ibid* Scott p89

⁶⁰ *Op cit.* Hope p809

most commonly performed following accusations of witchcraft,⁶¹ many people were subjected to torture for a large number of reasons.

Lord Hope notes that the practice of judicial torture in England stopped in 1640, when many of the powers of the Privy Council were transferred to lower courts unable to issue warrants for torture.⁶² The practice continued for some time after this in Scotland, however, where many people were tortured by authorities keen to stamp out political and religious rebellion and induce those allegedly responsible to name their accomplices or to implicate specific persons.⁶³ A common method of doing this was the *boot*, a form of torture in which the victim's leg would be encased in a metal container and a number of long pieces of wood would be forced into the gaps between the leg and the edge of the container with a mallet so as to crush the victim's leg.⁶⁴ Lord Hope notes the rumours that King James II of England (VII of Scotland) took particular enjoyment in observing the application of this particular form of torture.⁶⁵ Despite any preference the authorities may have had for the use of the *boot*, the rack, the thumbscrews and the witch's bridle were all used on a regular basis.⁶⁶ It is suggested that another reason for the continued use of torture in Scotland may have been the importance attached, in Scots law, to a confession by the accused.⁶⁷ The judicial use of torture in the United Kingdom was ultimately outlawed by the passage of the Treason Act of 1709.⁶⁸ This had the effect of finally extending the prohibition of torture across the whole country and all crimes. As described above torture had been a commonly used weapon in the political and religious conflicts of seventeenth century Britain and seems to have fallen out of use

⁶¹ *Op cit.* Scott p89

⁶² *Op. cit* Hope p812

⁶³ *Ibid* p817

⁶⁴ *Ibid* p815

⁶⁵ *Ibid* p815

⁶⁶ *Op cit.* Scott p90

⁶⁷ *Op. cit* Hope p814

⁶⁸ *Ibid* p814

as a result of the relative political stability that would follow the removal of King James II of England (VII of Scotland) and the subsequent passage of the Bill of Rights in 1688 which prohibited 'illegal and cruell punishment.'⁶⁹ This serves to underline the historical tendency of the authorities to resort to the use of torture to preserve their position when their power is challenged, a problem of which any attempt to eradicate or prevent torture must take account.

The newly formed United Kingdom was not alone in beginning its abolition of torture during this period in history. Peters notes a variety of factors common to the processes employed by most of the various States which moved to abolish judicial torture during the seventeenth century. Most notable of these, is an evolution in the legal system, often over a period of several decades.⁷⁰ Sweden is given as an example of this, being the first country to achieve an abolition of torture, with most forms of the practice being prohibited in 1734.⁷¹ The abolition was not always final with Switzerland outlawing torture in 1798, only to reintroduce the practice in 1815.⁷² The eventual re-abolition occurred slowly "canton by canton."⁷³ This led to a situation where, by the end of the nineteenth century, most of Europe was free, at least from judicially sanctioned torture.

(v) Historical Methods of Torture

Possibly the most common form of torture employed throughout history was beating or flogging. This method has remained widely practiced and is among the most frequently used forms of torture to this day.⁷⁴ The exact form of the execution of this torture, however, has varied greatly over time and between various geographical

⁶⁹ Bill of Rights 1688 in Wallington P & Lee R *Blackstone's Statutes on Public Law and Human Rights 2006-2007* 16th edition (OUP) 2006 p3

⁷⁰ *Op cit.* Peters p89

⁷¹ *Ibid* p90

⁷² *Ibid* p90

⁷³ *Ibid* p90

⁷⁴ See e.g.: Amnesty International *Torture in the Eighties* (London) 1984

regions. Scott notes that the practice of flogging offenders dates from the laws of Moses of the early Biblical period and has been in common use since.⁷⁵ It has continued to be one of the most frequently used forms of torture well into the twentieth century.⁷⁶ An ancient tool used for the administration of this punishment in East Asia, for a wide range of offences, was the *bastinado*.⁷⁷ The violent application of this device often resulted in the death of the victim.⁷⁸ A notorious instrument employed by the British military for the administration of beatings was the *cat-o'-nine-tails*, nine whips attached to a single handle, designed to cause its victim considerable pain.⁷⁹ This instrument came into frequent use following the passage of the Mutiny Act of 1689 and continued to be employed for over 200 years⁸⁰ with court-martials empowered to pass sentences of up to 1000 lashes frequently subjecting defendants to several hundred strokes.⁸¹ It was not uncommon for victims to die shortly after the execution of this form of torture.⁸² Other methods included the use of cart whips, which were four to five yards in length and capable of causing extreme pain.⁸³ While many of the above devices seem to have fallen out of use, beating continues to be one of the most commonly used forms of torture in the modern world.⁸⁴ Today it often takes the form of *falanga*, or the beating of the soles of the feet.⁸⁵ This can cause severe injury and pain.⁸⁶ Victims are also frequently subjected to beatings with electric cables.⁸⁷

⁷⁵ *Op cit.* Scott p200

⁷⁶ *Op cit.* Amnesty International

⁷⁷ *Op cit.* Scott p104

⁷⁸ *Ibid* p103

⁷⁹ *Ibid* p197

⁸⁰ *Ibid* p197

⁸¹ *Ibid* p197

⁸² *Ibid* p198

⁸³ *Ibid* p192

⁸⁴ *Op cit.* Amnesty International

⁸⁵ *Op cit.* Peters p169

⁸⁶ *Op cit.* Amnesty International p241

⁸⁷ See e.g.: *Op cit.* Amnesty International p237

Other methods of torture, used especially during the middle ages, involved the subjection of the victim to pain, mutilation or even death by the application of heat. Such executions could take the form of burning at stake⁸⁸ or boiling alive, the latter, at least in England, was a common sixteenth century punishment for the crime of poisoning.⁸⁹ Burning at stake, while used in a number of nations especially in Western Europe for a variety of crimes was most famously employed on the orders of Queen Mary I of England in her persecution of Protestants.⁹⁰ A less well-known method employed during this era involved the victim being placed in a large pan full of oil or pitch and fried to death.⁹¹ Branding was a non-fatal form of heat related torture applied during this period. It, like the methods listed above, was mainly intended to act as a punishment rather than an inducement to provide information, with different letters or symbols used as branding irons for different offences.⁹² Scott notes that this consisted of a two-fold punishment with the victim being subjected to great pain at the point of the execution of the punishment and then the subsequent disfigurement and social stigma for the remainder of their life.⁹³

Another method of torture common in the middle ages in a number of States was the rack, as noted above this method of torture had been widely and consistently used throughout Europe since the Roman times.⁹⁴ This consisted of two pieces of wood. The victim would be attached to one of these by their wrists and to the other by their ankles. The two pieces of wood would then be drawn apart, usually by some mechanical device connecting them, so as to stretch the victim's body.⁹⁵ This had the

⁸⁸ *Op cit.* Scott p158

⁸⁹ *Ibid* p166

⁹⁰ *Ibid* p155

⁹¹ *Ibid* p164

⁹² *Ibid* p163

⁹³ *Ibid* p163

⁹⁴ *Ibid* p169

⁹⁵ *Ibid* p169

effect of causing intense pain and damaging the victim's bones.⁹⁶ The wounds resulting from the application of this form of torture were often treated only for the process to be repeated.⁹⁷ Other forms of torture common in England at this time included the thumbscrews. These consisted of rings which were placed around the victim's thumbs and then tightened by means of screws so as to exert extreme pressure.⁹⁸ It is stated that the pain arising from this form of torture meant that it was often effective in procuring information even when other forms had failed.⁹⁹ Another such instrument was the *Ducking Stool*.¹⁰⁰ This took the form of a chair or stool in which the victim was restrained. It was attached to a long pole and would be lifted by this and the victim would be dipped into a body of water, either until the point of drowning was reached or merely as a form of public humiliation.¹⁰¹ Another, once common, form of torture involved trapping one or more animals, whether they were insects, rodents, or even in some cases, a cat in a container on the victim's bare stomach.¹⁰² Sometimes heat was used to cause the animal or animals distress and increase their capacity to torment the victim.¹⁰³ This form of torture has been reported to have been in use in some States as recently as the 1980s¹⁰⁴

(vi) The Transatlantic Slave Trade

Probably the main exception to the general use of torture as a punishment or a means of maintaining control of a society was its use in the context of slavery, especially during the transatlantic slave trade. Those involved in this trade, seen as a form of torture in itself, travelled to West Africa where they abducted or 'bought' large

⁹⁶ *Ibid* p170

⁹⁷ *Ibid* p170

⁹⁸ *Ibid* p236

⁹⁹ *Ibid* p236-237

¹⁰⁰ *Ibid* p239

¹⁰¹ *Ibid* p240

¹⁰² *Ibid* p245

¹⁰³ *Ibid* p245

¹⁰⁴ *Op cit.* Amnesty International p237

numbers of innocent people. The victims of the trade were not criminals and did not pose any threat to the traders. They were deprived of their liberty purely to create a profit. They were then transported to America and the Caribbean where they were sold to local plantation owners.

The conditions on board the slave ships were appalling. Victims were crammed into the hold of the vessel in large numbers, often kept in chains for the duration of the voyage. They were given minimal food and disease spread easily between the victims. Many did not survive the journey.¹⁰⁵ They were treated as a commodity, as cargo rather than as human beings.

The conditions faced on arrival were equally shocking. In addition to the suffering inherent in the removal of the victims' liberty for reasons unconnected with any wrongdoing, their involuntary removal from their community and their transfer to another continent, the slaves were forced to work in dreadful conditions for extremely long hours, usually running large farms or plantations. Living conditions were often extremely poor and discipline was maintained through the use of severe punishments.¹⁰⁶ These included the use of the cart whip described above as well as other forms of beating and the deprivation of food.¹⁰⁷ Sexual abuse was also common. The victims of the slave trade frequently included young children with any children born to slaves destined for a life of slavery themselves. These victims would know nothing but forced labour, atrocious conditions and severe punishment.

Slavery as a form of torture was arguably unique in its level of cruelty and its motivation. The slave trade existed not to punish its victims but to make money for the abusers. It also served to deprive its victims of their personhood. They were no longer viewed as people but as a commodity. In this respect comparisons may be

¹⁰⁵ See e.g.: Dow G *Slave Ships and Slaving* e.g. pp 145-169

¹⁰⁶ *Op cit.* Scott

¹⁰⁷ See e.g.: Engerman S, Dreschler S & Paquette R *Slavery* (OUP) 2001 pp231-245

drawn between this form of torture and the Nazi death camps which will be discussed below. This was a form of torture which resulted in the total destruction of its victims.

(vii) Torture in the Twentieth Century

The events of the Second World War are widely seen as a major turning point in the evolution of international human rights law in the twentieth century.¹⁰⁸ The main reason for this is the global horror at the atrocities, including torture, committed by the Nazi regime of Adolf Hitler in Germany.¹⁰⁹ The subsequent legal developments are seen mainly as a reaction to the post-war discovery of the death camps in which six million people were barbarically slaughtered in a campaign of ethnic cleansing accepted to be unique in history.¹¹⁰ This, more than any other event, has shaped subsequent international law and politics. It was in its immediate aftermath that the United Nations was formed and its Charter adopted. It has had, as described below, a guiding influence on a variety of subsequent international human rights treaties seeking to prohibit torture.

During this period many people were subjected to medical and scientific testing against their will. The most notorious example of this is the horrific series of tests carried out on holocaust victims by Dr Josef Mengele.¹¹¹ It is to this that one may be able to trace the origins of specific references, in subsequent human rights treaties, to the non-consensual use of human subjects in scientific experiments. Despite this, however, there are many relatively recent accounts of the forcible non-therapeutic administration of drugs being used as a form of torture in a variety of States.¹¹²

¹⁰⁸ See e.g.: Robertson G *Crimes Against Humanity, the Struggle for Global Justice* 3rd edition (Penguin) 2006 p41

¹⁰⁹ *Ibid* p41

¹¹⁰ *Op cit.* Robertson p34

¹¹¹ *Ibid* p34

¹¹² *Op cit.* Amnesty International e.g.: p151

While forced labour or *gulag* camps are commonly believed to have existed in the Soviet Union long after the Second World War, more recently, many political opponents of the Soviet regime were imprisoned in psychiatric hospitals where they were subject to mistreatment including beatings and the inappropriate use of forced medication.¹¹³ The non-therapeutic use of drugs being, as noted above, a form of torture seen as particularly abhorrent since its extensive use during the holocaust.

While the advances of the twentieth century in the area of human rights are widely accepted to include the process of decolonisation and the end of imperialism, these developments did not pass without the use of torture, in particular in order to resist independence movements. One of the most famous examples of this is, as described by Peters, the use of torture against rebels by the French army and colonial police forces in Algeria during the 1950's.¹¹⁴ One suggestion of a positive development, at least in attitudes towards torture, it is argued, is the role played by the outrage at these incidents in the collapse of the Fourth Republic and the independence of Algeria in 1962.¹¹⁵ In addition to violent beatings,¹¹⁶ sexual torture was very commonly used in this era.¹¹⁷ Lazreg suggests that a primary reason for this is that the French troops taking part in the torture believed that this manner of treatment would prove especially traumatic for their Arab victims who they viewed as being prudes.¹¹⁸ While the methods of torture used would in all probability cause distress to any victim, the idea of targeting members of certain cultures for specific forms of torture is highly disturbing and, indeed, similar to the actions of the Nazis the previous decade.

¹¹³ *Op cit.* Amnesty International p221

¹¹⁴ *Op cit.* Peters p133

¹¹⁵ *Op cit.* Peters p133

¹¹⁶ Lazreg M *Torture and the Twilight of Empire* (Princeton) 2008 p131

¹¹⁷ *Ibid* p123

¹¹⁸ *Ibid* p123

Peters suggests that the public reaction may be attributable to the recognition by this time of the use of torture in the Third Reich over a decade earlier.¹¹⁹ Lazreg notes many similarities between the use of sexual torture by the French forces during the Algerian war and that used previously in the Nazi death camps and in the psychological motivation behind such actions.¹²⁰ The motive for such actions, it is said, were a combination of power and its effect on the victims,¹²¹ an intention to bring the war to a swift conclusion,¹²² and a belief that such extreme actions would prove effective in achieving this objective, especially against the particular victims in this case.¹²³

Torture also became a significant feature of the military dictatorships of South America in the second half of the twentieth century.¹²⁴ Under these regimes in States such as Argentina, Chile and Paraguay, it is suggested that torture may have been used against the numerous persons who were 'disappeared' by the security services.¹²⁵ Other opponents were tortured before being murdered.¹²⁶ Such 'disappearances' probably followed by torture were also common in other regions of the world, including in Morocco, in relation to the Western Sahara conflict. It is feared that many of these victims subsequently died as a result of imprisonment in appalling conditions.¹²⁷

Torture, however, was also used for other purposes. Especially in Chile, where a significant number of people were reportedly arrested and tortured so that they might be released to spread the word of what they had suffered in order to increase public

¹¹⁹ *Op cit.* Peters p134

¹²⁰ *Op cit.* Lazreg pp113

¹²¹ *Ibid* p120

¹²² *Ibid* p120

¹²³ *Ibid* p123

¹²⁴ *Op cit.* Amnesty International pp143-179

¹²⁵ *Op cit.* Robertson p332

¹²⁶ *Ibid* p332

¹²⁷ *Op cit.* Amnesty International p239

fear of the authorities and further reduce the possibility of dissent.¹²⁸ This is a departure from the more traditional motives of torture, specifically punishment and the extraction of information, although it may still have been used for these purposes as well. It is, however, consistent with the general historical trend of the use of torture for the protection of government or State authority.

(viii) The Use of Torture Since World War II

Today many forms of beating remain common both as a judicial punishment and as an extra-judicial form of torture, especially of those in police or military custody.¹²⁹ A common method is *falanga* or beating the soles of the victim's feet. This is not, however the only method used with beatings with a variety of instruments including electric cables remaining common.¹³⁰

Extensive literature has also been published on the global practice of torture since the 1980s. While the methods used seem to have changed, Amnesty International point to a widespread global practice of torture throughout this period.¹³¹ The most common methods, as noted above, included beatings and floggings including *falanga*, the beating of the soles of the feet.¹³² Electrocutation was also frequently used¹³³ as was deprivation of food.¹³⁴ There continued to exist some regional variations with the military dictatorships of southern South America, especially Argentina, Chile, Paraguay and Uruguay, using such methods as the *picana eléctrica*

¹²⁸ *Op cit.* Robertson p333

¹²⁹ *Op cit.* Amnesty International pp105-246

¹³⁰ See e.g.: *Ibid* p237

¹³¹ *Ibid* pp105-246

¹³² *Ibid* e.g. p92

¹³³ *Ibid* e.g. p243

¹³⁴ *Ibid* e.g.: p144

or electric cattle prod¹³⁵ or the *submarino* in which victims were placed up to their necks in water with a wet cloth covering their head to hinder breathing¹³⁶ or their head was submerged for a long period of time in a tank which could on some occasions have been polluted with human excrement.¹³⁷ The sexual abuse of prisoners has also been widely reported to have been practiced by these regimes.¹³⁸ Forms of torture common in China in the 1980s included the use of very tight handcuffs over an extended period¹³⁹ as well as the practice of forcing detainees to wear gasmasks in order to hinder breathing.¹⁴⁰ Victims were also beaten.¹⁴¹

Other global examples of torture from this period include the incarceration of prisoners in Mauritania, for example, in solitary confinement without any light in very small cells for prolonged periods of time.¹⁴² Other common forms of torture practiced in recent years include the application of electricity to the body of the victim, including the genitals.¹⁴³ Detainees in many States are also burned with cigarettes¹⁴⁴ or suspended upside down for extended periods of time.¹⁴⁵

Psychological torture was also frequently used. This very commonly took the form of simulated executions¹⁴⁶ or incommunicado detention,¹⁴⁷ practices that are still prevalent to this day. This could, however take the form of the torture or threats against the safety of the children or other relatives of the victim.¹⁴⁸ Frequently people were 'disappeared' either permanently or for prolonged periods, often with their

¹³⁵ *Ibid* p144

¹³⁶ *Ibid* p144

¹³⁷ *Ibid* p175

¹³⁸ See e.g.: *Ibid* p176

¹³⁹ *Ibid* p185

¹⁴⁰ *Ibid* p185

¹⁴¹ *Ibid* p185

¹⁴² *Ibid* p120-121

¹⁴³ *Ibid* p243

¹⁴⁴ See e.g.: *Ibid* p218

¹⁴⁵ See e.g.: *Ibid* p195

¹⁴⁶ *Ibid* e.g. p230

¹⁴⁷ *Ibid* e.g. p237

¹⁴⁸ *Ibid* e.g.195

families not being notified of their fate.¹⁴⁹ These forms of psychological torture are accepted to have just as serious long term consequences as many of the physical methods of torture.¹⁵⁰

(ix)The International Move to Prohibit Torture

The recent practice of torture is contrary to a growing body of international law proscribing it. This has been formed throughout the twentieth century and has coincided with the evolution in the concept of human rights over this period. The period immediately following the atrocities of the Second World War saw the founding of the United Nations in 1945. In 1948 the General Assembly adopted Resolution 217A (III)¹⁵¹ containing the Universal Declaration of Human Rights. Article 5 of the Declaration provides that “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”¹⁵² This is among the first suggestions of an international prohibition not just of torture, but also of other related conduct, namely cruel, inhuman or degrading treatment or punishment. The Declaration was contained in a General Assembly Resolution and is not binding but the wide membership of the General Assembly, even at this time, means that it is still significant.

While the Universal Declaration of Human Rights is not binding, its provisions against torture were subsequently included in a variety of international treaties creating a formal legal prohibition of torture for their States parties. Article 3 of the

¹⁴⁹ *Ibid* e.g. p237

¹⁵⁰ *Op cit.* Peters p173

¹⁵¹ Universal Declaration of Human Rights, United Nations General Assembly Resolution 217A (III) 10th December 1948

¹⁵² *Ibid* Article 5

Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms¹⁵³ of 1950 uses almost the exact wording of Article 5 of the Universal Declaration in providing that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."¹⁵⁴ It is questionable whether the omission of the word 'cruel' from this prohibition has any significant effect. The European Court of Human Rights has subsequently issued judgements providing further details as to the exact definition of torture and 'inhuman or degrading treatment or punishment.' (see chapter 2) This basic prohibition has also been used in other international treaties. Article 7 the International Covenant on Civil and Political Rights of 1966¹⁵⁵ uses the exact wording of Article 5 of the Universal Declaration but provides also that "...[i]n particular, no one shall be subjected without his free consent to medical or scientific experimentation,"¹⁵⁶ a form of torture in common use in Nazi Germany.¹⁵⁷

Torture is also prohibited by other regional human rights treaties. Article 5 of the African Charter on Human and Peoples' Rights of 1981¹⁵⁸ provides that "Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."¹⁵⁹ There are also regional treaties specifically addressing the issue of torture such as the Council of Europe's Convention for the Prevention of Torture and Inhuman or Degrading Treatment or

¹⁵³ Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, in force 3 September 1953) ETS No. 5

¹⁵⁴ *Ibid* Article 3

¹⁵⁵ International Covenant on Civil and Political Rights (adopted 16 December 1966, in force 23 March 1976) 999 UNTS 171

¹⁵⁶ *Ibid* Article 7

¹⁵⁷ *Op cit.* Robertson p34

¹⁵⁸ African Charter on Human and Peoples' Rights (adopted 27 June 1981, in force 21 October 1986)

¹⁵⁹ *Ibid* Article 5

Punishment¹⁶⁰ which provides for country visits and inspections of detention facilities,¹⁶¹ where much of the torture still practiced now occurs.

While these international instruments demonstrate a growing and strengthening international prohibition of torture and cruel, inhuman or degrading treatment or punishment, these concepts are not defined, except by the regional and UN Treaty Body jurisprudence, and all of these treaties have a limited number of State Parties. This situation made a truly global prohibition necessary. The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment¹⁶² was adopted in New York on 10 December 1984 and entered into force on 26 June 1987. It currently had 163 State Parties,¹⁶³ making it the first codified proscription of torture to have anything approaching a global reach. It also seeks, unlike previous treaties to define the concept of torture. Article 1 of the Convention states that 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 that 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, where 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.”¹⁶⁴

¹⁶⁰ European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (adopted 26 November 1987, in force 1 February 1989) ETS No. 126

¹⁶¹ *Ibid* Article 1

¹⁶² *Op cit.* UNCAT

¹⁶³ See UNTS website at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en

¹⁶⁴ *Op cit.* UNCAT Article 1

The breadth and appropriateness of this definition will be examined in detail in Chapter 2 but should be noted here as a clear prohibition of most, if not all, of the acts described in the earlier parts of this section. In addition to banning States from engaging in such conduct the provisions of the Convention also require parties to actively punish it where it has occurred.¹⁶⁵ Article 2 of the Convention requires States to take legal measures to prevent torture.¹⁶⁶ It also provides that there can be no legitimate excuse for its commission,¹⁶⁷ not even the order of a superior officer.¹⁶⁸ Article 7 of the Convention requires States in whose jurisdiction a person is believed to have committed torture to prosecute or extradite them; wherever in the world the torture took place.¹⁶⁹ This has the effect of creating universal jurisdiction for the punishment of torture.

In addition to the prohibition of torture, the Convention also establishes the United Nations Committee Against Torture.¹⁷⁰ This body receives individual complaints¹⁷¹ and considers reports from State Parties on their practices and issues observations and recommendations as to how a State should act to completely abandon torture.¹⁷² This procedure will be considered in detail in the next chapter and represents an extension of the previously existing prohibition of torture to an international regime for the policing and governance of State conduct to ensure its eradication. In addition to the United Nations Convention, 64 States¹⁷³ have also ratified the Optional Protocol to the Convention which provides for the inspection of detention facilities,¹⁷⁴ now the most common venue for the commission of torture and other cruel, inhuman or

¹⁶⁵ *Ibid* Article 7

¹⁶⁶ *Ibid* Article 2(1)

¹⁶⁷ *Ibid* Article 2(2)

¹⁶⁸ *Ibid* Article 2(3)

¹⁶⁹ *Ibid* Article 7

¹⁷⁰ *Ibid* Article 17

¹⁷¹ *Ibid* Article 22

¹⁷² *Ibid* Article 19

¹⁷³ See http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9-b&chapter=4&lang=en

¹⁷⁴ Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNGA A/RES/57/199) 18 December 2002, in force 22 June 2006

degrading treatment or punishment.¹⁷⁵ This regime operates in much the same way as the Council of Europe's Committee for the Prevention of Torture which will also be discussed in Chapter 2.

The pre-UNCAT international legal framework prohibiting torture, while it also proscribed cruel, inhuman and degrading treatment and punishment, set a lower bar for this latter category of treatment with the view that, a "special stigma"¹⁷⁶ should be attached to the practice of torture. While understandable, in singling torture out as being among the gravest of crimes, this has allowed States to interpret the concept of torture rather creatively in order to avoid such a stigma. An example of this can be seen in the case of *Ireland v United Kingdom* which concerned the *five techniques*, five controversial interrogation methods employed by the British security forces in Northern Ireland against suspected republican terrorists.¹⁷⁷ These methods included practices such as hooding, sleep deprivation, exposure to constant noise for prolonged periods and the forced assumption of stress positions for extended periods of time.¹⁷⁸ They were applied, it is claimed to procure information for the protection of national security rather than as a punishment.¹⁷⁹ In the resulting legal challenge, the European Court of Human Rights rejected arguments put forward by the Irish government that these practices amounted to torture and claimed that they were merely cruel, inhuman or degrading treatment.¹⁸⁰ While this is also prohibited in the European Convention, such a judgement may risk encouraging such actions by States free from the threat of a finding of torture. The court has, however, taken a different view in more recent cases, in *Selmouni v France* for example the court would go on to find that violent treatment of suspects can indeed, amount to

¹⁷⁵ See e.g.: *Op cit.* Amnesty International pp105-246

¹⁷⁶ *Ireland v United Kingdom* (5310/71) 18 January 1978 2 E.H.R.R. 25 paragraph 167

¹⁷⁷ *Ibid* paragraph 165

¹⁷⁸ *Ibid* paragraph 167

¹⁷⁹ *Ibid* paragraph 212

¹⁸⁰ *Ibid* summary

torture.¹⁸¹ The change of view was justified on the grounds that the Convention must be interpreted in light of the current climate, including post *Ireland v United Kingdom* international instruments prohibiting torture.¹⁸² This is a positive development and would appear to demonstrate a significant improvement in the prevailing attitudes in the area of appropriate interrogation methods and the unacceptability of torture in the many years between the two cases moving further towards a globally accepted prohibition on the use of such methods.

A further example of the evolutive interpretation of the European Convention by the Strasbourg Court can be seen in the case of *Vinter, Bamber and Moore v United Kingdom*¹⁸³ which concerned sentences of life imprisonment without any possibility of release and is considered fully in Chapter 6. Here, Ashworth notes, the Grand Chamber went further even than the Court had in its earlier judgement in the same case¹⁸⁴ and significantly further than it had in the cases of *James v United Kingdom*¹⁸⁵ and *M v Germany*.¹⁸⁶ The reason given for this was that “[t]he general trend, both in Europe and internationally... goes against the current position in England and Wales.”¹⁸⁷ This is a very useful approach to the interpretation of the definition of torture and the scope of Article 3 of the European Convention as it allows for development of the law to correspond with the evolution of social norms and general understanding of pain and suffering and may prevent States from resisting such progress. It may, however, be argued to restrict the scope of the Convention if the view is taken that the Court is waiting for the position of States to change over time rather than seeking to shape such development in order to enhance the

¹⁸¹ *Selmouni v France* (25803/94) 28 July 1999 29 E.H.R.R. 43 paragraph 105

¹⁸² *Ibid* paragraph 97

¹⁸³ App No. 66069/09

¹⁸⁴ Ashworth A ‘Vinter v United Kingdom – human rights – article 3 – sentences of imprisonment with whole life term’ (2014 Crim L.R. 1 p82

¹⁸⁵ App No. 7806/77

¹⁸⁶ App No. 19359/04

¹⁸⁷ Op cit. Ashworth p82

protection of human rights. Here, it may be argued that the Court has struck the correct balance in encouraging progress in those States which may be seen as having fallen behind without risking alienating larger groups of States in a way which may prove damaging to the Convention.

Letsas notes that the ‘living instrument’ approach to interpretation of the European Convention goes against the traditional originalist approaches to treaty interpretation including intentionalism which seeks to examine the intentions of the drafters and textualism which focuses on the ordinary meaning of the language of the treaty provisions at the time of enactment.¹⁸⁸ It is true that the more dynamic approach taken in Strasbourg cannot be reconciled with either of these methods although it is also noted that the Court has in some cases, such as *Golder v United Kingdom*¹⁸⁹ sought to examine the “object and purpose”¹⁹⁰ of the Convention. This may seem like a form of intentionalism, but Letsas notes that it can form the basis for the living instrument approach which may cover issues not even envisaged by the drafters if one takes an expansive view of the object and purpose of the Convention.¹⁹¹ In the case of *Golder* this involved achieving the objective of protecting the rule of law by interpreting the Convention as protecting the right of access to courts¹⁹² and in the case of torture the objective of protecting citizens from ill-treatment at the hands of State officials may similarly be argued to allow for the development in the interpretation of the definition of torture described above. Letsas argues that such a rejection of originalist interpretation is justified in view of the object of Human Rights treaties which is argued to be to “...make states accountable for the violation of some moral rights which individuals have against their government.”¹⁹³ It follows, it is

¹⁸⁸ Letsas G ‘Strasbourg’s interpretive ethic: lessons for the international lawyer’ (2010) EJIL 509 p513

¹⁸⁹ 4451/70

¹⁹⁰ Op cit. Letsas p516

¹⁹¹ Ibid p517

¹⁹² Ibid

¹⁹³ Ibid p540

argued, that “the purpose of human rights courts is to develop, through interpretation, a moral conception of what these fundamental rights are,”¹⁹⁴ such morality being informed by the situation and prevailing views of the time. This approach has the potential to prove very helpful in the context of the battle against torture as there is the potential to bring those States providing less well developed protection into line with the majority.

There does exist the concern that this may be compromised if the prevailing views become less opposed to the use of torture and other ill-treatment in certain cases of violations of other provisions of the European Convention, as can be argued to have been the case since the terrorist outrages of September 2001 but Elliott notes that the Strasbourg Court has subjected the United Kingdom’s anti-terrorism legislation to a high level of scrutiny.¹⁹⁵ This is supported with the example of the case of *A v United Kingdom* in which it was decided that Part IV of the Anti-terrorism, Crime and Security Act 2001 which had provided for the detention without trial of suspected terrorists who were not UK nationals, was not necessary in the face of the emergency facing the United Kingdom following these attacks. Elliott argues that this is significant as “the European Court has in the past adopted a deferential if not supine approach when assessing the legality of derogations under Article 15”¹⁹⁶ and notes the “...traditional reticence [of British judges] whenever the phrase “national security is uttered.””¹⁹⁷ This would appear to demonstrate the continued underpinning of the provisions of the Convention by the Court’s interpretative approach in the face of the threats Europe faces in the present climate, although it was suggested that the

¹⁹⁴ Ibid

¹⁹⁵ Elliott M ‘Torture, Deportation and Extra-judicial Detention: Instruments of the “War on Terror” (2009) Cambridge LJ 245 p246

¹⁹⁶ Op cit. Elliott p246

¹⁹⁷ Ibid

Strasbourg Court may have been fortified in its conclusion by an earlier declaration of incompatibility by the House of Lords under section 4 of the Human Rights act 1998..

In addition to being outlawed by a host of international human rights treaties, torture is now almost universally seen as a violation of *jus cogens*,¹⁹⁸ or a peremptory norm of international law taking precedence above any diverging treaty or rule of custom. Possibly the strongest form of international law, This will be considered further in Chapter 2. It should be noted that Article 53 of the Vienna Convention on the Law of Treaties¹⁹⁹ provides that any treaty will be void if it conflicts with such a norm. Merron notes that hierarchies of legal norms are common in national legal systems with constitutional provisions routinely taking precedence over ordinary laws.²⁰⁰ While recognising *jus cogens*, Merron notes much disagreement as to what is covered and whether this concept should exist, although the example of freedom from torture is given as one of the few concrete examples of such a norm.²⁰¹ This is in contrast to the view taken by Cassese, who argues that a “clear understanding” exists, at least as to the content of the core *jus cogens* norms.²⁰² The difficulty it is argued, is in monitoring enforcing compliance with these rules. Suggested methods of doing this include strengthening the scope of international tribunals and civil society.²⁰³ Both these solutions require national co-operation, however, and as will be discussed in Chapter 5, there is no easy way of securing this.

Bianchi takes note of the particular force that human rights issues seem to carry in the determination of the existence of such norms and attributes this in part to the

¹⁹⁸ Grossman C Chairperson of the Committee Against Torture Statement to the 64th Session of the United Nations General Assembly Third Committee Item 71(b) 20 October 2009 New York p4 at <http://www2.ohchr.org/english/bodies/cat/docs/CGUNGenAssembly.doc>

¹⁹⁹ 1155 UNTS 331

²⁰⁰ Merron T ‘On a Hierarchy of International Human Rights’ AJIL 1986 80 p4

²⁰¹ Ibid

²⁰² Cassese A ‘A Plea for a Global Community Grounded in a Core of Human Rights’ in ‘Cassese A ‘Realizing Utopia: The Future of International Law’ (2012) OUP p139

²⁰³ Ibid pp142-143

extreme moral feelings that these issues invoke in members of the public including the academic commentators who, at least in the past, had been the primary source of determination of such norms,²⁰⁴ It is observed, however, that the notion of *jus cogens*, may be under threat as a result of international conflict and the war on terror.²⁰⁵ The example given is the restrictive interpretation of the definitions of these norms, notably the US ‘torture memorandum’ referred to in Chapter 3. This is indeed a risk in relation to the issue of torture but one positive aspect of the UN Torture Convention is the relatively wide definition in Article 1 which serves to minimise this risk. Bianchi also expresses concern at “the tendency of some of [*jus cogens*] most fervent supporters to see it everywhere.”²⁰⁶ This may, indeed, be a danger for two reasons. Firstly, it serves to undermine in society’s eyes the very special and vitally important quality of such norms and secondly, it risks further encouraging those who would not recognise them to behave in a manner which is inconsistent with their peremptory status and to resist their recognition.

In addition to the issues surrounding peremptory norms of *jus cogens*, Addo and Grief discuss the notion of ‘absolute rights’ in the context of Article 3 of the European Convention on Human Rights which seeks to prohibit torture and other inhuman or degrading treatment or punishment.²⁰⁷ It is noted that the text of Article 3 does not claim to be an absolute right but that it has been treated as such as a result of Strasbourg jurisprudence (see Chapter 6 for further discussion of this).²⁰⁸ While much weight is given to the debate surrounding the difference between torture and inhuman or degrading treatment in the *Ireland* case, it is argued that the Court’s method of making rights absolute is vague but that it is of note that no derogations

²⁰⁴ Bianchi A “Human Rights and the Magic of Jus Cogens” EJIL 2008 19 (3) 491 pp491-492

²⁰⁵ Ibid pp505-506

²⁰⁶ Ibid p506

²⁰⁷ Addo M and Grief N ‘Does Article 3 of the European Convention on Human Rights Enshrine Absolute Rights?’ (1998) EJIL 510

²⁰⁸ Ibid pp512-513

from this Article 3 are permitted by Article 15 of the Convention.²⁰⁹ It is also suggested that an absolute right is likely also to be a norm of *jus cogens*²¹⁰ and so the treatment of Article 3 cases by the Strasbourg Court would seem to support the view that the prohibition of torture is such a norm. Consideration is also given to the question of whether there is scope for ill-treatment to be justifiable.²¹¹ It is pointed out that the Court's stance has been that justifiability may be a consideration in determining whether ill-treatment has taken place but that if such a determination is made, then there may be no justification for a violation.²¹² This is a positive approach in that it provides for some flexibility within the scope of the absolute right but danger lies in assessing this after the fact as the violation may already have occurred and cannot be undone. While Addo and Grief note the positive nature of the existence of Article 3 as an absolute right, they caution against the threshold being too high, something that may since have been addressed, at least to some extent, by *Selmouni*, and warn that in the event of doubt the case of the victim should be favoured.

The notion that a breach of an absolute right must always be severely punished in order to avoid a climate of impunity is questioned by Greer who illustrates these arguments using the case of *Gafgen v Germany*. This case concerned threats to torture a suspect in order to induce him to reveal the whereabouts of a kidnapped child. The officers responsible for the threats were disciplined and given non-custodial sentences. Here the grand chamber found that such punishments did not provide adequate redress and amounted to a violation of Article 3. It is noted that in such cases, there is a conflict between the rights of the victim and those of other

²⁰⁹ Ibid p513

²¹⁰ Ibid p516

²¹¹ Ibid p522

²¹² Ibid pp522-523

parties, here an abducted child, who in fact had been murdered, and his parents.²¹³

In this case it is argued that a moral judgement must be made and that it should be appropriate to take into account the pressing need to find an abducted child, who the officers in question believed may still have been alive, in determining their sentences and that the finding of a violation of Article 3 was inappropriate.²¹⁴ This point of view does not necessarily seem to question the notion of the existence of absolute rights as the criticism was not of the fact the officers did face disciplinary action for their crimes, but does call for flexibility in their application.

This view provoked a response from Smet who constructs a hypothetical scenario similar to the ticking time bomb considered in Chapter 2. In Smet's version the police must consider torturing a person to determine the whereabouts of another and prevent them from being tortured by an associate of their prisoner, the conflict of a negative and a positive obligation.²¹⁵ The argument is made against the use of torture on the basis of a view, similar to the Kantian argument discussed in Chapter 2 that this would mean using the victim only as a means to rescue the other.²¹⁶ It is noted that there is no easy answer to this problem. This does not, however, mean that the positive or the negative obligations under Article 3 should be seen as any less than absolute as Smet's scenario is subject to the same criticisms as outlined by Shue in the ticking time bomb situation and discussed in Chapter 2. It is hypothetical and unlikely to occur, it is designed to appear to justify torture and it would be impossible to be certain that the correct person had been detained. It would be unwise, therefore, to consider hypothetical situations as detracting from the Article 3 prohibition.

²¹³ GreerS 'Should police Threats to Torture Suspects Always be severely Punished? Reflections on the Gafgen Case' (2011) HRLR 67 pp78-79

²¹⁴ Ibid p79-81

²¹⁵ Smet S 'Conflicts Between Absolute Rights: A Reply to Steven Greer' (2013) HRLR 469 p471

²¹⁶ Ibid p497

This has, however, been questioned, especially since the commission of terrorist outrages against the United States on September 11 2001 and the subsequent declaration of the 'War on Terror'. While there remains a significant body of opinion in support of the absolute nature of the prohibition, some commentators, and a number of governments observe that this may not be compatible with the protection of the public from further such attacks. This issue has risen most frequently in the context of *non-refoulement*, where a State has sought to remove an individual believed to represent a risk to a State where they would be at risk of treatment which may violate the prohibition. Battjes argues that while the European Court holds that the *non-refoulement* provisions of Article 3 of the Convention are absolute, some balancing is accepted where a genuine threat is posed.²¹⁷ Examples given include *N v United Kingdom*²¹⁸ which concerned a patient suffering from HIV who could be removed despite the lower standard of treatment available in Uganda. This case can be distinguished, at least to some extent as will be expanded upon in Chapter 6, from cases individuals facing torture on their return to another State. Here the conclusion is again reached that the Article 3 right is absolute but that a balancing exercise may be used in determining the existence of a violation and while some interests may be balanced, the finding of a risk of torture is still likely to prove fatal to an attempt to extradite.

As noted above, while many of the medieval methods of torture have long since ceased to be used, the practice does continue. Amnesty International noted the continued practice of torture in as many as 132 countries as recently as 2006.²¹⁹ This practice appears to be continuing in spite of the development, in the last

²¹⁷ Battjes H 'In search of a fair balance: The absolute character of the prohibition of Refoulement under Article 3 ECHR reassessed LJIL (2009) 22(3) 583 p583

²¹⁸ Ibid p585

²¹⁹ Pattenden R *Admissibility in criminal proceedings of third party and real evidence obtained by methods prohibited by UNCAT* International Journal of Evidence and Proof 2006 1 at p2

hundred years of a substantial and growing body of international law requiring the cessation of such conduct. The United Nations Committee Against Torture has seen no reduction in its workload and continues to make observations of the existence of torture in a variety of States.²²⁰ This can only lead to the inescapable conclusion that torture continues to be practiced on a global level by State governments and their agents. Its continued use combined with its status as a global practice before the existence of any kind of international communication may lead one to realise the extent of the challenge facing the international community in securing its eradication.

(x) Torture Today

In light of the above, it is possibly surprising that so comprehensive a rejection of torture by international law is not universally welcomed. Following the terrorist attacks of 11 September 2001, there have been further developments in the public attitude towards torture, not all of them positive. One example of a hypothetical situation often given in support of the use of torture in counter terrorism operations is the known existence of a 'ticking time bomb' capable of mass destruction and the certainty, if this is ever possible, that the subject of any such treatment is withholding vital evidence which may allow this to be neutralised.²²¹ In cases such as this, it is argued by some commentators, that torture may be an appropriate means of discovering such information in order to save lives.²²² Such arguments, however could be viewed as flawed as it may never be completely certain that a suspect is withholding information and an innocent person could find themselves subject to torture. It also fails to consider the notorious unreliability of evidence gained as a result of torture

²²⁰ See e.g.: Committee website at <http://www.ohchr.org/EN/HRBodies/CAT/Pages/CATIndex.aspx>

²²¹ Luban D *Liberalism, Torture and the Ticking Bomb* in Greenberg K *The Torture debate in America* (Cambridge) 2006 p44

²²² *Ibid* citing e.g.: Dershowitz A *Why Terrorism Works*

(see below) and the incompatibility of any form of torture with “...the inherent dignity of the human person.”²²³

In the face of the terrorist threat, States have once again been accused of seeking to interpret creatively the accepted definition of torture in order to allow for the use of controversial interrogation methods. The most notorious examples of this being the alleged practices of the United States military at the detention camp at Guantanamo Bay in Cuba, as well as the directions given by James Bybee in a memorandum dated 1 August 2002 which has been read as suggesting the ‘severe’ pain or suffering would have to be on the level of “...death, organ failure or serious impairment of body functions...” to constitute torture.²²⁴

Practices alleged to occur in Guantanamo Bay include ‘water boarding’ the pouring of water onto the covered face to simulate drowning,²²⁵ sleep deprivation and forcing detainees to stand for extended periods of time in stress positions.²²⁶ It could certainly be possible to draw some parallels between such interrogation methods and those used in the past during political difficulties in seventeenth century Scotland or during the inquisition; even if one concludes that the methods of today are less extreme. It is true that those who practice such interrogation techniques are charged with defending society from a threat of some magnitude, but equally those who did so in the past may well have believed the same thing. The situation in Guantanamo Bay has been described by Sayeed as “incredibly complex” as “a political and legal phenomena.”²²⁷ It is almost certainly true that at least some of the detained individuals have been guilty of atrocities and represent a threat to innocent people

²²³ *Op cit.* UNCAT preamble

²²⁴ Bybee-Gonzales August 1, 2002 Memo Re: Standards of Conduct for Interrogation AKA The Torture Memo in Greenberg K *The Torture debate in America* (Cambridge) 2006 p317 at p321

²²⁵ *Op cit* Luban p39

²²⁶ MacDonald H *How to Interrogate Terrorists* in Greenberg K *The Torture debate in America* (Cambridge) 2006 p84

²²⁷ Sayeed S ‘Guantanamo Bay – five Years On JIANL 2007 21(2) 109 ’p109

which may itself amount to suffering on a level comparable to that inherent to the practice of torture. There may be evidence that some of the individuals pose such a threat which cannot, for operational reasons, be tested in a public forum without posing a risk to the safety of the general population. Without such an examination, however, it is impossible to establish with any certainty that any specific individual constitutes such a threat or has been guilty of any wrongdoing and yet they remain detained under very severe conditions.

It is not only the conditions described above that would amount to the use of torture, although some US officials have sought to go yet further and use “...scenarios designed to convince the detainee that death or severely painful consequences are imminent for him and/or his family.”²²⁸ While such actions will undoubtedly, as described in Chapter 4, amount to torture or at least to inhuman and degrading treatment also prohibited by the Convention, similar issues may also arise from the open-ended nature of the detention. In a move described by Sayeed as “...one of the cornerstones of Anglo-American law [being] washed away,”²²⁹ section 1005 of the Detainee Treatment Act 2005 (known as the Graham-Levin amendment) severely restricted the ability of detainees to bring habeas corpus proceedings to challenge their detention.²³⁰ This, combined with the absence of any trial amounts to potentially indefinite detention, something which itself may be capable of causing the level of pain and suffering described in the Convention.²³¹ An additional issue is that the Military Commissions Act 2006 draws what Sayeed argues to be a very narrow view of torture. This creates the risk that actions contrary to the UN Convention may be committed with impunity.

²²⁸ Ibid pp114-115

²²⁹ Ibid p110

²³⁰ Ibid

²³¹ See Chapter 4

It is also alleged that a variety of States, including the United States, have responded to the present terrorist threat by participating in the extraordinary rendition of terrorist suspects to States where torture can easily occur.²³² While the UN Torture Convention prohibits involvement in torture, and requires its punishment, wherever in the world it takes place,²³³ the continued use of torture in a substantial number of States throughout the world may allow for this practice to take place with impunity.

As noted above in connection to the *Ireland v United Kingdom* case, ill-treatment not amounting to torture may still amount to a violation of the various international Conventions, even if this does not give rise to the same international obligations which would follow the practice of torture.²³⁴

Another relevant issue relating to the post September 11 practice of torture is the question of the use of evidence obtained by torture, especially where a State does not practice torture but shares intelligence with those that do and then uses in security operations, or legal proceedings, evidence which has been obtained, or may have been obtained through torture. The UN Convention clearly prohibits the use of any such evidence;²³⁵ clearly in the hope that torture will be used less where there is no demand for the evidence that it produces.²³⁶ It may, however be argued that it would be wrong for States to risk civilian lives by ignoring such evidence where it is known to exist and the State has not participated in any way in its procurement. It is also questionable what steps a State must take to ascertain whether foreign evidence is tainted by torture and how certain of this fact, or otherwise, they must be

²³² *Op cit.* Pattenden p8

²³³ *Op cit.* UNCAT Article 7

²³⁴ *Op cit.* European Convention Article 3

²³⁵ *Op cit.* UNCAT Article 15

²³⁶ *Op cit.* Pattenden pp8-9

in deciding whether or not to use such evidence and it is not possible for a State to impose its practice on others.²³⁷

Also, in recent years, the absolute global prohibition of torture, if this is accepted to exist, may be seen to conflict with other areas of international law such as the doctrine of sovereign immunity. This can be seen in the United Kingdom, in the case of *Jones v Saudi Arabia*²³⁸ where an alleged victim of torture was unable to sue for damages as the alleged perpetrators were agents of another sovereign State. This raises serious questions as to the effectiveness of the prohibition as the UN Convention, itself defines torture as an official act and if officials cannot be brought to account, then this kind of civil action may be impossible.

(xi) Conclusion

In this chapter, it has been observed that torture has been practiced from the earliest known human civilizations and has continued to be used throughout history. It is still practiced throughout the world to this day. There has, however, been some evolution and regional variation in the methods of torture used and the purposes for which it is practiced. Torture has been used as a ritual, a punishment, sometimes combined with, or as a form of execution, to illicit information for political purposes or for the protection of national security, to spread fear among the opponents of various regimes and as a tool of gross human rights violations on a massive scale. Domestic and international law have made a variety of attempts to restrict or to prohibit torture, ranging from the prohibition of certain acts in ancient times to the banning of the practice in certain States more recently. Following the atrocities of the Second World War and the subsequent founding of the United Nations, a variety of regional and

²³⁷ *Ibid* p3

²³⁸ *Jones v Ministry of Interior, Al-Mamlaka, Al-Arabiya, AS Saudiya (the Kingdom of Saudi Arabia) and Others* [2006] UKHL 26

international treaties now ban the practice of torture, including the United Nations Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment of 1984 which was adopted to address this specific issue. It is also contrary to customary international law and *jus cogens*. Torture has continued to be practiced, however, both for political purposes in certain States as was the case before but also, especially since the terrorist attacks of 11 September 2001, for the protection of national security by a range of States. In view of this it is questionable whether the practice of torture will ever be completely eradicated. This would, however, be the only acceptable outcome for all the reasons set out in the preamble to the UN Torture Convention, especially "...the inherent dignity of the human person,"²³⁹ and this must be the aim of the United Nations and of the international community. It will be necessary, therefore, to examine the prevention of torture which will be dealt with in Chapter 4.

²³⁹ *Op cit.* UNCAT Preamble

Chapter 2

The Philosophy of Torture and its Prohibition

This section will seek to examine the philosophy behind the practice of torture. It will attempt to explain the reasons for which people have, throughout history, chosen to employ torture against others, the circumstances in which this has happened, the way in which torture works and the unique and terrible consequences that this practice can have for its victims. It will also seek to examine the philosophical reasoning behind some of the arguments used in the current debates relating to torture. In addition to a theoretical examination of the concept of torture it will also be necessary to examine some theoretical approaches to compliance in international law in order to provide a background against which to assess the United Kingdom's fulfilment of its obligations.

(i) Ancient Philosophy

Even in ancient times, philosophers considered the appropriateness of the way in which States treat their citizens. Much of this focused on the concept of punishment, now seen as one of the main motivations for torture. Aristotle outlined the importance of just punishments. One aspect of this was that a punishment was just only so long as it was necessary.²⁴⁰ This suggests some disapproval of excessive punishments which may amount to torture, in writing about the execution of punishments Aristotle refers to the imposition of fines and to imprisonment but not to corporal punishment,²⁴¹ and of any unnecessary punishments. It is noted that those charged with the enforcement of punishments are likely to become unpopular and that such a task needs to be undertaken by a well managed office.²⁴² Aristotle also cites the

²⁴⁰ Aristotle *The Politics and Constitution of Athens* Edited by Stephen Everson (CUP) 1996 p184

²⁴¹ *Ibid* p163

²⁴² *Ibid* pp163-164

practice of tyrants persecuting their rivals by cruel methods as a major cause of revolution.²⁴³ While this would suggest disapproval of the use of torture, it remained common throughout this period as is discussed in the previous section.

In the period following this work, there was relatively little philosophical material published with the majority of mainstream thought focusing on religion. This was also the principal motivation for torture with the inquisitorial courts of Continental Europe punishing as heresy any public conduct seen to constitute a challenge to the Church. (see previous section) Torture has, however, been approached differently and more specifically by more recent philosophers.

(ii) Hobbes

In 'Leviathan,' Hobbes sees punishment, including acts which might be described as torture, as "...an Evill inflicted by publique Authority, on him that hath done, or omitted that which is Judged by the same Authority to be a Transgression of the Law; to the end that the will of men may thereby be better disposed to obedience."²⁴⁴ This is consistent with the theme of this work advocating the obedience of the subjects to the sovereign.²⁴⁵ Hobbes is very clear that only the sovereign should have the right to authorise or carry out such acts. Where they are committed otherwise, they would constitute a hostile act.²⁴⁶ Hobbes foresees the use of corporal²⁴⁷ and capital punishment "...either simply, or with torment"²⁴⁸ on individuals by public authorities to achieve the aim of rendering the population better disposed to obedience. Such a power would not, however, be unlimited and should under no circumstances be applied to innocent subjects. Such use of these powers is "...against the Law of

²⁴³ *Ibid* p141

²⁴⁴ Hobbes T *Leviathan* Edited by Richard Tuck (CUP) 2008 p214

²⁴⁵ Tuck R in *Ibid* at x

²⁴⁶ *Ibid* p215

²⁴⁷ *Ibid* p217

²⁴⁸ *Ibid* p217

Nature.”²⁴⁹ One of the arguments used against the use of torture and other punishments of the innocent is that this will be of no benefit to the Commonwealth.²⁵⁰ This raises the issue of the commission of torture as a method of spreading fear amongst the population. This was practiced widely by, for example, the Pinochet regime (see previous section) largely because it was seen as being of a benefit to the State and likely to render the population ‘better disposed to obedience,’ the very aim of punishment as defined by Hobbes.

While Hobbes foresees the use of punishments which would amount to torture, he condemns the use of torture as a tool in interrogation. It is argued that such a practice is of little or no benefit in the search for the truth as “...what is in that case confessed, tendeth to the ease of him that is Tortured; not to the informing of the Torturers:... for whether he deliver himself by true, or false Accusation, he does it by the Right of preserving his own life.”²⁵¹ This is consistent with the commonly-held modern view that evidence gained through torture is inevitably unreliable as a victim will act with the aim only of ending their suffering and may tell the perpetrators what they wish to hear whether or not this is the truth. This assertion by Hobbes is, however, unusual as it is contrary to the majority of the practice at the time. Leviathan was published in 1651²⁵² when judicial torture had until recently been widely used, especially in Scotland as described in the previous section.

While one may read this as condemning the use of torture to exact information under any circumstances, Hobbes’ remarks seem especially directed at the use of torture with the intention of producing evidence which might later be used in court. This work is silent on the ‘ticking bomb’ question, not applicable at the time, where the intention is to prevent damage to the State and its population rather than to bring

²⁴⁹ *Ibid* p219

²⁵⁰ *Ibid* p219

²⁵¹ *Ibid* p99

²⁵² Tuck R in *Ibid* *lix*

a criminal trial. It may be possible, given the themes of the work, the good of the Commonwealth and obedience to the sovereign, to suggest that a different view may have been offered had Hobbes foreseen such a situation. This may, however, have been unlikely as much of Hobbes' criticism of torture centres around the unreliability of the evidence it produces.

Hobbes was also of the view that certain evidence from, for example, a father, wife or benefactor²⁵³ should, if not willingly given, be "...praesumed to be corrupted by Nature" and therefore inadmissible. This, again, would represent a comprehensive safeguard at the time and a statement on the unreliability of torture evidence. While torture, as has been described in the previous section, has been practiced for a variety of motives, Hobbes draws a distinction between these accepting the practice as a means of punishment while condemning it as an unreliable interrogation tool.

(iii) Social Contractarian Theories relating to Torture

The theory of the social contract is based around the premise that society should be governed by a set of rules acceptable to all of its members and to which everyone should be able to freely agree.²⁵⁴ It would seem unlikely that such a rule would allow for the use of torture for the purposes of the interrogation of people who may be innocent, although is less clear what view supporters of such a theory may take on the use of torture as a punishment. This is not easily answered with different social contract theorists supporting very different levels of sovereign power over individual citizens.

Rousseau argues that the State or the City "...must have at its disposition a power of compulsion covering the whole field of its operations in order that it may be in a position to shift and adjust each single part in a way that shall be most beneficial to

²⁵³ *Ibid* p98

²⁵⁴ Barker E *Social Contract* (OUP) *xii-xiii*

the whole.”²⁵⁵ It is however argued that individuals do have natural rights to which they are entitled to benefit.²⁵⁶ This does not detract from the substantial powers such a system would afford to the sovereign. Rousseau suggests that citizens of a State should be prepared to die if the sovereign judges this beneficial to the State as a whole, as they have previously lived by and benefited from such a system.²⁵⁷ As to the question of how such a rule would apply to the commission of torture, any attitude placing such high importance on the benefit of the State as a whole might be read as demonstrating some sympathy for the use of torture in a modern ‘ticking bomb’ situation. Here it may be argued to be convenient to the State for one individual to suffer only to the extent required for them to surrender their information and to save the lives of the whole of the population. While there is little specific reference to the practice of torture in this essay, it is noted that one of the main forms of torture at the time, criminal punishments, should be little used if such a form of government were to be applied as this would, if well-run, result in fewer criminals.²⁵⁸ The idea of replacing punishment with ‘discipline’ would later be considered by Foucault.

It is also noted in the context of the death penalty that “...the evil-doer who attacks the fabric of social right becomes, by reason of his crime, a rebel and a traitor to his country. By violating its laws he ceases to be a member of it, and may almost be said to have made war upon it.”²⁵⁹ While this statement is made with reference to the death penalty, remarkably similar language has since been used in attempts to justify treatment of al Qaeda suspects which may not conform to international law and may well be seen as amounting to torture. (see below)

²⁵⁵ Rousseau J *Treatise du Contrat Social* 1792 translated by Hopkins G in Barker E *Social Contract* (OUP) p276

²⁵⁶ *Ibid* p277

²⁵⁷ *Ibid* p283

²⁵⁸ *Ibid* p285

²⁵⁹ *Ibid* p283

In his Second Treatise of Government, Locke takes an arguably opposing view, drawing a distinction between two possible situations in which society may exist. In the State of Nature, all people exist in the state they are naturally in.²⁶⁰ This, according to Locke is a state of perfect freedom and equality in which no person has more jurisdiction or power than any other.²⁶¹ The laws governing people in this situation are to be those of nature. Under the Laws of Nature, it is argued, every man has the right to punish anybody who transgresses such laws and “...declares himself to live by another rule than that of reason and common equity.”²⁶² This right must be granted to all persons in order to preserve the state of equality which forms the basis of the State of Nature.²⁶³ While afforded to everyone, this right is not unlimited. People who would exercise such a right are not to treat the criminal “...according to the passionate heats, or boundless extravagancy of [their] own will,”²⁶⁴ but must instead, only “...retribute to him, so far as calm reason and conscience dictates, what is proportionate to his transgression, which is so much as may serve for reparation and restraint.”²⁶⁵ Such a rule seems designed to prevent the kind of cruel and excessive punishments which were common in much of western Europe until the eighteenth century but many of the most barbaric examples of corporal and capital punishment at the time were, to an extent, tailored to fit the crime suggesting those who ordered them believed them to satisfy this very requirement. It is also highly questionable, where such ‘heats and extravagancy’ exist, that these will not be followed and that people will feel themselves bound by such a rule.

Locke suggests that a different set of rules should apply in a State of War. In this State, there exists a presumption that a person who will seek to take away any

²⁶⁰ Locke J *The Second Treatise of Government* 1694 in Wootton D *John Locke: Political Writings* (Penguin) 1993 p262

²⁶¹ *Ibid* pp262-263

²⁶² *Ibid* p265

²⁶³ *Ibid* p264

²⁶⁴ *Ibid* p264

²⁶⁵ *Ibid* p264

aspect of another's freedom will take everything else.²⁶⁶ In such a situation, therefore excessive punishment becomes acceptable so as to protect the person executing the punishment from future danger. It is suggested that it becomes legitimate, for example, to kill a thief who, has not caused injury and poses no physical threat.²⁶⁷ Locke does not refer, however, to other non-lethal measures such as the use of torture which may be seen as unnecessary once a person constituting such a threat has been subdued. Indeed, Locke refers only to the 'destruction' of one's enemy in a state of "...enmity, malice, violence and mutual destruction."²⁶⁸

The apparent differences between the views of Rousseau and Locke may be explained by the possibility that they take a different approach to the social contract with Locke favouring a contract between the members of society which all may agree to and Rousseau describing a contract between a sovereign government and its citizens.²⁶⁹

(iv) Torture and Kantian Theory

One of the main themes in the work of Kant is that humanity exists as an end in itself. It is from this conception that it is possible to derive one of the major Kantian principles: "So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means."²⁷⁰ This means that people should never use each other merely as a means to an end. This is one of the earliest philosophical views applicable to torture to place such focus on the concept of humanity, it is suggested that it is this ability to exist as an end rather than a means to an end that distinguishes humanity from animals.²⁷¹

²⁶⁶ *Ibid* p269-270

²⁶⁷ *Ibid* p270

²⁶⁸ *Ibid* p270

²⁶⁹ Barker E *Social Contract* (OUP) xii-xiii

²⁷⁰ Kant I cited by Guyer P in *Kant* (Routledge) 2006 p186

²⁷¹ Guyer P *Kant* (Routledge) 2006 p 186

An affront to this principle would clearly offend the humanity of the victim. Guyer notes that full respect for this principle would impose considerable constraints on one's own freedom and that certain breaches of it may be seen as warranting a punishment that would restrict a person's freedom and thus offend their humanity.²⁷² This may limit the application of the approach and provide more scope for the use of torture.

In the context of torture, this would suggest some disapproval of the use of the practice in order to extract information as such an act violates the human dignity of the victim purely for the advancement of the purposes of the torturer. The victim is being used as a means to the end of procuring information. Shue argues that the use of torture for the purposes of spreading fear among the population would also constitute a violation of this approach, using the victim as a means to the end of controlling others.²⁷³ The application of this principle may not, it would seem, preclude the use of torture in the course of punishment. It may, however, be argued that this would depend upon the motive of the punishment. If one takes the view that would later be discussed by Foucault, (see below) that punishment is a means of re-establishing sovereign power, such torture could easily be seen as using its victim as a means to an end. It is much more difficult to speculate how such a principle may apply where the aim is the preservation of the existence of others, an end itself, in a 'ticking bomb' situation. Here the authorities may be forced to balance the end of one person's existence with that of another as Guyer describes.

²⁷² *Ibid* p188

²⁷³ Shue H *Torture Philosophy & Public Affairs* vol 7 No 2 Winter 1978 124 at p132

(v) Torture and Marxist Theory

The role of the State is one of the central themes of Marxist philosophy. *The Fundamentals of Marxist-Leninist Philosophy*²⁷⁴ suggests that previous 'bourgeois' philosophy had sought to remove any conflict between the individual and society by making one superior to the other, the views of Hobbes are cited as evidence of this. Marxism, however, argues that it is, the situation arising from the bourgeois ownership of private property which is the ultimate cause of tensions between society and the individuals who form it. This is significant as it is just these conflicts which are likely to result in the practice of torture. It obviously goes against the interest of any individual to be tortured, but some argue that, in certain circumstances it may be in the interests of society that one individual is subjected to torture if the results benefit the whole of the population. The 'ticking bomb' is the most obvious example of this. The link to the private ownership of property would seem to suggest that such conflicts would not exist if this were to be abolished and that it would ultimately cease to be in the State's interests to torture individuals. As described in the previous section, the practice of torture in States employing such a system may suggest that this is not necessarily the case.

Marxist philosophy does raise objections to the practice of inflicting suffering on human beings. 'Marxist-Leninist Philosophy' condemns the impact the operation of capitalist systems has on the working classes. It "...crushed their intellectual energies and abilities."²⁷⁵ This condemnation, however, relates to the oppression of a class of people on a systematic basis and does not necessarily mean that the torture of a small number of individuals would draw the same level of criticism.

²⁷⁴ Moscow Progress 1974 pp 538-539

²⁷⁵ *Ibid* p540

Interestingly, as is noted by Garaudy, Marx had strongly criticised the State, the body whose organs are likely to be involved in the commission of torture. It was condemned as being a creation of the bourgeois

“...in order to guarantee the class interests of the capitalist class against the feudal and against the have-nots.”²⁷⁶

If one accepts that this is the case Marxism may be seen as being critical of much of the torture described in the previous section, especially that designed to preserve the regime of certain States. Garaudy also quotes Marx’s view that freedom requires the conversion of a State “...from an organ standing above society to one completely subordinated to it.”²⁷⁷ This supports the view that the individual’s interests must be balanced with those of the society rather than those of the State. One must, therefore ask, can a society engage in torture? Any organised practice of torture by those in authority could surely be seen as symptomatic of Statehood and would represent the oppression of its victims in the manner that was so abhorrent to the Marxists when directed at the working classes. It must also be noted, however, that many States supposedly based on this philosophy could not be argued to be subordinate to society.

(vi) Foucault

In ‘Discipline and Punish’, Foucault explores in detail the philosophy behind the use of torture, especially in the context of punishment and seeks to philosophically explain the development, over time of these practices as well as the increases and decreases in their use. Foucault notes that punishment has evolved from a public spectacle to a process conducted largely in secret and behind closed doors. He focuses on the gradual move from public and corporal punishments, often involving

²⁷⁶ Garaudy R *Karl Marx: The Evolution of his Thought* (Westpoint) 1976 p187

²⁷⁷ *Ibid* p190

torture, common before the nineteenth century as described in the previous section, to the common use of imprisonment as a punishment.

Foucault notes that much of the use of torture as a punishment was driven by a desire for retribution. It revolved around the idea of making the punishment fit the crime and the conception that justice was served by subjecting the victim to the same ordeal they had unleashed upon another person or on society as a whole.²⁷⁸

Punishments were made to fit the crime in a variety of bizarre ways. Foucault refers to cases of crimes being re-enacted in front of the public to discharge this aim with the victim often tortured or executed with the same instruments used in the commission of the original offence.²⁷⁹ Such punishments often displayed a higher level of cruelty than the crime with an increased degree of violence. In some cases additional forms of torture not involved in the crime, including amputation, were added to the punishment.²⁸⁰

Foucault writes extensively on the use of punishment so extreme that they may amount to torture. The point is made that such brutal treatment is often used in the context of a criminal punishment as the law represents the sovereign and a transgression of the law may be seen as an attack on the sovereign.²⁸¹ Crime is seen as "...an affront to [the] very person"²⁸² of the sovereign and the punishment must serve, at least in part, as revenge for this. Public punishments, therefore, constitute a 'ritual' restoration the dignity of the sovereign and expression of the extent of their power.²⁸³ The execution of the sentence had to clearly demonstrate the superiority of the sovereign over everyone else, especially the condemned criminal and it was through the body of the criminal that this power and superiority were expressed. It is

²⁷⁸ Foucault M *Discipline and Punish: The Birth of the Prison* (Penguin) 1979 p45

²⁷⁹ *Ibid* p45

²⁸⁰ *Ibid* p45

²⁸¹ *Ibid* p47

²⁸² *Ibid* p48

²⁸³ *Ibid* pp48-49

for this reason that punishments used a level of torture completely out of proportion to the crime committed. The sovereign had to demonstrate that their power was significantly greater than that of the criminal or their crime.

It is suggested that the gradual replacement of public punishments, which would have satisfied the definition of torture set out in the previous chapter, with such penalties as imprisonment and the use of torture 'behind closed doors', has to do with the nature of the deterrent. It is argued that "...it is the certainty of being punished and not the horrifying spectacle of punishment that must discourage crime"²⁸⁴ The punishment of the victim was no longer seen as a great ceremony but as a necessary and undesirable requirement of the wider system requiring it be shielded from the public gaze.²⁸⁵ This relates to the increased focus on the conviction. "It is ugly to be punishable, but there is no glory in punishing."²⁸⁶ Punishment was often carried out by entities separate to the courts so as to protect the administration of justice from having to dirty its hands through the use of punishment.²⁸⁷ An example used repeatedly by Foucault of this shielding of punishment from the public view involved the replacement of the public chain gangs used to transport prisoners in France with inconspicuous and enclosed carriages.²⁸⁸ Punishment was no longer a glorious means of expressing the power of the sovereign but a reprehensible necessity in a society governed by the rule of law.

Foucault also seeks to explain the decline in the use of torture throughout the nineteenth century described in the previous section with the suggestion that the target of the punishment had changed. It was no longer the intention of the justice

²⁸⁴ *Ibid* p9

²⁸⁵ *Ibid* p9

²⁸⁶ *Ibid* p10

²⁸⁷ *Ibid* p10

²⁸⁸ *Ibid* pp263-264

system to punish the body of the victim but to punish their soul.²⁸⁹ Foucault concedes that many modern forms of punishment including, imprisonment, community or prison work or deportation do act on the body by confining, moving or regulating it. It is argued, however, that such punishments use the body only as an intermediary to reach the soul, the true object of the punishment.²⁹⁰ With a change in the target of the punishment also came a change in its aim. It no longer existed just to destroy and to demonstrate the sovereign power, but also to manipulate and discipline the victim, to turn them into something else, something more acceptable to society.²⁹¹

Much of the above relates to the pattern noted by Foucault of the replacement of torture and public and corporal punishments with imprisonment for a large proportion of offenders. This was, it is argued, the result of a shift in emphasis from the expression or preservation of the power of the sovereign through the damage or destruction of the criminal to the expression of such power through the use of disciplinary regimes to control and to modify their conduct, thought and, indeed, their very being. The objective was to control the victim rather than to inflict upon them the pain or suffering which would be recognised as constituting torture.²⁹² Even in cases of the application of capital punishment, where such a level of control was clearly not the object, Foucault notes the movement towards more humane methods of execution over this period. The introduction of the guillotine in France is cited as an example of the execution of capital punishment involving the minimum interaction between the executioner and the victim, achieving its aim with the smallest possible amount of action upon the body.²⁹³ The absence of pain from the procedure is seen as significant as the sentence is one of death and of death alone without the addition

²⁸⁹ *Ibid* p11/16

²⁹⁰ *Ibid* p11/16

²⁹¹ *Ibid* p233

²⁹² *Ibid* p233

²⁹³ *Ibid* p13

of any other form of suffering that may have been deliberate or incidental in a painful or humiliating execution.²⁹⁴ Foucault notes that such an execution takes life "...just as prison deprives of liberty of a fine reduces wealth."²⁹⁵ It was also noted that such an execution was seen as being less shaming for the victim's family. This form of swift death by machine reaffirming the new-found desire of the State to distance itself from the act of punishment.

Such a situation would certainly reduce the incentive to commit torture for the purposes of punishment but would do little to prevent its use as a means of procuring information. This practice is also explored by Foucault, especially in the context of medieval Europe. Interrogation torture largely related to the historical importance, especially in Continental Europe as described in the previous section, of the confession of the accused.²⁹⁶ This, it was argued, was not only necessary for legal reasons but also prevented the authorities from being forced to gather further information, affirmed that the torture had been a 'victory' over the accused by the sovereign and ensured that their act was publicly acknowledged as opposed to quietly punished.²⁹⁷ The importance of such evidence in any criminal proceedings led to the widespread use of judicial torture. Foucault notes that this practice was aimed at the extraction of information and was regulated,²⁹⁸ there were legal limits to the levels of torture that could be used. Certain victims, for example, were only shown the instruments which would not then be used.²⁹⁹ It was also used to supplement what were sometimes seen as insufficient penalties available to the courts for some crimes.³⁰⁰ It is also noted that the failure of torture was not necessarily seen as proof of innocence and an investigation could continue once torture had failed to produce

²⁹⁴ *Ibid* p13

²⁹⁵ *Ibid* p13

²⁹⁶ *Ibid* p38

²⁹⁷ *Ibid* p38

²⁹⁸ *Ibid* p40

²⁹⁹ *Ibid* p40

³⁰⁰ *Ibid* p41

the required confession.³⁰¹ There was often little hesitation in the employment of torture against those who may have been innocent. It is suggested that the view was taken that "...if the patient is guilty, the pains that it imposes are not unjust; but it is also a mark of exculpation if he is innocent."³⁰² This may well have been seen, in the past, as being the case but it is unlikely that this remains so when torture is practiced today. Foucault notes that modern torture is more likely to take the form of a "...way of obtaining the truth at all costs,"³⁰³ if the information sought is indeed the truth, than of an integral part of the justice system as had previously been the case. Some writers such as Hutson disagree with the assertion that a public punishment always followed private judicial torture, pointing to the English jury system of open trials.³⁰⁴ Many of the motives behind the torture were, however the same across Europe.

(vii) Theories relating to the Need to Control Crime

One of the main motivations behind the use of torture has been the desire to ensure the protection of the public from perceived threats. One anonymous pamphlet dated 1701 entitled *Hanging, Not Punishment Enough, for Murtherers, High-way Men, and House-Breakers*³⁰⁵ expressed grave concern at:

"...the Lamentable Increase of High-way-Men, and House-Breakers among us; and this, tho' the Government has vigerously set it self against them, by pardoning but very Few, and that divers Laws have been Enacted to supress them."

The pamphlet goes on to argue that the prescribed penalty for these offenders at the time, execution by hanging, was failing to deter them as they were argued not to fear death but to go to the gallows only for more criminals to replace them resulting in

³⁰¹ *Ibid* p41

³⁰² *Ibid* p41

³⁰³ *Ibid* p40

³⁰⁴ Hutson L *Rethinking the "Spectacle of the Scaffold": Judicial Epistemologies and English Revenge Tragedy* 89 Representations 2005 30 p33

³⁰⁵ 1701 Printed for A. Baldwin at Warwick Lane see: <http://earlymodernweb.org/waleslaw/hanging.htm>

numerous deaths without any beneficial effect on public safety.³⁰⁶ The solution proposed is extreme;

“...if Hanging will not restrain them, Hanging them in Chains, and Starving them [similar to crucifixion], or (if Murtherers and Robbers at the same time, or Night-incendiaries) breaking them on the Wheel, or Whipping them to Death, a Roman Punishment should.”³⁰⁷

It cannot be doubted that this chilling suggestion was primarily intended as a means of protecting the law-abiding public but other arguments were also made. It is suggested in fact that the deterrent effect of such treatment may be “...the means of preserving great numbers of them, who now yearly by an easie Death are taken off at the Gallows.”³⁰⁸ The suggestion here is that by providing for such punishments and using them where the requirements are met, it may be possible to deter many individuals from committing crimes which would otherwise have resulted in their relatively quick execution by hanging and save many lives. This theory has not been fully tested as the suggested reforms were not enacted and the deterrent value or otherwise of very severe punishments, especially the death penalty, continues to be debated to this day.

(viii) Recent Anti-Torture Theories

In addition to the earlier work focusing, for example, on the social contract, there have been many recent developments in the area of legal philosophy relating to torture. Many of these arise from the post September 11 debates surrounding the acceptability or otherwise of the use of torture against terrorist suspects or those who are believed to possess information capable of preventing a potential attack. The

³⁰⁶ *Ibid*

³⁰⁷ *Ibid* p3

³⁰⁸ *Ibid* p3

possibility of such torture is condemned by writers such as Waldron.³⁰⁹ While Waldron accepts that, legally, it would be possible for the American government to sanction torture, although this would mean changing the law, he argues that this would not be desirable due to the particular status of the prohibition in the legal and social framework of the United States and many other Nations. It is stated that this prohibition exists as a 'legal archetype.' A Legal Archetype being defined as a norm on which substantial areas of the law, whether directly or indirectly, are based and depend. Such an archetype has a 'gravitational force' that supports the surrounding legal framework and holds the system together.³¹⁰

It is argued that the interference with such an archetype would lead to the questioning of the prohibition of a variety of actions which may appear less serious than torture but may be related to it and be described as brutal,³¹¹ acts which may now be described as cruel, inhuman or degrading treatment or punishment. This suggests that the prohibition of torture has formed, or at least is seen to have formed, such an integral part of the legal system that its removal or dilution would jeopardise the existence of the entire climate, described by Foucault, in which punishments are carried out humanely.

This argument very much follows on from Foucault's account of the historical evolution of the nature and purpose of punishment. Waldron argues that the prohibition of torture is archetypal of the principle of the humanity of law, that "[l]aw does not rule through abject fear and terror, or by breaking the will of those whom it confronts. If law is forceful or coercive, it gets its way by nonbrutal methods which respect rather than mutilate the dignity and agency of those who are its subjects."³¹²

³⁰⁹ Waldron J *Torture and Positive Law: Jurisprudence for the Whitehouse* 105 *Columbia Law Review* No 6 2005 1681

³¹⁰ *Ibid* p1748

³¹¹ *Ibid* p1735

³¹² *Ibid* p1726

It is stated that even where the law seeks to punish or to control, this must be done with respect to human dignity and without brutality. People must not be "...treated as bodies to be manipulated,"³¹³ an idea that would seem to progress beyond Foucault's view on the moderation of State power. Force, it is argued need not result in "...the sort of savage breaking of the will that is the aim of torture..."³¹⁴ The key element of this is the effect torture has on its victim and their human dignity. Indeed, the existence of the prohibition as a legal archetype stems from and is secondary to the unique and appalling nature of torture and the effect of this practice on its victims.³¹⁵

Other commentators such as Shue attempt to discuss the unique nature of torture as an unjustifiable act. They seek to dismiss suggestions that a legal system which permits killing, even under the most limited of circumstances can also permit torture without further jeopardising its moral status. These suggestions are based on the acceptance that torture entails the partial destruction of a human being, killing resulting in their total destruction.³¹⁶ It is argued that torture is, as a practice, distinct from killing in combat as a result of the defencelessness of its victims.³¹⁷ Killing is only permitted in such contexts as self-defence or the killing of a member of a particular armed force, it is in essence a 'fair fight'.³¹⁸ In the case of torture, however the perpetrator has absolute power over the victim who has no means of fighting back or halting their suffering and is in no way a threat to their tormentor.³¹⁹ Shue does acknowledge situations where the victim does have the power to bring an end to the torture by, for example, giving the torturer the information they request.³²⁰ Such torture may not prove reliable as a person with strength or commitment to their cause

³¹³ *Ibid* p1727

³¹⁴ *Ibid* p1727

³¹⁵ *Ibid* pp1749-1750

³¹⁶ *Op cit.* Shue p125

³¹⁷ *Ibid* p129

³¹⁸ *Ibid* p129

³¹⁹ *Ibid* p130

³²⁰ *Ibid* p130

may accept the continuation of the torture rather than submit to the demands of the torturers if these were unacceptable to them.³²¹ It is also argued that the victims of such torture cannot truly be described as having a means of defence. One reason for this is that a torturer can never be certain of what their victim does and does not know. It is very difficult, if not impossible, for such a victim to prove their ignorance of the facts the torturer wishes to discover and as Shue observes, victims need "...an escape not only from beatings for what they know but also from beatings for what they do not know."³²² It is also argued that even if one discounts these problems, a victim of such torture does not have a means of defence as their only way out would be to commit an act of betrayal to their cause which cannot be described as an escape as it would involve the victim being forced to surrender their principles and values.³²³

Shue draws a distinction between the practices of 'terroristic torture' used not to damage or influence its victims, (although it almost always has this effect) but to scare the wider public and 'interrogational torture' aimed at extracting this information. He argues, however, that both of these are unacceptable. Terroristic torture would only be morally justifiable in order to accomplish a clearly stated and 'supremely important' aim. It must be the least harmful means of achieving this aim and must be halted as soon as such an aim is achieved.³²⁴ Shue argues that it is difficult to imagine an aim of such importance as to justify the use of terroristic torture, especially where this form of torture is the least harmful means of addressing the

³²¹ *Ibid* p131

³²² *Ibid* p135

³²³ *Ibid* p135

³²⁴ *Ibid* p137

aim.³²⁵ He also notes the lack of historical precedent for States unilaterally halting the practice when they achieve stability, arguing that it becomes entrenched.³²⁶

While Shue accepts the possibility that, in a few cases, the harm associated with interrogational torture may be outweighed by that which it could prevent, the ‘ticking bomb’ situation, he urges caution. Aside from the arguments discussed above relating to the certainty of what the victim does or does not know, one must consider also the threat that the use of torture would “breach the dam” and allow for the more extensive use of torture in the future.³²⁷ It is also suggested that the example commonly used of the ‘ticking bomb’ scenario is specifically tailored to lead a reader to support the use of torture.³²⁸ Such a situation would never arise. There would always be some question relating to the identity of the culprit or the nature of the device making torture unjustifiable for the reasons described above.³²⁹ There would be danger, therefore, in taking the view that the prohibition of torture should be anything less than absolute based on this kind of hypothetical situation.

(ix) Torture and Contemporary Feminist Theory

The issue of torture has also been explored by contemporary feminist philosophers such as Adriana Cavarero. Cavarero, like Shue, is especially concerned by the state of helplessness of the victims of the practice of torture. She focuses on examples of torture from recent history, especially during the holocaust and, more recently, the situation in Abu Ghraib Prison in Iraq. In the case of Abu Ghraib, Cavarero focuses on the highly sexualised nature of the forms of torture used by the female torturers against the male detainees. It is also suggested that this form of torture would have had a disproportionately damaging impact on its victims as it had

³²⁵ *Ibid* p137

³²⁶ *Ibid* p138

³²⁷ *Ibid* p141

³²⁸ *Ibid* pp141-142

³²⁹ *Ibid* pp 141-142

been targeted to be especially offensive to the perpetrators' view of the Arab culture.³³⁰ Other commentators such as Lazreg have suggested that this element was also present in the use of sexual torture by the French military against those involved with the independence movement in Algeria.³³¹ Much is made in this connection of the infamous photographs taken of the Abu Ghraib torture. While committed in private, Cavarerro suggests that much of it may have been directed towards the camera with the documentation of the sexual humiliation of the victims being a part of the torture itself, along with the threat of the resulting photographs being shown to their families.³³² Cavarerro even goes so far as to suggest that the trend described by Foucault of the increased concealment of torture is beginning to be undone as a result of the arrival of the internet, capable of bringing the commission of torture to a global audience.³³³ Cavarerro uses the existence of this kind of abuse to attack the West for hypocrisy in relation to violence, claiming it critically condemns reported acts of violence or torture elsewhere in the world while itself committing such acts for its own purposes.³³⁴ Cavarerro notes the difference in the reaction of the West to the female torturers who provoked considerably more shock than their male counterparts. This has led to feminist criticism of a system that has only recently given women access to the public bodies which have always been the main perpetrators of torture and still subjects them to increased condemnation when such acts then occur.³³⁵

The Nazi death camps were, it is argued, a development that built on and exceeded all forms of torture which had gone before due to their absolute destruction of their victims and their uniquely horrendous purpose. Their aim was not to dominate

³³⁰ Cavarerro A *Horrorism: Naming Contemporary Violence* (Columbia) 2007 p110

³³¹ *Op cit.* Lazreg p123

³³² *Op cit.* Cavarerro p109

³³³ *Ibid* p111

³³⁴ *Ibid* p111

³³⁵ *Ibid* p112

or control their victims as human beings but to render them superfluous as human beings,³³⁶ a concept previously considered by Hannah Arendt. The camps were notable, not just for the horrendous scale on which they brought death, but also for the manner in which they did so and their shocking abilities to kill many aspects of their victims before their eventual physical death.³³⁷

(x) The Impact of the Holocaust on Theories relating to Torture

The examination of the effects of the concentration camps on their victims was also undertaken by Giorgio Agamben. Agamben, like Cavareno, discusses the concept of the 'Musselman,' which is defined as the "...untestifiable, that to which no one has borne witness"³³⁸ It is suggested that "Auschwitz is the site of an experiment unthought today, an experiment beyond life and death in which the Jew is transformed into a Musselman and the human being into a non-human"³³⁹The experience of the untestifiable being the aspect of the torture having the greatest impact on the surviving victim. A comparison can be made to the person described by Cavareno, and originally Primo Levi, as having "seen the gorgon"³⁴⁰ or having viewed the worst of all the horrors and having survived. Such a person may, it is suggested, be altered and Agamben, notes that it may only be becoming visible now, many years after the atrocities.³⁴¹ The analogy of 'having seen the gorgon' is also used by Agamben.³⁴² It relates to the Greek myth of the gorgon whose gaze would inevitably result in death.³⁴³ While this form of torture was not always instantly fatal, it is suggested that it had the effect of turning its victims into Musselmen or dehumanising them. Such an assertion is consistent with the views expressed above

³³⁶ *Ibid* p44

³³⁷ *Ibid* pp33-40

³³⁸ Agamben G *Remnants of Auschwitz* (Zone Books) 1999 p41

³³⁹ *Ibid* p52

³⁴⁰ *Op cit.* Cavareno pp33-40

³⁴¹ *Op cit.* Agamben p52

³⁴² *Ibid* p53

³⁴³ *Ibid* p53

of the unique abhorrence of torture arising from its destruction of the victim's human dignity. It goes further here, however, in the case of one of the most horrific examples in history of the commission of torture, possibly the most horrific. It is suggested that there has been a progression from the insult of the victim's human dignity to their complete dehumanisation.

Arendt had previously gone one step further even than this, suggesting that the victims of the death camps, even whilst still alive, did not truly exist.³⁴⁴ They are "...more effectively cut off from the world of the living than if they had died."³⁴⁵ This is because they continued to exist in such a state of terror that it enforced the oblivion into which they had been taken. This was certainly what those left behind were led to believe, with the regime encouraging the view that the victims had 'ceased to exist' from the moment they were arrested or disappeared.³⁴⁶ It is argued that the old forms of interrogation torture, however horrific they could be, were limited with the victim either surrendering their information or being killed.³⁴⁷ The Nazis had introduced a new even more appalling form of torture to the "totalitarian apparatus." This form of torture had no clear aim, such as the provision of information, and was controlled by what Arendt refers to as "abnormal elements." These people sought to destroy others for no reason of any benefit to themselves. Without such a benefit, be it the protection of the sovereign or information considered to be of significant importance, neither of which would be capable of justifying such action, the only motive for the practice of torture can be one of sadism.

Arendt also discusses how the camps functioned by seeking to dehumanise their victims, also removing their dignity and their identity. This was done, she argues, by every aspect of the camp regime, from the inhuman travelling conditions, a form of

³⁴⁴ Arendt H *The Origins of Totalitarianism* (London) 1967 p434

³⁴⁵ *Ibid* p443

³⁴⁶ *Ibid* p434

³⁴⁷ *Ibid* p453

torture in themselves, to the forced shaving of the victims' heads and the "grotesque" camp uniforms.³⁴⁸ The forms of torture used in the death camps were not all calculated to result in the death of the victim. Arendt argues that many were aimed at manipulating and controlling the body of the victim, not to discipline or rehabilitate it or turn it into that of a good citizen, as Foucault would later argue was the aim of ordinary prisons, but to make it suffer and to "destroy the human person".³⁴⁹ The system also worked through the destruction of the "moral person" by removing the victims' innocence, forcing them to participate in each other's destruction.³⁵⁰ This, as well as causing unimaginable suffering, served to obscure the boundary between right and wrong³⁵¹ and between the victims and their tormentors.

The result of this torture was the complete dehumanization of the victim leaving only "ghastly marionettes with human faces"³⁵² who ultimately submit quietly, without objection to their death. Arendt speaks of the aim of rendering their victims superfluous "...through a way of life in which punishment is meted out without connection with crime, in which exploitation is practiced without profit, and where work is performed without product."³⁵³ Such a regime, however, seeks to render people superfluous by dehumanising them. It seeks not to create superfluous people but to make people superfluous precisely by removing their condition as living people. Such a philosophy seems compatible with the suggestion that the practice of torture operates through the removal of the victim's humanity. The practice of the Nazi death camps, however, took this concept to an unprecedented level of cruelty.

³⁴⁸ *Ibid* p453

³⁴⁹ *Ibid* p453

³⁵⁰ *Ibid* p452

³⁵¹ *Ibid* pp452-453

³⁵² *Ibid* p455

³⁵³ *Ibid* p457

(xi) The Impact of Guantanamo Bay on Theories relating to Torture

Judith Butler also refers to the role the removal identity can play in the practice of torture. She writes in the context of conditions endured by detainees in Guantanamo Bay. Here, again, it is the dehumanisation of the victims which disturbs Butler. She notes that the detainees were restrained and sedated as well as having their heads shaved and their faces covered.³⁵⁴ Of particular relevance here, it is argued, is manner in which then Secretary of Defence Donald Rumsfeld presented the case for such treatment, insisting that these detainees were not like others who entered armed conflict and that such measures were required to prevent them from killing again.³⁵⁵ It is suggested that such detainees are seen as “pure killing machines”³⁵⁶ rather than human beings and are therefore being subjected to the kinds of treatment which would ordinarily be held to be unacceptable for all of the reasons described above.³⁵⁷ This fits into the arguments made by others that the situation following the events of September 11 2001 constitutes a ‘state of exception’ and acts such as the commission of torture are seen by some to lose their reprehensible character in the face of the specific threat faced. This is the view attributed to the US government by these authors. Butler attacks the emergence of what she sees to be an extra-legal regime governing the treatment of detainees at Guantanamo,³⁵⁸ a view that is compatible with that expressed by Waldron who argues, as noted above, that the practice of torture cannot be sanctioned under the American legal system.

Agamben also discusses the concept of the ‘State of Exception’ which has been argued to be applicable in the United States, and possibly much of the western world since the terrorist attacks of September 11 2001. This concept centres on the idea of

³⁵⁴ Butler J *Precarious Life: The Powers of Mourning and Violence* (Verso)2004 p73

³⁵⁵ *Ibid* pp73-74

³⁵⁶ *Ibid* p74

³⁵⁷ *Ibid* p74

³⁵⁸ *Ibid* pp84-85

the extension of State powers during times of national emergency. Such an extension could be seen as allowing interrogation methods or punishments which would not normally be acceptable for the reasons described above, including potentially torture.³⁵⁹

(xii) Compliance Theory

In addition to an examination of the theoretical perspectives on torture, it will be necessary to look at theories on compliance in international law in order to place the United Kingdom's compliance the requirements of the Convention in its proper context. Whilst it may be possible to determine the content of international law, it is not always as clear why States choose to follow the law or not to do so. A number of theories have been advanced in order to address this question. A traditional view of legal compliance is that subjects of a legal system, in this case States, obey the rules of that legal system in order to avoid the risk of sanctions which may attach to a failure to obey such rules. This may well be the case for certain States in their decision to obey certain rules but it is difficult to argue that this forces more powerful States to follow more onerous or inconvenient laws. Guzman observes that such sanctions are "...generally not optimal [because they] consist primarily of economic punishment and reputational losses, they are often too weak to achieve optimal compliance."³⁶⁰ On this basis, it may be argued that a militarily powerful and economically self-sufficient State in the face, for example, of a significant terrorist threat may not have the incentive to comply fully with the prohibition of torture. It is important, therefore to examine how such a State may be encouraged to comply more effectively.

³⁵⁹ Agamben G *State of Exception* (Chicago) 2003 p3

³⁶⁰ Guzman A 'A compliance-based theory of international law' *California Law Review* 90 (2002) 1826 p1829

One theory discussed by Guzman is based on State consent.³⁶¹ It relies on the notion that international law is based on the consent of States and that no such State is bound by an obligation which they have not agreed to and, therefore, there is no reason not to comply. This is, as Guzman notes and as will be observed in Chapter 3, a somewhat simplistic view of international law and it is difficult to see how it operates in the context of torture. This is because, as is discussed in Chapters 1 and 3, all States purport to abide by the prohibition of torture in a manner which would certainly seem to imply their consent to such a norm and yet, independent studies and Committee Against Torture findings show that the practice continues to take place in a substantial number of States. Another such theory considered by Guzman is 'Legitimacy Theory' in which rules are followed where they have been formed through the proper processes.³⁶² This is observed to be a vague concept and, again, fails to explain the continued use of torture in an environment in which States do not challenge the validity of the prohibition.

These theories can be contrasted with international relations based models which focus on the interactions between State actors. There are a number of such theories including Neorealist Theory which focuses on States acting out of self-interest and complying with international law when, and only, when it is in their interests in view of the law in question and the gravity of any potential sanctions.³⁶³ This differs from, for example, Institutional Theory which accepts a greater degree of international co-operation in compliance with the law.³⁶⁴ These theories are much easier to reconcile with the position in relation to torture. Here States can be seen to publically uphold and support a prohibition which is viewed as positive and a stabilising influence whilst privately breaching it where it is convenient for them to do so and they feel able to

³⁶¹ Ibid pp1833-1834

³⁶² Ibid pp1834-1835

³⁶³ Ibid pp1836-1837

³⁶⁴ Ibid p1840

get avoid any significant sanction. The reasons it may be convenient for State to comply or otherwise with the prohibition will be discussed further in Chapter 3.

It should be noted that other commentators take a different view of the development of international law. Slaughter and Burke-White argue that compliance with international law is moving towards groups of States working together to achieve shared goals or to counter common threats.³⁶⁵ At least in the European context, it is noted that "...the Treaty of Westphalia, ending the bloody Thirty Year war with the principle of *cuius regio, eius religio*, has given way to the Treaty of Rome, ending a century of bloody intra-European wars with a concept of pooled sovereignty..."³⁶⁶ This theory is argued to be particularly true in the European context a result of the operation of the European Union.³⁶⁷ It is, however, said to be developing and to be of value elsewhere as the international community is faced with a new generation of problems arising from within multiple States rather than from individual States themselves.³⁶⁸ This theory certainly has significant merit but it is, again difficult to apply it to the issue of torture as while it is certainly desirable that States should view human rights and freedom from torture as a common goal meriting transnational action, the fact that States continue to act contrary to the prohibition suggests that this view could be more sincere.

In view of the above, it would seem that the primary objective of any action taken to address torture must be to ensure compliance by States and it is likely that only a thorough and clear acceptance of the positive and absolute nature of the prohibition of torture will achieve a complete eradication of the practice. Given the tendency of States to act in their own self-interest, however, especially in the face of threats and

³⁶⁵ Slaughter A and Burke-White W 'The Future of International Law is Domestic' Harvard International Law Journal (2006) 327

³⁶⁶ Ibid pp331-332

³⁶⁷ Ibid p329

³⁶⁸ Ibid p330

challenges, it remains important for States, including the United Kingdom to monitor each other's activities and ensure that a full observance of the prohibition is in each State's best interests.

(xii) Conclusion

This section has attempted to explore the philosophical arguments behind the use and prohibition of torture. It has examined a variety of interpretations of the practice spread over a considerable period of time. These views have related to the motives behind the use of torture, its place in the political system and the effect it has on its victims.

One factor that many of these theories appear to have in common is their reference to the humanity of the victims of torture. It is argued that torture is such a barbaric practice because it works by acting against this humanity, whether by offending the human dignity of the victims or by completely destroying the 'human person' as is said to have been the effect of Hitler's death camps. This theory is applicable both to those who would condemn the use of torture with the most vigour and to those who would seek to justify it. For those, who condemn torture, the degradation of the victim's humanity represents a line which must not be crossed. It is the respect due to all human beings that, whatever other practices are used makes torture abhorrent. Others will attempt to justify treatment which may amount to torture by using just this argument and then attempting to exclude the victim from the body of humanity. They argue, as detailed above, a criminal has removed them self from society by defying its laws and has declared war on their Nation. They imply that a terrorist suspect is not a human being but merely a 'killing machine.' It is because these people fall outside the concept of humanity, that it is argued they may be treated in a way in which ordinary people may not.

The famous hypothetical 'ticking bomb' scenario so often used in defence of the practice of torture focuses on the level of harm caused. It is suggested that the harm associated with subjecting one individual to torture would be significantly less than that which may result if a terrorist attack is allowed to occur. While it cannot be denied that this is a difficult moral problem, such a situation would be very unlikely to occur in exactly this fashion and an excessive focus on this question may render people more disposed to compromise on the absolute nature of the prohibition of torture, even in other circumstances.

It has also been argued that the practice of torture existed primarily as a means of controlling the population and fell into disuse as it became more possible to achieve this aim through the use of discipline. The evidence suggests, however, that the use of torture is becoming more common in the modern world. (see previous section)

It has also been noted by a number of theorists that the unique and terrible nature of torture may result in a compulsion on the victim to bring it to an end at any cost by attempting to give the perpetrators what they want. This makes evidence procured this way unreliable and renders the practice far from useful.

Chapter 3

The Politics of Torture

This chapter will seek to examine the political aspects of the use of torture. It will examine the positions taken by various States, over time, in relation to the use of torture and compare these to the actual practice of these States. It will focus on the differences in the approaches taken by States to allegations of torture made against their allies and their enemies and the level of secrecy surrounding their own involvement in the practice. This will help to explain the reasons behind much of the torture practiced today, the majority of which is still conducted for political purposes, and seek to explain the reasons the international mechanisms against torture have assumed their current form as well as the obstacles arising from the current political situation of the practice of torture in the creation of a protection mechanism based on the prevention rather than punishment of the practice.

(i) The Cold War

Despite the supposedly universal application of many of the international human rights standards which emerged following the Second World War and which clearly prohibit the use of torture, many of the States involved in the subsequent Cold War appear to have practiced torture and to have used international revulsion at the practice of torture to their political advantage, often criticising the practice when committed by the opposing side whilst turning a blind eye to the abuses of their allies or even participating in it themselves.

As recently as 1987, E. I. Young, speaking for the United Kingdom before the UN General Assembly, while condemning any practice of torture singled out the abuse of psychiatry and medicine for particular criticism.³⁶⁹ As has been noted in previous sections, this form of torture was mainly practiced during the 1980s in Communist States such as China and the Soviet Union.³⁷⁰ Despite the strong criticism of all forms of torture, the UK was at the time allied to many States themselves engaged in the systematic practice of torture. No special

³⁶⁹ Young E I Speech to United Nations General Assembly 1987 available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N87/569/64/IMG/N8756964.pdf?OpenElement> at p7

³⁷⁰ Amnesty International *Torture in the Eighties* (London) 1984

reference is made in the speech for example, to the methods employed by General Pinochet in Chile such as the *picana electrica* or *el telefono*, or to the numerous forms of torture being perpetrated throughout the 1980s in the Commonwealth. While the United Kingdom would, the following year, pass the Criminal Justice Act 1988 criminalising torture and incorporating the Convention Against Torture, at least in part, into domestic law, it would maintain its close links with States engaged in the practice of torture and, after the Cold War, would develop ties with former rivals despite the limited improvements in their human rights records.

Heinlein argues that Cold War politics were also a key factor behind many of the policy decisions in the period leading up to widespread decolonisation (as discussed below) with the UK very keen to avoid giving a “decisive advantage”³⁷¹ to the Soviet Union which was critical of the practice of colonialism and the manner in which the colonies were administered. This included, in many cases, the use of torture. This criticism of colonialism came despite the behaviour of the Soviet Union in its various satellite States during this period which included the 1956 invasion of Hungary which was followed by widespread human rights abuses as well as the widespread use of torture throughout this region in the 1980s including the export of many of the methods previously used inside the Soviet Union. Cuba was also highly critical of any comment on its human rights record from the United States or its allies, on occasion reminding the UN General Assembly of US roles in the Vietnam War, the bombings of Hiroshima and Nagasaki and the activities of the Ku Klux Klan, when itself criticised.³⁷²

To some extent, it may be argued that the rivalry and conflict arising from the cold war may have served to provide an increased level of accountability for the use of torture. A State involved in the practice may attempt to conceal it but there remained a real risk to such a State of being exposed on the diplomatic stage by hostile States on the opposing side of the political divide who may then, as discussed below, gain an advantage in terms of global public opinion. Where relations between governments are good, there exists a danger that

³⁷¹ Heinlein F *British Government Policy and Decolonisation 1945-1963: scrutinising the official mind* 2002 p128

³⁷² See e.g. Records of discussion at.: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N83/567/24/PDF/N8356724.pdf?OpenElement> at p18

they may turn a blind eye to each other's human rights violations for their own political purposes or, in the most extreme cases, cooperate with and actively assist one another in the use of torture and extra-judicial execution for shared political ends. This happened in Latin America during what became known as Operation Condor and it has more recently been alleged to have taken the form of extraordinary rendition to allow for the torture of terrorist suspects since September 11 2001. It must, however, be noted that a considerable amount of torture took place because of the Cold War in order to gain information or to punish or silence alleged enemies of the relevant State. The abusive use of psychiatric detention referred to above, for example, was typically used against those seen as being ideologically opposed to the Soviet regime. States would also often turn a blind eye to torture and other human rights abuses committed by their allies for their own political purposes. It is possible, therefore, to conclude that torture continued to be a widely used political tool throughout the Cold War but that States were now able to use the prohibition of torture and the public opposition to the practice which had increased in strength since the end of the Second World War as an equally effective tool for the advancement of their political agenda.

(ii) Decolonisation

The use of torture played a part in the debates surrounding the process of decolonisation during the twentieth century. It may be argued that allegations of torture were used to discredit the opposing States in this context as they did carry a considerable amount of weight. As noted in previous sections, some writers such as Lazreg also argue that the public revulsion at the exposure of the systematic practice of torture by the French colonial forces in Algeria during this period played a crucial role in the independence of many of the former French colonies in North Africa and the collapse of the Fourth Republic in France.³⁷³ This is encouraging as, while these developments did take place in response to instances of torture which had already been committed and had resulted in a great deal of suffering,³⁷⁴ the response would have gone a long way towards preventing the use of such torture by these forces in the future as it had been directed specifically towards the populations of the areas

³⁷³ *Op cit.* Lazreg

³⁷⁴ *Ibid* p131

the forces were subsequently withdrawn from as opposed to being a general practice.³⁷⁵ This would not serve, however, to completely prevent the practice of torture in the area completely. The widespread use of torture has been documented in Algeria since the withdrawal of the French troops.³⁷⁶ This has not, however, taken the form of the abusive practices specifically calculated by a foreign power to offend the sensitivities of the local population such as many of the forms of sexual torture which had been practiced in the region prior to the French withdrawal.

It has equally been suggested that the ill-treatment and, in some cases, killing of members of independence movements in prison by British forces, including the beating to death in 1959 of eleven Mau Mau prisoners in a detention camp in Kenya, as well as the general conditions in such camps, prompted sections of the British public and a number of MPs to withdraw their support for colonial rule in Kenya.³⁷⁷ Although much of the political concern in this case stemmed from fears for the future of the government rather than for the suffering of the victims, it can be described as a positive development that the public were seen, by this point, to be likely to react to the exposure of the practice of torture in a way which could result in the removal of a government involved in the practice.

This may suggest that, whatever the failings of the international legal mechanisms for the prevention and punishment of torture, the increasing public revulsion at the use of torture taken together with the growth of democracy or other systems of government allowing the people to remove unpopular administrations from office may provide a safeguard against the use of torture in that regimes previously likely to use torture in order to preserve their power may in some cases refrain from the use of such a practice out of the fear that they may subsequently be removed from office as a result of it. This may also be true of other human rights violations such as the practice of colonialism itself. While any means of preventing human rights abuses is desirable, a full and comprehensive mechanism for the prevention of torture would arguably require a genuine commitment from world leaders to the abolition of

³⁷⁵ *Ibid* p131

³⁷⁶ *Op cit.* Amnesty International

³⁷⁷ *Op cit.* Heinlein pp193-194

the practice rather than the mere fear of exposure and this may prove difficult to achieve due to the inherent desire of governments to preserve their power and authority and the past effectiveness of the use of torture for these purposes, as described in previous sections.

(iii) Operation Condor

Throughout the 1970s and 1980s the military regimes of southern South America, including those of Brazil, Bolivia, Paraguay, Uruguay, Argentina and Chile,³⁷⁸ collaborated in a campaign known as Operation Condor aimed at the elimination of left wing dissidents from the region. The military juntas cooperated in the assassination, torture and disappearance of targeted individuals in each other's territory and outside of the region.³⁷⁹ Examples of this include the assassination of General Carlos Prats and that of Oscar Leiter³⁸⁰ in Washington in 1974. In such operations the military or secret services of one State would coordinate the action against the alleged enemy of another State with whom they had an agreement, often while the victim was in territory of a third State. The result of this was to provide for the elimination of the victim as a perceived threat to the State for whom the attacks were carried out without the implication of its security forces or to allow for action to be taken by a State against an individual outside of its territory. As noted above, these cases highlight the dangers associated with close inter-State cooperation on this issue without transparency. It was still seen by these leaders as acceptable to engage in these human rights violations including torture and enforced disappearances, which can be seen to constitute a form of cruel treatment of the victims' relatives,³⁸¹ and these governments were willing to cooperate in the spread of the practice across the region.

The United States maintained good relations with many of these regimes, at least in the early stages of Operation Condor. This, it has been argued, was out of a desire to support strong anti-communist regimes which would be able to suppress left-wing elements during the Cold

³⁷⁸ McSherry J *Tracking the Origins of a State Terror Network: Operation Condor* 122 *Latin American Perspectives* vol 29 No 1 2002 p38

³⁷⁹ *Ibid* p38

³⁸⁰ *Ibid* p39

³⁸¹ See *Cyprus v Turkey* app No. 25781/94 10 May 2001 35 E.H.R.R. 30 in the ECHR context or United Nations Committee Against Torture Summary Records available at:

http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/SessionsList.aspx?Treaty=CAT

War and would not be likely to destabilise the regional dominance of the United States and its allies. This link is most apparent with the regime of General Augusto Pinochet Ugarte which ruled Chile between 1973 and 1990. Pinochet seized power in a military coup d'état overthrowing President Salvador Allende, the World's first democratically elected Marxist head of State, who would die during the operation. During the course of the coup and its aftermath over three thousand people were killed and many more were tortured, a practice which would continue throughout the period of the dictatorship. The coup was backed by the Nixon administration in the United States who, through the CIA, are accused of providing assistance to Pinochet's armed forces.

The Nixon administration was also concerned about the effects on international trade of many of Allende's policies including the nationalisation in 1971 of Chile's lucrative copper mines. President Nixon and other senior US government figures had sought, for these reasons, to prevent Allende from taking power after his election in 1970 and had attempted to undermine the Chilean economy in order to jeopardise his presidency through the suffering of the population who were to be condemned to "...utmost deprivation and poverty" in order to ensure the compliance of their government.³⁸² When this strategy failed, however, the White House took the step of backing Pinochet's violent coup d'état which would be immediately followed by the widespread practice of torture, enforced disappearances and extra-judicial executions in its bid to consolidate its power.

The CIA is known to have had a close relationship to Pinochet's secret police the Directorate of National Intelligence (DINA) which, under the command of Colonel Manuel Contreras, is known to have participated extensively in the torture and extrajudicial execution of those considered to be a threat to the regime. It was revealed in 2000 that Contreras had been a paid CIA asset between 1974 and 1977, the period to which many of the allegations against DINA relate.³⁸³ During this time the military junta were attempting to consolidate their power and were involved in the disappearance of over 3000 individuals believed to constitute a potential threat to the regime. Colonel Contreras is currently serving a prison sentence in

³⁸² O'Shaughnessy H *Pinochet: the politics of torture* (Latin America Bureau) 2000 p30

³⁸³ *Op cit.* McSherry p53

Chile having been convicted in 2004, for his role in the disappearance of a journalist in 1974.³⁸⁴ Both agencies placed significant importance on the struggle against communism and both used anti-Castro Cuban dissidents in their violent operations.³⁸⁵ O'Shaughnessy notes the crucial role played by the Cuban exiles in the Bay of Pigs invasion,³⁸⁶ many of these exiles fled themselves from the threat of torture under the regime of Fidel Castro in Cuba. Throughout this period, the United States was highly critical of the Cuban human rights record despite any similarities between the conduct of its security services and the activities of DINA in Chile. As noted above the Cuban response to criticism of its human rights record during this period was to note the abuses committed by the US in the preceding years.

In addition to this involvement in Operation Condor, the United States was also involved in the commission of torture in a variety of other areas of the world. In Vietnam, for example, the US Army was engaged in what was known as 'Project Phoenix.' This is described by McSherry as a "...computerized counterinsurgency programme that used assassination, terror, and psychological warfare to decimate civilian sympathizers of the revolutionary Viet Cong."³⁸⁷ This included serious human rights abuses committed in the absence of any due process and resulted in the widespread commission of torture and extra-judicial execution. Again, the abusive regime of the Viet Cong was often invoked in order to justify what was known of the United States operations in the area at the time.

The United States was also involved in 'Project X' whereby US intelligence operatives active in Asia and Latin America were trained using manuals advocating "...assassination, torture, extortion, and other "techniques."³⁸⁸ McSherry states that such training began in the mid 1960's and that these manual were in use in the training of US intelligence officers as recently as 1982.³⁸⁹ Throughout this period the US continued to criticise the practice of torture, especially when committed by Communist States. Its own use of training manuals

³⁸⁴ See e.g.: BBC News Report Porteous C <http://news.bbc.co.uk/1/hi/world/americas/3723733.stm>

³⁸⁵ Op cit. O'Shaughnessy p82

³⁸⁶ *Ibid* p82

³⁸⁷ *Op cit.* McSherry p44

³⁸⁸ *Ibid* p43

³⁸⁹ *Ibid* p43

calling for the use of such tactics was not publicised and has only become public knowledge through the much more recent declassification of US government documents. Throughout this period the United States was also involved in the supply of assistance and support to often violent rebel groups in unfriendly States such as Nicaragua providing backing for their operations. This assistance included the use of such training manuals.

Here, once again, we see torture being used as a political tool, especially by more powerful States. Here they have not only used torture themselves but have encouraged its wider use throughout the world for the furtherance of their own political aims, especially in the context of Cold War politics. Again the suggestion that rival States can somehow police each other can be seen to be flawed as States cooperate in their illegal practices and go to even greater lengths in order ensure that their conduct remains secret. This may ultimately include the extra-judicial killing of torture victims and witnesses to ensure their silence. It may also prove difficult to establish a mechanism aimed at the prevention rather than the punishment of torture where States continue to view the practice as an effective means of securing their political goals globally as well as of ensuring their own protection at home.

(iv) The War on Terror

Since the terrorist attacks of September 11 2001 on New York and Washington DC, The United States and various other States have been involved in what has been termed a 'war on terror.' In addition to the issues, discussed in previous sections, of the use of torture against suspected terrorists, this has also led the United States and other Nations previously vocal opponents of torture to cooperate with States which have been known to systematically practice torture. Akbarzadeh argues, in the case of the United States' relations with Uzbekistan, that US State Department assurances that the continued development of diplomatic ties was dependent upon an improvement in Uzbekistan's human rights record amounted to "...a residual policy line from the pre-September 11 era."³⁹⁰ In fact relations have continued to improve in many areas, including counter-terrorism, with large amounts of

³⁹⁰ Akbarzadeh S *Uzbekistan and the United States: authoritarianism, Islamism and Washington's security agenda* (New York) 2005 p77

money targeted at the State despite its continued presence on the US State Department's list of countries of concern for their violation of basic freedoms and the absence of any concrete evidence of a significant improvement in its human rights record.³⁹¹ It is noted that some in the US State Department view negative human rights records as "...intended for internal use, not a stick for hitting anyone."³⁹² If this view is taken, then it is questionable whether such reports serve any purpose although similar reports of human rights abuses may carry greater weight were they to relate to States less friendly to the US and its allies. It is also difficult to imagine what 'internal use' the State Department might find for another State's human rights record other than to encourage its improvement. It is certainly unlikely, therefore, that the evidence of the practice of torture alone would be significant to limit such cooperation. This may, therefore, be seen as yet another conflict between the aims of universal protection of human rights and the prevention of terrorism with practices such as torture continuing to be tolerated when practiced by States viewed as helpful in the battle against international terrorism and used as a justification for possible action against State which may be found to be uncooperative.

Following the terrorist outrages, it may be argued that allegations of torture have once again been used for political convenience in order to support arguments in favour of wars which western governments had already taken the decision to launch. It is universally accepted that the Taliban in Afghanistan and the regime of Saddam Hussein in Iraq had practiced torture on a widespread and systematic basis and attention was drawn to this during the campaigns to remove these regimes. It has been shown, however, that these regimes had been known to be practicing torture for some time prior to the events of September 11 2001 and the subsequent decision to overthrow them. This took place without many of the governments involved in these invasions taking such strong action against them. Indeed, military action against Iraq in 1991 removed that State's forces from Kuwait but allowed Saddam Hussein to remain in power despite the widespread reports of the regime's use of torture prior to this. It may well be that the appalling and systematic practice of torture

³⁹¹ *Ibid*

³⁹² *Ibid*

by these regimes was only highlighted by other governments when this became convenient as a result of unrelated policy concerns. If this is the case then it will contribute little to the aim of preventing the use of torture as States may well seek to maintain their diplomatic relations with other governments in order to prevent their practices being used against them rather than seeking to halt them altogether. In the worst case, it is at least theoretically possible that more powerful States would deliberately do little to deter the practice of torture by some less powerful States so that they may be able to use this conduct to influence the weaker regime in the future, or to justify its removal.

The new practice of 'extraordinary rendition' has also emerged since the beginning of the 'war on terror.' This takes the form of the arrest or abduction of a victim by forces of one State on its own territory or that of another State. The victim is then transferred to the jurisdiction of a third State where they could be tortured with impunity or otherwise subjected to interrogation methods or punishments which would not be possible or acceptable in the State in which the victim was originally arrested.³⁹³ This is often alleged to involve close cooperation and intelligence sharing by the security services of the States involved which can include the suggestion of questions to be asked or of information to be demanded. This is the most recent alleged example of States cooperating in the use of torture for the protection of their own political objectives. Although public safety may be seen as a more legitimate aim than the preservation of a particular political regime, any mechanism seeking to prevent the use of torture must be absolute in order to provide full protection to those who most need it. There is also the risk considered in the previous section of such measures being used against the innocent leaving them completely without protection. Arguments in favour of such action in the face of the current unprecedented terrorist threat may also serve to dilute the overwhelming public anger at the practice of torture which has become increasingly apparent since the Second World War and which, as discussed above in the context of colonialism, may provide some limited contribution to the prevention and punishment of torture. In cases of rendition, governments have gone to greater lengths to

³⁹³ See UN Torture Committee Records for further details 2009-2010 sessions

carry out torture in secret and have arguably taken more extreme action to avoid this kind of public backlash resulting in the victim being provided with even less protection than they may otherwise have received. This does not mean, however that such public feeling should be jeopardised as this would risk a return to the widespread and open practice of torture throughout the world and any single violation of the prohibition is enough to result in considerable suffering. Extraordinary rendition is also another example of more powerful States and those where the government may feel less able to violate the prohibition of torture encouraging the continuation of the practice in other States or, at the very least having no reason to press for it to be abandoned and as long as States continue to believe that they are able to gain from the practice of torture it is likely to remain difficult to establish any kind of protection mechanism based on the prevention of torture alone.

Another example of the use of allegations of torture to gain advantage in an armed conflict can be found in the current situation in Israel and the Palestinian Territories. Each side of this conflict has accused the other of practicing torture. The evidence would suggest some truth in these allegations and that each side would criticise the other while resorting to similar practices themselves. This would demonstrate the use of the horror of the international community at the practice of torture and the international legal prohibition emerging from this as a political tool in order to encourage the international community to support one particular side in the conflict.

(v) Conclusion

This section has described how the practice of torture has, since becoming politically unacceptable, been used as a tool to gain the advantage in political disputes often stemming from completely unrelated matters. It is open to debate how this contributes to the overall aim of preventing the practice of torture. It is certainly encouraging that torture is now seen as unacceptable to such an extent as States believe that its exposure will damage the authority of the culprit and strengthen the position of that State's enemies, both internal and external, and those who have criticised the practice. One can also hope that there will be a deterrent to those States that would engage in the practice of torture. These States may fear that their

enemies may expose such activities and use them to inflict political damage on the perpetrators in the international arena. This may make the use of torture less common but it may also serve to drive the practice further underground through the use of international cooperation or extraordinary rendition where a State will not practice torture on its own territory but will remove victims to other States which do. This may also render the use of torture more likely to culminate in the execution of the victim to ensure their silence and avoid the embarrassment of exposure. There is also the danger that while public anger among a State's domestic population or the wider international community can itself be used as a political tool to enable a State to gain a political advantage, there is no incentive for States to seek to end the practice of torture itself and to move to a system based on the prevention of the practice before it is able to take place rather than its punishment after it has occurred. Even if such a development remains impossible, a situation in which the practice of torture is driven underground or beyond a State's borders and carried out under increasing levels of secrecy would make it significantly more difficult to control or punish the use of torture and would make it almost impossible to prevent it which must be the aim of the international community. It is also extremely worrying that the suffering of the victims of torture is used as a political tool in this way in order to settle scores with political rivals, the reliance on such a practice in the conduct of politics is hardly conducive to the prevention of torture. Whatever view is taken of the reaction to torture in international politics, dialogue, it is clear that the prevention of this practice requires a comprehensive system of international law and regulation. Unless and until such a system can be implemented effectively, it can only be better for any instances of torture to be exposed on the international Stage whatever the motives of the accuser than to be left hidden to create a climate of impunity. It is certainly true that the Cold War system of the two sides of the conflict holding each other to account for their abuses completely failed to prevent the commission of torture which remained common throughout the world during this period (see previous sections) while States knew they may have been exposed for their abuses, they would often simply provide a standard answer detailing the crimes of their accusers. This led to the unfettered practice of torture causing suffering to many people on both sides of the conflict.

General Conclusion

This chapter has sought to illustrate how torture has been used systematically by public officials throughout history for a variety of purposes. Generally the focus of torturers has been the preservation of their power over the victim or of their jurisdiction more generally. Whether this was to take the form of a punishment for something the victim had done which had the effect of injuring the power of the sovereign, an attempt to obtain information which may prove useful to the sovereign in the preservation of their position or an attempt to extinguish any opposition to the sovereign through the destruction of such a threat or the spreading of fear, the principal aim of the practice of torture has been the maintenance of power. There have, however been some notable exceptions to this rule. One of the most significant of these is the trans-Atlantic slave trade which reduced human beings to mere commodities who were bought, sold and treated in a manner intended to make money for the traders. The victims of this form of torture were not deprived of their liberty and kept in the most appalling conditions to punish them for anything they had done, although some commentators have discussed the possible use of slavery both in the Americas and in the Welsh mines as a punishment for the worst criminals,³⁹⁴ nor were the activities of the slave traders particularly instrumental in the preservation of any particular government, at least not in the United Kingdom from where many of the traders were operating. These people were treated in a manner designed purely to maximise profits. The reason for the horrific conditions aboard the ships which made the crossings from Africa to America and the Caribbean appears to have been to allow for the carriage of as many slaves as possible at minimal cost. Similarly the appalling regimes on the plantations seem to have been devised to ensure the efficient running of these businesses. While slavery may have centred on money rather than power, it was motivated as much by self-interest as any other form of torture and is equally disturbing in its attempts to dehumanise people on a massive scale. In this respect it has much in common with another of the main exceptions to the pattern of

³⁹⁴ *Op cit.* Hanging Not Punishment Enough paragraph 16

torture being committed in the pursuit or maintenance of power, the holocaust. Here, again and as discussed by Arendt, a system was set in place to make individuals superfluous and to remove from them, in large numbers, their individuality and their identity. Once again this was done not for any particular advantage that may be afforded to the torturers, even financial gain, but out of pure sadism.

While torture was largely accepted throughout much of the period in question, as is evidenced by its extremely widespread practice, some philosophers began expressing disquiet about the use of torture, particularly for certain motives many years before the widespread rejection of the practice which followed the holocaust. It is certainly true that the use of torture in the most barbaric forms of punishment has met with approval from some philosophers such as Hobbes and the Social Contractarians as a means to preserve the social order but even Hobbes drew the line at the use of torture to extract information condemning such activity as being contrary to the laws of nature and suggesting, before this view became widely accepted, that evidence gathered in this way tends to be unreliable in character. This would fit in with the Kantian principle that it is not acceptable to use a person as a means to an end, the end here being the gathering of information. This rule would also prohibit the use of torture in the context of punishment where an aim of the punishment is to restore the dignity of the sovereign as described by Foucault or to preserve the social order and it would certainly not allow for the use of slavery

While a strong and widespread movement against the use of torture emerged after World War II when the extent of the abuses of the holocaust became known, there has historically been greater sympathy for the use of torture when a threat to the safety of the public is perceived to exist. This could be seen as early as 1701 in the arguments advanced by the anonymous author of 'Hanging Not Punishment Enough' and has been most apparent in the last decade since the terrorist attacks of September 11 2001 and the al-Aqsa intifada against Israeli targets which has given rise to greater discussion of the 'ticking time-bomb' theory in support of the use of some torture and this is one of the main obstacles to the eradication of torture. Any attempt to do this would have to address all of the motives behind the practice

and, where this cannot be achieved, seek to prevent torture from occurring by focusing on the situations, as identified here, where it is likely to arise.

Part B: The United Kingdom's implementation of the United Nations Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment on the international level.

This section will examine the work of the Committee Against Torture and its engagement with the United Kingdom. Chapter 4 will explore the structure, competence and practice of the Committee as well as some of the general difficulties which arise in relation to attempts to combat torture. It will seek to determine what is required of an international preventive mechanism in order to adequately address the issues raised in Part A of the thesis. It will then discuss the work of the Committee and the extent to which it satisfies these requirements. Specific attention will be given to the increasing focus of the Committee on the prevention of torture and to its expansive approach to the interpretation of the definition of torture set out in Article 1 of the Convention.

Chapter 5 will then focus on the Committee's interactions with the United Kingdom. It will examine in detail the most recent appearances by UK delegations before the Committee, the Committee's observations and recommendations and any subsequent development in relation to the issues raised. This will serve to shed light on the extent to which the Committee is effective in practice in its aim of engaging States parties in a constructive dialogue and sharing good practice to combat the problem of torture in the long term. It will also demonstrate the extent to which the United Kingdom is influenced by the views of the Committee in its interpretation of and level of compliance with its obligations under the Convention.

In relation to both of these chapters it will be necessary to examine the general advice and recommendations given by the Committee in relation to the prevention of torture in relation to its criminalisation and punishment as well as moves to eradicate

the practice through, for example, monitoring and the use of procedural safeguards and its aim to prevent the practice including through training and education in order to achieve a situation in which torture cannot occur.

Chapter 4

The Eradication and Prevention of Torture

While there have been many developments in the last century concerning the international community's response to the problem of the continued practice of torture throughout the world, most of this has focused on the prohibition of torture and its criminalisation and punishment. While this is necessary it may not, by itself, be sufficient to address the problem. This is due to the unique and serious nature of the act of torture which always by definition involves a period of severe pain or suffering³⁹⁵ and also has the potential to cause long lasting and even lifelong damage to its victims. It can, therefore, only be addressed satisfactorily through total eradication and prevention as discussed in the previous part. This may pose some challenges as it is easier for the law to formulate a clear prohibition than a more complex mechanism of the prevent of torture within a society through the modification of practice and of the institutional apparatus of each individual State in order to reach a situation where torture is prevented from taking place as it has been prevented from occurring. This, however, is the only way to comprehensively protect people from the continued violation of this most basic human right and the international community has already made some progress towards achieving this through the activities of various international monitoring bodies.

(i)The Committee Against Torture and Prevention

The focus of many of the Articles of the Torture Convention is the regulation of State responses to the occurrence of the practice of torture. States Parties are obliged to criminalise the practices covered by the Article 1 definition of torture and to make such offences punishable by penalties commensurate to the gravity of the

³⁹⁵ United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, in force 26 June 1987, 1485 UNTS 85 Article 1

crime.³⁹⁶ This serves not only to deal with those who have committed torture, but may also contribute to the eradication of the practice as it is likely to remove those responsible from positions in which they can mistreat individuals and may contribute to the prevention of torture as those who fear severe consequences are unlikely to engage in such conduct, although it will not achieve the latter aim by itself. States must cooperate in the extradition and trial of those accused of such acts³⁹⁷ and must also provide compensation and rehabilitation.³⁹⁸ This represents a significant step forward from previous regional and international treaties such as the International Covenant on Civil and Political Rights³⁹⁹ and the European Convention on Human Rights⁴⁰⁰ which merely sought to prohibit the practice without even seeking to define it. Some of this uncertainty has since been remedied, however, by the jurisprudence of monitoring bodies and the Strasbourg court which will be considered in greater detail in Part C. The Torture Convention places States Parties, for the first time, under the legal obligation to take action against those who are accused of involvement in the commission of torture and to take appropriate measures to provide for the victims of the practice and assist in their recovery.

These developments, while welcome, can still be argued to be insufficient. This is due to the unique nature of the act of torture the key ingredient of which is the infliction of "...severe pain or suffering, whether physical or mental..."⁴⁰¹ This means that, by definition, a victim of torture will have been subjected to a period of pain or suffering during which they will have experienced considerable distress and anguish. This suffering is something that cannot be undone by the subsequent imprisonment of the perpetrator or through the provision of financial compensation or assistance

³⁹⁶ *Ibid* Article 4

³⁹⁷ *Ibid* Article 6

³⁹⁸ *Ibid* Article 14

³⁹⁹ 16 December 1966, in force 23 March 1976 999 UNTS 171

⁴⁰⁰ 4 November 1950, in force 3 September 1953, ETS No. 5

⁴⁰¹ *Op cit.* UNCAT Article 1

with rehabilitation, although such things will certainly be necessary and may be successful in preventing a repetition of the treatment. The only effective means of addressing the problem of torture must, therefore, be the prevention of the practice before it can occur and before its victims are subjected to the often irreparable harm described above in chapter 3.

This does not mean that the requirements that States take action against perpetrators and compensate victims are unnecessary. While the aim of any mechanism for the prevention of torture must be a world in which no torture is practiced, this is not currently the case and until such a situation is achieved victims of torture must receive the support they need in order to rebuild their lives and the culprits must be punished in a manner reflecting the grave nature of their crime. Such measures also form an important part of the preventive framework. The punishment of perpetrators is necessary here both because their imprisonment and removal from their public office is likely to render them unable to commit the same acts again in the future and because of the message of deterrence which it sends to others in similar positions of authority who may be less likely to violate the prohibition if they feel that this would expose them to serious legal consequences. Similarly States will have less to gain from the practice of torture if they are aware that any such acts will result in the need to provide full redress for the victims at their own expense and that this requirement is likely to be enforced with pressure from the international community.

The necessity of a focus on the prevention of torture has led the Committee Against Torture to focus much of its work on the monitoring of compliance with Article 2 of the Convention which requires States Parties to take effective legislative, administrative, judicial and other measures aimed at the prevention of torture.⁴⁰² The importance of this provision to the Committee's work led it in 2008 to publish its

⁴⁰² *Ibid* Article 2

second General Comment on the implementation of Article 2.⁴⁰³ This document contained both general and specific advice to States on the prevention of torture. The main focus of the document is on the institutional apparatus of the States Parties and how this may operate to ensure the creation of an environment in which torture cannot take place.

The document focuses on the identification of the situations in which torture is most likely to occur and the introduction of preventive measures to eliminate the practice in these situations. A key example of this can be found in the discussion of the use of incommunicado detention and the Committee's work to combat this.⁴⁰⁴ This practice is not only argued to have the potential to amount to cruel treatment in itself but is seen to give rise to opportunities for other forms of torture to take place as the public official's control over the victim is unchecked and there is often no oversight of their actions meaning that they may be able to torture the suspect knowing that there is little that may be done about it. The Committee consistently recommends, therefore, that fundamental procedural safeguards are put in place to preserve a detainee's contact with the outside world bringing the activities of the public officials into full view of the public and making the commission of torture more difficult. The three areas which the Committee focuses on here are the detainee's access to a legal representative of their own choosing,⁴⁰⁵ their ability to contact family members⁴⁰⁶ and their right to an independent medical examination.⁴⁰⁷ The Committee also seeks to

⁴⁰³ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee Against Torture, General Comment No. 2, *Implementation of article 2 by States parties* 24 January 2008 UN Doc: CAT/C/GC/2

⁴⁰⁴ *Ibid* and see the Committee's concluding observations at:

http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/SessionsList.aspx?Treaty=CAT

⁴⁰⁵ *Ibid* and General Comment paragraph 13

⁴⁰⁶ *Ibid*

⁴⁰⁷ *Ibid*

encourage as full an education as possible both of law enforcement personnel and of the general public as to the absolute nature of the prohibition of the use of torture.⁴⁰⁸

This, combined with the ability of a potential victim to communicate details of their ordeal to the outside world is seen as a strong deterrent to those who would use torture. The knowledge that they are highly likely to be exposed and punished means that they are significantly less able to resort to the use of torture. This approach can also be seen in the Committee's examination of other aspects of pre-trial detention. Aside from discouraging the use of prolonged detention they also recommend the use of video and audio recordings of interrogations where there is a particular risk of the use of torture in order to coerce confessions.⁴⁰⁹ The Committee also recommends the employment of same sex guards in detention facilities in order to minimise the risk of sexual violence in these institutions.⁴¹⁰

More generally, the General Comment also refers to groups who may be particularly vulnerable to the use of torture as a result of discrimination or marginalisation. States need to be aware of any increased risk of torture being practiced against members of such groups and take action to avoid discrimination of this kind.⁴¹¹ It is also argued that public officials, especially those involved in law enforcement should publish full statistics relating to the identities of those they deal with, disaggregated by characteristics including ethnicity, religion and gender.⁴¹² This, it is stated, could serve to identify any discrimination against, or targeting of, particular groups so that this may be quickly addressed and may also discourage such discrimination if those responsible are aware that such information will be

⁴⁰⁸ *Ibid* paragraph 25

⁴⁰⁹ *Ibid* paragraph 14

⁴¹⁰ *Ibid*

⁴¹¹ *Ibid* paragraphs 20-24

⁴¹² *Ibid* paragraph 25

published and examined. States being examined by the Committee over such data may also take more serious action against any such abuses.

Although prior to the publication of the General Comment, this approach can be seen in the Committee's more recent set of recommendations concerning the United Kingdom following the examination of their periodic report in 2004, here the Committee recommended among other things the repeal of Part IV of the Anti-terrorism, Crime and Security Act 2001 allowing for the indefinite detention without trial of certain foreign nationals suspected of involvement in terrorism⁴¹³ despite the suggestion by the United Kingdom that this was itself a mechanism for the prevention of torture as it was used as an alternative to the deportation of these individuals to States where they may have been at risk of torture contrary to Article 3 of the Convention.⁴¹⁴ They also praised the United Kingdom for the disbandment of the Royal Ulster Constabulary and its replacement with a police force more representative of the religious makeup of Northern Ireland,⁴¹⁵ a reform aimed at the creation of a culture in which sectarian abuses would not be seen as acceptable and would be less likely to occur. Similarly, the Committee praised the policy of not only outlawing torture but also discouraging the manufacture of much of the equipment used in its commission making it more difficult for such acts to take place not only in the United Kingdom but also across the world.⁴¹⁶

The Committee's other functions also place emphasis on the importance of the prevention of torture. Aside from considering State Party reports submitted in accordance with Article 19 of the Convention, the Committee is authorised by Article

⁴¹³ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee Against Torture, Concluding Observations on the United Kingdom 10 December 2004 UN Doc: CAT/C/CR/33/3 paragraph 5(g)

⁴¹⁴ Statement of UK delegation at:

http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en paragraph 33

⁴¹⁵ Concluding Observations paragraph 3(a)

⁴¹⁶ *Ibid* paragraph 3(c)

22 to consider, where the State Party has made an authorising declaration, communications from individuals who “...claim to have been the victim of a violation by a State Party of the provisions of the Convention.”⁴¹⁷ While this may appear to act only as an enforcement mechanism reacting to past breaches of the prohibition, many of the complaints considered under this Article have related to Article 3 of the Convention concerning *non-refoulement*.⁴¹⁸ Here individuals have complained to the Committee that the execution of an order for their removal to another State would violate the Convention as it would place them at risk of torture or other cruel, inhuman or degrading treatment or punishment. Here the Committee is able to give interim instructions to States Parties preventing the execution of such orders until it has been able to consider the matter⁴¹⁹ and such consideration frequently results in the provision of instructions to the State Party not to remove the individual to the State in question.⁴²⁰ This, combined with the general requirement of Article 3 not to remove individuals to these States, itself serves as a strong preventive mechanism by allowing those who are at the greatest risk of being subjected to torture to remain in States in which they are relatively safe and restricting the number of people being sent to those States where torture is most likely to occur. This is not, however, without difficulty as the requirement on States Parties to allow these individuals, some of whom may be viewed as dangerous or otherwise undesirable, to remain in their territory may cause political difficulties within these States and may not encourage governments to allow for the consideration by the Committee of such communications. It also does little to address the continued use of torture in the unsafe destination States which continues to affect those who are not able to reach

⁴¹⁷ *Op cit.* UNCAT Article 22

⁴¹⁸ See eg: Gorlick B *Convention and Committee Against Torture: A Complementary Protection Regime for Refugees* International Journal of Refugee Law (1999) 479

⁴¹⁹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee Against Torture, ‘Rules of Procedure’ 21 February 2011 UN Doc: CAT/C/3/Rev.5 Rule 114

⁴²⁰ See e.g.: *Op cit.* Gorlick

safer States and take advantage of the protection offered by Article 3. Even where all members of a vulnerable group are able to make use of this protection, the continued existence of governments who are minded to use torture against opponents represents a risk to all those under their jurisdiction and other preventive measures will also be required.

Article 1 of the Convention defines torture as including the infliction of severe pain and suffering by, or with the consent or acquiescence of a public official. The Committee uses a wide interpretation of this aspect of its mandate, taking the view that acquiescence can be seen to cover any activity taking place in public or in private where the public authorities in a State Party have not exercised due diligence and done all that they could do to prevent it.⁴²¹ This represents a significant expansion in the duties of States Parties who are charged not only with ensuring the comprehensive prevention of the use of torture by their officials in the discharge of their proper functions but also with doing all that they are reasonably able to do to eradicate the infliction of severe pain or suffering by private individuals against one another and to prevent this from occurring in the future. It also seems to expand the concept of torture beyond the State actions envisaged by many of the theorists described in chapter 2. This may be viewed as onerous but is necessary to ensure the full prevention of torture, the effects of which can be no less severe where it is inflicted in private than when it is perpetrated in public by organs of the State. The most obvious example of this can be seen in the Committee's approach to domestic and gender based violence.⁴²² This is committed, in most cases, behind closed doors, in private homes and by private individuals with little or no involvement of the public officials described in Article 1 of the Convention, something that has led some

⁴²¹ *Op cit.* General Comment 2 paragraph 18 and Concluding Observations

⁴²² *Ibid*

States to argue that it is not within the mandate of the Committee to address the issue.⁴²³

The Committee, however, takes the view that the failure of the relevant public officials of a State Party to take action to prevent such activities constitutes their acquiescence to the suffering of the victims of these abuses and that public officials are under a duty to take action to prevent these activities from taking place. In the case of domestic violence, for example, such action would include, at the very least, the criminalisation of these acts and the vigorous prosecution of the culprits, but is also likely to cover the provision of public information campaigns and support for victims.⁴²⁴ The suggestion that States must modify their institutional structure to prevent abuses by public officials and must, at the same time, take administrative action to prevent these acts being committed by individuals in their private capacity represents what is arguably the most comprehensive approach to the eradication of torture and, if practiced universally, would result in a situation in which torture is prevented from occurring. There are some difficulties, particularly in the level of cooperation required by States Parties in the full compliance in all aspects of their government and potential problems, discussed below, relating to enforcement but it is only with this level of cooperation by States that the practice of torture can be completely prevented. The international community must, therefore, do all that it can to encourage full cooperation by States with such a system in all areas of their legal framework.

The Committee, in conclusion, focuses much of its attention on those areas of its mandate concerned with the prevention of torture. It does this in a number of ways including by reading Article 22 together with Article 3 to prevent the removal of

⁴²³ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee Against Torture, 5th and 6th Periodic Report of Finland 29 November 2010 UN Doc CAT/C/FIN5-6 paragraph 165

⁴²⁴ See CAT concluding observations

individuals to dangerous States and requires action to deter potential torturers. The most significant aspects of its approach, however, have been the examination of the practice of torture as it still exists throughout the world and the identification of the situations in which it is most likely to take place including likely victims and risk factors, and the pressure it places on States Parties to take action by modifying their practices in these areas to eradicate the use of torture and to reorganise their public bodies in a manner consistent with the aim of preventing such torture from occurring in the future as well as taking comprehensive action to prevent the infliction of severe pain and suffering by those who are not public officials. These elements taken together have the potential to form a strong and effective preventive mechanism and while, as discussed below, there are some difficulties associated with the treaty body system of enforcement, a universal application of this approach would represent a significant step towards the complete eradication of torture from society.

(ii) Other Bodies

The focus of the Committee Against Torture on prevention in the context of the deprivation of liberty is similar to the approach taken by other bodies involved in the campaign to eradicate torture. The Council of Europe's Committee for the Prevention of Torture attempts to combat the problem through a regime of visits to places of detention. Here, again, deprivation of liberty is recognised to dramatically increase the risk of torture and the work of the Committee is focused on this situation. The Subcommittee on the Prevention of Torture established by the Optional Protocol to the United Nations Convention Against Torture also focuses on these circumstances and provides for visits by members of the SPT to detention facilities on States Parties' territory in order to identify potential risk factors and to make

recommendations for their improvement.⁴²⁵ As noted above, these bodies focus on the problem of torture occurring in places of detention but this is not restricted only to prisons. The concept of deprivation of liberty is construed widely to cover institutions including police stations, immigration removal centres and psychiatric hospitals. By seeking to regulate the practices of all of these establishments the SPT and CPT examine the majority of situations in which individuals fall under the complete control of the public officials of a State and become subject to an increased risk of torture. And if these recommendations are universally followed the practice of torture would to a large extent be eradicated and prevented from occurring again. The mere existence of a system of visits to these institutions may also be seen to create a more open environment, limiting impunity and making torture less likely to occur.

The Optional Protocol to the Convention Against Torture, in addition to providing for such visits, also requires States Parties to establish a National Preventive Mechanism.⁴²⁶ This consists of one or more organisations which act independently of the government of the State Party in order to monitor the regimes in places where people are deprived of their liberty and to take action aimed at preventing the use of torture in these institutions. These bodies are required to have a variety of powers and must be able to compel cooperation by the authorities in the places of detention in order to ensure their efficacy as a safeguard against the use of torture. The activities of these bodies and the focus of the Committee Against Torture, which has a wider mandate, on the regime in places of detention demonstrates the aim of seeking to identify the situations in which torture is most likely to take place and take action to make it impossible, eradicating the practice in these institutions and

⁴²⁵ Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 18 December 2002, in force 22 June 2006, 2375 UNTS 237 Article 11

⁴²⁶ *Ibid* Article 17

modifying their structure in order to achieve a situation in which torture is prevented from occurring in this context.

(iii) A Preventive Mechanism

As noted in the previous chapter, the ultimate goal of the international response to the problem of torture must be the eradication of the practice. Where this is frustrated by the issues raised in Chapter 1, the international community must seek to prevent torture from taking place with punishment and rehabilitation for torture being a last resort and acting as a partial mitigation of a State's failure to stop torture where it has occurred. The above outlines the approach currently taken by international monitoring bodies to the prevention of torture. A comprehensive prevention mechanism must incorporate all of these elements. Public officials must be prohibited from using torture or removing individuals to any area where torture is likely to take place.

This prohibition needs to be reinforced with the threat of severe penalties in order to remove those individuals who breach it from public office and to deter others. States and the international community must examine the practice of torture to determine where it is most likely to occur including identifying the most likely victims, and take action including the restructuring of their institutional apparatus and the modification of their procedures to prevent the use of torture in these contexts. This must be reinforced through a system of domestic and international monitoring using both institutional visits and a reporting procedure. This will require both the existence of an international monitoring body similar to those which already exist and also full engagement by States with this body and with the mechanism described above. It is only where both of these factors are present that torture can be completely prevented. In addition, States must act against any infliction of severe pain or

suffering. This can be relatively simple in the case of the infliction of suffering by public officials, as described above, but States must also use due diligence and take action to prevent the infliction of such suffering by individuals in their private capacity to ensure that individuals are fully protected from torture.

(iv) Potential Difficulties

The above represents a comprehensive system with which to address the problem of the continued practice of torture. It requires States to take appropriate measures to eradicate torture in all of the situations in which it is likely to occur, modifying their practice to create an environment in which torture cannot occur in these situations and is prevented from being used in the future. If followed fully and universally it may result in the absolute prevention of torture but there are a number of difficulties associated with this. These include issues relating to State participation. As long as it is seen by States and their governments to be in their interests to use torture to maintain public order or to put down opposition and ensure the continued stability of the government, there will remain a real risk of the continued use of torture and the need for an enforcement mechanism to ensure full compliance with any preventive approach. This raises many of the same questions of compliance which affect the existing bodies charged with enforcement of the prohibition. The most obvious example of this is full participation. Most of the existing monitoring bodies are either regional in character and not all of these have full local participation, or have a significant number of non-party States. The United Nations Convention Against Torture, for example, has 153 States Parties⁴²⁷ and while this represents the majority of States currently in existence, there are a significant number of States which are not included and contain populations totalling tens of millions of people who are more

⁴²⁷ See UNTS webpage at:
http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en

vulnerable as a result. It may also be argued that it is the States which are most likely to commit torture might not ratify such Conventions as they would result in the examination of their conduct and engagement with the prohibition may force them to abandon a practice which some governments may view as advantageous . Even where States are party to the Convention, the Committee has faced many of the same difficulties which have to an extent frustrated the operations of the other United Nations Treaty monitoring bodies. These are discussed more fully in previous sections but include, among other things a significant shortage of time and resources and limited cooperation of States Parties, including the problems of non-reporting and late reporting.

Even where appropriate periodic reports are submitted on time, the Committee must wait for several sessions to address them and States Parties are only considered every four years. This, combined with the huge amount of State Practice which would have to be considered to ensure full compliance with the preventive approach described above would suggest that the full prevention of torture may not be something which can be achieved through an enforcement mechanism alone, even with such a preventive approach. In this case the only possible solution to the complete prevention of torture would require the unilateral engagement of States with this model. Prevention may only be achieved where States act to amend their laws and practices in line with the good practice identified by the Committee with at least partial independence from any monitoring body. This may prove to be the ultimate solution to the problem of the continued use of torture but, as noted above, it seems unlikely that all States will be prepared to restrict themselves through this level of engagement in the foreseeable future.

(v) Cultural Relativism in International Human Rights Law

Any fully international preventive mechanism would have implications for cultural relativist arguments in international law. Some commentators in this area take the view that human rights, as they are currently understood derive from a relatively recent development in Western European social and legal tradition and, as such, their compatibility with other traditions must be examined.

Pollis considers this issue at length in the context of Eastern Orthodoxy. It is argued that this branch of Christianity is inconsistent with the 'natural law' which can be argued to form the basis of the concept of individual human rights and which is derived from Catholic doctrine in the period following the schism between these two branches of Christianity during which period Eastern Orthodox doctrine involved very limited recognition of the concept of the individual. It is concluded that "...individual human rights cannot be derived from Orthodox theology...they stem from a radically different world view."⁴²⁸ This may be the case but it does not follow that the two views are completely incompatible. While Pollis does point to some conflicts between traditional Orthodox theology and the notion of equality on which universal individual rights are, at least in part, based, (most notably in relation to the situation of women) this does not seem to manifest itself in a religious sanctioning of ill-treatment targeting any specific group. It should also be noted that, as will be examined fully in Chapter 5, the Committee Against Torture vigorously seeks to oppose the continuation of what it describes as 'harmful cultural practices in States parties, even where such practice have deep-rooted cultural or religious origins. It may be possible to argue that this is a manifestation of the imposition of a particular experience or world view on the world at large but as Pollis notes, "[t]oday all countries at least rhetorically attest to their adherence to the international standards of human rights

⁴²⁸ Pollis A 'Eastern Orthodoxy and Human Rights' HRQ 15 (1993) 339 p354

developed by the United Nations and regional organizations...”⁴²⁹ It can be argued that, at least in the case of torture this has much to do with the wide acceptance of the prohibition as an absolute norm of *jus cogens*, something which, as outlined, in Chapter 2, is a relatively recent development by the standards of any tradition. Pollis notes that this development has, at least to some extent, been influenced by the world’s horror at the Nazi holocaust of the 1940’s⁴³⁰ and it is certainly true, as is also set out in Chapter 2 that this has changed the common understanding of what torture is and the dehumanising effect it has on its victims. This may be seen to result in a new understanding of the human experience of practices such of torture where this has not previously existed in such a way in any legal tradition.

It is also important, in this connection, to consider the interface between Civil and political Rights such as that to be free from torture and Economic and Social Rights. In the 1980s Howard examined arguments being advanced by many that “...economic, social and cultural, but especially “economic” rights (usually meant as the right to development) must take priority over civil and political rights”⁴³¹ in the Third World where it is the non-fulfilment of these rights which can be argued to be a primary cause of human suffering, with the reverse being true in the West. It is certainly worthwhile looking at rights with the question in mind: what is needed to prevent suffering? This may not, however, mean that a hierarchy of types of right is desirable. Howard makes three main arguments in this area. The first of these being that Civil and Political Rights are necessary to ensure the fair distribution of wealth needed to ensure that the full benefit can be obtained from Economic, social and Cultural Rights,⁴³² the second key argument is that they are also needed to ensure

⁴²⁹ Ibid p339

⁴³⁰ Ibid

⁴³¹ Howard R’ The Full-Belly Thesis: Should Economic Rights Take Priority over Civil and Political Rights? Evidence from Sub-Saharan Africa’ HRQ 5 (1983) 467 p468

⁴³² Ibid p470

the requisite social order for the enjoyment of such rights⁴³³ and the third that Civil and Political Rights are, in themselves, necessary.⁴³⁴ The last of these arguments is supported by the example of religious persecution in numerous States.⁴³⁵ The point is made that where Civil and Political Rights are denied to individuals, they may find themselves in situations in which their Economic and Social Rights, even where these are comprehensively protected, have very little value. This may, of course, also be the case for Civil and Political Rights where Economic and Social Rights are restricted. Howard proposes the concept of a “basic right to personal and physical integrity”⁴³⁶ as a solution to this problem. The protection of such rights at the expense of other considerations being preferable to the enforcement of a hierarchy of ‘types’ of rights which are separated by an “artificial distinction.”⁴³⁷ Such basic rights may include freedom from torture and the most fundamental Economic Rights. This would seem to be a sensible approach. The objective of individual human rights is to protect individuals from suffering and, whilst all individuals will be most concerned about the problems which they are facing, the unfortunate truth is that the majority are potentially vulnerable both to torture and ill-treatment but also the suffering which may arise from the denial of basic Economic Rights and need protecting from both of these dangers. In view of the extreme nature of the act of torture as set out in Chapter 2, the right to be free from this practice must be afforded the maximum protection but this should not be read as a justification for the denial of other human rights which may be linked. Where people are denied Economic Rights, for example they may be subjected to pain and suffering on a level comparable with that set out in Article 1 of the Torture Convention⁴³⁸ and given a wide reading of the ‘consent or

⁴³³ Ibid p478

⁴³⁴ Ibid p482

⁴³⁵ Ibid p484

⁴³⁶ Ibid p488

⁴³⁷ Ibid

⁴³⁸ UNCAT

acquiescence of a public official' component of this definition (discussed in the next chapter) it is possible that such abuses may even amount to conduct in breach of the Torture Convention.

(vi) Article 2 of the United Nations Convention Against Torture

The Committee outlined its approach to the interpretation of the requirements of Article 2 when in 2007 it published its General Comment No2⁴³⁹ relating to the 'Implementation of Article 2 by States parties.' This document focuses on the aim of preventing torture from being committed rather than punishing the perpetrator after it has occurred. It follows the approach of attempting to identify the contexts in which torture is likely to occur and recommending measures to prevent this from happening.⁴⁴⁰ It lists examples of the recommendations often made by the Committee which, as stated above, typically include the employment of same sex guards where persons are deprived of their liberty to prevent sexual violence in custody, the video-recording of all police interviews to minimise the risk of abusive interrogation techniques and the use of recognised procedures such as the Istanbul Protocol⁴⁴¹ in the investigation and documentation of torture.⁴⁴² The Committee takes particular interest in places of detention as this is where a substantial amount of torture is practiced. Much of the Committee's general focus on prevention concerns the recommendation of procedural changes to eliminate the practice of incommunicado detention as this is seen to provide opportunities for torture to be committed with impunity. The Committee also emphasises the importance of

⁴³⁹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee Against Torture, General Comment No 2, 'Implementation of article 2 by States parties' 24 January 2008 UN Doc: CAT/C/GC/2

⁴⁴⁰ For a discussion of the Committee's approach to prevention prior to the General Comment see Op cit. Ingelese C 249

⁴⁴¹ Office of the United Nations High Commissioner for Human Rights Geneva *Istanbul Protocol* Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Professional Training Series No.8/Rev 1 United Nations New York and Geneva 2004

⁴⁴² *Ibid* Paragraph 14

fundamental procedural safeguards when a person is detained. Factors such as the right of a detainee to immediate access to an independent legal representative and, where appropriate to an independent doctor are also seen as vital to preventing the practice of torture in police custody facilities.⁴⁴³ Article 11 of the Convention also requires States Parties to systematically review their practices relating to detained persons.⁴⁴⁴

As part of its focus on identifying situations in which there is a risk of torture, General Comment No2, unlike the Convention itself, makes particular reference to ‘individuals and groups made vulnerable by discrimination or marginalisation.’ In this context it is noted that the laws of States Parties must be applied to all persons without discrimination and that States Parties should take positive action to prevent the torture of those who may be more vulnerable to ill-treatment as a result of their membership of a marginalised group.⁴⁴⁵ It is stated that while such action should include the monitoring and investigative techniques described above, it should not be limited to these areas.⁴⁴⁶ This may suggest some support for the argument that States Parties should consider the vulnerability of particular groups in all areas of their practice and take action to mitigate the risks they face before torture can occur. To facilitate this, the Committee should also consider in all areas of its practice, situations in which specific groups are likely to be particularly vulnerable to the use of torture and make recommendations to rectify this. The Committee’s experience in the examination of a substantial number of States Parties in a variety of situations combined with its non-political nature means that it is well equipped to identify

⁴⁴³ These are often considered. For a full list of issues examined by the Committee see Summary Reports of the Committee’s sessions at: http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/SessionsList.aspx?Treaty=CAT last accessed 09/02/2014

⁴⁴⁴ This is also the role of the Subcommittee on Prevention created by the Optional Protocol to the Convention,

⁴⁴⁵ *Ibid* paragraph 20

⁴⁴⁶ *Ibid* paragraph 21

examples of good and poor practice and to communicate these to the other States Parties with the aim of preventing torture globally.

The General Comment outlined a number of specific areas in which preventive action should be taken. Article 10 of the Convention requires States Parties to educate public officials, including law enforcement personnel on the prohibition of torture but the General Comment goes further and calls for the wider education on the prohibition of torture and its absolute nature, not just of the public officials whose actions are covered by the Convention but also of the population more generally.⁴⁴⁷ It is argued that the knowledge of both the perpetrator and the victim that the practice of torture is illegal will act as a strong deterrent. This is also true where such acts are universally perceived as unacceptable in the general population of the State and a reading of Article 2 consistent with this approach may require States to guide public opinion in this direction. The Committee therefore takes a keen interest in the training given to public officials concerning both the prohibition and standards of good practice which may be applied in order to avoid incidents which may violate the Convention. With reference to vulnerable groups, the General Comment calls for the 'sensitization training' of public officials to address the particular vulnerability of these groups.⁴⁴⁸

The Committee will seek to encourage States Parties to take appropriate action where any part of their government is seen to be actively prejudiced against any vulnerable group. At its 44th session in 2010, Switzerland was encouraged to take action to address allegations of police violence targeted at victims of African origin in the Cantons of Geneva and Vaud.⁴⁴⁹ The Committee has also attempted to bring an

⁴⁴⁷ *Ibid* paragraph 25

⁴⁴⁸ *Ibid* paragraph 24

⁴⁴⁹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee Against Torture, 44th session, Concluding Observations of the Committee Against Torture Switzerland 25th May 2010 UN Doc: CAT/C/CHE/CO/6 paragraph 8

end to discrimination by police officers in Northern Ireland, for example, by recommending in 1998 the restructuring of the Royal Ulster Constabulary in order to render it more representative of the religious composition of the community it served.⁴⁵⁰ The aim of such a change being to create a culture in the police force whereby abuses targeted at members of particular religious communities are not seen as acceptable and will, therefore, become far less likely to occur. The United Kingdom Government had taken this action by the time its next periodic report was considered by the Committee in 2004. The Committee has also made similar recommendations concerning the staffing of the Austrian police and prison services which were observed to employ low numbers of officers from minority groups,⁴⁵¹ something that has the potential to increase the risk of targeted abuse against members of these groups.

The General Comment focuses on the prevention of the torture of women as well as various minority groups, including ethnic and sexual minorities, who are also seen to be at greater risk of being subjected to torture due to discrimination and marginalisation in a similar manner to many such groups. Here particular reference is made to women who are also members of minority groups who may, in some circumstances, be particularly vulnerable. In relation to this, the Committee notes the lack, in many State Party reports of full statistics disaggregated by age, gender, ethnicity and other relevant characteristics relating to aspects of the implementation of the Convention.⁴⁵² It is argued that the provision of such data can assist in the identification of discriminatory treatment which may lead to violations of the

⁴⁵⁰ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee Against Torture, 21st session, Concluding Observations of the Committee Against Torture United Kingdom of Great Britain and Northern Ireland 17th November 1998 UN Doc: A/54/44 paragraph 77(e)

⁴⁵¹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee Against Torture, 44th session, Concluding Observations of the Committee Against Torture Austria 20 May 2010 UN Doc: CAT/C/AUT/CO4-5 paragraph 12

⁴⁵² *Op cit.* General Comment No.2 paragraphs 22-23

Convention and which may not otherwise be dealt with. The knowledge that States will be required to provide the Committee with such information may also have the effect of increasing the pressure on governments to take action to prevent such discrimination.

This focus on the prevention of torture does not mean that the Committee is not concerned with the punishment of acts contrary to the Convention. While any completely effective system of the prevention of torture would render this superfluous, such a situation remains a long way off and torture continues to be practiced across the world. Article 4(2) of the Convention requires that acts of torture are "...punishable by appropriate penalties which take into account their grave nature."⁴⁵³ The existence and regular imposition of such penalties on those found to have committed abuses has the potential to act as a strong deterrent to those who may otherwise consider committing torture in the exercise of their public functions. Recent examples of the Committee issuing recommendations aimed at the removal of climates of impunity can be found in relation to the consideration of the reports of Jordan and Syria in 2010.⁴⁵⁴ Particular concern has been raised at the lack of appropriate penalties where victims appear to have been targeted on the basis of their membership of a vulnerable group. At the Committee's 44th session in 2010, the Committee raised reports which it had received of Austrian police officers accused of subjecting members of ethnic minorities to racist abuse and severe violence. It was noted that some of the officers, although ultimately convicted, received only

⁴⁵³ *Op cit.* UNCAT Article 4(2)

⁴⁵⁴ See: Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee Against Torture, 44th session, Concluding Observations of the Committee Against Torture Jordan 25 May 2010 UN Doc: CAT/C/JOR/CO/2 paragraph 10 and Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee Against Torture, 44th session, Concluding Observations of the Committee Against Torture Syrian Arab Republic 25 May 2010 UN Doc: CAT/C/SYR/CO/1 paragraph 13

suspended sentences.⁴⁵⁵ It was argued that this did not discharge the State Party's obligations under Article 4(2) of the Convention as not only did it fail to provide justice for the victims in this case, but it also created no deterrent for other public officials who may be inclined to behave in the same way, contributing to a climate of impunity in which such officials feel able to commit similar acts, often targeting vulnerable victims, without fear of punishment. It also represents a failure on the part of the State party to adequately communicate the unacceptable nature of such actions.

In addition to seeking to protect individuals from abusive actions from public officials, the Committee also interprets the Convention to provide protection from harmful cultural practices. While these practices do not, generally speaking, involve public officials of the States Parties, Article 1 of the Convention requires only their consent or acquiescence for such practices to constitute torture. This is interpreted as a duty on States Parties to enact and enforce laws prohibiting these practices. The Committee has previously encouraged States Parties to take action against harmful cultural practices including Female Genital Mutilation⁴⁵⁶ and early marriages.⁴⁵⁷

Article 3 of the Convention prohibits the expulsion return or extradition of any person to any State where there are substantial grounds for believing they would be in danger of being subjected to torture. This wording means that this provision applies to States extraditing their own nationals but the Committee's main concern in

⁴⁵⁵ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee Against Torture, 44th session, Concluding Observations of the Committee Against Torture Austria 20 May 2010 UN Doc: CAT/C/AUT/CO4-5 paragraphs 20-21

⁴⁵⁶ The Committee has praised action taken to prevent this See e.g. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee Against Torture, 33rd session, Concluding Observations of the Committee Against Torture United Kingdom of Great Britain and Northern Ireland 10th December 2004 CAT/C/CR/33/3 paragraph 3(c)

⁴⁵⁷ The Committee has made numerous comments on this See e.g. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee Against Torture, 44th session, Concluding Observations of the Committee Against Torture Yemen 25 May 2010 UN Doc: CAT/C/YEM/CO/2/Rev.1 paragraph 31

this area has been the removal of foreign nationals to potentially unsafe States.

Article 3(2) requires States Parties to take into account all relevant considerations in determining the existence of such a risk of torture. This includes the existence of a “...consistent pattern of gross, flagrant or mass violations of human rights.”⁴⁵⁸ In such cases a State would be expected to assess as a relevant consideration, for example, whether the person to be removed belongs to any group which may be particularly at risk from such violations. In addition to seeking to prevent the removal of vulnerable persons to States where they are at risk of torture, the Committee has sought to safeguard the position of individuals belonging to minority groups by encouraging States Parties to offer increased protection in their application of domestic nationality laws. During its 44th session, it questioned the delegation from Jordan over allegations that State had removed its nationality from residents of Palestinian origin.⁴⁵⁹ It also questioned Liechtenstein over its naturalisation laws requiring stateless persons to be resident in that country for a period of thirty years before acquiring its nationality.⁴⁶⁰

⁴⁵⁸ *Op cit.* UNCAT Article 3(2)

⁴⁵⁹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee Against Torture, 44th session, Concluding Observations of the Committee Against Torture Jordan

25 May 2010 UN Doc: CAT/C/JOR/CO/2 paragraph 24

⁴⁶⁰ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee Against Torture, 44th session, Consideration of the 3rd report of Liechtenstein Summary Record of the first part (public) of the 938th Meeting of the Committee Against Torture 4th May 2010 UN Doc: CAT/C/SR.938 paragraph 21

Chapter 5

The United Nations Committee Against Torture and its Constructive Dialogue with the United Kingdom

(i) Introduction

One of the main actors in the international struggle against torture is the United Nations Committee Against Torture which was established under Article 17 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984.⁴⁶¹ The Committee's role is to monitor and encourage compliance with the provisions of this Convention and to engage with States parties in a constructive dialogue with the aim of encouraging them to improve their compliance with the Convention's requirements relating to the cessation and punishment of torture, and increasingly to encourage changes in the administration of States aimed at creating an environment in which torture cannot take place. This chapter will seek to examine the structure and functions of the Committee and their suitability for these purposes as well as to explore the Committee's consideration of the United Kingdom's most recent periodic report as an example of the Committee's procedures in practice and an illustration of their effectiveness and of the United Kingdom's implementation of the Convention and how this may be improved.

The United Nations Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (hereafter the Convention or CAT) was ratified in 1984 and has been in force since 26 June 1987. The Committee has been in existence since 1 January 1988.⁴⁶² Although the Convention initially entered into force after the ratification or accession of just 20 States in accordance with Article

⁴⁶¹ 10 December 1984 (in force 26 June 1987) 1465 UNTS 85

⁴⁶² See first annual report of the Committee Against Torture at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=1&DocTypeID=27

27,⁴⁶³ it has since been widely ratified internationally and currently has a total of 153 States Parties,⁴⁶⁴ representing the vast majority of States currently in existence. All of these States are obliged to report to the Committee.⁴⁶⁵ As discussed in previous chapters, the Convention aims to define, prohibit and punish acts of torture. Article 1 of the Convention sets out the definition of torture:

“...any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third 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, where such pain or suffering is inflicted by or at the instigation 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.”⁴⁶⁶

Articles 2-16 detail the duties of States Parties in relation to the abolition of the practice. It is in relation to these requirements that States are examined by the Committee. Article 2, for example, requires government action to prevent the use of torture,⁴⁶⁷ while Article 3 prohibits the refoulement, deportation or extradition of persons to States where they risk being the victim of violations of the Convention.⁴⁶⁸ Articles 17-24 of the Convention relate to the establishment and operation of the Committee.

⁴⁶³ Op cit. UNCAT Article 27

⁴⁶⁴ United Nations Treaty Collection Ratifications Page at:

http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en

⁴⁶⁵ Op cit. UNCAT Article 19

⁴⁶⁶ Ibid Article 1

⁴⁶⁷ Ibid Article 2

⁴⁶⁸ Ibid Article 3

(ii) The Committee Against Torture

Article 17(1) of the Conventions provides that the Committee shall be composed of “...ten experts of high moral standing and recognised competence in the field of human rights, who shall serve in their personal capacity.”⁴⁶⁹ Such experts are to be elected by the States Parties, “consideration being given to equitable geographical distribution...”⁴⁷⁰ While there is no clearly defined requirement of even geographical distribution beyond this vague reference to equitable distribution in Article 17(1), Parties have tended to elect members from a relatively diverse selection of States. The current members of the Committee originate from Chile, China, Denmark, Georgia, Italy, Mauritius, Morocco, Nepal, Senegal and the United States of America.⁴⁷¹ This arguably represents a relatively even geographical distribution, despite some evidence of a European bias. When the Committee was formed on 1 January 1988, it comprised 1 member from Africa, 1 from Asia, 2 from Latin America, 1 from North America, 2 from Eastern Europe and 3 from Western Europe.⁴⁷² Nowak and Mc Arthur note that this resulted in complaints from some African States given that an informal consensus had previously been reached that the Committee should comprise 1 member from Asia, 2 from Latin America, 2 from Eastern Europe, 3 from Western Europe and 2 from Africa.⁴⁷³ Even this model may not have resulted in an equitable distribution as it would leave Asia and North America under represented despite their substantial populations. It must be noted, however, that in the early stages of the Committee, ratification of the Convention in some regions was not as uniform as it is at present. Given that the Committee, with only ten members, is the smallest of the United Nations human rights treaty bodies, it may prove difficult to

⁴⁶⁹ *Ibid* Article 17(1)

⁴⁷⁰ *Ibid*

⁴⁷¹ See CVs of Members at: <http://www2.ohchr.org/english/bodies/cat/members.htm>

⁴⁷² Nowak M and McArthur E *The United Nations Convention Against Torture: A Commentary* (OUP) 2008 p591

⁴⁷³ *Ibid* pp591-592

achieve a genuinely equitable geographical distribution of membership without having to compromise on the other requirements of membership such as independence and recognised competence in the field of human rights. In practice members have tended to act fairly in their interaction with States Parties regardless of their geographical position and there is little evidence that any European bias on the Committee would result in a lesser level of scrutiny of UK practice. Some States, however, may react more negatively to questioning from members of certain nationalities.

The convention also makes reference to “...the usefulness of the participation of some persons having legal experience.”⁴⁷⁴ This does not seem to suggest that the Committee should be composed entirely of legal professionals or set any specific quota for such members. In practice many of the Committee’s members have been legal practitioners but a number of other professions have also been represented. In addition to legal practitioners and academics, recent Committee members have included a political academic, several diplomats, a magistrate, a psychologist and a member of the United Nations staff.⁴⁷⁵ This is clearly a positive selection. While a certain amount of legal expertise is essential to the operation of the Committee, the inclusion of other professionals provides the Committee with an in-depth knowledge of various areas of State practice in which there may be a danger of the violation of the Convention. Such a diverse Committee also has the advantage of being able to make a wider range of recommendations for the prevention and avoidance of torture. Ingelese notes, however, the risk of members’ judgement being affected by their roles outside the Committee.⁴⁷⁶

⁴⁷⁴ *Op cit.* UNCAT Article 17(1)

⁴⁷⁵ *Op cit.* CVs of members

⁴⁷⁶ Ingelese C *The UN Committee Against Torture: An Assessment* (Martinus Nijhoff) 2001 p98

While the Convention requires that the Committee should be made up of independent experts serving in a personal capacity and not as agents of their governments, it is arguable that there may be the potential for the effectiveness of the Committee to be jeopardised by the election process set out in Article 17(2). This states that members “...shall be elected [by States parties] by secret ballot from a list of persons nominated by States parties.”⁴⁷⁷ Difficulties may arise from the requirement that a potential member must be nominated by their national government, of whom they are required to act independently once elected. Once nominated prospective members are then elected by the States parties. It may be possible to suggest that a system which permits States to vote for those who will police them may not necessarily produce a Committee that is willing and able to take action against powerful States over non-compliance with the Convention. There is, however, no evidence that this has been the case in practice and it is undoubtedly true that any move to take the power to elect Committee members away from States parties would not receive the necessary support from States and would risk a reduction in the level of cooperation with the Committee.

The other major area of concern relating to the election process for Committee members is the fact that nothing in the Convention or the Committee’s Rules of Procedure prevents members standing for re-election and many do, in fact, serve multiple terms.⁴⁷⁸ There may be a theoretical danger here, as noted by Ingelse, whereby Committee members become reluctant to take an assertive stance with States parties, or even being more assertive when dealing with certain States, for fear of jeopardising their chances of being nominated and subsequently re-elected by States parties.⁴⁷⁹ Again, there is no evidence of this having occurred with many of the

⁴⁷⁷ *Op cit.* UNCAT Article 17(2)

⁴⁷⁸ *Op cit.* Nowak and McArthur p594

⁴⁷⁹ *Op cit.* Ingelse p97

members having served multiple terms and gained valuable experience in dealing effectively with States parties, encouraging their compliance and making innovative recommendations for the avoidance of torture.

Nowak and McArthur also point to the potential difficulties which may arise from the fact that following the death or resignation of a Committee member, Article 17(6) allows the State which had initially nominated that member to freely appoint one of its own nationals to serve for the remainder of the previous member's term.⁴⁸⁰ The only means of defeating the appointment by such a method of a person who is not qualified or independent is for more than half of the States parties to formally object to the appointment within six weeks of being advised of the decision by the UN Secretary General.⁴⁸¹ This is unlikely to occur for diplomatic reasons. Any State at risk of this kind of international backlash may be unlikely to succeed in having one of its nominations elected to the Committee to begin with. It should also be noted that many of the Committee members appointed through this process have gone on to make valuable contributions to the Committee. Two recent Committee members were appointed through this mechanism and both have since been re-elected by the States parties.⁴⁸² Nowak and McArthur suggest that the nomination of members by States parties directly rather than through any United Nations organs underlines the fact that the Committee is

“...not a body of the United Nations but a relatively autonomous quasi-judicial treaty based organ created by the States parties of the Convention.”⁴⁸³

The Committee is dependent on the United Nations for its staff and facilities⁴⁸⁴ but States Parties are responsible for bearing the costs of meetings.⁴⁸⁵ The Committee

⁴⁸⁰ *Op cit.* Nowak and McArthur p603

⁴⁸¹ *Op cit.* UNCAT Article 17(6)

⁴⁸² *Op cit.* Nowak and McArthur p594

⁴⁸³ *Ibid* 581

has been able to establish its own rules of procedure⁴⁸⁶ and has been largely independent of the United Nations in its ordinary operations.

Nowak and McArthur also consider the alternative measures considered by States in the process of drafting the Convention. Some States had advocated the monitoring of compliance with the Convention through existing treaty bodies such as the Human Rights Committee established under the International Covenant on Civil and Political Rights. This, however, was seen to amount to a substantial change in that Committee's mandate which would be difficult to justify under the Covenant.⁴⁸⁷ There were also suggestions that the Convention should be self-enforced with any international monitoring of compliance being optional. This was met with arguments that such a system could not be effective given the well-documented continuation of the practice of torture despite a substantial body of domestic and international law purporting to prohibit this.⁴⁸⁸ It would certainly have been a missed opportunity had States chosen to make the Committee's supervisory powers optional as a Committee with full supervisory competence over all the States parties would be uniquely placed to coordinate international efforts and good practice in order to secure the prevention of torture globally. Even where the Convention compels States Parties to engage with the Committee its impact may be argued to have been limited by some degree of non-cooperation by certain States, a problem which would be made considerably worse if States were not obliged to report.

Even during the drafting of the Convention, some States were concerned about the financial implications of the establishment of such a Committee.⁴⁸⁹ While the Committee is financed and resourced by the States Parties through the Office of the

⁴⁸⁴ *Op cit.* UNCAT Article 18(3)

⁴⁸⁵ *Ibid* Article 18(5)

⁴⁸⁶ *Ibid* Article 18(2)

⁴⁸⁷ *Op cit.* Nowak and McArthur pp 586-587

⁴⁸⁸ *Ibid* p587

⁴⁸⁹ *Ibid* p588

United Nations High Commissioner for Human Rights, it has been faced with a serious lack of resources which has weakened its ability to discharge the wide mandate that makes it such a vital tool in the battle against torture. Some current Committee members have noted the irony that while the Committee presses States Parties for the full cooperation required by the Convention, it is fully aware that it would be unable to deal with the workload that would be created if this was forthcoming.⁴⁹⁰ Article 18 of the Convention relates to the general operation of the Committee and provides that the "...Secretary General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under this Convention."⁴⁹¹ While the Committee is provided with staff and facilities for its twice yearly meetings, it does face a lack of resources⁴⁹² and a chronic shortage of time which has resulted in a substantial backlog of State party reports and individual communications.⁴⁹³

(iii) Consideration of State Party Reports

One of the main functions of the Committee is the consideration of State party reports. Article 19(1) of the Convention requires States parties to submit an initial report to the Committee, through the UN Secretary General, on "...the measures they have taken to give effect to their undertakings under this Convention,"⁴⁹⁴ within one year of the entry into force of the Convention for the State party concerned. This report is then considered by the Committee in a public meeting with a delegation of officials from the State party concerned. The Committee members will question the

⁴⁹⁰ Notes from observation of public meetings of the Committee Against Torture available on request

⁴⁹¹ *Op cit.* UNCAT Article 18(3)

⁴⁹² *Op cit.* Observation of meetings

⁴⁹³ Annual Report of Committee Against Torture November 2009 UN Doc A/65/44 at:

http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en p7

⁴⁹⁴ *Op cit.* UNCAT Article 19(1)

delegation on issues of State practice relating to Articles 2-16 of the Convention arising from the report or from information received from non-governmental organisations, which are also permitted to make representations to the Committee. A second public meeting will follow at which the delegation will attempt to give answers to all of the questions raised by the Committee members and to provide any further information requested. Based on this the Committee will then issue Concluding Observations on the State's level of compliance with the requirements of the Convention as well as recommendations as to how this may be improved. The Concluding Observations and recommendations of the Committee will then form the basis for the State's supplementary reports to be submitted every four years after the submission of the initial report.⁴⁹⁵ The aim of this exercise is to establish what is described as a 'constructive dialogue'⁴⁹⁶ with the State party in order to provide it with the encouragement and advice needed to improve its compliance with the Convention and to share best practice in the prevention and avoidance of the commission of torture. Ingelse also notes that a repeated reporting system will ensure that governments are aware of the areas where their policies fall short of the standards required by the Convention.⁴⁹⁷ It will also have the effect of maintain constant contact between the Committee and States parties, ensuring recommendations are followed up.

Weaknesses of this system include the problems of non-reporting and late reporting by State parties. Some of the reports considered in recent sessions have been submitted up to fourteen years late⁴⁹⁸ with the Committee unable to assist in the improvement of the human rights records of these States parties during this

⁴⁹⁵ *Ibid* Article 19(1)

⁴⁹⁶ Committee Against Torture Revised Rules of Procedure UN Doc CAT/C/3/REV.5 at: <http://tb.ohchr.org/default.aspx?Symbol=CAT/C/3/Rev.5>

⁴⁹⁷ *Op cit.* Ingelse p127

⁴⁹⁸ Committee Against Torture Initial Report of Ethiopia UN Doc :CAT/C/3/ETH1

period. There are also a number of States which became party to the Convention considerably more than one year ago and are yet to make any report to the Committee.⁴⁹⁹ This has not been a serious obstacle in the case of the United Kingdom, which has submitted a total of four reports to the Committee and has a good record of prompt submission. It should be noted, however, that the UK is yet to submit its fifth report to the Committee despite being asked to do so by 2008.⁵⁰⁰

In some cases States have submitted reports to the Committee in accordance with Article 19 but then fail to send a delegation to attend the Committee's examination of the report. This has happened in the cases of Cambodia in 2003⁵⁰¹ and Yemen in 2009.⁵⁰² In such cases the Committee has attempted to mitigate the frustrating effect of this non-cooperation by considering the report in the absence of a delegation from the State Party and submitting Preliminary Concluding Observations on the basis of the report and any communications received from non-governmental organisations. This procedure is provided for in Rule 66(2)(b) of the Committee's Rules of Procedure⁵⁰³ which it was free to draft under Article 18(2) of the Convention. This method of consideration is widely accepted not to be as effective as a full consideration in the course of a dialogue with a delegation from the State party and has not been universally accepted by Committee members for this reason.⁵⁰⁴ It is, however, undoubtedly preferable to postponing the examination of the report which would provide no benefit to potential torture victims in the relevant State and may

⁴⁹⁹ *Op cit.* 2009 Annual report

⁵⁰⁰ Concluding Observations to Fourth Periodic Report of United Kingdom to the Committee Against Torture UN Doc CAT/C/CR/33/3

⁵⁰¹ Consideration of Second Periodic Report of Cambodia to the Committee Against Torture UN Doc CAT/C/SR.968

⁵⁰² Consideration of Second Periodic Report of Yemen to the Committee Against Torture UN Doc CAT/C/SR.898

⁵⁰³ *Op cit.* Rules of Procedure

⁵⁰⁴ Consideration of Second Periodic Report of Yemen to the Committee Against Torture UN Doc CAT/C/SR.898

lead other States to conclude that they are able to withhold cooperation with the Committee without consequences.

This strategy has generally proved successful with Cambodia fully cooperating with the examination of its next report in 2010⁵⁰⁵ and sending a full delegation to engage in a dialogue with the Committee. Following the Concluding Observations issued concerning the Yemeni report in 2009, that State requested an additional meeting at the following session in 2010⁵⁰⁶ at which they sent a delegation to deliver the State's replies to the Committee's findings. These results demonstrate that the Committee is making progress in dealing with States who do not cooperate with its procedures. This only relates, however, to States who have already cooperated to the extent that they have submitted their report in accordance with Article 19 of the Convention, a major difficulty facing the Committee is the total non-cooperation of States parties who do not submit any reports at all. In 2010 a total of 29 of the 147 States parties had yet to submit their initial report to the Committee despite these being more than three years overdue.⁵⁰⁷ The situation since seems to have deteriorated further with the accession of six new States parties. While these States are obliged by the Convention to submit such reports the Committee has great difficulty in compelling them to do so. There is also a significant problem of late reporting to the Committee. A recent example of this is the initial report of Ethiopia considered by the Committee in November 2010 which was submitted to the Committee 14 years after it was due.

⁵⁰⁵ Consideration of Second Periodic Report of Cambodia to the Committee Against Torture UN Doc CAT/C/SR.968

⁵⁰⁶ Responses to Second Periodic Report of Yemen to the Committee Against Torture UN Doc CAT/C/SR.943

⁵⁰⁷ *Op cit.* 2009 Annual Report

(iv) Confidential Inquires

Article 20 of the Convention provides for inquiries by the Committee into reports of the systematic practice of torture in any State party. The Article is triggered if the Committee

“...receives reliable information which appears to it to contain well-founded indications that torture is being systematically practiced in the territory of a State party.”⁵⁰⁸

The Convention is silent as to exactly what constitutes the ‘systematic’ practice of torture. Read with its ordinary meaning, it may be taken as being similar to widespread but it is unclear how widespread and this would omit any very serious sporadic episodes of the commission of torture which may not be described as systematic but are equally damaging to their victims.

Where such information is received, the Committee will “...invite that State Party to co-operate in the examination of the information and to this end to submit observations with regard to the information concerned.”⁵⁰⁹ In response to this, the Committee may direct one or more of its members to conduct an inquiry into the conduct of that State.⁵¹⁰ Such an inquiry, however, may only visit the territory of the State concerned with the agreement of that State.⁵¹¹ This, combined with the confidential character of Article 20, may allow States to evade the attention of the Committee with impunity and continue any such systematic practice of torture. Various States including Turkey and Mexico⁵¹² have, however, invited members of the Committee into their territory in order to conduct such inquiries. Article 20(5) of

⁵⁰⁸ *Op cit.* UNCAT Article20(1)

⁵⁰⁹ *Ibid* Article 20(1)

⁵¹⁰ *Ibid* Article 20(2)

⁵¹¹ *Ibid* Article20(3)

⁵¹² *Op cit.* Nowak and McArthur pp691-693

the Convention does provide for the inclusion of a summary of the findings of any such inquiry in the Committee's annual report but this is only to happen "...after consultations with the State Party concerned."⁵¹³ This again leaves the potential for States in violation of the Convention to refuse to co-operate with the Committee without the risk of genuine enforcement action. Article 20 appears to be aimed more at halting existing practices of systematic torture rather than preventing it altogether, although States' knowledge of these provisions may have some deterrent value. Such provisions are, however, valuable as unless and until any mechanism can be created that can completely eliminate torture through prevention alone, the practice must be punished where it continues and measures must be taken to bring an end to any widespread practice which is contrary to the Convention. There have been no such inquiries focusing on the United Kingdom. While the UK has received some criticism from the Committee of its level of compliance with the Convention, there has been no suggestion of the systematic practice of torture required to trigger such an inquiry.

(v) Inter-State Communications

Article 21 of the Convention provides that States parties may make declarations recognising the competence of the Committee to receive communications "...to the effect that a State party claims that another State party is not fulfilling its obligations under this Convention."⁵¹⁴ Such communications may only be made by States which have made the relevant declaration under Article 21 and may only concern such States.⁵¹⁵ The Convention then goes on to outline the procedure for the consideration of these complaints. The State which is subject of the Communication is given three

⁵¹³ *Op cit.* UNCAT Article 20(5)

⁵¹⁴ *Ibid* Article 21(1)

⁵¹⁵ *Ibid*

months to forward the communicating State an explanation of the matters concerned.⁵¹⁶ If a solution satisfactory to both States cannot be reached, then either State may refer the matter to the Committee.⁵¹⁷

This mechanism may only be used in situations in which all domestic remedies have been exhausted.⁵¹⁸ Any consideration of such complaints is required to take place in closed meetings.⁵¹⁹ It is to be noted that the use of this provision, unlike the other functions of the Committee, is to an extent discouraged by the Convention in that States Parties are to be directed towards the 'friendly settlement' of such disputes before the Committee will deal with the matter. The Committee will, in the absence of such a 'friendly settlement' issue a report on the situation within twelve months of the receipt of the communication.⁵²⁰

To date a total of 59 of the Convention's 153 States parties have made such declarations under Article 21⁵²¹ including the United Kingdom, although the declaration made it clear that such complaints were only to be admissible where they emanated from a State which had also made a declaration under Article 21.⁵²² It is theoretically possible, therefore, that another State may attempt to report the UK to the Committee under this Article for failure to adhere to the Convention, or that the UK could take such action against another State in order to combat any continued use of torture and to encourage its prevention.

The inter-State reporting mechanism, however, remains unused as it may be seen as an internationally unfriendly act.⁵²³ The requirement that both the reporting State

⁵¹⁶ *Ibid(a)*

⁵¹⁷ *Ibid(b)*

⁵¹⁸ *Ibid(c)*

⁵¹⁹ *Ibid(d)*

⁵²⁰ *Ibid(h)*

⁵²¹ *Op cit.* United Nations Treaty Collection Ratifications Page

⁵²² *Ibid*

⁵²³ *Op cit.* Nowak and McArthur p701

and the State subject to the report have made declarations may also obstruct the use of this Article as States risking such action by virtue of their non-compliance with the Convention or their poor diplomatic relations are likely to choose simply not to make any such declaration. Nowak and McArthur note that in relation to other International instruments, for example the European Convention on Human Rights, joint complaints made by a number of States have been used as opposed to individual complaints. This is argued to be less damaging diplomatically and the involvement of a variety of States could serve to underline the unacceptable nature of any Convention violations. The action taken against Greece in response to human rights abuses following the 1967 military coup is given as an example of this.⁵²⁴ Nowak and McArthur also note that, despite these difficulties, any information transmitted to the Committee by a State party, regardless of any Article 21 declarations could be used as the basis for an inquiry under Article 20 if it was found to be reliable and indicated the systematic practice of torture by any State Party.⁵²⁵ This, it is argued, would prove more effective than any attempt to resolve the matter as a dispute between States. Such action would, however, be taken under Article 20 and Nowak and McArthur conclude that Article 21 is the weakest of the various monitoring procedures available to the Committee under the Convention.⁵²⁶

While the UK has not been the subject of any such communications from other States parties, non-governmental organisations have produced a considerable volume of literature relating to UK practice and compliance with the Convention which has been shared with the Committee prior to its consideration of State Party reports.

⁵²⁴ *Ibid* p702

⁵²⁵ *Ibid* p718

⁵²⁶ *Ibid* p701

(vi) Individual Communications

Article 22(1) of the Convention allows a State party to make a declaration recognizing the competence of the Committee to receive and consider individual communications “...by or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State party of the provisions of the Convention .”⁵²⁷ This provides a means for individual torture victims to contact the Committee directly where they are unable to rely on the domestic legal system of the State Party responsible. On receiving such communications, the Committee will transfer relevant details to the State Party concerned. The State will then have six months to “...submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.”⁵²⁸ The Committee will then examine the communication in a closed meeting⁵²⁹ before forwarding its views on the matter to the State Party and individual concerned.⁵³⁰

While this mechanism has the potential to act as a valuable tool for the prevention of torture in those States that do not fully cooperate with the Committee’s reporting procedures or observe the provisions of the Convention, there are a number of problems which may serve to reduce the level of protection it can offer. The most obvious of these is that it applies only to State parties who have made an authorising declaration under Article 22(1) in addition to having ratified the Convention. “No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.”⁵³¹ In practice, as of January 2014 only 67 of the 153 States parties had authorised the consideration of such communications.⁵³²

There is also the risk that declarations will only be made by the State Parties who are

⁵²⁷ *Op cit.* UNCAT Article 22(1)

⁵²⁸ *Ibid* Article 22(3)

⁵²⁹ *Ibid* Article 22(6)

⁵³⁰ *Ibid* Article 22(8)

⁵³¹ *Ibid* Article 22(1)

⁵³² *Op cit.* UN Treaty Collection Webpage

less likely to violate the Convention in any case with torture continuing to be practiced with impunity in those State Parties who do not cooperate with the Committee and have not made Article 22 declarations. The United Kingdom has not made such a declaration authorising the Committee to consider individual communications despite encouragement from the Committee to do so.⁵³³

Even where there has been an Article 22 declaration, communications will be inadmissible where they are anonymous or amount to “...an abuse of the right of submission of such communications or [is] incompatible with the provisions of [the] Convention.”⁵³⁴ It is perhaps understandable that measures should be taken to prevent the use of the Committee’s time and recourses in the consideration of abusive or vexatious complaints. The Convention is, however, silent as to what would constitute an abusive communication and the appropriate operation of the individual communications mechanism will require the Committee members to take great care to apply this provision in an independent and apolitical manner. It is certainly true that the consideration of anonymous communications would cause a variety of difficulties but it should be noted that torture victims who may be in fear of a particular State’s government may have good reason not to want to be identified, in order to prevent further abuses. In addition to this, the Committee is also unable to consider communications that are or have been examined under “...another procedure of international investigation or settlement”⁵³⁵ or where all domestic remedies have not been exhausted.⁵³⁶ This requirement does not apply “...where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of [the] Convention.”⁵³⁷ This is a welcome

⁵³³ See below

⁵³⁴ *Op cit.* UNCAT Article 22(2)

⁵³⁵ *Ibid* Article 22(5)(a)

⁵³⁶ *Ibid* Article 22(5)(b)

⁵³⁷ *Ibid* Article 22(5)(b)

exception as if the aim of the communications provisions is to prevent violations, or at least to prevent further violations, of the Convention, it is essential that the victim has a swift remedy which is not always possible in certain jurisdictions and there is always the possibility of further violations of the Convention pending the resolution of the matter. It should also be noted that an authorising declaration under Article 22 may be withdrawn at any time. While such a withdrawal shall not serve to prejudice any communications already received by the Committee,⁵³⁸ it may be possible for any State faced with a difficult situation, for example a threat to its government, to make such a withdrawal and then begin to practice torture against individuals seen as a threat. A State which withdraws an Article 22 declaration will remain bound by the remaining provisions of the Convention⁵³⁹ but, as discussed above, there may be scope for States to evade the enforcement of these through non-cooperation with the Committee. In practice, States have not withdrawn Article 22 declarations and any that do are likely to be faced with large scale international pressure. The most significant challenge has been to encourage States to make such declarations to begin with. The other major problem jeopardising the effective operation of the communication provisions is the Committee's lack of time and resources, a problem which would only be worsened by any expansion of the Committee's competence in this area. Meeting only twice each year, the Committee now has a substantial backlog of such communications with potential torture victims often waiting a number of years to be heard and granted any relief. This has led to the ironic situation, as acknowledged by Committee members where the Committee encourages as many States as possible to make declarations under Article 22 in the full knowledge that

⁵³⁸ *Ibid* Article 22(8)

⁵³⁹ *Ibid* Article 22(8)

they would have great difficulty dealing with any large scale uptake of these recommendations.⁵⁴⁰

The individual communication procedures contained in Article 22 of the convention do seem to be aimed mainly at putting an end to existing practices of torture rather than at a wider concept of prevention with victims largely seeking to use the communications mechanism after they have already been tortured, a practice for which full redress is never possible. The main exception to this is, as noted by Gorlick,⁵⁴¹ the use of the procedure in relation to possible future breaches of Article 3 of the Convention relating to non-refoulement. Here it is possible for a person to petition the Committee prior to the execution of any order for their deportation or extradition to any State where they are likely to be treated in a manner which would constitute a violation of the Convention. In such cases the Committee is able under Rule 110(3) of its revised Rules of Procedure to offer interim relief by preventing the execution of the order until it has considered the matter,⁵⁴² a process which can take some time. If this is followed by a finding in favour of the individual, it may constitute a clear and effective mechanism for the prevention of torture, compelling States to comply with the requirements of Article 3. It remains an area of concern, however, that the Committee's case law clearly demonstrates a continued practice among States Parties of attempting to remove people to States where there is a clear risk that they will be the victim of violations of the Convention.⁵⁴³ Gorlick also suggests that the mechanism is being used to plug holes in International Refugee Law but warns against reliance on the procedure due to its uneven applicability.⁵⁴⁴

⁵⁴⁰ Notes on observations of public meetings available on request

⁵⁴¹ Gorlick B *Convention and Committee Against Torture: A Complementary Protection Regime for Refugees* 11 IJRL 479

⁵⁴² *Op cit.* Rules of Procedure

⁵⁴³ *Op cit.* Gorlick pp 486-487

⁵⁴⁴ *Ibid* p495

This is an area in which the Committee has proved invaluable as an independent enforcement mechanism of the prohibition of torture as States may be guided by self-interest in their operation of their own deportation and extradition laws. They may consider domestic and international political issues as well as security and diplomatic concerns when enforcing such laws and this may result in unfair outcomes which risk the violation of the Convention. The Committee, in its capacity as an independent and apolitical body is immune from such considerations and will act only to encourage full compliance with the Convention meaning that the observance of its jurisprudence in this area is a powerful tool for the prevention of the practice of torture. An examination of the Committee's jurisprudence reveals that many such cases relate to industrialised European States, such as Switzerland and Sweden and most of these concern Article 3 of the Convention.⁵⁴⁵ This does not necessarily constitute an indictment of these States' human rights records but, as Nowak and McArthur point out, may reflect the fact that such States have made the majority of Article 22 declarations and torture victims in States with worse human rights records may fear coming forward, especially as the Committee is unable to consider anonymous communications.⁵⁴⁶ The failure of the United Kingdom to make such a declaration was, as is discussed below, the cause of a great deal of debate with Committee members during the consideration of its most recent periodic report in 2008. Much of the focus of this examination centred on detention and refoulment procedures, and other issues under Article 3 of the Convention which have been a major part of the Committee's Article 22 jurisprudence.

⁵⁴⁵ *Op cit.* Annual reports and Gorlick

⁵⁴⁶ *Op cit.* Nowak and McArthur p723

(vii) Consideration of the United Kingdom

The consideration by the Committee of the fourth United Kingdom report took place on 17th and 18th November 2004 when the Committee examined the State's fourth periodic report.⁵⁴⁷ This report had been submitted to the Committee following its previous consideration of the UK in 1998 and attempted to address the issues raised by the Committee during that session.

Prior to its consideration of the report, the Committee issued a 43 point list of issues to be addressed by the UK. Some of these related specifically to the incorporation of the Convention into domestic law. The first point raised highlights the judgement of the Court of Appeal in *A v Secretary of State for the Home Department*⁵⁴⁸ which found that the provisions of the Convention are not part of UK law. The Committee suggested the possibility of fully incorporating the Convention into domestic law as the European Convention on Human Rights (hereafter ECHR) had been incorporated by the Human Rights Act 1998⁵⁴⁹ to provide extra protection for victims. The list also focused on the measures which the UK had taken to implement the Convention, noting the criminal offence of torture created by Section 134 of the Criminal Justice Act 1988. Section 134(1) provides that: "A public official or person acting in an official capacity, whatever his nationality, commits the offence of torture if in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties."⁵⁵⁰

Section 134(4) and (5)(b)(iii) of this Act provide for a 'lawful authority or excuse' defence to a charge of torture as well as applying this defence to local law where the

⁵⁴⁷ Fourth Periodic report of the United Kingdom to the Committee Against Torture UN Doc CAT/C/67/Add.2 and consideration of this at UN Docs CAT/C/SR.624 and CAT/C/SR.627

⁵⁴⁸ [2005] 1 W.L.R 414

⁵⁴⁹ Committee Against Torture List of Issues Relating to the United Kingdom UN Doc CAT/C/33/L/GBR Point 1

⁵⁵⁰ S134(1) Criminal Justice Act 1988

offence has been committed abroad. The Committee requested a further elaboration of the findings of a Home Office review that this was acceptable under Article 2 of the Convention.⁵⁵¹ The Committee also asked questions relating to the treatment of asylum seekers, especially to the interview process⁵⁵² and the basis on which the Secretary of State determines applications to be 'clearly unfounded.'⁵⁵³ Questions were also asked relating to the treatment of those detained without charge under Sections 21-23 of the Anti-Terrorism, Crime and Security Act 2001⁵⁵⁴ and about prison conditions more generally, including the issues of prison violence and self-harm.⁵⁵⁵ Questions were also raised relating to the prohibition on the use of evidence obtained through the use of torture in legal proceedings.⁵⁵⁶ The second main section of the list of issues focused on the conduct of the UK military in Iraq and Afghanistan. The Committee asked specific questions relating to the applicability of the legal prohibition of torture to such troops,⁵⁵⁷ the treatment of detainees,⁵⁵⁸ and the status of private contractors involved in the handling of detainees.⁵⁵⁹ The list of issues also contained questions relating to the adherence to the Convention in British Crown Dependencies and Overseas Territories.⁵⁶⁰ These issues reflect the main concerns relating to the UK's human rights record at the time of the consideration although other issues have arisen since.

The United Kingdom sent a substantial delegation of 25 members to participate in the consideration of the report and to address the Committee's questions.⁵⁶¹ The delegation included members from the Department of Constitutional Affairs, Home

⁵⁵¹ *Op cit.* list of issues Point 5

⁵⁵² *Ibid* Point 8

⁵⁵³ *Ibid* Point 7

⁵⁵⁴ *Ibid* Points 9 and 10

⁵⁵⁵ *Ibid* Points 12 and 13

⁵⁵⁶ *Ibid* Point 22

⁵⁵⁷ *Ibid* Point 24

⁵⁵⁸ *Ibid* Point 25

⁵⁵⁹ *Ibid* Point 28

⁵⁶⁰ *Ibid* Points 31-43

⁵⁶¹ UK Delegation to the Committee Against Torture

<http://www2.ohchr.org/english/bodies/cat/docs/CAT-UK-Delegation.pdf>

Office, Ministry of Defence, Prison Service, Scottish Executive, Foreign and Commonwealth Office, Immigration and Nationality Directorate and Northern Ireland Office as well as representatives of the governments of the Isle of Man and Anguilla. This allowed the Committee to communicate directly with representatives of most of the organs of government most likely to be involved in matters of relevance under the Convention and to communicate suggestions and good practice for the avoidance of torture to the widest possible audience.

Prior to the examination of the report, the delegation stated that the United Kingdom condemns the practice of torture under all circumstances⁵⁶² with the head of the delegation describing the practice as “...an affront to and a denial of the inherent dignity and right to respect which is the birthright of every human being.”⁵⁶³ He went on to note aspects of the UK’s long history of the legal prevention of torture including the fact that torture has not been used as a tool of interrogation in the UK since 1640.⁵⁶⁴ In fact various interrogation methods used by the UK as recently as the 1970s have been found to amount to inhuman and degrading treatment, this was the case, for example, in *Ireland v United Kingdom*.⁵⁶⁵ The head of the delegation did concede that the UK’s past as a colonial power made a full description of its historical use of torture more complex.⁵⁶⁶ As to the current position, it is noted that most forms of torture would constitute offences under the Offences Against the Person Act 1861,⁵⁶⁷ although most of the offences under this Act require some level of physical contact and it may not, therefore, cover all forms of torture as defined under Article 1 of the Convention which also refers to mental pain or suffering.⁵⁶⁸ It was also stated

⁵⁶² UK Statement to the Committee Against Torture at <http://www2.ohchr.org/english/bodies/cat/docs/UKopening.pdf> Para 10

⁵⁶³ *Ibid* Para 11

⁵⁶⁴ *Ibid* Para 13

⁵⁶⁵ 18 January 1978 App No: 5310/71

⁵⁶⁶ *Op cit.* UK statement Para 6

⁵⁶⁷ *Ibid* Para 14

⁵⁶⁸ *Op cit.* UNCAT Article 1

that the specific offence of torture was created by Section 134 of the Criminal Justice Act 1988.⁵⁶⁹ The United Kingdom has been a party to the Convention and to the Council of Europe's European Convention for the Prevention of Torture since 1989⁵⁷⁰ and was one of the first States to ratify the Optional Protocol to the Torture Convention.⁵⁷¹ The delegation also sought to draw attention to the UK's relevant diplomatic activity on the international stage. It was noted that the UK had been engaged in lobbying for the universal ratification of the Convention and that 28 States had become party to it since this lobbying had begun.⁵⁷² It is not necessarily clear, however, to what extent these ratifications had been influenced by the UK's diplomatic pressure. The UK had also made financial contributions to the UN Voluntary Fund for the victims of torture.⁵⁷³

Following this introduction, Jonathan Spencer, the head of the delegation, turned to some of the specific areas of domestic practice identified by the Committee in its list of issues. Firstly he noted the Committee's long standing concerns relating to the scope of the offence of torture under the Criminal Justice Act 1988 but insisted that this provision did adequately cover all acts of torture⁵⁷⁴ and moved on to consider the 'lawful authority or excuse' defence which the Committee had identified as its main area of concern and which would appear to run contrary to Article 2(3) of the Convention which clearly states that the order of a superior officer or public authority may not be invoked to justify the commission of torture⁵⁷⁵ and would appear to preclude any kind of 'lawful authority' defence. Spencer went on to note that the provision was now 'supported by' the Human Rights Act 1998.⁵⁷⁶ It is argued that

⁵⁶⁹ *Op cit.* UK Statement Para 15

⁵⁷⁰ *Ibid* Para 16

⁵⁷¹ *Ibid* Para 17

⁵⁷² *Ibid* Para 18

⁵⁷³ *Ibid* Para 18

⁵⁷⁴ *Ibid* Para 22

⁵⁷⁵ *Op cit.* UNCAT Article 2(3)

⁵⁷⁶ *Op cit.* UK statement Para 22

Section 6 of the Human Rights Act makes it unlawful for any public authority to act in a manner which is incompatible with any of the rights provided for under the European Convention on Human Rights, Article 3 of which prohibits the use of torture⁵⁷⁷ and that this would preclude the application of the 'lawful authority' defence of superior orders to anybody charged with this offence.⁵⁷⁸ While this argument may have some merit, it raises the question of why such a defence has been preserved if it cannot be applied and only serves to bring into question the absolute nature of the prohibition of torture. It was also noted that Section 3 of the Human Rights Act requires courts to interpret all legislation, so far as is possible, in accordance with the Convention rights and that this would further affect the potential application of the defence as Article 3 of the ECHR would have to be considered in any attempt to use the defence.⁵⁷⁹

With regard to the Committee's requests that the UK should make a declaration under Article 22 of the Convention enabling the Committee to receive individual communications relating to the United Kingdom, Mr Spencer stated that this was subject to a policy review⁵⁸⁰ and that it had been decided that the UK should accede to the individual communication mechanism under the Convention on the Elimination of Discrimination Against Women (CEDAW) and that the effects of this should be evaluated in order to allow for the merits of an Article 22 declaration to be considered on a more empirical basis.⁵⁸¹ While the move to allow individual communications under CEDAW is to be welcomed, this policy has the effect of ruling out any possibility of an Article 22 declaration under CAT for the duration of the review and limiting the ability of any torture victims to seek such a remedy for at least this period.

⁵⁷⁷ Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950, in force 3 September 1953, as amended 1 November 1998) ETS 5 Art 3

⁵⁷⁸ *Op cit.* UK statement Para 23

⁵⁷⁹ *Ibid* Para 24

⁵⁸⁰ *Ibid* Para 29

⁵⁸¹ *Ibid* Para 30

Addressing the other main area of concern highlighted by the Committee in its list of issues, the detention provisions under UK anti-terrorism legislation, Mr Spencer noted the exceptional gravity of the terrorist attacks of September 11 2001 and the level of threat facing the UK, highlighting the terrorist attacks against British interests in Istanbul in 2003.⁵⁸² The power of the Home Secretary to order the indefinite detention of suspected international terrorists without trial under Sections 21-23 the Anti-Terrorism, Crime and Security Act 2001 was described as an immigration power rather than one relating to criminal justice⁵⁸³ and one which would only be used where the removal of those concerned from the UK would expose them to the risk of torture or ill-treatment contrary to Article 3 of the European Convention on Human Rights and that the power was, therefore, one designed to protect those concerned from the commission of torture rather than to be an form of torture or cruel treatment in itself.⁵⁸⁴ It was also noted that the UK had derogated from Article 5 of the ECHR and Article 9 of the International Covenant on Civil and Political Rights (ICCPR) citing an emergency threatening the life of the nation.⁵⁸⁵ It was noted that the Special Immigration Appeals Commission (SIAC) had found the provisions to be discriminatory under Article 14 of the ECHR and that the matter was now before the House of Lords.⁵⁸⁶ The House of Lords would also find the provisions discriminatory and declare them to be incompatible with the Convention rights under the ECHR in accordance with Section 4 of the Human Rights Act as discussed below.⁵⁸⁷

With respect to the Committee's questions relating to the situation of refugees and asylum seekers in the United Kingdom, it was noted that in 2000, 2001 and 2002, more asylum applications were received by the UK than any other EU member

⁵⁸² *Ibid* Para 32

⁵⁸³ *Ibid* Para 33

⁵⁸⁴ *Ibid* Para 33

⁵⁸⁵ *Ibid* Para 34

⁵⁸⁶ *Ibid* Para 36

⁵⁸⁷ See *A v Secretary of State for the Home Department* [2005] 2 A.C. 68

State.⁵⁸⁸ It was claimed that the majority of these claims were groundless and made “...as a means of sidestepping mainstream immigration controls.”⁵⁸⁹ It was argued that the legislation providing for out of country appeals relates mainly to applicants from countries generally considered to be safe⁵⁹⁰ and that if an applicant applied for a Judicial Review of a refusal, their removal would be suspended pending the outcome of this hearing.⁵⁹¹ No mention was made, however of the criteria used in determining which countries are safe or the level of risk that may be acceptable in designating them as generally safe except that Schedule 3 of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004 introduced a list of States to which applicant could be returned “...without substantive consideration of their claims.”⁵⁹² This list comprised EU and EEA States.⁵⁹³ It was noted that immigration detainees have been housed in Immigration Service removal centres rather than prisons since 2002 with the exception of those in Northern Ireland where the low numbers of detainees does not justify the construction of such a centre and detainees may choose to be transferred to a removal centre elsewhere in the UK.⁵⁹⁴ Detainees may also be held in prisons where they are considered unsuitable for accommodation in a removal centre for security reasons.⁵⁹⁵ No specific reference was made to the conditions in such centres or of how these compared to those in prisons but there was some response to the Committee’s questions relating to the conditions in custody more generally. Mr Spencer referred to the modernisation of sanitation facilities in English prisons and a similar programme underway in Scotland as well as the construction of a new prison on the Isle of Man.⁵⁹⁶ Reference was also made to anti-bullying

⁵⁸⁸ *Op cit.* UK Statement Para 54

⁵⁸⁹ *Ibid* Para 54

⁵⁹⁰ *Ibid* Para 55

⁵⁹¹ *Ibid* Para 57

⁵⁹² *Ibid* Para 59

⁵⁹³ Schedule 3 Asylum and Immigration (Treatment of Claimants etc.) Act 2004

⁵⁹⁴ *Op cit.* UK statement Para 62

⁵⁹⁵ *Ibid* Para 63

⁵⁹⁶ *Ibid* Para 68

strategies launched in an attempt to reduce prison suicide and self-harm.⁵⁹⁷ In the context of police custody reference was made to the establishment of the Independent Police Complaints Commission in England and Wales and parallel bodies in Scotland and Northern Ireland empowered to investigate allegations of police misconduct.⁵⁹⁸

Mr Spencer noted the passage of the Female Genital Mutilation Act of 2002 which made this practice a criminal offence whether committed domestically or abroad⁵⁹⁹ but also noted parallel educational strategies aimed at eradicating the practice,⁶⁰⁰ an example of the use of preventive measures alongside the punishment of acts of torture. The delegation confirmed that a new Mental Health Bill⁶⁰¹ was currently under Parliamentary scrutiny and that this aimed to modernise the treatment system by providing safeguards for patients with a new Mental Health Tribunal or, in criminal cases, the courts required to authorise all compulsory treatments of more than 28 days.⁶⁰² Reference was then made to improvements in detention conditions and procedural safeguards in the Channel Islands and the Isle of Man.⁶⁰³

Martin Howard of the Ministry of Defence then gave a statement outlining the United Kingdom's response to the questions raised in the list of issues concerning the conduct of the UK's armed forces in Iraq and Afghanistan.⁶⁰⁴ It was first argued that one of the reasons behind both deployments was to "...help create a climate in which human rights can flourish."⁶⁰⁵ Mr Howard stated that Section 134 of the Criminal Justice Act 1988 is fully applicable to UK troops serving aboard⁶⁰⁶ who also

⁵⁹⁷ *Ibid* Para 69

⁵⁹⁸ *Ibid* Para 70

⁵⁹⁹ *Ibid* Para 71

⁶⁰⁰ *Ibid* Para 72

⁶⁰¹ Now Mental Health Act 2007

⁶⁰² *Op cit.* UK Statement Para 77

⁶⁰³ *Ibid* paragraphs 78-84

⁶⁰⁴ *Ibid* paragraph 88

⁶⁰⁵ *Ibid* Para 89

⁶⁰⁶ *Ibid* Para 90

receive full training in the laws of armed combat including in the handling of detainees.⁶⁰⁷ It was argued that while the UK armed forces always act in accordance with the Convention, certain means of prevention contained in Articles 2 and 16 of the Convention can only be exercised by a sovereign government.⁶⁰⁸ It was also stated that the ICRC were “generally satisfied” with the manner in which detainees were treated by UK forces describing this as “fairly good.”⁶⁰⁹ It was noted, however, that UK forces had, more recently, been engaged in joint operations with Iraqi and Afghan forces in circumstances in which the latter had jurisdiction and in which Article 3 of the Convention which focuses on the removal of potential victims from a State Party’s territory was argued not to be applicable.⁶¹⁰ It was stated that the UK was “...concerned that those [handed over]... are treated appropriately,”⁶¹¹ with any breach of the military agreements by Iraqi or Afghan authorities being “tak[en]... up rapidly”⁶¹² but no comment was made as to exactly what measures were taken to ensure that this was the case.

It was argued that all allegations of mistreatment are appropriately investigated by Service Police who had at the relevant time examined a total of 156 cases⁶¹³ including 17 cases alleging deliberate mistreatment⁶¹⁴ one of which had been sent for trial.⁶¹⁵ Mr Howard asked the committee to consider these numbers in relation to the 65,000 UK service personnel who had served in Iraq at the time and argued that there was no evidence of systematic abuse of civilians, rejecting calls by Physicians for Human Rights for a full inquiry.⁶¹⁶ Howard also commented on submissions made

⁶⁰⁷ *Ibid* Para 91

⁶⁰⁸ *Ibid* Para 92

⁶⁰⁹ *Ibid* Para 93

⁶¹⁰ *Ibid* Para 98

⁶¹¹ *Ibid* Para 98

⁶¹² *Ibid* Para 99

⁶¹³ *Ibid* Para 101

⁶¹⁴ *Ibid* Para 101

⁶¹⁵ *Ibid* Para 102

⁶¹⁶ *Ibid* Para 103

by Redress concerning the hooding of detainees. It was noted that UK forces had used this practice as a substitute for blindfolding in the Iraqi and Afghan conflicts but that this was no longer the case. It was also argued that hooding had never been used for what were described as 'sinister purposes' or during interrogations, a practice banned in the UK since 1972.⁶¹⁷ Hooding was one of the interrogation practices found by the European Court of Human Rights to amount to inhuman and degrading treatment in *Ireland v United Kingdom*. Howard also addressed submissions made by Redress concerning the applicability of the ECHR to the actions of UK troops serving abroad. He argued that that Convention was never intended to cover such situations and that its requirements, including the thorough investigation of every civilian death could no practically be carried onto the battlefield but that this did not mean that UK soldiers were not bound by English law or that the Torture Convention was not applicable.⁶¹⁸

The delegation concluded its opening remarks by addressing some of the concerns raised by the Committee relating to the UK overseas territories. It was note that, while many of the overseas territories enjoy a high level of autonomy from the United Kingdom government, regular visits are made by inspectors to places of detention in order to ensure international standards are met.⁶¹⁹ Most of the comments in this area had addressed the improvements made to conditions of detention.

The following examination of the UK report was extensive and resulted in no fewer than 75 questions to the delegation.⁶²⁰ The UK delegation was able to reply to the Committee's questions the following day and attempted to address the main areas of concern to the Committee. The first major issue addressed was the UK policy of

⁶¹⁷ *Ibid* Para 104

⁶¹⁸ *Ibid* Para 104

⁶¹⁹ *Ibid* paragraphs 107-108

⁶²⁰ Responses of the UK to the Committee Against Torture 2004 at <http://www.legislation.gov.uk/ukpga/2004/19/schedule/3/p1>

postponing accession to the individual communication procedures under the Convention until the effects of accession under CEDAW had been analysed. Jonathan Spencer noted criticism of this policy from Committee member Mr Mavrommatis and stated that this approach had been taken to ensure the best outcome for British citizens but gave no examples of how an Article 22 declaration may prove prejudicial in this respect.⁶²¹ He also asked the Committee for recognition that at least some progress had been made in this area since the consideration of the UK's previous report.⁶²² Dame Audrey Glover then addressed the Committee's questions relating to the Optional Protocol to the Convention. Dame Audrey expressed concern that at the relevant time only five of the twenty ratifications necessary for the Protocol to enter into force had been achieved and confirmed that the Foreign Secretary was lobbying globally for a wide ratification of the Protocol.⁶²³ It was also confirmed that the UK would not set up any new bodies to form part of the National Preventive Mechanism (NPM) or national body for the monitoring of places of detention required under the Protocol as the several existing bodies including Her Majesty's Inspectorate of Prisons were seen as appropriate.⁶²⁴ The Optional Protocol, providing for the monitoring of places of detention is key to the overall aim of the avoidance of torture.

In response to the Committee's questions relating to the incorporation of the Convention into UK law, Mr Spencer noted that the UK has a dualist system of law and that before an international Convention is ratified, Parliament should ensure that domestic law complies with this. It was argued that the European Convention on Human Rights had been complied with for a long period prior to the passage of the Human Rights Act without incorporation into domestic law. The various findings

⁶²¹ *Ibid* p3

⁶²² *Ibid* p3

⁶²³ *Ibid* p4

⁶²⁴ *Ibid* p4

against the UK in the European Court of Human Rights during this period were attributed to situations “...where our understanding of what the Convention required was at variance with the Court’s.”⁶²⁵ The Human Rights Act was passed to allow domestic enforcement of the Convention avoiding the need for citizens to take cases to Strasbourg and was not required by international law.⁶²⁶

Arguing in defence of the ‘lawful authority or excuse’ defence Richard Heaton noted that the offence of torture created by Section 134 of the Criminal Justice Act 1988 to implement the Convention is drafted more widely than is required by Article 1 of the Convention containing the definition of torture. The UK offence covers pain and suffering inflicted by a public official in performance or purported performance of their duty and does not contain the exception found in Article 1 of the Convention covering the pain and suffering ‘arising from or inherent in or incidental to lawful sanctions.’⁶²⁷ Heaton argued that the offence, as defined by the Criminal Justice Act, could potentially cover a surgeon administering any medical treatment which may result in pain or a prison governor as the penalty of imprisonment is argued to cause some level of suffering.⁶²⁸ The defence, it is argued serves to protect this category of potential defendant and the word ‘lawful’ in English law does not allow for protection for those who carry out illegal orders but would only apply when the authority or justification itself has the quality of law and so would comply with Article 2(3) of the Convention. It was also noted that the Convention would be used by any court interpreting the meaning of the Criminal Justice Act and that this would not permit the use of the defence to justify torture on the basis of superior orders. Any doubt in this connection would be removed by the requirement to interpret the Criminal Justice Act

⁶²⁵ *Ibid* p7

⁶²⁶ *Ibid* p8

⁶²⁷ *Ibid* pp9-10

⁶²⁸ *Ibid* p10

in accordance with the European Convention on Human Rights.⁶²⁹ It was also confirmed that none of the 17 cases of alleged abuse by British troops in Iraq and Afghanistan had been dismissed on this basis.⁶³⁰ It was argued that Section 134(5)(iii) of the Act was included to secure the protection of those people in positions similar to the hypothetical surgeon or prison officer described above who exercised these functions in another jurisdiction. It would be for such people to prove that their actions were sanctioned by the appropriate legal system and this would be unlikely to apply to torture as this, it is argued, is "...sanctioned not by law but rather by lawlessness, by abuse of power, and by corruption. In none of these cases would a defence under section 134 succeed."⁶³¹ Some may argue that this argument has merit but the existence of any kind of 'lawful authority defence to an allegation of torture remains troubling. It may be argued that the United Kingdom would do better to adopt the definition of torture contained in Article 1 of the Convention described above. This definition has an additional requirement that the torture must be for a particular purpose, for example the procurement of information or coercion. Such a requirement would spare the surgeon described by Mr Heaton from being guilty of torture if they acted in genuine performance of their duty but may provide a loophole for those who would cause others suffering for its own sake without any particular purpose. The Convention also provides an exception for lawful punishment which would exonerate Heaton's hypothetical prison governor. Such a provision may, however, have the effect of permitting draconian or cruel punishment so long as they are prescribed by law.

Consideration was also given to the Committee's questions relating to the UK's compliance with Article 15 of the Convention prohibiting the use of evidence obtained

⁶²⁹ *Ibid* p10

⁶³⁰ *Ibid* p11

⁶³¹ *Ibid* p11

through the use of torture. Mr Heaton assured the Committee that there are substantial legal safeguards to prevent the use of such evidence in court and that there are no known cases in the modern era of its use. The only situation in which it was accepted that this kind of evidence could be used was in the trial of the person who had administered the torture for an offence under section 134 of the Criminal Justice Act.⁶³²

Note was made by two Committee members of the continued state of emergency in Northern Ireland, something that had been criticised by the Committee in its consideration of the previous UK report in 1998. It was stated that it was the aim of the UK government to end the application of the temporary Northern Ireland provisions in the Terrorism Act 2000, which replaced the previous legislation, when the security situation allows for this.⁶³³ It was stated that these provisions are the subject of an annual review by both Houses of Parliament.⁶³⁴

In response to questions from Committee member Ms Gaer, concerning the application of the legal system to UK troops serving overseas, it was confirmed that English law, which as discussed above prohibits torture, applies to all British troops serving overseas regardless of the type of operation or the organisation which coordinates it. Such troops may also be subject to local laws but there may be agreements with the local government to exempt them from these. The delegation persisted in the view that aspects of the Convention covering only the territory of a State Party cannot apply to UK forces in Iraq and Afghanistan.⁶³⁵ The view was also expressed again that European Convention on Human Rights had no application to the UK's operations in Iraq and Afghanistan.⁶³⁶ Ms Gaer had also raised questions

⁶³² *Ibid* p12

⁶³³ *Ibid* p19

⁶³⁴ *Ibid* p20

⁶³⁵ *Ibid* p22

⁶³⁶ *Ibid* p23

about the legal responsibilities of private contractors who the delegation confirmed would be subject only to local laws unless they had been engaged directly by the military. It was noted, however, that such people could still be prosecuted under Section 134 of the Criminal Justice Act as this covers acts committed outside the United Kingdom.⁶³⁷

The view was repeated that Article 3 which prohibits refoulement "...to another State..."⁶³⁸ was not applicable to the conflict which meant that detainees could be handed over to the custody of the Iraqi or Afghan authorities, the Military Technical Agreements with these authorities ensure that such detainees will be appropriately treated and where detainees are transferred to the custody of the United States of America, the UK remains the detaining power and responsible for the treatment of the detainees.⁶³⁹ Also in connection to the armed forces, Ms Gaer had raised the issues of bullying and suicide among UK troops. The delegation confirmed that it was revising its procedures relating to these issues but rejected calls from the public for a full public inquiry into the events at the Deepcut army barracks as a full police investigation had already been carried out and it was unlikely such an inquiry would expose any new facts.⁶⁴⁰

In the context of asylum, the delegation argued that no removals would take place in violation of the Convention Relating to the Status of Refugees, the ECHR or CAT. It was argued that the ECHR prevents removal where "...this would expose [the detainee] to a real risk of torture or inhuman or degrading treatment or punishment or where this would lead to a flagrant breach of other ECHR rights."⁶⁴¹ This, it is argued is wider than the protection offered under Article 3 of CAT which only prohibits

⁶³⁷ *Ibid* pp22-23

⁶³⁸ *Op cit.* UNCAT Article 3

⁶³⁹ *Op cit.* UK responses pp24-25

⁶⁴⁰ *Ibid* pp28-29

⁶⁴¹ *Ibid* p30

removals where “...there are substantial grounds for believing that [the detainee] would be subjected to torture,”⁶⁴² so that by adhering to its responsibilities under the ECHR, the UK is also in compliance with CAT.⁶⁴³ All asylum claims are considered on their own merits, even those where the claimant originate from one of the 14 States designated as ‘safe countries’ and no claim will be refused purely because the claimant is a resident of one of these States.⁶⁴⁴ It was stated that claims were ‘clearly unfounded only where “on no legitimate view can the claim succeed.”⁶⁴⁵ Such claimants may apply for judicial review of this decision and will not be removed until this has been decided.⁶⁴⁶ A specific question had been raised by Ms Gaer concerning the treatment of trafficked women by UK immigration law. It was argued that the UK is sensitive to the vulnerable position of these women but that each case must be considered on its own merits as any blanket approval for trafficked women to remain in the UK would risk encouraging illegal immigrants to pretend to have been the victim of people traffickers.⁶⁴⁷ In response to questions raised by Committee member Mr Grossman, concerning violent disturbances at the Yarl’s Wood immigration removal centre, the delegation confirmed that a number of recommendations had been received in a report from the Prisons and Probation Ombudsman and that these would be considered as a means of improving conditions in the centre.⁶⁴⁸

In response to a variety of questions from Ms Gaer relating to the emergency powers provided for by the Anti-Terrorism, Crime and Security Act 2001, Jill Tan of the delegation, confirmed that it was the role of the Home Secretary to determine the extent of the threat from international terrorism and argued that any oversight must

⁶⁴² *Op cit.* UNCAT Article 3

⁶⁴³ *Op cit.* UK responses pp29-30

⁶⁴⁴ *Ibid* p30

⁶⁴⁵ *Ibid* p30

⁶⁴⁶ *Ibid* p31

⁶⁴⁷ *Ibid* p33

⁶⁴⁸ *Ibid* p35

not be allowed to prejudice national security.⁶⁴⁹ The emergency powers under the Act must be renewed annually.⁶⁵⁰ It was argued that the power to detain some foreign nationals without trial under Section 23 of the Act was necessary and proportionate for the purposes of Article 15 of the ECHR as it was “...strictly required by the exigencies of the situation.”⁶⁵¹ All those detained under these powers are free to leave the country if they chose to do so but cannot be removed in accordance with the ECHR, as discussed above.⁶⁵² In response to questions by Committee member Mr Mavrommatis, it was argued that the detainees were not in a ‘legal limbo’ and that a legal challenge to the powers was pending in the House of Lords at the time of the consideration.⁶⁵³ In addition to this a number of Committee members raised questions relating to prison conditions and were assured by members of the delegation that measures were being taken to monitor and prevent violence between prisoners and against prisoners at the hands of guards. It was also stated that measures were being taken to improve prison conditions more generally.⁶⁵⁴

The focus of the Committee on these areas demonstrates an emphasis on the aim of the prevention of torture. While Section 134 of the Criminal Justice Act and Article 22 of the Convention are aimed at prohibiting and, in the case of S134, punishing the practice, they remain a valuable preventive tool as the wide awareness among British officials, including troops serving overseas, of the law in this area and the penalties available may have a strong deterrent effect. A particular focus on the conduct of military personnel overseas is crucial here as, given the danger associated with armed conflict, there is an increased risk of ill-treatment. There may also be a lack of scrutiny due to the UK’s views concerning the non-applicability of Article 3 of the

⁶⁴⁹ *Ibid* p38

⁶⁵⁰ *Ibid*

⁶⁵¹ *Ibid* p39

⁶⁵² *Ibid* p40

⁶⁵³ *Ibid* p42

⁶⁵⁴ *Ibid* pp43-51

Convention and the ECHR meaning that those who come into contact with UK forces overseas may require additional protection. The focus on asylum seekers is also significant as the Committee attempts simultaneously to end the alleged ill-treatment faced by this group as a result of the legal process and in detention centres while also seeking to prevent the use of torture which may occur if they are wrongfully removed from the State. There was also a considerable focus on those held in detention. This took the form of calls for the independent monitoring of detention facilities in order to reduce the risk of ill-treatment but also of calls to modify the detention laws in order to prevent indefinite detention from being used as a means of ill-treatment in itself, both clear examples of the Committee's increased focus on the prevention of torture rather than just its criminalisation.

(viii) Concluding Observations and Recommendations

The Committee published its Concluding Observations on the United Kingdom's compliance with the Convention shortly after the consideration of its report. As usual the observations were divided into two headings, 'positive aspects' and 'subjects of concern.' Under the former the Committee praised the UK for its positive response to its previous recommendations, including the closure of certain prison facilities which had been criticised, the discontinuation of the use of baton rounds and the dissolution of the Royal Ulster Constabulary.⁶⁵⁵ The Committee also praised the entry into force of the Human Rights Act 1998⁶⁵⁶ and the Female Genital Mutilation Act 2002 as well as the extra-territorial application of the latter.⁶⁵⁷ The House of Lords judgement in *R v Bartle and the Commissioner of Police for the Metropolis, ex parte Pinochet*,⁶⁵⁸

⁶⁵⁵ *Op cit.* Concluding Observations 2(a)

⁶⁵⁶ *Ibid* 2(b)

⁶⁵⁷ *Ibid* 2(c)

⁶⁵⁸ [2001] 1 A.C. 147

relating to acts of torture committed abroad and the absence of immunity for former Heads of State was also noted⁶⁵⁹ as was the establishment of the Independent Police Complaints Commission.⁶⁶⁰ The government's assurances that British military personnel serving overseas remain subject to English criminal law, including the prohibition of torture,⁶⁶¹ and that evidence shall be inadmissible in court where is knowledge or suspicion that it has been obtained by the use of torture⁶⁶² were welcomed. The Committee also commended the application of various local human rights provisions to the British Virgin Islands, Channel Islands, Isle of Man and Bermuda⁶⁶³ as well as the State's early ratification of the Optional Protocol and its global diplomatic activity to encourage the universal ratification of and adherence to the Convention and Optional Protocol.⁶⁶⁴

It is certainly encouraging that these topics should attract the attention of the Committee given their relevance to the overall aim of the prevention of torture as opposed to that only of its criminalisation and punishment. It is noted for example, in the context of legislative measures, that the United Kingdom seeks to prevent its companies from becoming involved in the manufacture of the equipment used in the commission of torture, whether for export or domestic use.⁶⁶⁵ This is a very positive development which, if universally replicated, could render certain forms of torture much more difficult. Many of the changes praised by the Committee related to the establishment of independent human rights monitoring bodies and independent bodies charged with dealing with complaints against public officials, for example police officers who are now the subject of examination by the Independent Police Complaints Commission. While such measures seem primarily to relate to the

⁶⁵⁹ *Op cit.* Concluding Observations 2(d)

⁶⁶⁰ *Ibid*(e)

⁶⁶¹ *Ibid*(e)

⁶⁶² *Ibid*(f)

⁶⁶³ *Ibid*(g)

⁶⁶⁴ *Ibid*(h)

⁶⁶⁵ *Ibid* (c)

investigation and, ultimately, the punishment of violations of the Convention after they have already been committed, the well-publicised existence of such bodies may also serve to instil in the minds of public officials that any such acts will inevitably be punished which has the potential to serve as a deterrent reducing the likelihood that torture will be committed at all.

The second section of the Committee's observations focused on subjects of concern. This included several of the most serious issues highlighted in the consideration of the reports. These included the continued existence of the 'lawful authority' defence to the offence of torture and the weakness of the requirement to interpret UK law to avoid the use of evidence gained through the use of torture.⁶⁶⁶ Concern is also expressed at the limited acceptance of the application of international Human Rights instruments to UK forces abroad,⁶⁶⁷ the use of 'diplomatic assurances' in order to support deportation proceedings which may otherwise breach Article 3 of the Convention,⁶⁶⁸ the resort to indefinite detention without trial under the Anti-Terrorism, Crime and Security Act 2001⁶⁶⁹ as well as various inadequacies in prison conditions.⁶⁷⁰

Further to its Concluding Observations, the Committee issued a total of 16 recommendations for the improvement of UK compliance with the Convention.⁶⁷¹ These largely followed on from the discussion and observations and included the following:

⁶⁶⁶ *Ibid* 4(a)

⁶⁶⁷ *Ibid* 4(b)

⁶⁶⁸ *Ibid* 4(d)

⁶⁶⁹ *Ibid*(e)

⁶⁷⁰ *Ibid* (g)-(i)

⁶⁷¹ *Ibid* 5

The UK should take measures to ensure that any possible defences to Section 134 of the Criminal Justice Act 1988 is fully compliant with the Convention.⁶⁷²

The grouping together and publication of all relevant legal provisions relating to compliance with the Convention.⁶⁷³

A reassessment of the role of the Home Secretary in the extradition process.⁶⁷⁴

Full application of Articles 2 and 3 of the Convention relating to the prohibition of torture and non-refoulement to the transfer of detainees to the de jure or de facto custody of another State.⁶⁷⁵

Publication and, where necessary, independent review of the findings of all investigations into the conduct of UK forces in Iraq and Afghanistan.⁶⁷⁶

A re-examination of the review process of the emergency provisions of the Terrorism Act 2000 and the Anti-Terrorism, Crime and Security Act 2001.⁶⁷⁷

An examination of any alternatives to the indefinite provisions of the Anti-Terrorism, Crime and Security Act 2001,⁶⁷⁸

Provision to the Committee of information on cases of deportation or extradition on the basis of diplomatic assurances and any safeguards applicable in such cases.⁶⁷⁹

The United Kingdom should ensure that all of its officials including those based overseas act in accordance with the Convention and that any alleged breaches are investigated and, where necessary, prosecuted.⁶⁸⁰

⁶⁷² *Ibid* 5(a)

⁶⁷³ *Ibid* 5(b)

⁶⁷⁴ *Ibid* (c)

⁶⁷⁵ *Ibid* (e)

⁶⁷⁶ *Ibid* (f)

⁶⁷⁷ *Ibid* (g)

⁶⁷⁸ *Ibid*(h)

⁶⁷⁹ *Ibid* (i)

All practical steps should be taken to investigate all unresolved deaths resulting from the lethal use of force in Northern Ireland during the troubles.⁶⁸¹

The development of an Action Plan to combat the problems identified by the Committee relating to prison conditions.⁶⁸²

The designation of the Northern Ireland Human Rights Commission as one of the UK's monitoring bodies for the purposes of the Optional Protocol.⁶⁸³

The routine medical examination of all persons prior to removal by air.⁶⁸⁴

The central collation of statistical data relating to issues arising under the Convention in places of detention.⁶⁸⁵

The United Kingdom should make a declaration under Article 22 of the Convention enabling the Committee to consider individual communications relating to the UK.⁶⁸⁶

Since the publication of the Committee's recommendations the House of Lords ruled in *A v Secretary of State for the Home Department*,⁶⁸⁷ that the provisions of the Anti-Terrorism, Crime and Security Act 2001 allowing for indefinite detention were incompatible with Articles 5 and 14 of the European Convention of Human Rights and issued a declaration to this effect under Section 4 of the Human Rights Act 1998. The United Kingdom subsequently passed the Prevention of Terrorism Act 2005 which removed these provisions and replaced them with a system of 'Control Orders' which permitted these detainees to live in the community under a variety of restrictions.

⁶⁸⁰ *Ibid* (j)

⁶⁸¹ *Ibid* (k)

⁶⁸² *Ibid* (l)

⁶⁸³ *Ibid* (m)

⁶⁸⁴ *Ibid* (n)

⁶⁸⁵ *Ibid* (o)

⁶⁸⁶ *Ibid* (p)

⁶⁸⁷ *Op cit. A v Secretary of State*

The removal of these provisions was not a direct result of the Committee's recommendations as it resulted from an action relying on the Human Rights Act which was already pending as the Committee considered the UK report, but the UK government would certainly have been aware of these recommendations as it considered its response to the House of Lords ruling relating to the detention measures and attempted to devise an alternative solution. As there has been no further examination of the United Kingdom by the Committee since the introduction of Control Orders, it is difficult to assess whether this regime would be viewed as satisfactory. The removal of these persons from custody would certainly amount to an improvement in their conditions and render them less vulnerable to ill treatment at the hands of public officials which is of great importance for the aim of the prevention of torture. It may, however, be argued that the sometimes draconian restrictions placed on their freedom within the community may amount to a lesser form of cruel treatment contrary to the Convention. Some of the more stringent control orders have been found by the House of Lords to be incompatible with the ECHR. An example of this is the case of *Secretary of State for the Home Department v JJ*⁶⁸⁸ which involved an 18 hour daily curfew which was found to amount to virtual solitary confinement and almost equivalent to indefinite detention, arguments the Committee had used against Part IV of the Anti-Terrorism, Crime and Security Act 2001.

Other recommendations have not been followed. The UK has yet, for example, to make a declaration under Article 22 of the Convention authorising the Committee to consider individual communications, something which may be of paramount importance for the reasons considered above. The UK has now had time to assess the impact of its accession to the individual complaints mechanism under CEDAW as it advised the Committee was its intention. It is questionable, however, whether this

⁶⁸⁸ [2008] 1 A.C. 385

can constitute a legitimate reason not to make an Article 22 declaration. The UK did not comment on what possible implications of accession to the CEDAW procedure would discourage it from using Article 22 of CAT but it would seem few would be justifiable. If there are few complaints under CEDAW, this does not necessarily mean that there would not be more under CAT and if only a handful of people would benefit from the protection of Article 22, this is no reason to deprive them of that. If, alternatively, CEDAW produces a substantial number of complaints causing the UK government additional work and international embarrassment, this would suggest problems with UK government policy which need to be addressed. A State cannot be justified in failing to engage with an enforcement mechanism because it is aware that it does not comply with the rules.

Also, since the consideration of the UK report, the House of Lords held in *R. (on the application of al-Skeini) v Secretary of State for Defence*⁶⁸⁹ that the Human Rights Act, and therefore the ability to enforce the ECHR domestically did apply outside the territory of the United Kingdom but only where the UK exercised its jurisdiction. This may provide some protection for detainees in UK custody but reinforces the UK's previous position in other cases, which makes the universal application of CAT and the scrutiny of the Committee even more important

The Committee invited the United Kingdom to submit its fifth periodic report, originally due in 2006, by 2008.⁶⁹⁰ As yet no further reports have been received from the United Kingdom and the Committee has published no comments from the UK government concerning its Concluding Observations and Recommendations or any follow-up of the recommendations under Rule 68 of the Rules of Procedure.⁶⁹¹

⁶⁸⁹ [2008] 1 A.C. 153

⁶⁹⁰ *Op cit.* Concluding Observations 7

⁶⁹¹ *Op cit.* Rules of Procedure

One of the main tests for the effectiveness of the Committee is the reaction of States Parties to its Concluding Observations and recommendations. Prior to its report of 2004, the United Kingdom had previously been examined by the Committee in 1998. On that occasion the Committee had expressed concerns over the continuing state of emergency in Northern Ireland, noting that no exceptional circumstances could justify breaches of the Convention.⁶⁹² The Committee did, however, praise the progress of the Northern Ireland Peace Process⁶⁹³ and would do so again in 2004. The Committee also called for the closure of certain notorious detention facilities in Northern Ireland including the Castlereagh Detention Centre⁶⁹⁴ and the reconstruction of the Royal Ulster Constabulary,⁶⁹⁵ both aims that had been achieved by 2004. The Committee also called for the amendment of Sections 1 and 14 of the State Immunity Act 1978 which it argued were contrary to Articles 4, 5, 6 and 7 of the Convention.⁶⁹⁶ These provisions relate to sovereign immunities and privileges and have not been modified. The Committee, however, praised the evolution in the law in this area arising from the Pinochet case. The Committee also called for the amendment of Section 134(4) and (5)(b)(iii) of the Criminal Justice Act 1988 relating to the 'lawful authority or excuse' defence to the criminal offence of torture, arguing that the existence of such a defence was contrary to Article 2 of the Convention.⁶⁹⁷ This provision has yet to be amended although, as discussed above, the UK argued in 2004 that the entry into force of the Human Rights Act 1998 served to make the defence unusable. The Committee recommended that the UK should examine the possibility of prosecuting General Augusto Pinochet, the former president of Chile, who was then present in the UK if it was not possible to extradite

⁶⁹² Committee Against Torture Concluding Observations on the United Kingdom 1998 UN Doc A/54/44 Para 75

⁶⁹³ *Ibid* Para 74(c)

⁶⁹⁴ *Ibid* Para 76(c)

⁶⁹⁵ *Ibid* Para 77(f)

⁶⁹⁶ *Ibid* Para 76(f)

⁶⁹⁷ *Ibid* Para 77(c)

him to Spain. While the decision was ultimately taken to prosecute General Pinochet, something which would be praised by the Committee in 2004, he was ultimately found unfit to stand trial and returned to Chile where he died in 2006 without being convicted of any offences in any jurisdiction.

(ix) Consideration of the Fifth Periodic Report and the Constructive Dialogue

The fifth periodic report of the United Kingdom was considered by the Committee on 7th and 8th May 2013.⁶⁹⁸ Due to delays in submitting the report and to the Committee's substantial backlog of reports to consider the interval between the consideration of the fourth and fifth periodic report was eight and a half years as opposed to the four years envisaged by the Convention and the six years between the consideration of the third and fourth reports. This is a cause for concern, especially when combined with the fact that the examination had, due to the Committee's time constraints, to be condensed into a five hour period with two hours for the consideration of the report and three for the responses of the delegation. A number of Committee members remarked on the size and comprehensive nature of the report as well as that of the material provided by NGOs and went on to say that they were not able to raise all of the issues they wished to.⁶⁹⁹ This was despite the abstention of the member from Mauritius who chose not to participate in the proceedings in order to avoid any appearance of a conflict of interest arising from the dispute between the United Kingdom and Mauritius concerning Diego Garcia.⁷⁰⁰ It may be possible to question the value of the reporting process if it leads to only five hours of scrutiny in eight and a half years and potentially less than this in the case of the many States Parties who fail to report to the Committee or do so with even greater delays than were seen in this case. It is clear that any public consideration of

⁶⁹⁸ CAT/C/SR.1136 and CAT/C/SR.1139

⁶⁹⁹ *Ibid* 1136 (Gaer)

⁷⁰⁰ CAT/C/SR.1136 paragraph 24 (Domah)

a State's compliance with the Convention is a positive step but given the urgency of the issue and the slow nature of the process, the current mechanism alone will not achieve the eradication of torture.

As to the content of the meetings, there appeared to be some progress in the discussions surrounding Northern Ireland with many of the police and prison reforms the Committee had previously called for now having been achieved. This resulted in a greater focus by Committee members on transitional justice as well as the problems of the 'Magdalena Laundries'.⁷⁰¹ Concerns were also raised by multiple Committee members about prison overcrowding and the use by the police of 'Taser' type weapons as well as the training officers would receive to operate these.⁷⁰² One interesting feature of the discussion was that a number of members appeared to actively encourage the United Kingdom to make use of the inter-State reporting procedure contained in Article 21 of the Convention in order to facilitate a resolution with the United States of America in the case of Sheikh Ahrmer who is currently detained at Guantanamo Bay in Cuba. The Article 21 procedure, as noted above, has not previously been used largely as it is seen as an unfriendly act. This assertion was expressly challenged by one member, Fernando Marino, who described it as a 'friendly' procedure and one focused on 'reconciliation'.⁷⁰³ Given the difficulties noted above relating to the severe and urgent nature of the problem of torture and the potential difficulties associated with reliance solely on the periodic reporting procedures, it can only be positive that the Committee is encouraging States Parties to use all means available under the Convention to avoid or at least to halt torture where it occurs.

⁷⁰¹ CAT/C/SR.1136 paragraph 31 (Gaer)

⁷⁰² See e.g. *Ibid* paragraph 36 (Grossman)

⁷⁰³ See e.g. *Ibid* paragraph 21 (Marino) and CAT/C/SR.1139 paragraph 56 (Marino)

In other areas, however, the discussions demonstrated little progress since 2004. One such issue was the age of criminal responsibility which is currently set at 10 years in England and Wales, a cause of concern to the Committee. The delegation refused, however, to consider arguments on this point arguing that children of 10 know the difference between right and wrong and that this age was appropriate.⁷⁰⁴ Similar intransigence could be observed in relation to Article 22 of the Convention with the government, eight and a half years after the previous exchanges, still insisting that it remained to be convinced of any practical value to British citizens of a declaration under this Article.⁷⁰⁵ This was despite arguments from multiple Committee members that the UK had nothing to lose in making such a declaration in that if it is in full compliance with the Convention, official actions will not be interfered with and if it is not, then the government will only be directed to comply with existing obligations⁷⁰⁶ as well as the suggestion made openly by one member that the real reason for the non-use of the procedure was a fear of how it may be used in relation to Article 3 of the Convention.⁷⁰⁷ The other significant issue on which little progress had been made since 2004 was the question of the applicability of the Convention, especially Article 3, to UK forces serving overseas. The United Kingdom has continued to accept only very limited application of the Convention in these circumstances but has noted that any offence, including torture, which would violate English law would also be punishable if committed by troops serving abroad and also pointing to the existence of a moratorium on the transfer of detainees in Afghanistan.⁷⁰⁸ This was, however, questioned by Alessio Bruni, who served as Country Rapporteur for the examination and noted a clear contradiction between this assertion and Section 134(4) and (5) of the Criminal Justice Act 1988 which, as will

⁷⁰⁴ CAT/C/SR.1139 paragraph 23 (Tugushi)

⁷⁰⁵ *Ibid* paragraphs 1-45

⁷⁰⁶ CAT/C/SR/1136 paragraph 8 (Bruni)

⁷⁰⁷ Private notes on observation of meeting, available for inspection on request.

⁷⁰⁸ CAT/C/SR.1136 paragraph 9 (Bruni)

be considered in chapter 3(1)(a), provide a defence to a charge of torture based on authorisation by local law if the act was committed outside the United Kingdom.⁷⁰⁹

On the issue of prison conditions, it was observed that there were problems with severe overcrowding as well as numerous deaths including from suicide and issues with self-harm.⁷¹⁰ It was also noted that the levels of overcrowding varied considerably between public and private prisons.⁷¹¹ The Committee was clear in linking the issues of overcrowding and prison deaths and invited the UK to consider expanding the use of measures alternative to custodial sentences.⁷¹² The other issue over which the Committee expressed serious concerns was over the use of diplomatic assurances to guarantee the non-use of torture or ill-treatment in cases of deportation or extradition.⁷¹³ While the UK delegation was very clear in stating that such measures were adequate and that the State had a mechanism to follow up on such removals by checking on the welfare of the individuals involved,⁷¹⁴ further details were not given.

On 27th May 2013 the Committee issued its Concluding Observations on the United Kingdom's report and its dialogue with the State Party's delegation together with a total of 33 recommendations for the improvement of the level of compliance with the Convention obligations.

The Committee noted a number of positive developments since the consideration of the previous periodic report. These included the UK's ratification of the Convention on the Rights of Persons with Disabilities in 2009⁷¹⁵ and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and

⁷⁰⁹ *Ibid*

⁷¹⁰ CAT/C/SR.1136 paragraph 17 (Tugushi)

⁷¹¹ CAT/C/SR.1136 paragraph 13 (Bruni)

⁷¹² CAT/C/SR.1136 paragraph 26 (Gaye)

⁷¹³ CAT/C/SR.1136 paragraph 30 (Gaer)

⁷¹⁴ CAT/C/SR.1136 paragraph 2 (Sweeny)

⁷¹⁵ CAT/C/GBR/CO5 paragraph 4(a)

Child Pornography in 2009.⁷¹⁶ A number of Acts of Parliament and Judicial Decisions were also noted by the Committee including *A v Secretary of State for the Home Department (No. 2)* [2005] which affirmed the inadmissibility of evidence obtained through torture in legal proceedings⁷¹⁷ as well as the Protection of Freedom Act 2012 which limited the duration of pre-trial detention for terrorist suspects to 14 days.⁷¹⁸ Other measures commended by the Committee included the establishment in 2007 of the Commission of Equality and Human Rights⁷¹⁹ and the implementation of changes in the youth justice system aimed at reducing the number of children in detention.⁷²⁰ It is positive that the Committee notes and encourages measures of this nature as they all relate to the prevention of torture and cruel, inhuman or degrading treatment or punishment. Barring evidence obtained through torture from being heard in court removes one of the primary motives for law enforcement officials to engage in ill-treatment and, indeed, encourages them to take steps to ensure that their evidence can be shown not to have been so obtained. Terrorist suspects may be at increased risk of ill-treatment due to public anger at their alleged activities which may result in them being target for abusive treatment.⁷²¹ As discussed in Chapter 1(b), many of the theoretical arguments used to justify the use of torture, such as the 'ticking time bomb' theory, specifically relate to these suspects as does much of the UK and ECHR case law in which such abuse has actually been alleged.⁷²² It is, therefore, desirable to limit pre-charge detention for this group as far as possible in order to minimise the real risk of ill-treatment taking place. The establishment of the Equality and Human Rights Commission is also positive because, as discussed at

⁷¹⁶ *Ibid* 4(b)

⁷¹⁷ *Ibid* 5(c)

⁷¹⁸ *Ibid* 5(b)

⁷¹⁹ *Ibid* 6(a)

⁷²⁰ *Ibid* 6(g)

⁷²¹ See Chapters 2 and 3 for a full discussion of this

⁷²² See e.g. *Ireland v United Kingdom* App No. 5310/71

length by the Committee in its General Comment No. 2,⁷²³ members of minority and other oppressed groups are at an increased risk of ill-treatment and it can be hoped that the establishment of a government body focusing on the protection of such groups will prevent this from happening.

No reference was made to the delay to the submission of the report which resulted in an interval of eight and a half years between appearances before the Committee rather than the four years envisaged by the Convention. As discussed previously oversight and public discussion are key elements in the prevention of torture as they serve to increase awareness of the prohibition and to counter cultures of impunity where these exist. It is, therefore, to be regretted that the Committee did not pass comment on a delay which has had the effect of reducing the frequency of international scrutiny of the United Kingdom's record in relation to its obligations under the Convention. While there is a problem of under reporting affecting some States which lack the resources to make regular reports to all of the UN treaty bodies, the United Kingdom is not faced with difficulties of this severity and, although it is true that the Committee's allotted schedule would not allow it to consider reports in a timely fashion if they were all submitted on schedule, there are currently a total of 21 State Party reports awaiting consideration by the Committee,⁷²⁴ the mere publication of the report ahead of consideration allows for public engagement by civil society and non-governmental organisations with the issues raised and serves to increase oversight of the State's activities.

The Committee noted the concern surrounding the uncertainty over the future of the Human Rights Act.⁷²⁵ During the dialogue with the delegation, multiple members of the Committee had pressed the State Party for an assurance that the European

⁷²³ General Comment No.2 on the Implementation of Article 2

⁷²⁴ <http://www2.ohchr.org/english/bodies/cat/sessions.htm>

⁷²⁵ Concluding Observations paragraph 8

Convention would remain incorporated in United Kingdom law following any proposed reforms in this area including the adoption of any 'British Bill of Rights' to replace the Human Rights Act. The delegation appeared to provide such an assurance which was noted and welcomed by the Committee in its Concluding Observations.⁷²⁶ One can hope that this will be remembered and referred to in the event that such reforms do serve to dilute the protection presently offered by the Human Rights Act. The Committee appears to acknowledge the level of protection offered to people by the Act and urges the government not to "...erode the level of constitutional protection afforded to the prohibition of torture, cruel, inhuman or degrading treatment or punishment currently provided by the Human Rights Act."⁷²⁷ The full scale of the improvement in the United Kingdom's level of compliance with the Convention brought about by the Human Rights Act will be discussed in full in chapter 3 but there is significant evidence to suggest that ceasing to require domestic courts in particular, to consider the requirements of the European Convention on Human Rights and the jurisprudence of the Strasbourg court would have the potential to result in breaches of the provisions of the UN Convention Against Torture, especially Article 3.

With regard to the situation in Northern Ireland, previous sessions of the Committee have, as discussed above, focused on the prevention of torture. The Committee had praised the move to disband the Royal Ulster Constabulary and to replace it with the new Police Service for Northern Ireland (PSNI) which was intended to be more representative of the sectarian balance of the community. It also called for the closure of a number of detention facilities notorious for abuses. With many of these positive developments now having taken place, the focus of the Committee appears

⁷²⁶ *Ibid*

⁷²⁷ *Ibid*

to have moved on to the issue of transitional justice.⁷²⁸ It expresses concern at what it describes as “...apparent inconsistencies in the investigation processes where military officials are involved, which delayed or suspended investigations, thus curtailing the ability of competent bodies to provide prompt and impartial investigations of human rights violations...”⁷²⁹ It was also noted with concern that the State Party had decided not to hold a public inquiry into the murder of Patrick Finucane in 1989.⁷³⁰ This shift in focus illustrates the nature of the ‘constructive dialogue’ between the Committee and State Parties with the Committee first encouraging the United Kingdom to eliminate the most severe instances of ill-treatment and to take steps to prevent their repetition and then, once this has been largely accomplished, encouraging the State to focus on achieving justice for the victims in the hope that a regular repetition of the dialogue will result in a steady improvement in the State’s human rights record over time. It also demonstrates the clear set of priorities needed to combat the problem of torture. The primary aim must be the eradication of torture for society. Where this cannot be achieved in a timely fashion, measures are proposed to prevent torture from taking place, especially in the situation where it is most likely to occur with a focus on rehabilitation and redress where torture has occurred in the past and as a less attractive option than prevention.

Despite some of the positive illustrations of the constructive dialogue model listed above, it is possible to note some deficiencies in this system. It is also questionable as to how many of the improvements which have been observed can be traced to the work of the Committee. Two of the most significant areas of progress noted above are the repeal of Part IV of the Anti-terrorism, Crime and Security Act 2001 and the

⁷²⁸ *Ibid* paragraph 23

⁷²⁹ *Ibid*

⁷³⁰ *Ibid*

restructuring of the police service in Northern Ireland. It cannot be denied that these developments have each represented a significant step forward in the battle to prevent torture and ill-treatment. It is questionable, however, as to the extent that this may be attributed to the Convention. As is noted above, the 2001 Act was amended after the House of Lords in *A v Secretary of State for the Home Department* issued a declaration of incompatibility with Articles 5 and 14 of the European Convention on Human Rights under Section 4 of the Human Rights Act 1998 without considering the Convention Against Torture or the jurisprudence of the Committee. Similarly the restructuring of the police in Northern Ireland was undertaken in response to the Good Friday Agreement with which the Committee was not involved. These developments must also be contrasted with other issues on which the Committee has been the primary force for change and on which there has been more limited development. Again the issue of Article 22 of the Convention and its extraterritorial scope are examples of this. This does not mean that the Committee and its reporting procedures are not a valuable tool in the battle against torture, indeed it may suggest that the Committee's powers and the frequency of its meetings should be increased but it may well suggest that UK engagement with the Committee has been rather more limited than it may have appeared from the content of the meetings above.

(ix) Conclusion

This demonstrates that the Committee has been capable of exercising some influence over UK policy with many of its recommendations, especially those relating to the situation in Northern Ireland, being put into effect by the UK reducing the scope for violations of the Convention. Many of these recommendations, including the closure of certain detention facilities and the reconstruction of the RUC to render it more representative of the wider community seem aimed not at punishing past abuses, although many had undoubtedly involved these organisations, but to prevent

violations of the Convention by seeking to create a climate in which such abuses are less likely to occur. This is also true of the many recommendations calling for the establishment of independent monitoring bodies and must be the ultimate aim of the Committee given the irrevocable nature of the act of torture and the consequence that any punishment or compensation can only be the second-best outcome for its victims. The UK also began legal proceedings against Senator Pinochet as the Committee had requested. It may be questionable whether the Committee had any influence on these decisions as the Northern Ireland peace process and the investigation of Senator Pinochet were already ongoing processes but it is clear that the Committee and the public nature of its work must have provided at least some encouragement for the UK to take action in these areas. Other recommendations, however, were not dealt with as favourably. No action has been taken in relation to the defences available under the Criminal Justice Act 1988 and, while there may be some merit in the argument that the Human Rights Act 1998 has the effect of removing the defence, its continued presence on the statute books can only have the effect of undermining the contention that the prohibition of torture is absolute and that no exceptional circumstances can be used to justify breaches of the Convention. At the time of the 1998 examination, it was impossible to foresee the situations which would arise in Iraq and Afghanistan by 2004. This underlines the need for the continued existence of the Committee and the continued cooperation of States Parties, even in the event of full compliance with previous recommendations, to ensure a full eradication of torture is achieved and then maintained. In view of the overall aim of the complete prevention of torture, the Committee may hope to ultimately render itself superfluous. Such a situation would, however, be some way off as the Committee continues to find widespread violations of the Convention in its examination of State Party reports as well as the continued existence of climates of

impunity in which instances of torture go unpunished and are seen as acceptable. There also exists the problem of non-reporting by some States which have received criticism from other bodies and organisations over their human rights records. The Committee continues, however to make recommendations aimed at the prevention of torture, but in view of the problems described above, it must also pursue the punishment of those who commit torture. The ultimate eradication of torture will require the international community to pursue both aims until the latter becomes unnecessary. It is true that a deeper analysis of many of the positive developments which have taken place between 1998 and 2013 may suggest causes for these other than the work of the Committee. This does not, however mean that the Committee is not a valuable tool in the struggle to eradicate torture or that it does not have a great deal to offer in the sharing of good practice and the scrutinising of State practice. It may suggest, though, a greater need to ensure full and timely cooperation and engagement by all States with the international monitoring mechanisms.

Part C- The Domestic Engagement of United Kingdom Institutions with the United Nations Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment 1984 and the Prohibition and the Prevention of Torture

This section will seek to examine the compliance with various organs of the State with the United Kingdom's obligations under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The focus of the chapter will be on the extent to which the structure of the State's apparatus is consistent with these obligations and the level of engagement, if any, of the key public institutions with the Convention and the jurisprudence of the Committee Against Torture in all areas of their activities when not in direct dialogue with the Committee. The chapter will consider the level of awareness demonstrated by, among others, the courts, Parliament and the executive, with a focus on the role of the Secretary of State for the Home Department, of the requirements of the Convention and their willingness to follow these in the discharge of their functions. As discussed in chapter 4, the unique and destructive nature of the act of torture means that the ultimate focus of any measures aimed at combating torture must be the prevention of the practice before it is able to occur. This chapter will, therefore, examine the above questions with specific reference to the discussion of and progress towards this aim demonstrated by the above institutions. It will also examine the impact of the entry into force of the Human Rights Act 1998 and the duty it imposes on public authorities to act in a manner compatible with the European Convention on Human Rights and Fundamental Freedoms in the discharge of their duties.⁷³¹ The level of adherence to this section will be examined together with the

⁷³¹ Human Rights Act 1998 Section 3

extent to which it has improved compliance with the United Nations Torture Convention. The role of the police and the military will also be examined with reference to the fundamental procedural safeguards set out by the Committee Against Torture for the prevention of torture and inhuman or degrading treatment set out in General Comment No. 2⁷³² with a view to assessing their compliance with these requirements.

⁷³² United Nations Committee Against Torture General Comment No. 2 on the Implementation of article 2 by States parties 24 January 2008 CAT/C/GC/2

Chapter 6

The Criminalisation of Torture and the Approach of the Courts

This chapter will seek to examine the way the legal system approaches the issue of torture and the United Kingdom's compliance with its obligations under the Convention. It will examine both the criminal law prohibition of torture and the approach of the courts to the Convention in the discharge of their duties. This Chapter will also seek to examine the role of transnationalism in the United Kingdom's application of the Convention. This has been considered to some extent in Chapters 2, 4 and 5 but must also be discussed in the context of the UK's domestic response to its Convention obligations, especially in relation to the role of civil society.

(i) The Criminalisation of Torture

The most significant direct response of the United Kingdom to the United Nations Convention Against Torture was the passage of the Criminal Justice Act 1988 which, for the first time, created a specific offence of torture in English Criminal Law together with a corresponding definition. Section 134 of the Act provides that:

(1) A public official or person acting in an official capacity, whatever his nationality, commits the offence of torture if in the United Kingdom or elsewhere he inflicts severe pain or suffering on another in the performance or purported performance of his official duties.

(2) A person not falling within subsection (1) above commits the offence of torture, whatever his nationality, if-

(a) in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another at the instigation or with the consent or acquiescence-

- (i) *of a public official; or*
- (ii) *of a person acting in an official capacity; and*

(b) the official or other person is performing or purporting to perform his official duties when he instigates the commission of the offence or consents to or acquiesces in it.

(3) It is immaterial whether the pain or suffering is physical or mental and whether it is caused by an act or an omission.

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

(5) For the purposes of this section "lawful authority, justification or excuse" means-

(a) in relation to pain or suffering inflicted in the United Kingdom, lawful authority, justification or excuse under the law of the part of the United Kingdom where it was inflicted;

(i) if it was inflicted by a United Kingdom official under the law of the United Kingdom or by a person acting in an official capacity under that law, lawful authority, justification or excuse under that law.

(ii) if it was inflicted by a United Kingdom official acting under the law of any part of the United kingdom or by a person acting in an official capacity under such law, lawful authority, justification or

excuse under the law of the part of the United Kingdom under whose law he was acting; and

(iii) in any other case, lawful authority, justification or excuse under the law of the place where it was inflicted.

(6) A person who commits the offense of torture shall be liable on conviction on indictment to imprisonment for life.

This would appear, at least at first glance, to outlaw conduct covered by Article 1 of the Torture Convention.⁷³³ The definition includes all of the components of torture, as defined in Article 1 and section 134 serves to criminalise such conduct as required by Article 2(1) of the Convention in addition to going some way towards satisfying other requirements of the Convention. Subsection (6) provides, for example, for sentences of imprisonment for life for those convicted of torture which would satisfy the requirement contained in Article 4(2) of the Convention that the penalties available for the offense should be commensurate with its grave nature. As discussed below, there are questions as to whether life imprisonment itself may fall within the Article 1 definition, although Article 1(1) excludes pain or suffering inherent in or incidental to any lawful sanctions. Section 134 also provides for liability for torture committed outside of the United Kingdom which satisfies the requirements of Articles 7 and 8 that States parties should extradite or prosecute persons suspected of torture who are found within their territory.

The most significant weakness in section 134 can be found in the subsection (4) defence of 'lawful authority justification or excuse' which would have the potential to extend far beyond the limited exception contained in Article 1(1) of the Convention for pain or suffering arising from lawful sanctions. As discussed in detail in Chapter

⁷³³ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984, in force 26 June 1987) 1465 UNTS 85 Article 1

2(a)(vii), the Committee Against Torture has expressed concerns that this defence may be inconsistent with the Article 2(3) rule that an order from a superior officer can never justify the use of torture. It was subsequently argued by the United Kingdom delegation that the defence could not be used in such a way as it was now supported by the Human Rights Act 1998 which requires public authorities to act in accordance with the provisions of the European Convention on Human Rights,⁷³⁴ including Article 3 of this Convention which prohibits torture, cruel and inhuman treatment.⁷³⁵ If the Human Rights Act does, indeed have this effect, then it is unclear why the defence is not abolished in order to demonstrate adherence to the absolute prohibition of torture. The Committee has not pressed the United Kingdom as forcefully on this issue in its consideration of the State party's most recent periodic report although some concerns were expressed regarding the incorporation of the Convention definition.⁷³⁶

Another significant potential obstacle to the successful operation of section 134 is contained in section 135 which provides that:

Proceedings for an offense under section 134 above shall not be begun-

(a) in England and Wales, except by, or with the consent of the Attorney General; b

(b) in Northern Ireland, except by, or with the consent of the Attorney General for Northern Ireland.

This has the potential to raise more serious issues under the Convention. The most obvious of these is that it forms a barrier to any prosecution which may serve to

⁷³⁴ Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950, in force 3 September 1953, as amended 1 November 1998) ETS 5

⁷³⁵ UK Statement to the Committee Against Torture at <http://www2.ohchr.org/english/bodies/cat/docs/UKopening.pdf>

⁷³⁶ See United Nations Committee Against Torture Concluding Observations and Recommendations on the United Kingdom May 2013 CAT/C/GBR/CO/5 and Summary Records at CAT/C/SR.1136 and CAT/C/SR.1139

weaken the United Kingdom's compliance with Article 7(1) which requires states parties to either extradite or prosecute suspected torturers present on their territory. Possibly more worrying is the nature of the Attorney General as a political appointment chosen by the Prime Minister. As discussed extensively in Chapter 1(a), governments have historically used torture as a means of maintaining power and harming their opponents. Requiring a member of the government to give consent for any prosecution of such conduct would be very likely to contribute to a culture of impunity in which public officials are able to commit such acts freely knowing that it is likely their superiors will be able to prevent them from receiving any kind of punishment.

(ii) The approach of the Courts to the Convention

The UK courts have been called upon on a number of occasions to decide on issues relating to the prevention of torture and other forms of ill treatment. A key aspect of any effective national mechanism for the prevention of torture and cruel inhuman or degrading treatment will, as discussed in the previous section, require all bodies forming part of a State's institutional apparatus to consider aspects of prevention in all relevant areas of their activity. This means that courts must have regard to prevention in all decisions relating to issues of torture, including those concerning the possible future use of torture and that they must not make decisions which allow this to occur. This section will seek to evaluate the extent to which the UK courts have satisfied this requirement.

(iii) *Non Refoulement*

One context in which the UK courts have frequently been called upon to consider arguments relating to the prevention of torture and have had, therefore, an opportunity to take a clear stance on the issue is *non refoulement*. Article 3 of the UN

Torture Convention prohibits the removal of any person to any State where they are at a significant risk of being a victim of torture. A large number of States including the UK, however, continue to attempt such removals. This issue was considered by the Court of Appeal in *R v Secretary of State for the Home Department Ex parte. Chahal (No. 2)*.⁷³⁷ This case concerned an application for judicial review in relation to an order for deportation against an Indian national who was accused of involvement in terrorist activities relating to the Punjabi separatist movement. The court accepted that Chahal had previously been detained and tortured by the Indian security services and he had argued that he was likely to be killed if returned.⁷³⁸ In this case the court concluded that the law required the Secretary of State to balance the risks faced by Chahal if returned to India against those which may be posed by his continued presence in the United Kingdom. The court felt unable to judge whether this had been done to an acceptable standard as it did not have access to the evidence on which the Secretary of State had based his decision. This raises concerns for a number of reasons. The first of these is that the idea of balancing the risks faced by a person with those which they allegedly pose to others seems to go against the absolute nature of the prohibition of torture. The idea that it is acceptable to expose a person to the risk of torture on the basis of unproven allegations would also appear to violate Article 3 of the UN Convention and it would seem that some other means must be employed to ensure public protection without exposing any individuals to these risks.

One of the main issues here was the role of the Home Secretary in the removal of individuals and the grounds on which such decisions may be based as well as the potential lack of oversight in this process. In this case the deportation order described itself as relating to "...reasons of national security and other reasons of a political

⁷³⁷ 22 October 1993 [1995] 1 W.L.R. 526

⁷³⁸ *Ibid* Staughton LJ at 528-529

nature, namely the international fight against terrorism.”⁷³⁹ The fact that the court was prepared to accept such a vague description as sufficient basis to allow the deportation of Chahal, especially when it describes itself as political in nature, despite the grave risks he faced if returned to India, evidence of which is supported by the court’s acceptance that he had previously been tortured by the country’s security services, raises serious concerns. The Home Secretary in this and other cases is shown a high level of deference by the court. Here their arguments in favour of the deportation of Chahal in spite of the associated risks were accepted without any request to view the evidence on which it is based. The ability of the Home Secretary, and other public officials to make such decisions alone without any requirement to justify their reasoning demonstrates a serious lack of oversight in the removals process. Such oversight is, as discussed in Chapter 4, a key element of an effective mechanism for the prevention of torture which is most likely to occur where public officials are not accountable for their actions and the potential victim has no right to appeal, challenge or even disseminate details of their treatment. The court’s readiness to accept such decisions without appropriate oversight also highlights an inadequate focus on prevention in its consideration of these cases as the existence of these risks was accepted and yet not reflected in the final decision in spite of the absolute nature of the prohibition. In contrast, Any effective preventive mechanism would require them to consider the prevention of torture in all areas of their operations. There may also be concerns relating to the determination of such issues by the Home Secretary who is a political figure but these will be considered in greater detail in a subsequent chapter. The primary argument in favour of the approach taken in this case is that the Home Secretary may be in possession of relevant information as to the risk posed by the individual concerned, the publication of which

⁷³⁹ *Ibid* at 530

may prove prejudicial to national security. While this may well be the case, an absolute prohibition of torture and a comprehensive preventive mechanism would require the protection of all persons, even those who may be described as dangerous, from the exposure to the risk of torture. Asking the Secretary of State to present evidence to the court sitting in private, while itself undesirable, may be preferable to allowing such decisions to be taken without oversight in cases where risks must be balanced in this way but where the risk of torture in the receiving State is significant a removal cannot be consistent with a preventive approach to the issue of torture even where it follows an appropriate balancing of the risks and an alternative means of protecting the public would need to be found.

In other cases courts have acknowledged and even expressed regret for the suffering that will be caused by their decisions but have gone on to make them none the less. The case of *D v United Kingdom*⁷⁴⁰ concerned an order for the deportation of a national of St Kitts following his conviction for drug trafficking. During D's imprisonment in the UK he had been diagnosed with an AIDS related illness at an advanced stage and was receiving treatments which were widely available in the UK but which he would be unable to access in St Kitts. This, it was argued, would hasten his death if returned there and would also mean that the death would be more painful and would take place in worse conditions. Here the Court of Appeal was called on to examine, again in the context of a judicial review, the decision of the Chief Immigration Officer to approve the order. The judge in the case Sir Iain Glidewell stated:

"Nobody can but have great sympathy for this applicant in the plight in which he finds himself. If he is to return to St Kitts it seems that he will be unable to work because of his illness. His expectation of life, if the medical evidence is correct,

⁷⁴⁰ App No 30240/96

may well be shorter than what it would be if he remained under the treatment that he is receiving in the United Kingdom, and in many ways his plight will be great. On the other hand he would not be here if he had not come on a cocaine smuggling expedition in 1993; and if he had not been imprisoned he would have gone back to St Kitts, if he had ever come here at all, long before his AIDS was diagnosed. Taking account of the fact that the Court must give most anxious scrutiny to a decision which involves questions particularly of life expectancy, as this one apparently does, nevertheless I cannot find that an argument in this case that the decision of the Chief Immigration Officer was irrational is one that has any hope of success at all. Putting it the opposite way, it seems to me to be one which was well within the bounds of his discretion, and thus is not one with which the court can properly interfere.”⁷⁴¹

The European Court of Human Rights ultimately ruled that the execution of this deportation order would serve to violate Article 3 of the European Convention due to the significantly aggravated features of the death which D faced in St Kitts. If removed, he would be deprived of the counselling and accommodation which he had been receiving and would find himself alone and homeless while seriously ill in a State with insufficient resources to properly treat him. It would later be stated, however, in the similar case of *N v United Kingdom*⁷⁴² that this was only due to the particularly grave nature of the applicant’s condition in that particular case. While protection was ultimately granted in this case it required D, by then gravely ill, to undertake the difficult and complicated process of taking the case to Strasbourg when compliance with Article 3 required that this protection should have been given by the domestic courts. While there was no evidence that D risked being subjected to torture by the public authorities in St Kitts, Article 1 of the Torture Convention defines

⁷⁴¹ *Ibid* paragraph 12

⁷⁴² App No 26565/05

torture as also including acts of acquiescence by public officials. The act of removing a seriously ill person to a State where they will be unable to access medical treatment, will have no means of supporting themselves and are likely to be homeless would arguably satisfy this test even if it was not seen as active mistreatment by the UK authorities in itself.

While the decisions described above may appear to suggest that the UK courts place limited importance on the prevention of torture, they are bound to follow the law and the reform of many relevant procedures, including immigration regulations is a matter for Parliament, with the courts only gaining the ability to challenge most legislation under Section 4(2) of the Human Rights Act and even such a declaration of incompatibility does not affect the validity of the legislation. These cases also suggest that the limited grounds of judicial review may have served to restrict the courts in any efforts to proactively prevent the practice of torture, this seems to have been the case in *D*, where some sympathy for the applicant was evident but human rights provided no grounds to interfere with the decision. Since the entry into force of the Human Rights Act in 2000 however, one may be able to expect the UK courts, as public authorities, to take greater account of the prohibition of torture contained in Article 3 of the ECHR and possibly to consider the prevention of torture in all relevant areas of their activities. The Act gives the courts the power to declare legislation incompatible with Convention rights. It also requires them to interpret legislation where possible to be compatible with Convention rights and creates a further ground for judicial review. It may be hoped that this will enable the courts to adopt a less deferential stance towards executive officials and give greater scrutiny to their activities where they risk jeopardising Convention rights including the prevention of torture. How this has worked in practice can be seen below. Many of the most significant examples of increased scrutiny of the executive have arisen in cases

concerning Article 5 of the Convention relating to the deprivation of liberty. Courts have however, considered the effects that severe violations of this provision may have on a victim, which in extreme cases may be viewed as being on a similar level to breaches of Article 3.

While it is positive that the United Kingdom's obligations under the European Convention are now being considered by the courts in these cases, it is questionable whether even a full adherence to the jurisprudence of the European Court would fully guarantee compliance with the UN Convention. The European Court decided in *Othman v United Kingdom*⁷⁴³ that the removal of a detained individual to Jordan would not violate the *non-refoulement* requirements of Article 3 of the European Convention. This is despite serious concerns expressed by the Committee Against Torture⁷⁴⁴ and referred to by the court itself⁷⁴⁵ over Jordan's compliance with key requirements of the UN Torture Convention. These included a climate of impunity among law enforcement officials,⁷⁴⁶ the lack of prompt and impartial investigations of allegations of torture,⁷⁴⁷ prolonged administrative detention without adequate monitoring⁷⁴⁸ and the general lack of monitoring of detention facilities.⁷⁴⁹ The court relied heavily on the existence of a Memorandum of Understanding between the United Kingdom and Jordanian governments that the applicant would not be subjected to torture or cruel, inhuman or degrading treatment,⁷⁵⁰ a practice that the Committee Against Torture has repeatedly discouraged.⁷⁵¹ While accusing the UK of

⁷⁴³ App No. 8139/09

⁷⁴⁴ Committee Against Torture Concluding Observations and recommendations on Jordan 25 May 2010 CAT/C/JOR/CO2

⁷⁴⁵ *Op cit.* *Othman v United Kingdom* paragraphs 125-135

⁷⁴⁶ *Op cit.* Concluding Observations on Jordan paragraph 10

⁷⁴⁷ *Ibid* paragraph 11

⁷⁴⁸ *Ibid* paragraph 13

⁷⁴⁹ *Ibid* paragraph 15

⁷⁵⁰ *Op cit.* *Othman v United Kingdom* paragraph 194

⁷⁵¹ See e.g. United Nations Committee Against Torture Concluding Observations and United Nations Committee Against Torture, Concluding Observations and Recommendations, United States of America, 25 July 2006, CAT/C/USA/CO/2 Recommendations on the United Kingdom May 2013 CAT/C/GBR/CO/5 and

“...a tendency to play down Jordan’s record on torture,”⁷⁵² the court would argue that the applicant’s high profile would mean that he faced, if anything, a diminished risk of ill-treatment.⁷⁵³ This clearly demonstrates a failure on the part of the Strasbourg court to provide the same standard of protection as is required of States parties by the UN Convention meaning that even a full application of Strasbourg jurisprudence would be unlikely to ensure full compliance with the UN Convention or sufficient protection for individuals within the United Kingdom’s jurisdiction, especially in the absence of an Article 22 declaration allowing the Committee to receive individual complaints concerning the UK. Full protection can, therefore, be achieved only by full consideration of the requirements UN Convention and the jurisprudence and observations of the Committee in the exercise of decisions on whether to remove individuals to other States where torture is known to be practiced.

A number of other issues have been raised in the context of the long legal battle involving Othman. The most recent case before the UK courts was *Othman v Secretary of State for the Home Department*.⁷⁵⁴ This case concerned the long and protracted attempts by successive Secretaries of State to deport a suspected terrorist to Jordan where he had been convicted in absentia of conspiracy to cause explosions.⁷⁵⁵ Here the arguments focused not on whether Othman faced the prospect of being tortured if returned to Jordan, although this would undoubtedly have been a concern in view of the most recent Concluding Observations by the Committee Against Torture on that State,⁷⁵⁶ but the fact that he faced a retrial which may have included evidence allegedly obtained as a result of torture.⁷⁵⁷ This case involved a Memorandum of Understanding concluded between the governments of

⁷⁵² *Op cit. Othman v United Kingdom* paragraph 194

⁷⁵³ *Ibid* paragraph 196

⁷⁵⁴ *Omar Othman aka Abu Qatada v Secretary of State for the Home Department* [2013] EWCA civ 277

⁷⁵⁵ *Ibid* Mitting J at paragraphs 7-8

⁷⁵⁶ *Op cit.* CAT Concluding Observations on Jordan

⁷⁵⁷ *Op cit. Othman v Secretary of State* paragraphs 7-8

the United Kingdom and Jordan in which the latter State undertook that Othman would not be subjected to treatment contrary to Article 3 of the European Convention if deported.⁷⁵⁸ This practice has been condemned by both the Committee Against Torture⁷⁵⁹ and the Human Rights Committee, the latter referring to previous litigation involving Othman which will be discussed below.⁷⁶⁰ In this case, however, the view was taken that there was little difference between the two questions:⁷⁶¹

“Torture is universally abhorred as an evil. A state cannot expel a person to another state where there is a real risk that he will be tried on the basis of evidence which there is a real possibility may have been obtained by torture... SIAC found that there was a real risk that evidence obtained by torture would be admitted at the retrial and that, as a consequence, there was a real risk that he would be subjected to a flagrant denial of justice.”⁷⁶²

This case was informed by the earlier judgement of the European Court of Human Rights on the matter.⁷⁶³ Here, as discussed above, the case was not considered as a potential violation of Article 3 of the European Convention which prohibits torture and inhuman or degrading treatment, but as a violation of Article 6 which guarantees access to the courts, the possible admission of this evidence being a denial of justice. The Court of Appeal here makes extensive reference to the Strasbourg judgement but only refers to Article 15 of the Convention Against Torture which expressly prohibits the admission in legal proceedings of evidence obtained under

⁷⁵⁸ *Ibid* paragraph 10

⁷⁵⁹ *Op cit.* CAT Concluding Observations on the United Kingdom

⁷⁶⁰ *Op cit.* CCPR Concluding Observations on the United Kingdom

⁷⁶¹ *Op cit.* *Othman v Secretary of State* paragraph 56

⁷⁶² *Ibid* paragraph 58

⁷⁶³ App No. 8139/09

torture in so far as it notes the consideration given to this in the Strasbourg judgement.⁷⁶⁴

A more recent case to thoroughly illustrate the approach taken by the United Kingdom's courts to the issue of extradition is *Assange v Sweden*⁷⁶⁵ which concerned Julian Assange, the founder of the website 'wikileaks.' Assange was wanted in the United States in connection with the activities of this website and had claimed he would be at risk of the death penalty had he been sent there. These proceedings, however, concerned an attempt to extradite him to Sweden where he was facing unrelated allegations of sexual assault. In this case the Supreme Court appeared to pay very little attention to either the European Convention on Human Rights or to the United Nations Convention Against Torture, instead focusing on the technical issue of the competence of the Swedish prosecutor to seek extradition.⁷⁶⁶

Any arguments that extraditing Assange to Sweden would be likely to result in a subsequent extradition to the United States where he may face the death penalty are likely to fail on the basis that Sweden is a member of the Council of Europe and is, like the UK, bound by the Strasbourg Court's judgement in *Soering v United Kingdom*,⁷⁶⁷ which prevents extraditions to States where detainees are likely to face the death penalty. It is to be noted, however, that the two main areas of concern raised by the Committee Against Torture following its consideration of Sweden's most recent periodic report in 2008 were the treatment of remand prisoners and the deportation and extradition of non-nationals, often to States with which they have a

⁷⁶⁴ *Op cit. Othman v Secretary of State* paragraph

⁷⁶⁵ [2012] UKSC 22

⁷⁶⁶ *Ibid*

⁷⁶⁷ [2012] UKSC 22

very limited connection.⁷⁶⁸ Assange is currently residing in the Ecuadorian embassy in London having claimed political asylum.

(iv) Control Orders

As discussed in Chapter 2(1), deprivation of liberty may also lead to torture unless key fundamental safeguards are in force to protect those who are detained. An example of this can be seen in the case of *Secretary of State for the Home department v JJ and others*⁷⁶⁹ which concerned the imposition of control orders on terrorist suspects under the Prevention of Terrorism Act 2005, the conditions of which included a curfew requiring the subjects to remain in their own home for 18 hours per day, restricting their movement during the six hours when they were permitted to leave and requiring all visitors to be approved by the Home Office following the provision of extensive personal information.⁷⁷⁰ They were also restricted in the communication equipment which they were permitted to possess.⁷⁷¹ While the House of Lords found these orders incompatible with Article 5 of the Convention, account was taken of the potentially damaging effects of these conditions. Lord Bingham stated that:

*“The effect of the 18-hour curfew, coupled with the effective exclusion of social visitors, meant that the controlled persons were in practice in solitary confinement for this lengthy period every day for an indefinite duration, with very little opportunity for contact with the outside world, which means insufficient to permit provision of significant facilities for self-entertainment and with knowledge that their flats were liable to be entered and searched at any time...”*⁷⁷²

⁷⁶⁸ CAT/C/SWE/CO5 paragraphs 13 and 16

⁷⁶⁹ [2008] 1 A.C. 385

⁷⁷⁰ *Ibid*

⁷⁷¹ *Ibid* Lord Bingham at para 20

⁷⁷² *Ibid*

The analogy to solitary confinement here is interesting as this type of detention is something which has been found to have the potential to amount to inhuman or degrading treatment.⁷⁷³ Even if this case is considered merely with reference to Article 5, this increased focus on the situation of the individuals concerned rather than on the determinations of the Secretary of State at least suggests a greater willingness following the entry into force of the Human Rights Act which requires public authorities, including the courts,⁷⁷⁴ to act in a way which is compatible with Convention rights.

The judgement in this case can be argued to be inconsistent with that of the European Court of Human Rights in *Guzzardi v Italy*,⁷⁷⁵ where a violation of Article 5 was established in relation to a less draconian set of restrictions imposed on an individual suspected of involvement in organised crime.⁷⁷⁶ Here the individual in question was required to, among other restrictions, reside on the island of Asinara, “report to the supervisory authorities twice a day and whenever called upon to do so,”⁷⁷⁷ “not associate with persons convicted of criminal offences and subjected to preventive or security measures”⁷⁷⁸ and “not return to his residence later than 10 p.m. and not go out before 7a.m., except in case of necessity and after having given notice in due time to supervisory authorities.”⁷⁷⁹ This amounted to a curfew period of only nine hours per day. He was also required to “inform the supervisory authorities in advance of the telephone number and the name of the person telephoned or

⁷⁷³ See e.g. concluding observations and recommendations of the UN Committee Against Torture available at: <http://www2.ohchr.org/english/bodies/cat/sessions.htm>

⁷⁷⁴ *Venables v News Group Newspapers Ltd* [2001] 2 W.L.R. 1038 per Dame Elizabeth Butler-Sloss P

⁷⁷⁵ Application No. 7367/76

⁷⁷⁶ *Ibid* paragraph 12

⁷⁷⁷ *Ibid*

⁷⁷⁸ *Ibid*

⁷⁷⁹ *Ibid*

telephoning each time he wished to make or receive a long-distance call.”⁷⁸⁰ It should be noted, that:

*“Whilst the area around which the applicant could move far exceeded the dimensions of a cell and was not bounded by any physical barrier, it covered no more than a tiny fraction of an island to which access was difficult and about nine-tenths of which was occupied by a prison... He lived there principally in the company of other persons subjected to the same measures and of policemen.”*⁷⁸¹

These conditions may appear to be more extreme than those in JJ, where the suspects were confined to an area of London much less isolated than the conditions described above. The restriction of association, however, remains a key factor here. It is also important to note the other significant differentiating factor in *Guzzardi* was that the suspect’s family were prevented from residing on the island for a period of time.⁷⁸² While these cases were decided under Article 5 of the European Convention, any examination of this issue under Article 3 or the UN Torture Convention must be guided by the fact that such restrictions on social contact have been compared to the practice of solitary confinement, the ability of which to amount to ill treatment, if not to torture, can be greatly increased in cases where it is imposed over an extended or open ended period as is the case under the control order regime.⁷⁸³ While it is positive that the European Court found a violation in the case of *Guzzardi*, the facts of this case mean that there is still scope for severe restrictions on the liberty of unconvicted persons not to amount to a violation of Article 5 which may raise concerns relating to Article 3 and the prohibition of torture and inhuman or degrading treatment given that, as noted above, parallels can be drawn between the kind of

⁷⁸⁰ *Ibid*

⁷⁸¹ *Ibid* paragraph 95

⁷⁸² *Ibid* paragraph 35

⁷⁸³ See e.g. United Nations Committee Against Torture, Concluding observations on the second periodic report of Japan adopted by the Committee at its fifteenth session (6-31 May 2013) CAT/C/JPN/CO/2 paragraph 14

restrictions imposed and conduct which has been condemned by the UN Torture Committee. The Committee has, however, been silent on the specific issue of the Control Order regime and has, in fact, praised the United Kingdom for the repeal of the system of indefinite detention without trial of foreign terrorist suspects under Part IV of the Anti terrorism, Crime and security Act 2001 which preceded it.⁷⁸⁴ The Human Rights Committee has, however, been more vocal in its criticism of the regime, arguing that the regime:

*“...involves the imposition of a wide range of restrictions, including curfews of up to 16 hours, on individuals suspected of being “involved in terrorism”, but have not been charged with any criminal offence... The Committee is also concerned that the judicial procedure whereby the imposition of a control order can be challenged is problematic, since the court may consider secret material in closed session...”*⁷⁸⁵

This demonstrates the importance of engagement by the UK, not just with the Committee Against Torture, but with all of the United Nations treaty monitoring bodies in order to ensure full protection of human rights. Here the Human Rights Committee addressed this issue in relation to articles 9 and 14 of the Covenant which guarantee the rights to liberty and security of the person and equality before courts and tribunals respectively.

Regardless of how they have been perceived by the courts, Control Orders have provoked a significant amount of academic controversy. Walker⁷⁸⁶ notes that far from being an overused power, only 15 Control Orders were in effect in 2008 where the, then Director of the Security Services had spoken of up to 2000 who posed a significant threat to national security.⁷⁸⁷ He goes on to argue that while such orders

⁷⁸⁴ *Op cit.* CAT Concluding Observations on the United Kingdom paragraph

⁷⁸⁵ *Op cit.* CCPR Concluding Observations on the United Kingdom paragraph 17

⁷⁸⁶ Walker C *The threat of terrorism and the fate of control orders* 2010 Public Law 4

⁷⁸⁷ *Ibid* p6

may be seen as 'odious,' something is required to protect people from a substantial terrorist threat.⁷⁸⁸ One alternative considered would be prosecution for all those suspected of such offences. Walker argues that this is not necessarily difficult given the wide range of terrorism charges available especially since the passage of the Terrorism Act 2006.⁷⁸⁹ It is, however, noted that these offences are themselves controversial as they often involve minimal conduct on the part of the guilty party.⁷⁹⁰ Another alternative suggested is the inclusion of evidence obtained from intercepted communications to facilitate the successful prosecution of suspects currently subject to Control Orders, something currently prohibited by Section 17 of the Investigatory Powers Act 2000.⁷⁹¹ It is argued that such prosecutions may be less than ideal and, while this may remove the need for many Control Orders...

*"...one problem may be solved at the expense of another. With redesigns to criminal process and offences, the dangers of miscarriage of justice and of delegitimising criminal justice will grow in severity"*⁷⁹²

This is an understandable viewpoint. It cannot be denied that there are individuals who do pose a clear risk to the safety of others, regardless of whether these are the ones subject to such orders, who cannot be given a fair trial. There is no easy answer as to how to resolve this in a manner which prevents harm to the whole population but it is impossible to deny on the strength of the facts described above that these orders represent an indefinite fetter not only to the liberty of an unconvicted person but also to their ability to interact with other human beings and it is this that may be argued to raise issues under the Torture Convention. Walker argues that limiting the duration of these Orders to a non-renewable period of 12

⁷⁸⁸ *Ibid* p7

⁷⁸⁹ *Ibid* pp7-8

⁷⁹⁰ *Ibid*

⁷⁹¹ *Ibid* pp8-9

⁷⁹² *Ibid* p9

months would limit their damaging effect⁷⁹³ This may be the case but as is also noted this has been opposed by the government and, in view of the fact that it is not always possible to remove these suspects who may include British nationals, this would only delay the problem in question. While The Prevention of Terrorism Act was repealed by the Terrorism Prevention and Investigative Measures Act 2011, Section 2 of this Act also allows the Secretary of State to make restrictive orders against terrorist suspects but a two year time limit has been introduced in Section 5 which will serve to limit the damage such orders have on individuals, something previously likened to solitary confinement.

(v) State Immunity for Acts of Torture

In *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia and another*,⁷⁹⁴ a British national who was allegedly detained in solitary confinement and systematically tortured over a period of 67 days in Saudi Arabia⁷⁹⁵ attempted to sue the Kingdom in the British courts. The House of Lords confirmed the rulings of the lower courts and found that the Kingdom was immune from suit under the State Immunity Act 1975 and the International Law doctrine immunity.

Here Lord Hoffmann referred to suggestions made at meetings of the UN Committee Against Torture that as an exception to this rule exists in relation to *acts jure gestionis* where the organs of a State are not always able to claim immunity for acts which do not fall into the exclusive, one should also be considered for acts of torture.⁷⁹⁶ While he went on to dismiss this suggestion, he did so noting that "...[w]hether it should be is another matter."⁷⁹⁷ The judgement went on however, to take a strong stance on the scope of State immunity. It was noted that Article 1 of the

⁷⁹³ *Ibid* p16

⁷⁹⁴ [2007] 1 A.C. 270

⁷⁹⁵ *Ibid* Lord Hoffmann at para 37

⁷⁹⁶ *Ibid* para 57

⁷⁹⁷ *Ibid*

UN Torture Convention defines torture as being the act of a public official and argued that such acts are protected by immunity.

*“The acts of torture are either official acts or they are not. The Torture Convention does not “lend” them an official character; they must be official to come within the Convention in the first place. And if they are official enough to come within the Convention, I cannot see why they are not official enough to attract immunity.”*⁷⁹⁸

The Lords were also highly critical of any international jurisprudence suggesting that there is an exception to the strict rules of State immunity in cases of grave international crimes or violations of norms of *jus cogens*, including the commission of torture. Lord Bingham was particularly critical of the decision of the Italian Court of Cassation in *Ferrini v Federal Republic of Germany*, observing that “...one swallow does not make a rule of international law.”⁷⁹⁹ While there are clear justifications for the international law doctrine of sovereign immunity relating to sovereign dignity and equality which may be jeopardised through the use of politically motivated allegations of torture as discussed in Chapter 1(c), it may be questioned whether the courts are right to allow for its use as a shield against allegations of the most flagrant breaches of the prohibition of torture. As explained in Chapter 1(b) States have historically, and continue to, use torture as a means of maintaining the position of their governments. The applicability of sovereign immunity to such actions would, in effect, render the absolute prohibition of torture useless as States could continue to engage freely in the practice in the knowledge that they would not face any meaningful consequences. Courts in other jurisdictions have gone further in this area as was the case in *Ferrini* but this has not met with international approval with the International Court of Justice ruling that the decision of the Italian court in this case violated

⁷⁹⁸ *Ibid* para 83

⁷⁹⁹ *Ibid* Lord Bingham at para 22

international law.⁸⁰⁰ It may be noted here, however, that in this case it was international law and not domestic law which prevented the House of Lords from taking a stronger stance in relation to the punishment of torture, also a key element of a preventive mechanism and that it may be more difficult to fault the UK judicial system in this connection.

It was held by the European Court of Human Rights on 14th January 2014⁸⁰¹ that the judgment in the *Jones* case did not amount to a violation of Article 6 of the European Convention on Human Rights⁸⁰² which guarantees the right to a fair trial. Here the court found insufficient evidence of any exception in public international law to the rule on sovereign immunity for cases of torture and held that the House of Lords judgment had been consistent with this.⁸⁰³ It was noted that there was “some debate”⁸⁰⁴ and that the position appeared to be evolving but it was concluded that such developments remained ongoing and could not justify a different outcome.⁸⁰⁵ This decision is a cause for concern. As noted in chapters 1(a) and (b), the majority of the acts which can be defined as torture have historically been committed by agents of the sovereign, in many cases in order to preserve the position of this sovereign. Indeed the definition of torture set out in Article 1 of the United Nations Convention describes acts committed “...by or with the consent or acquiescence of...”⁸⁰⁶ public officials. The very concept of sovereign immunity in such cases risks the creation of a climate of impunity in which officials may commit torture or other acts of ill treatment without the risk of sanctions. It is true that the international monitoring bodies are able to provide some measure of oversight but, in view of the

⁸⁰⁰ *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* 3 February 2012 at: <http://www.icj-cij.org/docket/files/143/16883.pdf>

⁸⁰¹ *Jones and Others v United Kingdom* App No. 34356/06 and 40528/06

⁸⁰² *Op cit* European Convention on Human Rights Article 6

⁸⁰³ *Op cit. Jones* paragraph 214

⁸⁰⁴ *Ibid* paragraph 213

⁸⁰⁵ *Ibid*

⁸⁰⁶ *Op cit. UNCAT* Article 1

problems of non-reporting and non-ratification referred to in chapter 2 as well as the lack of any meaningful sanctions against States parties, this is likely to be of limited assistance. Sovereign immunities do not preclude the commencement of legal proceedings in a State's own courts but it is doubtful, given the absolute nature and *jus cogens* status of the prohibition of torture that a State in which would permit a public official to engage in such acts would permit a fair hearing for the victim.⁸⁰⁷ The current system of sovereign immunity can, therefore, be seen as a significant obstacle to full compliance with the obligations of the UN Convention. This judgment from the European Court of Human Rights would suggest, therefore, that the duty under the Human Rights Act is not sufficient in itself to ensure full compliance with the United Kingdom's obligations under the UN Torture Convention, although, as described in the next section, it has undoubtedly contributed to this. The jurisprudence of the Strasbourg court, of which UK courts are bound to have regard has upheld a state of impunity which would appear to run counter to the provisions of the UN Convention relating to the availability of remedies for torture victims⁸⁰⁸ and this would suggest the need for the United Kingdom's courts to consider, in all relevant cases, the UN Convention and the jurisprudence of the Committee as well as that of the Strasbourg court in order to ensure full compliance.

(vi) Life Imprisonment

Another context in which it is possible to examine the approach of the courts to treatment potentially amounting to torture or inhuman or degrading treatment is the imposition of sentences of life imprisonment with 'whole life orders' meaning that a prisoner will never be considered for release.

⁸⁰⁷ See e.g. Committee Against Torture Concluding Observations and Recommendations on Jordan 25 May 2010 CAT/C/JOR/CO/2 paragraph 10

⁸⁰⁸ *Op cit.* UNCAT see e.g. Articles 4, 6, 7, and 8

The procedure for determining the earliest date at which a person sentenced to life imprisonment may be considered for release on licence, at least in the case of those subject to mandatory life sentences had previously required a determination by the Home Secretary, although Section 269 of the Criminal Justice Act 2003 now requires that this should be decided by the sentencing judge. The issues which this had raised in relation to the role of the Home Secretary and the compatibility of this with a comprehensive preventive mechanism requiring independence and oversight will be considered in more detail in a later section but it should be noted that it was held in *R v Secretary of State for the Home Department, Ex parte Doody*⁸⁰⁹ that it was acceptable for the Home Secretary to have the final say in such matters, although the Court of Appeal in *R v Bieber*⁸¹⁰ made the point of stating that it had not considered whether decisions relating to the release of such prisoners on compassionate grounds should be made by a judge rather than a minister, suggesting at least the acknowledgement that this may create difficulties under the Human Rights Act which did not yet exist when *Doody* had been decided. The other relevant feature of *Doody* is the requirement set out by Lord Mustill in this judgement that prisoners be informed of the decisions taken by the Home Secretary in respect of their tariff dates. Here Lord Mustill refers not only to the ability of a prisoner to challenge any error in the facts or reasoning behind such decisions but also to "...the human desire to [know the reasons] behind decisions...effecting their future."⁸¹¹ While this is not explored in the context of compliance with international human rights law, it does provide some support for the view that it may amount to cruel treatment to imprison a person for a set minimum period without informing them of what this is. Following this judgement, Myra Hindley was informed in December 1994 of the decision of the Secretary of State that she should be subject to a whole life tariff.

⁸⁰⁹ [1993] 3 W.L.R. 154

⁸¹⁰ [2008] EWCA Crim 1601 para 51

⁸¹¹ *Doody* Lord Mustill

The *Hindley* case⁸¹² was decided prior to the entry into force of the Human Rights Act in 2000 and incompatibility with Article 3 of the European Convention was not argued in challenging the whole life tariff and, indeed, the European Convention was not considered by the House of Lords as it rejected arguments that Hindley had been treated unfairly by the imposition of the tariff and that the Home Secretary had acted irrationally. Lord Steyn concluded in this case that:

*“...there are cases where the crimes are so wicked that even if the prisoner is detained until he or she dies it will not exhaust the requirements of retribution and deterrence.”*⁸¹³

While these needs of society were referred to, there was no real consideration of whether these conflicted with Hindley’s human rights and, if so, where the appropriate balance should be struck.

The main illustration of the approach taken by the English courts to this issue since the entry into force of the Human Rights Act in 2000 can be seen in the case of *R v Bieber*⁸¹⁴ which concerned a whole life order made against an individual convicted of the murder of a police officer in the course of his duty and the attempted murder of two further such officers. This was appealed, unlike *Hindley*, in part on the basis that the European Court of Human Rights had suggested in *Kafkaris v Cyprus*⁸¹⁵ that such orders may have the potential to violate Article 3 of the European Convention.

The court considered this argument in great depth reproducing large extracts from the concurring judgement of Judge Bratza in the case which concerned the removal of regulations which allowed prisoners serving life sentences under Cypriot law to be considered for parole after 20 years. This was not found to be a violation of Article 3

⁸¹² *R v Secretary of State for the Home Department ex parte. Hindley* [2001] 1 A. C. 410

⁸¹³ Lord Steyn at 417

⁸¹⁴ [2008] EWCA Crim 1601

⁸¹⁵ Application number 21906/04

as there remained provision for such prisoners to be released on the orders of the President. Having considered this and previous judgements of the Strasbourg court the UK court reached the conclusion that only a life sentence which was irreducible, that is to say provided no means for the prisoner ever to be released, would have the potential to raise issues under Article 3.⁸¹⁶ The court then went on to conclude that there was no reason to suppose that an irreducible life sentence would violate Article 3 if it satisfied the legitimate purposes of imprisonment including punishment and deterrence which was possible.⁸¹⁷ This seems to have led the court to a very similar conclusion to the one reached by the House of Lords in *Hindley*, albeit by a completely different route. Following the entry into force of the Human Rights Act, courts are considering in detail, the requirements of the Convention and even going so far as to base their judgements on key questions of law around these where they had previously barely been considered, even in very similar cases only a relatively short time previously. It must, however, be noted that there are limits to the extent of Article 3 and the fact that it was considered in such great detail in *Bieber* did not prevent an outcome very similar to that in *Hindley* although very different reasoning was used.

The court in *Bieber* noted that:

“...[it] may be that the approach of the Strasbourg court will change. There seems to be a tide in Europe that is setting against the imposition of very lengthy terms of imprisonment that are irreducible.”⁸¹⁸

There remained an emphasis, however, on the point that such lengthy sentences could be imposed for the purposes of punishment and deterrence and that violations of Article 3 are only likely to arise where this is not the case. It was concluded that:

⁸¹⁶ *Op cit.* Bieber at paragraph 32

⁸¹⁷ *Ibid* paragraph 39

⁸¹⁸ *Ibid* paragraph 46

“...[any] article 3 challenge where a whole life term has been imposed should therefore be made, not at the time of the imposition of the sentence, but at the stage when the prisoner contends that, having regard to all the material circumstances, including the time that he has served and the progress made in prison, any further detention will constitute degrading or inhuman treatment.”⁸¹⁹

Despite this conclusion the court decided that the facts in *R v Bieber* did not justify the imposition of a whole life order and substituted one for a minimum term of 37 years.⁸²⁰

The compatibility of the United Kingdom’s laws on life sentences with Article 3 of the European Convention was assessed by the Grand Chamber of the European Court of Human Rights in the case of *Vinter and Others v United Kingdom*⁸²¹ in 2013. This case concerned Douglas Vinter, Jeremy Bamber and Peter Moore who are all currently serving sentences of life imprisonment for murder and are subject to ‘whole life’ orders.⁸²² Vinter had been sentenced on 21 April 2008 for the murder of his wife having previously served ten years of a sentence of life imprisonment for the murder of a work colleague. He was made subject to a whole life order as this was his second conviction for murder.⁸²³ Bamber was convicted on 28 October 1986 of the murder of five members of his family including two children.⁸²⁴ He was given a whole life tariff by the Secretary of State in 1988 on the basis that these killings were premeditated and planned.⁸²⁵ This was upheld by the Court of Appeal in 2009.⁸²⁶ Moore was convicted on 29 November 1996 for the murder of four men for the

⁸¹⁹ *Ibid* paragraph 49

⁸²⁰ *Ibid* paragraph 58

⁸²¹ 66069/09

⁸²² *Ibid* paragraphs 1-7

⁸²³ *Ibid* paragraph 17

⁸²⁴ *Ibid* paragraph 20

⁸²⁵ *Ibid* paragraph 21

⁸²⁶ *Ibid* paragraph 23-25

purposes of his own sexual gratification.⁸²⁷ A whole life tariff determined by the Secretary of State was subsequently affirmed by the High Court.⁸²⁸

The Grand Chamber found that it is not permissible to detain a person without “legitimate penological grounds”⁸²⁹ and while these may be present at the start of a prolonged prison sentence, they may alter over time and that an irreducible whole life sentence has the effect of depriving the prisoner of the right to atone for their offence:

“If anything, the punishment becomes greater with time: the longer the prisoner lives, the longer his sentence. Thus, even when a whole life sentence is codign punishment at the time of its imposition, with the passage of time it becomes... a poor guarantee of just and proportionate punishment.”⁸³⁰

The Grand Chamber was careful to note the wide margin of appreciation afforded to States in the area of criminal justice⁸³¹ and stated that so long as a sentence of life imprisonment provided for a review it was for the State to determine what form this should take, even whether it was to legislative or judicial,⁸³² so long as such a review would take place. This means that whole life sentences which are irreducible would violate Article 3 of the European Convention but the “very long” sentences referred to in *Bieber*, quoted above, would not necessarily do so. The Grand Chamber concluded that:

“...in the course of the present proceedings, the applicants have not sought to argue that, in their individual cases, there are no longer any legitimate penological grounds for their continued detention. The applicants have also accepted that, even if the requirements of punishment and deterrence were to be fulfilled, it would

⁸²⁷ *Ibid* paragraph 26

⁸²⁸ *Ibid* paragraph 30

⁸²⁹ *Ibid* paragraph 110

⁸³⁰ *Ibid* paragraph 112

⁸³¹ *Ibid* paragraph 120

⁸³² *Ibid*

*still be possible that they could continue to be detained on grounds of dangerousness. The finding of a violation in their cases cannot therefore be understood as giving them the prospect of imminent release.*⁸³³

In her concurring opinion, Judge Power-Forde expressed some sympathy with the views of the partly dissenting judge but added:

*“...what tipped the balance for me in voting with the majority was the Court’s confirmation, in this judgement, that Article 3 encompasses what might be described as “the right to hope.” It goes no further than that. The judgement recognises, implicitly, that hope is an important and constitutive aspect of the human person. Those who commit the most abhorrent and egregious of acts and who inflict untold suffering upon others, nevertheless retain their fundamental humanity and carry within themselves the capacity to change. Long and deserved though their prison sentences may be, they retain the right to hope that, someday, they may have atoned for the wrongs which they have committed. They ought not to be deprived entirely of such hope. To deny them the experience of hope would be to deny a fundamental aspect of their humanity and, to do that, would be degrading.*⁸³⁴

This approach again tends to support the view that it would not necessarily constitute a violation of Article 3 to detain a person in prison for the remainder of their life where their crime is sufficiently serious and they do not make any significant progress in prison. What would violate Article 3 is the current United Kingdom practice of giving prisoners ‘whole life orders’ which are not subject to any kind of review and do not allow for any possibility of release at any point in the future regardless of any progress that the prisoner may be able to make. It is true that the

⁸³³ *Ibid* paragraph 131

⁸³⁴ Concurring opinion of Judge Power-Forde

current regime in the UK allows for the release of prisoners subject to whole life orders at the discretion of the Secretary of State on compassionate grounds. This, however, is only available to those who are terminally ill or severely incapacitated such as murderer Reggie Cray in England and alleged Lockerbie bomber Abdelbasset al-Megrahi in Scotland.⁸³⁵ There is no provision for prisoners subject to these orders to be recognised as having been rehabilitated sufficiently to lead an ordinary life at liberty in the community.

This judgement may be argued to represent the best balance between the Article 3 rights of prisoners and the safety of the general public, including their Article 2 rights to be protected from those who have repeatedly taken peoples' lives. These prisoners do not have to be released where it cannot be established that they have atoned for their crimes and are no longer a danger to the public, meaning that the majority of them will indeed never be released and are likely to die behind bars, but they are not degraded by being held in continued detention once rehabilitation has been established in the knowledge that they will never be released under any circumstances. This does not address all of the complex issues surrounding the release of these prisoners such as how it may be established with any certainty whether such a prisoner has reformed, the need to appropriately punish some of the worst crimes that occur in society, the needs and wellbeing of the families of the victims of such crimes and, indeed, the safety of the most notorious offenders and anybody who may be mistaken by the general public for such an offender. It does, however, expose the weaknesses in the current UK approach which allows for people to be detained in full knowledge that they will never be released which can only serve, as described by Judge Power-Forde, to deprive them of any hope for their future in a manner which must be considered to be degrading.

⁸³⁵ See e.g. <http://www.scotland.gov.uk/Topics/Justice/legal/lockerb主e/CompassionateReleasePro>

The judgement and Judge Power-Forde's views on a 'right to hope' are of debatable compatibility with the assertion discussed above in the *Bieber* case that any violation would occur at the point where any further imprisonment would be degrading rather than at the point of the sentencing. The imposition of any 'whole life order' that is seen to be irreducible would surely serve to violate this 'right to hope' but it is accepted, and prisoners are aware, that there may come a point at which further detention would violate this right, it would become more difficult to argue that such sentences are incompatible with Article 3 so long as there is an appropriate mechanism to establish that this is the case and to secure the release of these prisoners. The significant problem with the UK system is the lack of any such mechanism which that these sentences are irreducible and can be argued to constitute a violation of Article 3 whichever view is taken on this question.

This raises the question of how the UK government will respond to the ruling. Thomson considers a number of possible options which may be available.⁸³⁶ The most obvious of these would be to amend sentencing practice in a manner consistent with the judgement so as to exclude the possibility of whole life sentences. Such a change would be the most likely option to ensure full compliance with the prohibition of torture and other ill-treatment. This, however, is likely to inflame public opinion. An alternative considered is the repeal of the Human Rights Act which would prevent the judgement being used in proceedings before UK courts.⁸³⁷ It is noted, though, that such a repeal would not by itself affect the United Kingdom's international obligations under the European Convention and that similar cases could continue to be brought before the Strasbourg court with violations of Article 3 continuing to be found.⁸³⁸ A further alternative considered by Thomson is withdrawal from the European

⁸³⁶ Thomson D *The implications of Vinter v United Kingdom: its effect upon life sentence "tariffs" and its implications for the Human Rights Act* 2013 Scots Law Times 233

⁸³⁷ *Ibid* p235

⁸³⁸ *Ibid*

Convention and the Council of Europe. This would be a cause of grave concern given the role played by the European Convention, as discussed throughout this chapter, in safeguarding the fundamental human rights of all individuals in the United Kingdom and its success, arguably greater than that of the Convention Against Torture, in combating the problem of torture and inhuman or degrading treatment. Full withdrawal would also have significant constitutional implications. Thomson notes Council of Europe Resolution 1610 (2008) and the 1993 Copenhagen Criteria which provide that accession to the Convention is a requirement of membership of the European Union.⁸³⁹ A somewhat less radical alternative, it is argued, would be the UK wide adoption of a system similar to that currently used in Scotland. Here Thomson points to Section 2(3A) of the Criminal proceeding (Scotland) Act 1993 as amended by Section 1 of the Convention Rights (Compliance) (Scotland) Act 2001 which requires that minimum terms for those sentenced to life imprisonment should be expressed in years and months.⁸⁴⁰ It is noted that this is:

“subject to the proviso that, by virtue of s2.(3A(b)), [the court] “may specify any such period of years and months notwithstanding the likelihood that such a period will exceed the remainder of the prisoner’s natural life”⁸⁴¹

This raises the possibility of minimum terms running into many decades or even longer to the point that the prisoner’s survival until the expiry date becomes a biological impossibility. This, however, would seem to be equally contrary to the provisions of Article 3. The Convention, as Judge Forde-Power put it, includes a ‘right to hope’ for such prisoners and this will be breached by any sentence which provides them with no hope of review, regardless of whether it describes itself as one of life or as one of a finite yet excessive period of time. Full compliance with the Article 3

⁸³⁹ *Ibid* p236

⁸⁴⁰ *Ibid* p233

⁸⁴¹ *Ibid*

prohibition would, therefore, require at least the theoretical possibility of release after an appropriate period. This would not, however, force States to release all their most dangerous criminals purely on the basis of the length of time which they have served as the right is merely one of review. There is nothing in the *Vinter* judgement that prevents a criminal who remains dangerous from being detained until their death.

It is positive that the United Kingdom courts have been considering the requirements of the European Convention and the jurisprudence of the Strasbourg Court since the entry into force of the Human Rights Act 1998 and such consideration of Article 3 is bound to result in at least some improvement in compliance with the UN Torture Convention. It is to be noted with concern that while the comprehensive analysis of Strasbourg jurisprudence in *Bieber* represented a step forward in the nature of the Court's reasoning, it did not produce an outcome that would be accepted by the Grand Chamber as fully satisfying Article 3 of the Convention meaning that the Human Rights Act, in itself, is not providing sufficient protection to those who find themselves before the United Kingdom's courts. It should be noted, however, that the European Convention is interpreted as a 'living instrument' which evolves with its societal context and, as noted above, it was observed by the Court of Appeal in *Bieber* that there may come a time when the Strasbourg Court comprehensively rules against irreducible whole life tariffs so it may be that understanding of the scope of Article 3 of the European Convention has developed since the judgement in the *Bieber* case and that this case would have been decided differently today. This is not convincing as the weak connection between the UK courts and Strasbourg requires cases to be considered by the European Court in order to establish the parameters of the Convention rights and while compliance with Article 3, and with the UN Torture Convention, cannot be guaranteed by the Human Rights Act alone, it is necessary to provide members of

the public with further protection in the form of an accessible and affordable way of taking their cases not only to Strasbourg, but also to the Committee Against Torture in the form of Individual Communications under Article 22 of the UN Convention, something for which the United Kingdom does not currently provide as is discussed in chapter 2. It remains to be seen, of course, how the United Kingdom will respond to this judgement. If the government seeks to modify the sentencing guidelines contained in section 197 of the Criminal Justice Act 2003, it would demonstrate that the government's attitude to the problem of torture and ill-treatment is reactive in nature with action being taken, in cases such as this, in response to violations which have already occurred. This cannot be described as being fully conducive to a system which seeks to prevent torture before it can take place, or indeed to a society from which the practice is eradicated, but it would represent a step in this direction as those who are sentenced in future would be prevented from being subjected to this form of degrading treatment. The greater danger would be if the government, for reasons of public opinion, were to ignore the judgment and continue to leave people at risk of ill-treatment.

This raises questions as to the views of the Committee Against Torture on this subject. While the Committee makes it its regular practice to advise States which continue to practice the death penalty to abolish this punishment,⁸⁴² there has been less focus on sentences of life imprisonment with limited reference to such punishments in the examination of periodic reports and the Concluding Observations and Recommendations subsequently issued. The Committee has, however, expressed some concern at the imposition of sentences of life imprisonment on children.⁸⁴³ This would seem, therefore, to be a practice which would be capable of

⁸⁴² *Op cit.* Concluding observations on Japan

⁸⁴³ See e.g. United Nations Committee Against Torture, Concluding Observations and Recommendations, United States of America, 25 July 2006, CAT/C/USA/CO/2 paragraph 34

causing pain or suffering within the scope of Article 1 of the Convention but one that has not received a significant amount of attention. The wording of Article 1, as noted above in section (a)(i), excludes pain and suffering arising from lawful sanctions but this has not served to dampen the Committee's sometimes vocal opposition to the death penalty. It can be concluded that greater development is needed in the Committee's practice in this area and that the approach of the European Court of Human Rights is to be preferred.

(vii) Assisted Suicide

Another context in which treatment has been argued before the courts to be cruel relates to the enforcement of laws prohibiting assisted suicide even in cases where an individual is suffering from a debilitating illness which prevents them from taking their own life without assistance and will condemn them to a painful or degrading death if they are prevented from doing so. This was the situation faced by Diane Pretty who suffered from Motor Neurone Disease and had sought an undertaking from the Director of Public Prosecutions that her husband would not be prosecuted if she were to take her own life with his assistance. This case was decided after the entry into force of the Human Rights Act and demonstrates the level of consideration now given by judges to the Convention rights including the Article 3 prohibition of torture and other inhuman or degrading treatment which was argued to be at issue here.

All the judges involved in hearing this case, from the initial request for a judicial review hearing⁸⁴⁴ at the Divisional Court⁸⁴⁵ to the House of Lords⁸⁴⁶ expressed great sympathy for Mrs Pretty's plight as they described her symptoms noting the "suffering

⁸⁴⁴ R. (on the application of Pretty) v DPP (Permission to Move for Judicial Review) [2001] EWHC Admin 705

⁸⁴⁵ R. (on the application of Pretty) v DPP [2001] EWHC Admin 788

⁸⁴⁶ R. (on the application of Pretty) v DPP [2001] UKHL 61

and indignity” associated with her illness as well as her fear of a death resulting from the natural progression of the disease.⁸⁴⁷ The Divisional Court was quick to accept that the DPP was not empowered to issue the undertaking which had been requested accepting their argument that they were unable to offer guarantees which may encourage future criminal conduct and rejecting the view that the need for a quick ‘vindication’ of Mrs Pretty’s Convention rights made this an exceptional case.⁸⁴⁸ The court did, however, consider another potential argument, not made by Pretty, that she should be granted a declaration that the actions proposed were lawful. In considering this it was noted that Section 3(1) of the Human Rights Act requires courts to interpret legislation including the Suicide Act 1961 in a way which is compatible with Convention rights ‘so far as it is possible to do so,’ and that where this is not possible Section 4(2) of the Human Rights Act allows courts to declare primary legislation incompatible with these rights.⁸⁴⁹ The court noted with concern however, that this would be “...a much less satisfactory outcome”⁸⁵⁰ in this case as it would not affect the validity of the legislation and while it may encourage a change to the law in the future, this would be likely to come too late for those already in Pretty’s condition. Despite this demonstration of the shortcomings of the Human Rights Act, this exploration of the issue does show a high level of engagement among the judiciary with human rights in a way which (see above) was not previously apparent and an inclination to apply the law consistently with the European Convention, including Article 3, where it is possible to do so. The requirements of the Act can be seen to be forcing the judiciary to examine, in detail, the content of the Convention rights.

⁸⁴⁷ *Op cit. Pretty* EWHC para 5

⁸⁴⁸ *Ibid* paras 30-31

⁸⁴⁹ *Ibid* para 35

⁸⁵⁰ *Ibid* para 35

The protection from ill-treatment which can be offered by the judiciary under the Human Rights Act is limited by the fact that Article 3 is only one of a series of Convention rights which the Act is intended to protect. Cases such as *Pretty* involve what the court saw as a conflict between the Article 3 right to protection from ill-treatment and the Article 2 right to life. Whether or not the Article 2 right to life includes a right to die is a separate and extensive debate which will not be considered here for reasons of space. Here the court took the view that it did not, something subsequently confirmed by the Strasbourg court in this case.⁸⁵¹ It was also argued that this had been established by the reasoning in *D v United Kingdom*.⁸⁵² While accepting that the suffering involved in this case was comparable to that in question in *D*,⁸⁵³ it was noted that that case concerned the possible withdrawal of treatment which would accelerate death and increase suffering whereas this case concerned the conscious act of ending the life of a person in order to prevent their suffering and hinged, it was argued, on the existence of a right to die guaranteed under Article 3 of the Convention as a part of the prohibition of torture and other ill-treatment.⁸⁵⁴ The view was taken that no such right existed and that in the eyes of the court "...Article 3 is not the right to *die* with dignity, but the right to *live* with as much dignity as can possibly be afforded, until that life reaches its natural end."⁸⁵⁵ Here the court makes reference to the Council of Europe's 'Recommendation on the protection of the human rights and dignity of the terminally ill and dying.'⁸⁵⁶ This reference is encouraging in that it shows the willingness of the courts to follow the spirit as well as the letter of the Strasbourg jurisprudence but demonstrates also how any such protection from ill-treatment will be restricted in the

⁸⁵¹ App No 2346/02

⁸⁵² *Op cit.* *Pretty* EWHC para 48

⁸⁵³ *Op cit.*

⁸⁵⁴ *Pretty* EWHC para 48

⁸⁵⁵ *Ibid* para 48

⁸⁵⁶ Recommendation 1418 1999 at *Ibid* para 49

UK courts, by the nature of this jurisprudence and the status of Article 3 as only one of a number of sometimes conflicting rights. In this case it was found that any right to a dignified death was outweighed by the interests of the community in the preservation of life.⁸⁵⁷

A similar view was taken in the House of Lords where Article 3 of the Convention was also considered at length. Here there was significant discussion on what amounted to 'treatment' for the purposes of the interpretation of this right. The similarities between the suffering of Pretty and of D in *D v United Kingdom* was also considered but again the difference was found to lie in the actions of the State. Where as a deportation and the withdrawal of treatment could constitute 'treatment' the prohibition of assisted suicide could not.⁸⁵⁸ Lord Steyn went so far as to state that the case "...plainly does not involve 'inhuman or degrading treatment'"⁸⁵⁹ Once again emphasis was placed on the societal need for the DPP not to give any undertaking not to act against a potential criminal offence to be committed in the future.⁸⁶⁰

As unsatisfactory as the outcome may have been in the Pretty case, many of the observations both of the Lords and of the Strasbourg judges, can be attributed to the nature of the European Convention as illustrated, for example, by Morris.⁸⁶¹ Firstly Morris argues that Mrs Pretty's suffering could not possibly amount to treatment under the European Convention,⁸⁶² a view accepted by all of the courts. It may, however, be argued as discussed in chapter 2, that Article 1 of the Convention Against Torture goes beyond this and covers the acquiescence of public officials in any severe pain or suffering which was undoubtedly the case here. If, therefore, the

⁸⁵⁷ *Op cit.* Pretty EWHC paras 50-51

⁸⁵⁸ *Op cit.* Pretty Lord Bingham at para 14

⁸⁵⁹ *Ibid* Lord Steyn at para 60

⁸⁶⁰ *Ibid* Lord Bingham at para 14

⁸⁶¹ Morris D *Assisted suicide under the European Convention on Human Rights: a critique* E.H.R.L.R. 2003 1 65

⁸⁶² *Ibid* pp70-71

UK courts were required to consider the application of the Convention Against Torture in their judgements, a different outcome may have been possible. The other significant argument made by Morris is that Pretty's suffering did not reach the 'minimum level of severity to engage Article 3 of the European Convention,⁸⁶³ especially given her ability to mitigate her suffering through the use of drugs and palliative care:

"There are some, of course, who would argue that this was not the point for Mrs Pretty. They would suggest that the whole purpose for her was to have control over her death—to be able to say goodbye while she was alert, not while sedated and overcome by a drugged stupor. This is indeed true. But the fact is, again, this can have no bearing on Convention arguments, at least under Art.3. According to Strasbourg jurisprudence—which requires any assessment of whether the minimum severity has been reached to take into account "all the circumstances of the case, such as the nature and context of the treatment..."⁸⁶⁴

This, again, is very true under the European Convention but does not necessarily mean that the rulings were in accordance with the Convention Against Torture. The Committee Against Torture, as noted in chapter 2 regularly addresses practices causing pain or suffering on a smaller scale than that faced by Mrs Pretty, even where this did not equate to that faced by D. Morris' view also raises the question of the scope of the European Convention in cases where good palliative medicine may not be available, either generally or to the specific patient in question. It may not be impossible that the provisions of the Suicide Act would violate Article 3 in those circumstances.

⁸⁶³ *Ibid* pp71-72

⁸⁶⁴ *Ibid* p72

These cases are encouraging as, however they were decided and whatever view is taken on assisted suicide and its place, if any, in any prohibition of torture or ill-treatment, they demonstrate the detailed consideration of, and the high level of engagement with the European Convention by the judiciary since the entry into force of the Human Rights Act. It seems clear that it is now quite possible to argue before a court about the extent of the requirements of the Convention and for the judges to take this seriously and engage fully with Strasbourg jurisprudence. They underline however, the limits to this approach as any difficulties associated with the prohibition of torture contained in Article 3 of the Convention will be imported into the consideration of the issue in UK courts. This may include, for example, the perceived conflict between Article 3 and other rights or interests as well as any limits to the scope of Article 3, such as the non inclusion of any 'right to die.' It may be possible to conclude that the various duties imposed on courts under the Human Rights Act provide a basic minimum standard which must be upheld in the consideration of cases involving treatment which may violate Article 3 of the European Convention but, as discussed in sections (i-iii), a comprehensive prohibition of torture goes beyond this. As argued by the Committee Against Torture in their General Comment No.2,⁸⁶⁵ it is not sufficient for States merely to prevent their public officials engaging directly in acts of ill-treatment, they must also do all that they reasonably can do in order to prevent such pain or suffering from occurring in order not to be acquiescing in the infliction such pain or suffering, one of the defining characteristics of torture under Article 1 of the Convention. The Committee has not discussed in any detail how such a requirement should apply where the pain and suffering involved is being inflicted not by public officials or those under their potential influence but by nature but where, by prohibiting assisted suicide, public officials are not doing all which they

⁸⁶⁵ United Nations Committee Against Torture, General Comment No. 2, Implementation of article 2 by States parties 24 January 2008 CAT/C/GC/2

might do to prevent further pain or suffering and may even be said to be contributing to further suffering by obstructing what may be the only means of preventing this. This raises other questions which must be considered in the examination of any preventive mechanism. If torture is viewed as pain or suffering caused by the State or which could have been prevented by the State, then it can certainly be argued that any blanket ban on assisted suicide could be inconsistent with the absolute nature of the prohibition. This, however, appears to be a shocking argument as it takes no account of the moral difficulties associated with such killings. These range from ethical objection to suicide to the scope for the abuse of any legalisation of this practice and the danger that those who believe themselves to be a 'burden' may feel pressurised into ending their lives prematurely in this way. This forces consideration of the balancing act described in the *Pretty* cases between the needs of the individual patient and those of society. This is concerning as, taken to its potential extreme, such a 'balancing act' could be used to justify unacceptable treatment of small groups of individuals for the benefit of society at large and be completely inconsistent with any absolute prohibition of torture. This issue demonstrates that an absolute prohibition of torture may not be compatible with both a wide definition of this concept and with all other aspects of the existing body of human rights law.

(viii) Transnationalism and Civil Society

In order to properly examine the approach taken by the United Kingdom to its obligations under the Convention, it is important to note that the general understanding of international law has, as stated in Chapter 2, developed beyond the view that the State should be the only actor in legal compliance. As noted in

Chapters 5 and 6, non-governmental and civil society organisations have been playing a growing role in the UN treaty monitoring mechanisms, including participating in the Committee Against Torture's examination of State party periodic reports.

Berman discusses the emergence of new networks of governments co-operating with international organisations, not only those founded by States through treaties, but also wholly non-State actors including, for example, charitable organisations.⁸⁶⁶ As part of this co-operation, Berman points to the readiness of judges to adopt transnational legal approaches.⁸⁶⁷ This, as discussed above, has had only limited effect in the United Kingdom where judges have been reluctant to look beyond the traditional sources of English law with the exception of post Human Rights Act cases concerning rights under the European Convention on Human Rights. This can be viewed as unfortunate given the positive influence which legal pluralism can bring. Berman argues that such pluralism may involve sub-national as well as transnational and supranational organisations.⁸⁶⁸ In view of this, it is unfortunate that such groups have had a limited effect within the UK, both in the courts and, as is discussed later, in Parliament. Berman argues that such groups have the potential to hold governments to account over human rights norms⁸⁶⁹ and have the ability to influence business and other organisations through, for example, codes of conduct.⁸⁷⁰

It is, however, questionable whether the UK's position is sustainable. Grossman and Bradlow point to a number of factors which are serving to detract from the significance of the traditional sovereign State and make a more transnational approach necessary. These include developments in technology and the

⁸⁶⁶ Berman P 'From International Law to Globalization' 43 *Colombia journal of Transnational Law* 485 pp501-505

⁸⁶⁷ *Ibid* p503

⁸⁶⁸ *Ibid* p511

⁸⁶⁹ *Ibid* p546

⁸⁷⁰ *Ibid* p548

globalisation of the economy, increasing concern for the environment, the growing role of international organisations and the existence of new and internationalised threats to peace and security.⁸⁷¹ In view of these threats, it is questionable whether the UK State institutions will be able to address the issue of torture and other contemporary global issues without greater engagement with transnationalism and civil society. It should be noted, however, that, as Grossman and Bradlow warn, there must continue to be safeguards against any abuse of power on the transnational level.⁸⁷² In view of all of this, while there may be some risks attached to increased transnational involvement in the British legal system, the involvement of non-governmental organisations, at least for the purposes of information gathering in a similar manner to that employed by the Torture Committee, would only be positive.

⁸⁷¹ Grossman C & Bradlow D @Are we being propelled towards a people-centred transnational legal order?' American University International Law Review 9.1 1993 p10

⁸⁷² Ibid p24

Chapter 7

The Operation of the Police and Military

(i) Exercise of Police Powers and Introduction to PACE

As discussed in previous chapters, a comprehensive approach to the prevention of torture requires the identification of the situations in which the practice is most likely to occur and a focus by governments on these areas of their practice in order to provide appropriate safeguards against the use of torture in these situations. A significant proportion of the torture that continues today takes place in detention facilities immediately following the arrest of the potential victim or during their interrogation by law enforcement officials. This has led the United Nations Committee to focus its attention on this area of State practice both in its examination of State party reports and its General Comment on Article 2 of the Convention relating to the prevention of torture. Transparency and accountability are, as previously discussed, critical in the prevention of torture in this setting. One of the most significant risk factors is the use of incommunicado detention. The risk of torture has been seen to increase significantly where a public official has full control of a potential victim without any oversight of their conduct. Where such an official is aware that their actions will be open to inspection by others, this risk is significantly reduced, although there remains scope for institutional cultures of impunity. Similarly the ability of a potential victim of torture to disseminate details of their treatment to others in the general population of a State means they are less likely to be abused. It is therefore, necessary to examine the extent to which the law of England and Wales allows for such oversight and removes the opportunity for torture to take place as well as the way such abuse is approached by the courts.

In their General Comment no. 2 on Article 2⁸⁷³ of the Convention, the Committee Against Torture focused on three main aspects of arrest and interrogation, the right to an independent legal representative of the detainee's choice,⁸⁷⁴ the right to inform others, particularly family of the detention⁸⁷⁵ and the right to a medical examination by an independent doctor.⁸⁷⁶ In England and Wales, much of these rights are regulated by the Police and Criminal Evidence Act 1984 (PACE.) Most of the cases relating to these rights were considered between the passage of the Criminal Justice Act 1988 and the Human Rights Act 1998 but still provide some insight into the approach taken by the courts to the prohibition of torture, inhuman and degrading treatment.

(ii) The Act of Detention

It should be noted that Section 30(1A) of PACE provides that when a person is arrested or taken into police custody "[t]he person must be taken by a constable to a police station as soon as practicable after the arrest."⁸⁷⁷ Stone notes that the aim of this is to ensure that any person who is detained is brought as soon as possible into a situation in which all of the procedural safeguards are fully applicable but notes that the existence of any exceptions to this rule may result in the police attempting to invent or exaggerate reasons to avoid doing so in order to prolong the period during which the suspect is under their control without such safeguards or oversight.⁸⁷⁸ It is true that, while it may be possible to apply appropriate safeguards to detention at police stations, it would be considerably more difficult to provide this level of protection when a suspect is detained elsewhere and it is during this first period after arrest, therefore, that torture is most likely to occur with impunity. Even where rights

⁸⁷³ General Comment No 2

⁸⁷⁴ *Ibid*

⁸⁷⁵ *Ibid*

⁸⁷⁶ *Ibid*

⁸⁷⁷ Section 30[1A]

⁸⁷⁸ Stone R *Textbook on Human Rights and Civil Liberties* 6th edn OUP 2006 pp 100-101

to independent legal or medical assistance are immediately exercisable some time may elapse between when these individuals are informed of this right and the arrival of the legal or medical professional at the scene during which time the detainee will be vulnerable. It may be possible to reduce the risks associated with this through the installation of video and other surveillance equipment in police vehicles but this may not, by itself, be enough to address these concerns. This can be seen in the case of *R v Kerawalla*,⁸⁷⁹ where an individual was arrested in an hotel room on suspicion of importing heroin and was questioned there at length without access to a solicitor as it was feared that this would prejudice the investigation by warning any co-conspirators of the arrest. During this questioning, the detainee made statements which the prosecution attempted to use against him. Here the Court of Appeal held that Kerawalla's right to legal advice had not been breached as this would not arise until he had been brought to a police station. While the court accepted that there had been a breach of Section 30 of PACE when Kerawalla was not brought immediately to a police station, this was not sufficient to exclude the incriminating evidence. While there was no suggestion in this case that Kerawalla had been improperly treated, this judgement risks the creation of a situation in which any police officers or customs officials minded to subject a detainee to torture or other ill-treatment could simply keep them in an environment similar to the hotel room in this case and subject them to ill-treatment without the risk of detection. Section 76 of PACE may, however, provide some protection against this by requiring, as discussed below, that the prosecution in a criminal trial prove that any confession has not been obtained through oppression where this has been alleged.⁸⁸⁰ This should provide some protection by removing one of the potential motives for police officers to act in this way.

⁸⁷⁹ [1991] Crim. L.R. 451

⁸⁸⁰ *Op cit.* PACE Section 76

(iii) Evidence Obtained through the Use of Torture or Ill Treatment

A common reason for the use of torture is the desire to force a detainee to confess to an act which they or another person may or may not have committed, this is listed as a possible motivation for torture under Article 1 of the Torture Convention. The Torture Convention prohibits all conduct covered by the Article 1 definition and Article 15 requires States Parties to ensure that any evidence obtained through the use of torture is not admissible in any court.⁸⁸¹

Section 76(2) of PACE provides some protection from the use of coercion in obtaining confessions. It provides that:

“If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained-

(a) by oppression of the person who made it; or

(b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof,

The court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid.”⁸⁸²

⁸⁸¹ *Op cit.* UNCAT Article 15

⁸⁸² *Op cit.* PACE Section 76(2)

Subsection 8 defines oppression as including torture and other inhuman or degrading treatment as well as the threat or use of violence whether or not this amounts to torture.⁸⁸³

This goes a long way towards the prevention of the use of torture in the interrogation of suspects. It means that whenever a defendant argues that a confession has been obtained through the use of torture or other ill-treatment, the prosecution will have to prove beyond reasonable doubt that this is not the case in order to use the confession in evidence. This may be consistent with the requirement in Article 15 of the Convention that any evidence obtained through the use of torture should not be admissible in any court,⁸⁸⁴ although it does not prevent the admissibility of any other evidence discovered as a result of the confession.⁸⁸⁵ It can also serve to prevent ill-treatment by removing the incentive for public officials to resort to such measures. A police officer, for example, will be far less likely to abuse a suspect in order to obtain a confession if they are aware that there is little prospect of such a confession being used in evidence.

This raises questions as to how the prosecution may be able to prove beyond reasonable doubt that a confession has not been wrongly obtained. The most obvious means of achieving this are measures which are encouraged by the Torture Committee as means of preventing torture generally. If a detainee has their legal representative present, they will be able to testify as to the nature of the interrogation prior to the confession and will deter the officials present from mistreating the detainee as they would be able to expose this conduct. Similarly, States are encouraged to use audio and, where possible, video recording equipment to document interrogations. This will provide a court with clear evidence of what took

⁸⁸³ *Ibid* Section 76(8)

⁸⁸⁴ *Op cit.* UNCAT Article 15

⁸⁸⁵ *Op cit.* PACE Section 76(4)(a)

place during the interrogation and will discourage officials from acting illegally towards the detainee. Such measures, where employed, will allow the prosecution to defend the use of genuine confessions against even the stringent test set out in Section 76(2) without allowing for the inclusion in evidence of any confessions obtained through the use of torture or other ill-treatment, rendering such treatment of detainees purposeless. They will also help to create a climate of openness and oversight in which officials will be less inclined to mistreat detainees as they are very likely to be exposed.

(iv) Right to Have Someone Informed of an Arrest

Section 56(1) of PACE provides that:

“Where a person has been arrested and is being held in custody in a police station or other premises, he shall be entitled, if he so requests, to have one friend or relative or other person who is known to him or who is likely to take an interest in his welfare told, as soon as is practicable... that he has been arrested and is being detained there.”⁸⁸⁶

This is significant as the UN Torture Committee has noted that this right is key to the prevention of torture as it prevents people from being detained in secret or, in extreme cases, disappeared which allows for torture to occur with impunity. If a detainee is able to communicate their whereabouts and the identity of their captors to the outside world the officials involved are under greater scrutiny which may reduce the risk of torture. The words “...or other person who is likely to take an interest in his welfare...” do not appear to exclude the information of Non-Governmental Organisations or the media of such detentions. It should be noted, however, that this is a right to have a person informed of an arrest rather than on to speak with them

⁸⁸⁶ *Ibid* Section 56(1)

directly which the Torture Committee tends to prefer as such communication can constitute a reassurance to the detainee and their associate and provides them with an opportunity to communicate details of their treatment in their own words.⁸⁸⁷

Delay is, however, permissible where the arrest is for an indictable offence⁸⁸⁸ and the delay has been authorised by an officer of the rank of at least inspector.⁸⁸⁹ This is a cause for concern as those detained on suspicion of more serious offences may be at a greater risk of ill-treatment as police officers may be under greater pressure to obtain a confession or conviction and by allowing a police officer, albeit a senior one, to authorise the delay, the public officials are permitted to police themselves without oversight. Cases of the abuse of detainees have typically involved those suspected of more serious crimes, including terrorist offences,⁸⁹⁰ where officers have been under such pressure and, as discussed in chapter 1(b), much of the contemporary political and philosophical discussion of torture has related to the ‘ticking time bomb’ scenario where information is needed urgently from the suspect. In the face of such pressure, it is inadvisable to afford the police such powers without sufficient oversight. The delay must not be for more than 36 hours⁸⁹¹ and, importantly, the reason for the delay must be recorded in the custody record.⁸⁹² This means that the police are only able to delay informing those known to the detainee of their arrest where they are able to provide a reason for doing so which will stand up to examination should the record be viewed. There may, however, be a risk of police recording vague reasons such as the risk of jeopardising their investigation where such a risk might not exist and that, once recorded, this may simply be accepted in any examination of the custody record. As noted in section (a) the use by public

⁸⁸⁷ Concluding Observations of UN Committee Against Torture at: <http://www2.ohchr.org/english/bodies/cat/sessions.htm>

⁸⁸⁸ PACE Section 56(2)(a)

⁸⁸⁹ Section 56(2)(b)

⁸⁹⁰ See e.g. *Ireland v United Kingdom* App No. 5310/71

⁸⁹¹ PACE Section 56(3)

⁸⁹² PACE Section 56(6)(b)

officials of general but fear provoking terminology such as "...reasons related to the international fight against terrorism"⁸⁹³ has been readily accepted by courts in the past.⁸⁹⁴ This would allow for the use of incommunicado detention, cited by the Torture Committee as one of the most significant risk factors for the commission of torture.⁸⁹⁵ It is questionable then, whether any possibility of delay in the information of those known to a detainee is desirable but reasons for any such delay should always be recorded in detail and it could certainly be argued that where any court is not satisfied with the validity of any reason given for a delay, that this should affect the admissibility of any evidence obtained as a result of the arrest. This would render purposeless any such abuse by the police of the PACE procedures to allow for ill-treatment but is not provided for under the current framework and any future inclusion of such a provision would be likely to be subject to Section 78 of PACE and allow for the discretion of the court.

(v) Access to a Legal Representative

The Committee Against Torture has repeatedly emphasised, both in its consideration of State Party reports and in its General Comment, the importance of a detainee being given access to an independent legal adviser. This is vital both because it allows a detainee the chance to properly defend them self and also because such an adviser will be able to ensure that they are being appropriately treated and may report any abuse to the relevant authorities. If public officials are aware of this, it may serve to prevent such abuse. Section 58(1) of PACE provides that:

"A person arrested and held in custody at a police station or other premises shall be entitled, if he so requests, to consult a solicitor privately at any time."

⁸⁹³ *Op cit. Chahal*

⁸⁹⁴ *Ibid*

⁸⁹⁵ General Comment No 2 on Article 2 paragraph 13

This is significant because it, like the right to have other persons informed, provides a clear right to this type of protection and, just as importantly, it allows for such consultations to take place in private. The ability to consult with a solicitor in private is vital as it affords a detainee the opportunity to share any concerns which they may have regarding their treatment without fear of reprisals and will enable the solicitor to gain a thorough understanding of what is happening to their client allowing them to take any action necessary to ensure their safety including, for example, reporting concerns to the relevant authorities. Studies have, however found that, in certain police stations, solicitors are barred from entering the custody suite with conversations taking place by telephone.⁸⁹⁶ This results in an obvious inability of the legal representative to see the client and, therefore dilute much of the oversight protection offered by this safeguard.

It may be argued that the wording of this section may create difficulties by expecting a detainee to specifically request a consultation with a solicitor. This may pose a problem for two reasons, firstly it assumes that members of the general public who may be unfamiliar with the law are aware of the existence of this right and allows for the abuse of the more vulnerable detainees who may not be. A risk acknowledged in *R v Sanusi*.⁸⁹⁷ This criticism may to some extent be countered by the argument that there is a wide level of awareness among the general public of this right. The Torture Committee advocates the education of the public on such issues as playing a key role in the prevention of torture.⁸⁹⁸ It should also be noted that there are specific rules in place concerning the questioning of children and mentally handicapped suspects who may be less aware of their rights than the public in general. Secondly, the need for a suspect to specifically request legal advice may also risk a situation in

⁸⁹⁶ Kemp V "No time for a solicitor": implications for delays on the take-up of legal advice 2013 Crim. L.R. 184 at 195

⁸⁹⁷ [1992] Crim. L.R. 43

⁸⁹⁸ *Ibid*

which those who do are noted and may be singled out for reprisals when the lawyer is not present. While suspects are now routinely advised of their rights this often done in a way Kemp describes as “incompletely or incomprehensibly”⁸⁹⁹ apparently to discourage the take-up of the right. It is, however, noted that this situation has improved with the introduction of CCTV cameras and microphones to custody suites which has prevented such conduct from taking place with impunity.⁹⁰⁰

While it may appear that the right to consult a solicitor is relatively comprehensive, it is arguable that the consequences for breaches by the police of Section 58 are insufficient as evidence obtained through such breaches is not necessarily excluded under Section 78 of the Act. In *Kirkwall v DPP*⁹⁰¹ for example, a suspect was prevented from speaking with a solicitor for one hour after arrival at a police station as the custody suite was busy. He was subsequently convicted of failing to provide a specimen of breath contrary to Section 7 of the Road Traffic Act 1988 after refusing to do so between his request to speak with a solicitor and the granting of this request. Here it was held that while there had been a breach of Section 58, the magistrates had been entitled to use their discretion in determining that this did not necessitate the exclusion of the evidence and that the conviction was correct. Once again, there were no allegations of physical ill-treatment in this case but isolation in detention can, in the view of the Committee Against Torture, amount to inhuman or degrading treatment in itself⁹⁰² meaning that the refusal may still be inconsistent with Convention obligations and even in the context of purely physical ill treatment, where public officials are able to ignore such rights without consequences and are able to use evidence gained by interviewing or carrying out tests on suspects in the absence of a solicitor whose presence has been requested, it creates the risk that some police

⁸⁹⁹ *Op cit.* Kemp at 192

⁹⁰⁰ *Ibid*

⁹⁰¹ [2003] EWHC 2354 (Admin)

⁹⁰² General Comment No. 2 paragraph 13

officers may feel able to avoid the safeguards set out in Section 58 in order to obtain certain evidence by coercion. There is also a risk that police officers may feel that they are permitted to restrict a detainee's Section 58 rights wherever a custody suite is busy which may not be an uncommon occurrence at particular times. In a qualitative study of four police stations, Kemp⁹⁰³ discovered differences between the attitudes of individual custody sergeants on the issue of legal advice. While there were issues similar to those described above, some sergeants would actively encourage suspects to take up this right, especially where they had been arrested on suspicion of a serious offence.⁹⁰⁴ This is encouraging because, as noted in chapter 1(b), it is in the case of the most serious charges that the police are most likely to be put under pressure to gain evidence or a confession resulting in an increased risk of torture or inhuman or degrading treatment. The literature is, however, silent on the question of whether such advice is being given as a result of concern for the suspect or whether there is a desire to ensure that any evidence obtained in the more serious cases is not found to be inadmissible on procedural grounds, as discussed below. The latter would, in itself, be a positive development as if police officers feel unable to commit abuses without the risk of exposure and that such exposure would hinder not only their career but also their case, this would contribute to the removal of impunity and the creation of a situation in which such abuses are prevented from occurring. It must, however, be noted that Kemp found that many custody sergeants feel obliged to remain neutral on the question of whether a suspect should exercise their right of access to legal advice.⁹⁰⁵

⁹⁰³ *Op cit.* Kemp

⁹⁰⁴ *Ibid* at 193

⁹⁰⁵ *Ibid*

This is contrary to the judgement in *R v Sanusi*⁹⁰⁶ which concerned the application of PACE to customs officials through a 1985 Code of Practice. Here an individual detained on suspicion of importing heroin was interviewed without being informed of their right to consult a solicitor. Here the Court of Appeal held that evidence arising from this interview should have been excluded, noting that the detainee was not ordinarily resident in the United Kingdom and could not be presumed to be aware of this right. They also requested a solicitor as soon as they were eventually made aware of the right. This judgement sends out a far clearer message that the Section 58 right must be respected and, by not allowing the use of this evidence, removes the key incentive for the police or customs officials not to do so. While it is positive that consideration was given to the fact that the detainee in this case was not resident in the United Kingdom, this leaves open the question of how such a case would be approached if a UK resident were to fail to request access to a solicitor. There is little authority on this issue but the emphasis on this point in *Sanusi* may suggest that a more draconian approach would be taken with UK based suspects. It appears not to be consistent, however, with the general approach of the courts which have, as noted above, been ready to excuse breaches of the fundamental procedural safeguards where they have not been presented with evidence of actual ill-treatment. While such treatment need not necessarily be physical in nature and, as stated above, a breach of a right of notification could in itself be inconsistent with Convention obligations, this has not been argued in any of the above cases. An expansion of the approach in *Sanusi* would go further to preventing the possibility of torture by ensuring that the safeguards are complied with and make it clear that the Courts are fully committed to prevention. As it is, *Sanusi* would appear to be an isolated judgment with many more cases, detailed above, where the courts have

⁹⁰⁶ [1992] Crim. L.R. 43

been prepared to overlook breaches of fundamental procedural safeguards creating, at the very least, a risk of torture, inhuman or degrading treatment.

*R v Parris*⁹⁰⁷ concerned the admissibility of a confession obtained by police during an interview at which the detainee was denied a legal representative contrary to the PACE code of practice. The defendant had alleged that the confession had been manufactured by the police. The Court of Appeal found that the conditions of the interview did amount to a breach of Section 58 and that, in the application of Section 78 the inclusion of the confession in evidence would be unfair. This is positive as by not allowing the use of evidence obtained in this way, it may be possible to remove any advantage that may be gained by subjecting detainees to such treatment but it also highlights that there remains scope in the police's institutional culture for such treatment to occur. Any comprehensive preventive mechanism would require the creation of an environment in the police force where this cannot happen. Such cases may also illustrate the need for punishment as a means of prevention. While punishing breaches may not be sufficient by itself, it may provide an additional deterrent to those officials who may be tempted to ignore the PACE safeguards.

The limits to this power have been demonstrated in the case of *R v Samuel*⁹⁰⁸ in which the Court of Appeal held that where access to a solicitor is prevented due to a fear that they may prejudice the investigation, that this must be demonstrated with respect to the particular solicitor in question.⁹⁰⁹ While any limit to the PACE exception is to be welcomed from the perspective of safeguarding against torture, it may be argued that this is insufficient in that even where there are concerns surrounding the alleged motives of one particular solicitor, a detainee should always have access to an alternative solicitor and should never be interviewed without legal advice once this

⁹⁰⁷ (1989) 89 Cr. App. R. 68

⁹⁰⁸ [1988] Q.B 615

⁹⁰⁹ *Ibid*

has been requested as had been the case in *R v Samuel* as any acceptance of this practice would risk removing any protection offered by the safeguard as it would be used against those at the greatest risk of torture or ill-treatment.

R v Samuel appears to a large extent to have been followed since the entry into force of the Human Rights Act. This can be seen in the case of *R v James*⁹¹⁰ which saw a murder conviction quashed on the basis that the appellant had been refused access to a solicitor during police interviews. This case focused, however, on the fact that the Section 78 test had not been followed and the court suggested that a different conclusion may have been reached if it had been. In view of this it may be questioned whether the Human Rights Act has had any significant positive effect on this area of State practice as it does not appear to have directed the courts' consideration towards the prevention requirements of Article 3 of the European Convention in the way that it has in other areas (see above sections) and there is no evidence in the case law of courts considering the UN Torture Convention or the jurisprudence of the Committee in these cases.

It is also important to note that the Codes of Practice released by the Secretary of State have sought to qualify this right in a manner Roberts argues has the potential to raise issues under the European Convention.⁹¹¹ Roberts points to Code H of PACE which includes provisions dealing with suspects detained under Section 41 and Schedule 8 of the Terrorism Act 2000.⁹¹² While noting that the purpose of the Code is to ensure the welfare of suspects detained for longer periods of time, Roberts goes on to point out some difficulties with the provisions:

“A glaring example is lack of guidance in relation to circumstances in which discussion between a detainee and his legal advisor takes place within the

⁹¹⁰ [2004] EWCA Crim 1433

⁹¹¹ Roberts *A Protection of Convention Rights under the PACE Codes* 2006 Archbold News 6

⁹¹² Roberts pp 8-9

*sight and hearing of a “qualified police officer”...where there are reasonable grounds for suspecting that failure to do so might result in any number of consequences... include[ing] the risk of: other suspects being alerted; the investigation and prosecution of offences being rendered more difficult; interference with or loss of evidence, and risk of physical injury being caused to any person.*⁹¹³

It is noted that such restrictions create an obvious risk of breaches of Convention rights and it must also be stated that the provisions are very wide ranging with any number of investigation arguably falling somehow into one of the relevant categories. Roberts goes on to argue that such restrictions are not subject to sufficient curbs, describing the lack of guidance on the issue as “lamentable.”⁹¹⁴ It is also noted that the Strasbourg court found in *Ocalan v Turkey*⁹¹⁵ that the right to consult with a legal representative in private is a key component of the right to a fair trial⁹¹⁶ and it is not difficult to see the potential for similar implications for the right to be free from torture and inhuman or degrading treatment.

(vi) Discretion of the Courts

Section 78(1) of PACE allows Courts to exclude evidence where “...it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, that admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.”⁹¹⁷ It is important to note that it gives courts discretion to allow evidence which has been obtained where the rights of a detainee have not been fully respected. While most of the cases concerning breaches of the key safeguards described above have

⁹¹³ *Ibid*

⁹¹⁴ *Ibid* p9

⁹¹⁵ [2005] ECHR 282

⁹¹⁶ *Ibid*

⁹¹⁷ *Op cit.* PACE Section 78(1)

not involved any allegations of ill-treatment and it may not be seen as desirable for offenders to avoid conviction on the basis of a technicality or a minor procedural error, the creation of an environment in which public officials feel able to ignore such safeguards also creates the potential for the lack of oversight over certain areas of these officials' activities in which torture may be able to take place. A strict enforcement by the courts of these safeguards, where they are provided for in PACE will encourage the establishment of a culture in public bodies where such safeguards are incorporated into standard procedures as a matter of routine and cannot easily be avoided. An example of these difficulties can be seen in the case of *R v Dunford*⁹¹⁸ in which the Court of Appeal held that a correct application of Section 78 would require courts to consider in each individual case, whether the interests of justice required the evidence arising from a breach of the PACE safeguards to be excluded. This may be insufficient as it enables police officers to ignore the safeguards in the knowledge that any evidence they may obtain from doing so, including that gained through ill-treatment may still be used in court. A blanket ban on the admissibility of such evidence may go further towards compliance with Article 2 of CAT by minimising the risk of officials engaging in such behaviour. There may be some risk of guilty individuals walking free because of procedural errors but this could serve to ensure that police officers are particularly cautious in their observance of the PACE safeguards which would make it significantly more difficult for ill-treatment to occur, satisfying Article 2 of CAT.

The approach taken by the courts to breaches of the safeguards set out in PACE has therefore, been mixed. While they have been prepared to reject evidence where there have been serious abuses or where actual ill-treatment has been alleged, they have too often been prepared to use their discretion under Section 78 of PACE to

⁹¹⁸ (1990) 91 CR. App. R. 150

allow such evidence. This is not encouraging as complete prevention of torture requires full adherence to these fundamental safeguards even where no harm has been argued to have been done so as to completely eliminate the possibility of torture. It is uncertain how some of these cases may have been approached had they come to light after the entry into force of the Human Rights Act. As noted above in relation to other topics (e.g. assisted suicide etc) the Human Rights Act has encouraged judges to examine the requirements of the Convention in greater detail in their judgements. This would be very useful in these cases where the breach of the PACE safeguards has not been argued to have resulted in actual ill-treatment as it may shed greater light on the extent of the preventive requirements of Article 3.

(vii) Conclusion on PACE

The above cases illustrate the failure of the UK courts to take full account in the past of the requirements of the prevention of torture, especially in *non-refoulement* cases. In many cases they have taken action exposing individuals to the risk of torture or have failed to pursue proactively the punishment of those who have participated in the practice. They have also provided limited oversight of the activities of public officials including Secretaries of State and immigration officers who have been allowed to make decisions relating to the prevention of torture without any significant accountability, something which leaves those people they deal with at an increased risk of becoming victims of torture. This is not necessarily a result of problems with the operation of the judicial system, however. The Courts in any jurisdiction function as an organ within the wider institutional apparatus of the State concerned. They are bound to follow the laws of that State as well as, in some cases, international law. Any comprehensive national system for the prevention of torture requires all of a State's organs to function consistently with that aim. If the courts are restricted in the protection which they are able to offer to potential and actual victims of torture, this

may be the result of problems with the institutional structure of the State which would need to be addressed to provide full protection, rather than of any specific failures of the courts. There may be reason to be optimistic here. With the passage of the Human Rights Act the courts have been given increased freedom to actively seek to enforce the requirements of the prevention of torture and to prevent actions by officials which may be inconsistent with this. As demonstrated above this has changed the way in which courts approach many of the questions put to it. Where previously they had focused only on the provisions of domestic law which often omitted any meaningful consideration of human rights, they are now increasingly basing their reasoning on the requirements of the European Convention of Human Rights including the Article 3 prohibition of torture and, as noted in relation to assisted suicide and life imprisonment, are assessing the actions of public officials against these. This is not a necessarily a substantial increase in the courts' powers, they remain limited in their ability to challenge legislation and a significant degree of deference is still shown to public officials who are able to take decisions concerning the exposure of individuals to the risk of torture without the most thorough scrutiny. Any change resulting from the Human Rights Act is also, as noted above, limited by the scope of Article 3 and while the courts may base their reasoning around human rights issues they may still reach the same conclusions which they had done previously. It does represent, however, a step in the right direction. The courts are aware of the absolute nature of the prohibition of torture and it can be hoped that they will use any increased freedom they have to protect those who remain at risk from this practice.

(viii) Macpherson Report

In addition to the requirement to prevent abuses by public officials, the Convention, as discussed in previous chapters, requires States in many cases to exercise due

diligence to prevent pain and suffering being caused by private individuals, including "...for any reason based on discrimination of any kind."⁹¹⁹ The police, especially the Metropolitan Police, came under increased scrutiny in this connection following the racist murder of Stephen Lawrence in London in 1993 and the failures in the subsequent investigation which resulted in a 17 year delay before any convictions were achieved. The subsequent inquiry chaired by Sir William Macpherson of Cluny⁹²⁰ made no fewer than 70 recommendations to address the failures of the police and the Crown Prosecution Service in their handling of the case.

The report condemned the Metropolitan Police as being 'institutionally racist' a phrase it defined as:

"...consist[ing] of the collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people."⁹²¹

The report proceeded to give examples of ways in which such institutional racism had been evident in the course of this investigation, these included racist stereotyping of the victim in the incorrect assumption that he had been stabbed following a fight, insensitive behaviour towards his parents during the family liaison process, refusal by no fewer than five officers to accept that the killing had been a purely racially motivated murder and the lack of any racism training for officers at that

⁹¹⁹ *Op. cit* UNCAT Art 1

⁹²⁰ Report at <http://www.archive.official-documents.co.uk/document/cm42/4262/4262.htm>

⁹²¹ *Ibid* Paragraph 46:25

point.⁹²² These bare some similarity to issues previously identified by the Torture Committee as leaving certain groups vulnerable to abuse.⁹²³

Among the recommendations made to prevent repetition of the failings were the use of a wider definition of 'racist incident' to include "...any incident which is perceived to be racist by the victim or any other person,"⁹²⁴ greater training on the issue of racism should be made available to police officers,⁹²⁵ greater recording of the use of stop and search powers⁹²⁶ with greater public awareness of the scope of such powers⁹²⁷ and the recruitment of a greater number of minority ethnic police officers to make police forces more representative of the communities they serve. While these recommendations may go some way to preventing such crimes in the future, it is questionable whether significant progress has been made. In the context of Stop and Search powers, for example, previous chapters have discussed how the abusive and discriminatory use of such powers was known to be a problem more than ten years prior to the publication of the Macpherson report⁹²⁸ and continues to be so. While it is positive that disaggregated data is now available on this, it continues to show disproportionate targeting of ethnic minority groups in the exercise of these powers. This demonstrate an ingrained attitude in at least some sections of the police which could put members of some groups at greater risk of ill-treatment.

(ix) Conduct of the Military overseas

The most significant tests of the extraterritorial application of the prohibition of torture to the armed forces have concerned the Human Rights Act and the European

⁹²² *Ibid* Paragraph 46:28

⁹²³ *Op cit.* General Comment No 2

⁹²⁴ Macpherson Recommendation 12

⁹²⁵ *Ibid* Recommendation 48

⁹²⁶ *Ibid* Recommendation 62

⁹²⁷ *Ibid* recommendation 63

⁹²⁸ See above section on the Parliamentary consideration of the Police and Criminal Evidence Act 1984

Convention on Human Rights which contains a prohibition of torture in Article 3. The case of *R (on the application of al-Skeini) v Secretary of State for Defence*⁹²⁹ concerned applications for judicial review made by the relatives of six Iraqi nationals killed, or alleged to have been killed, by British forces operating in southern Iraq, into the decision not to order a full public inquiry into the deaths. Five of the six had been shot in various public places having either been suspected of wrong doing or caught in the crossfire during gun battles. The sixth case concerned a Baha Mousa who was detained by UK forces at an hotel, taken to a military base and severely beaten causing a total of 93 injuries which resulted in his death. The relatives had argued that the failure to hold an inquiry into the deaths breached the investigatory duties associated with the right to life contained in Article 2 of the European Convention. This Convention is only directly enforceable in the UK courts through the Human Rights Act 1998 and so it was necessary for the House of Lords to determine whether this Act had extraterritorial scope. In this case, the Lords found that the Act would apply to Baha Mousa who, having been in the custody of UK forces at the time of the abuses complained of and at the time of his death was under the effective control of a UK public authority. As Lord Browne stated in his judgement:

“Section 6 of the Human Rights Act 1998 makes it unlawful for a “public authority” to “act” in a way incompatible with “a Convention right.” There can be no doubt that a “public authority” means a public authority of Great Britain and Northern Ireland, just as “legislation” referred to in sections 3 and 6 of the Act means legislation enacted in Great Britain and Northern Ireland. It is not, however, suggested that the claimant (the alleged victim) need be present in the UK (let alone a British citizen)

⁹²⁹ [2007] UKHL 26

nor that the decision complained of need have been taken in the United Kingdom (consider, for example, a decision taken by a minister travelling abroad).⁹³⁰

A different view was taken, however, in the remaining five cases. Here, although the UK forces were operating in the area they were not seen to be exercising jurisdiction in the same way as where the individual was in their custody. Lord Bingham was keen to point out, however, that:

“This does not mean that members of the British armed forces serving abroad are free to murder, rape and pillage with impunity. They are triable and punishable for any crimes they may commit under the three service discipline Acts already mentioned, no matter where the crime is committed or who the victim may be... What cannot, it would seem, be obtained by persons such as the present claimants is the remedy they primarily seek: a full, open, independent inquiry into the facts giving rise to their complaints, such as articles 2 and 3 of the Convention have been held by the Strasbourg court to require.”⁹³¹

While it is positive that it was affirmed in such clear language that English criminal law, which would include the offense of torture contained in section 134 of the Criminal Justice Act 1988 would remain applicable to UK forces even where they serve abroad, previous chapters have discussed the need for transparency and oversight of the kind such inquiries may provide in the prevention of torture through the creation of an environment in which it cannot occur with impunity. Lord Bingham did note that “...there are real practical difficulties in mounting such an inquiry.”⁹³²

This may well be the case but where the conduct of those in a position to torture or in this case, extra-judicially kill, is not examined there will remain a risk of abuses being

⁹³⁰ *Ibid* paragraph 139

⁹³¹ *Ibid* Paragraph 26

⁹³² *Ibid* Paragraph 26

committed for operational expediency and then being covered up to allow for their repetition.

The case of *al-Skeini* subsequently progressed to the European Court of Human Rights at Strasbourg⁹³³ where there was found to have been a violation of Article 2 of the European Convention on the basis that there was what was described as a jurisdictional link between the UK and each of the individuals killed by its forces. This would seem to allow for a greater level of extraterritorial application for the European Convention, including the Article 3 prohibition of torture, in the context of overseas military activities than the House of Lords had been prepared to allow for the Human Rights Act. This would suggest that full compliance with the European Convention would require its observance by military forces serving abroad even if this is not required by the Human Rights Act. While a faithful adherence to the European Convention may discharge most of the UK's obligations under the UN Torture Convention, a regime aimed at the prevention of torture would be more effective if it allowed the victims of these kinds of incident to seek redress in the UK courts rather than forcing them to undertake the prolonged and costly process of taking their case to Strasbourg.

In addition to the issues raised by the judgments in the *al-Skeini* matter which related to the European Convention on Human Rights and the UK Human Rights Act, the United Kingdom has resisted the full application of the UN Torture Convention to its soldiers serving abroad. The government have sought to rely on the wording of Article 2 of the Convention which requires it to take appropriate measures to prevent the commission of torture on "...any territory under its jurisdiction."⁹³⁴ The argument advanced by the government is that, although UK forces operate in these areas they

⁹³³ App No:55721/07

⁹³⁴ *Op cit.* UNCAT Article 2(1)

are not in effective control of them. The government argued in its most recent periodic report to the Committee Against Torture that:

*“...the UK does not accept that where military forces operate overseas it is exercising legal or de facto effective control... The UK does not exercise jurisdiction either in Afghanistan or Iraq; nor is the UK in a position to take “effective legislative, administrative, judicial or other measures to prevent acts of torture” in the territory of those countries, as set out in Article 2 of the Convention.”*⁹³⁵

This position drew some criticism from the Torture Committee, one member of which noted that one of the reasons often given for the continued presence of UK forces in Afghanistan is the fact that the Afghan government is not in full control of that country and asked who is in control of the territory and responsible for the implementation of the Convention if it is neither the UK nor the Afghan government⁹³⁶. It was noted with concern that such a position could create a situation in which no entity is responsible for the implementation of the Convention and individuals are unable to rely on the protection which it offers. Such a situation could hardly be conducive to the prevention of torture.

This has been a particularly contentious issue in relation to Article 3 of the Convention. Here, again, the UK government has sought to rely on the wording of the provision which requires that:

⁹³⁵ CAT/C/GBR/5 paragraph 29

⁹³⁶ CAT/C/SR.1136 Bruni

“No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”⁹³⁷

The United Kingdom government argued in its periodic report that:

“The Government cannot ‘expel’ ‘return’ or ‘extradite’ from territory other than UK territory. The Government does not consider that the terms ‘expel’ ‘return’ or ‘extradite’ apply to overseas military operations and associated activities.”⁹³⁸

The government has argued that since many of the individuals being transferred to the Afghan government are being held by UK forces in Afghanistan, such a transfer would not constitute their removal to a territory where they would be at a real risk of being subject to torture as they are already present on such territory. The United Kingdom has, however, declared a moratorium on the transfer of detainees to the Afghan authorities. This suspension remains in force but the government has not been specific as to how long this will remain the case.⁹³⁹

While this may be a valid reading of the wording of Article 3, it is an interpretation which goes against the very purpose of the Convention: the universal prohibition of torture. The Convention was intended to protect all persons from being tortured, or being placed at risk of torture, by State officials. It cannot be consistent with this aim to suggest that the Convention only protects those living under an established government. Indeed, it is often those living in situations of conflict that are at the greatest risk of torture and are most in need of the protection offered by Article 3 in order to prevent their transfer to the custody of potential torturers. Even if one takes the view that Article 3 cannot, given its wording, apply to the transfer of detainees in

⁹³⁷ UNCAT Article 3(1)

⁹³⁸ CAT/C/GBR/5 Paragraph 119

⁹³⁹ CAT/C/SR.1139 Sweeny

Iraq, Afghanistan or other areas of conflict, a government committed to the aim of the prevention of torture may choose not to assert this and to apply the provisions of the Convention to these detainees in any event. UK public officials operating in Afghanistan or Iraq have just as much control over many of the individuals who they come across as they would in the UK and are just as capable of putting them at risk of ill-treatment. It is difficult, therefore, to argue that the same level of protection should not apply.

This does not, however, address the possibility of abuses being committed by UK forces. British troops and civilians under service discipline are subject to English and Welsh criminal law wherever in the world they serve.⁹⁴⁰ This means that the offense of torture provided for under Section 134 of the Criminal Justice Act 1988 will still be applicable as will other offences which may cover conduct amounting to cruel, inhuman or degrading treatment or punishment, such as assault, actual bodily harm, false imprisonment or wounding. While this is positive and the criminalisation of ill-treatment is a key component of its prevention, it is not by itself sufficient to ensure that ill-treatment cannot take place.

The Committee Against Torture also noted with concern the sentence given to Corporal Donald Payne for his role in the death of Baha Mousa, one of the victims in the *al-Skeini* case. It was noted that Mousa's body had sustained a total of 93 injuries including a broken nose and fractured ribs and that Corporal Payne was sentenced only to one year in prison.⁹⁴¹ Committee members argued that such a sentence cannot be commensurate to the grave nature of the abuse and would not, therefore, conform to Article 4 of the Torture Convention. Fortunately, cases such as this are rare but if this sentence is typical of how military personnel who abuse detainees are

⁹⁴⁰ *Ibid*

⁹⁴¹ CAT/C/SR.1136 Wang

likely to be dealt with then this would raise concerns about the level of compliance of the military justice system with the Convention. It is also doubtful as to whether such a sentence can be described as an effective deterrent. The United Kingdom's delegation answered that they were unable to comment on the appropriateness or otherwise of any individual sentence but quoted from the judge's sentencing remarks which cited a total failure of the chain of command as a reason behind these abuses.⁹⁴² Even if it were accepted that this mitigates Corporal Payne's culpability, a failure in command structure allowing this kind of activity to take place cannot be consistent with the aim of the prevention of torture. It can be hoped that the British authorities will learn from this event and provide for more oversight in the military command structures in the future in order to foster a climate in which torture cannot take place and that any abuses which do occur are appropriately punished. It was also noted with concern that the Gibson inquiry into alleged abuse of detainees had been suspended.⁹⁴³ The UK delegation confirmed that this was pending an on-going police investigation but would not comment on how long this was likely to take. They confirmed their intention to publish as much of Gibson's preliminary findings as possible but were unable to confirm when this would take place or how much would be published.⁹⁴⁴

(x) Deepcut Barracks

Most of the allegations of ill-treatment concerning the conduct of UK forces within Great Britain concern the mistreatment and poor training and supervision of young army recruits. The most extreme example of this in recent years has been the suicides of three such soldiers; Sean Benton, Cheryl James and Geoff Gray at the Deepcut barracks in Surrey in the mid-1990s. These deaths were blamed on the

⁹⁴² CAT/C/SR.1139 Sweeny

⁹⁴³ CAT/C/SR.1139 Bruni

⁹⁴⁴ CAT/C/SR.1139 Sweeny

nature of the training regime for younger recruits along with the imposition of prolonged solo guard duties which ran the risk of leaving them feeling isolated as well as their easy access to weapons. The resulting review by Nicholas Blake QC⁹⁴⁵ resulted in a total of 34 recommendations. While no reference is made in the report to the Torture Convention or to the jurisprudence of the Committee Against Torture, many of these recommendations are strikingly similar to those frequently issued by the Committee, especially in the areas of oversight and prevention.

The report found in two of the cases that there was no evidence suggesting that bullying or sexual harassment had led to the suicides and that while it was possible that bullying or excessive disciplinary measures including the imposition of extra guard duties may have contributed to the suicide of Sean Benton, it could not be confirmed that this had been the case. This, in itself, suggests the existence of problems within the training regime. Even in the event that none of these recruits had been subjected to any bullying or harassment, a comprehensive system for the prevention of ill-treatment would require a system of oversight and record keeping that would allow any subsequent review to determine with certainty that no such actions had taken place. The introduction of greater oversight into the processes governing the training and management of these recruits would create a situation in which it would be significantly more difficult for abuses to occur.

It was noted in the United Kingdom's fifth periodic report to the Torture Committee that "[t]he Armed Forces do not deny that problems such as bullying exist in the Armed Forces, just as they do in wider society."⁹⁴⁶ Although this may well be the case, acceptance of such situation is likely to hinder any attempt at preventing bullying.

⁹⁴⁵ 'The Deepcut Review' A review into the circumstances surrounding the deaths of four soldiers at Princess Royal Barracks, Deepcut between 1995 and 2002 at <http://www.official-documents.gov.uk/document/hc0506/hc07/0795/0795.pdf>

⁹⁴⁶ Paragraph 105

While stopping short of recommending that those under the age of 18 be barred from enlisting in the army, the Blake review did recommend that particular care be taken in vetting and training such recruits⁹⁴⁷ and that they should be afforded the automatic right of discharge if they are unhappy in their career.⁹⁴⁸ It is also recommended that instructors dealing with these soldiers should be thoroughly vetted for their suitability to work with young people.⁹⁴⁹ These steps, if followed, may prove key to the prevention of the abuse of young army recruits and the review has made similar recommendations concerning oversight. It is encouraging that it was suggested that the failure to report any evidence of bullying or ill-treatment should always result in disciplinary action⁹⁵⁰ and that there should be a procedure to refer such complaints to the Royal Military Police.⁹⁵¹ Blake also recommended greater supervision of guard duties⁹⁵² during which many of the suicides had occurred.

These are all positive steps which may help to prevent a repeat of these tragic incidents but the review concluded that there would be no need for a full public inquiry into the events.⁹⁵³ This is a concern as, while regulations can be brought into place to prevent the commission of torture or ill-treatment, these can be bypassed by public officials whose actions are not monitored. It is only with full public scrutiny and awareness of this on the part of such officials that these abuses can be prevented from occurring. It is true that inquiries present considerable financial and logistical difficulties, especially in the military where it may not be operationally expedient to reveal all areas of officials' activity and that they are not immune from being frustrated by uncooperative officials but a closed environment allows for abuses to

⁹⁴⁷ Blake review Recommendation 5

⁹⁴⁸ *Ibid* Recommendation 7

⁹⁴⁹ *Ibid* Recommendation 12

⁹⁵⁰ *Ibid* Recommendation 18

⁹⁵¹ *Ibid* Recommendation 22

⁹⁵² *Ibid* Recommendation 27

⁹⁵³ *Ibid* Recommendation 34

take place and then to be covered up so it is possible to conclude that at least some level of scrutiny is necessary.

(xi) Conclusion

While it is encouraging that the commission of torture and other ill-treatment by the police and the military is comprehensively outlawed wherever in the world such officials may be serving, this by itself is not sufficient to ensure the prevention of torture. It is to be noted with some concern that the UK continues only to recognise a limited level of application of the Torture Convention and the European Convention on Human Rights to the operations of its military personnel serving abroad. These instruments, and particularly the prohibition of torture which they contain, are intended to provide a basis level of protection to all persons from abuses by government officials. It is encouraging that much of the regulation of the police contained in PACE and the associate codes of practice is aimed at providing oversight and safeguarding against the commission of torture, despite some of the failings in this regime, and that many of the recommendations of the Blake review and Macpherson inquiry seem to share this purpose despite their mixed results. One of the most significant components of any preventive mechanism, however, is public oversight and the reluctance of the UK authorities to hold public inquiries into abuses, however difficult, prolonged and expensive these may be, risks jeopardising the progress which is being made. It is when officials operate in secret that they are able to commit abuses without the risk of being held accountable and where they are aware of public oversight of their activities much of the motivation to do this disappears.

Chapter 8

The Role of the Secretary of State for the Home Department in the Prevention of Torture

This section will seek to examine the role of the Secretary of State for the Home Department in the fulfilment of the United Kingdom's obligations under the United Nations Convention Against Torture. It will examine some of the executive powers of the Secretary of State and the relevance of these to the Convention as well as exploring the compatibility of the political nature of the office with the aim of the prevention of torture and assessing how the role and its associated powers have developed in recent years.

(i) Life Imprisonment

Under section 61 of the Criminal Justice Act 1967, the Secretary of State for the Home Department was given the authority to determine the minimum tariff period, that is to say the minimum amount of time that must be served in prison, for those criminals sentenced to mandatory terms of life imprisonment, including under section 1(1) of the Murder (Abolition of the Death Penalty) Act 1965, although this power had already existed in various forms related to the commuting of sentences since prior to the passage of the Homicide Act 1957. Despite the role of judges in sentencing and the involvement of experts in the activities of the Parole Board, the Secretary of State, who is not necessarily legally trained and who is appointed by the Prime Minister in a political capacity, maintained the final authority over these important decisions until 2003. As former Secretary of State Merlyn Rees noted in 1978:

“Final decisions on all matters relating to the release of life sentence prisoners rest with the Home Secretary of the day. He is not bound to accept a recommendation

*by the joint committee. Nor is he bound to accept a recommendation by the Parole Board that a prisoner should be released. I cannot bind my successors...*⁹⁵⁴

The compatibility or otherwise of the political nature of the office of the Secretary of State with what is in many ways a judicial decision of how long a criminal should serve in prison has the potential to raise issues for the United Kingdom's compliance with its obligations under the Torture Convention as it creates the obvious risk of these decisions being taken with limited regard for the public safety or the rights of those involved in order to satisfy public opinion which may demand the exposure of certain notorious criminals to treatment which may fall under the definition of torture as set out in Article 1 of the Convention, or at least be described as cruel, inhuman or degrading treatment or punishment. This risk became evident as early as 1983 when a subsequent Secretary of State, Leon Brittan set out his policy on the determination of such tariff periods. He expressed alarm at "...the general public concern about the increase in violent crime and the growing criticism of the gap between the length of sentences passed and the length of sentences actually served in certain cases,"⁹⁵⁵ He went on, as discussed in the previous section to introduce the concept of the tariff period with a first review three years before its expiry or after 20 years if this was sooner.

This statement would later be described by Lord Mustill in *R v Secretary of State for the Home Department ex p. Doody* as reflecting the "pressure of public opinion,"⁹⁵⁶ indeed the statement makes frequent references to the concerns of the public but little if any to the rights of these individuals or their victims. Here the fear appears to have been of a negative reaction from the general public rather than of any injustice

⁹⁵⁴ Merlyn Rees 24 January 1979 quoted in *R v Secretary of State for the Home Department Ex p. Hindley* 1998 Q.B. 751

⁹⁵⁵ HC Deb 30 November 1983 HANSARD vol 49 cc505-7W

⁹⁵⁶ Lord Mustill in *R v Secretary of State for the Home Department ex p. Doody* [1994] 1 A.C. 531 at para 552

occurring. As discussed in the previous section, this has been a common theme in the political debates surrounding human rights and the criminal justice system. During discussion of the Human Rights Act 1998 Gordon Prentice MP asked the Secretary of State:

“Do prisoners have any rights under the European Convention? In particular, does Myra Hindley have any way of challenging my right hon. Friend’s decision to keep her in prison until she dies, while other people convicted of heinous, revolting and repulsive crimes may be released early?”⁹⁵⁷

The issue of public opinion and the desire to see justice done was discussed further in *Doody*. Lord Mustill stated that the original purpose of the requirement of consultation with the sentencing judges has been to avoid excessive leniency on the part of the Secretary of State but that the requirement had been preserved to allow the Secretary to prevent excessive leniency on the part of the judiciary.⁹⁵⁸ This would seem to underline the danger of allowing an elected official to overrule judges in the context of sentencing and it is interesting to note that it is not even considered that a requirement of consultation between the two branches of government may have been able to provide safeguards for detainees.

Leaving aside this obvious concern about the difficulties inherent in the nature of this kind of system for the determination of life sentences, a number of challenges were also made to the way in which it was carried out. A significant example of this can be seen in the case of *Doody*⁹⁵⁹ which concerned the failure of the Home Secretary to inform such prisoners of their tariff dates and the reasons for these. While a sentence of life imprisonment may seem to be a relatively clear concept, what is likely to matter to a detained person and to their family is the date at which

⁹⁵⁷ HC Deb 24 November 1997 HANSARD vol 301 cc626-8

⁹⁵⁸ *Op cit.* Lord Mustill In *Doody* at 553

⁹⁵⁹ [1994] 1 A.C. 531

they may be released into the community. The policy of successive Home Secretaries not to inform them of this may be argued to amount to the imposition of indefinite detention which itself may amount to the severe pain or suffering described in Article 1 of the Torture Convention. This is why the secrecy surrounding the role of the Home Secretary may be relevant, as Lord Mustill put it:

“...although everyone knows what the words do not mean, nobody knows what they do mean since the duration of the prisoner’s detention depends on a series of recommendations to, and executive decisions by, the Home Secretary, some made at an early stage and others much later, none of which can be accurately forecast at the time when the offender is sent to prison.”⁹⁶⁰

Lord Mustill argued that the imposition of a tariff period followed by the release of the prisoner when this appeared safe was “...fair, practical in operation and easy to comprehend”⁹⁶¹ in the context of a discretionary life sentence but that:

“The same cannot I believe be said of the situation created by the ministerial decision, some 10 years ago, to import the concept of a penal element into the theory and practice governing the release on licence of prisoners serving mandatory life sentences for murder.”⁹⁶²

This was a reference to the statement of Leon Brittan discussed above. In the case of *Doody*, each of the prisoners in question had been able to determine their tariff date owing to Brittan’s policy of reviewing detention three years prior to the expiry of the tariff period. As a subsequent Home Secretary, Michael Howard stated in 1993:

“At present, a prisoner is not told the contents of the judicial recommendation, nor the length of the period which the Secretary of State has determined to be the

⁹⁶⁰ *Ibid* Lord Mustill at 550

⁹⁶¹ *Ibid* Lord Mustill at 551

⁹⁶² *Ibid*

minimum necessary to satisfy the requirements of retribution and deterrence.

*However, where the period so determined is less than 20 years, the prisoner can deduce its length by adding three years to the date which he is given for his first review; and where it is 20 years, he can deduce its length from the terms of the notice informing him that his first review will take place 17 years after sentence. But where the period is more than 20 years, the prisoner is not able to establish its total length.*⁹⁶³

This raises two separate issues, that of the reasons for the decision and the question of those serving minimum terms of more than 20 years who were left with no idea of how long they were to remain in prison. Only the first of these was considered in *Doody* as all of the tariffs in question were less than 20 years and, therefore, known to the prisoners. The issue of the Home Secretary's reasoning remains important, however, with those subject to these sentences keen to know this as Lord Mustill put it:

*“partly from an obvious human desire to be told the reason for a decision so gravely affecting his future, and partly because he hopes that once the information is obtained he may be able to point out errors of fact or reasoning and thereby persuade the Secretary of State to change his mind, or if he fails in this to challenge the decision in the courts.”*⁹⁶⁴

The Secretary of State was, therefore, forced to reveal the reasons for the decisions to set these tariff dates. This judgement was also relevant to those serving minimum tariff periods of more than 20 years as it required the Home Secretary to inform them of the reasons for these tariffs and, therefore, of the tariff date itself. In the context of indefinite detention as ill treatment, it can be argued that this is worse in the case of

⁹⁶³ Statement by Michael Howard 27 July 1993 quoted in *Op cit. Hindley*

⁹⁶⁴ *Op cit.* Lord Mustill in *Doody*

prisoners serving very long sentences as these individuals are, by reason of their crimes, at greater risk of being subject to a 'whole life tariff' and are likely to be aware of this. The non-disclosure of the tariff date is likely, therefore, to prove still more distressing for them. An example of this can be observed in the case of *R v Secretary of State for the Home Department Ex p. Hindley*⁹⁶⁵ which concerned a notorious child killer sentenced to life imprisonment in 1966. Here correspondence between various Secretaries of State and Lord Lane CJ had resulted in a consistent judicial recommendation that she should serve a minimum period of 25 years. When the case was considered by the Parole Board and Secretary of State in 1985 pursuant to Brittan's policy of 1983, a minimum tariff period of 30 years was set. This was increased in 1990 to a 'whole life tariff' meaning that Hindley would die in prison. She was not informed of any of these decisions until 15th December 1994 when a letter was sent pursuant to the judgment in *Doody*. There is little evidence of any widespread belief that the Torture Convention prohibits very long sentences of imprisonment or even, in extreme cases such as this, 'whole life tariffs.' Indeed, the preventive requirements of Article 2 of the Convention may be read as requiring States Parties to imprison very dangerous individuals such as Hindley for prolonged periods in order to prevent them from inflicting conduct amounting to torture on innocent people. There cannot, however, be any justification for secrecy surrounding the determination of such sentences. The uncertainty which this created had the potential to cause distress not only to the prisoner in question but also to the families of their victims. This kind of uncertainty has also, in the past, been criticised by international monitoring bodies.⁹⁶⁶ While a very extreme punishment, such as that described, will not necessarily violate the Convention, it should certainly not be any

⁹⁶⁵ [2001] A.C. 410

⁹⁶⁶ See e.g. Council of Europe Committee for the Prevention of Torture Report to the Government of the United Kingdom
CPT/Inf(2009)30 pp28-30

more severe than is necessary to achieve its objectives, including the prevention of torture, if it is not to be considered cruel, inhuman or degrading and it is difficult to argue that the addition of this kind of uncertainty for all involved into the process can be described as being in any way necessary to the administration of justice.

Another issue arising from the political nature of the office of the Secretary of State is the regular replacement of the office holder following general elections or cabinet reshuffles. The difficulties which this can create are, again, demonstrated by the *Hindley* case in which the judgement of the divisional court⁹⁶⁷ included quotations from the comments of no fewer than six Secretaries of State, on both the issue of sentencing and the specific case, from Merlyn Rees in 1978 to Jack Straw in 1997. In this case the view of the successive office holders was largely consistent, with the exception of the increase to the tariff in 1990. However, had this not been the case, there would be scope for a decision of such great importance to the individual concerned and the families of their victims to become a political device. Michael Howard last confirmed Hindley's tariff on 3rd February 1997 but following a change of government in May of that year, it became necessary for his successor Jack Straw to affirm his position on 10th November. Any politicisation of conduct which has the potential to result in the severe pain or suffering described in Article 1 of the Torture Convention would run the risk of this pain or suffering being inflicted in an arbitrary manner with the potential for individuals to be subjected to grave suffering for the convenience of a government or to assist them in the retention of power.

While it was held in *Hindley* that the successive Secretaries of state had not acted unlawfully in deciding her tariff period, the right of the Secretary of State to impose minimum tariffs was removed by section 269 of the Criminal Justice Act 2003 which requires the trial judge to set a minimum term which must be communicated to the

⁹⁶⁷ [1998] Q.B. 751

prisoner. While this may leave some room for inconsistency, it removes many of the issues discussed above relating to impartiality and transparency and allows for a system which may, for these reasons, be more conducive to the prevention of torture. As considered below, this may also be part of a pattern of the transfer of these functions from the politically appointed Secretary of State to politically independent judges.

(ii) Extradition Proceedings

Under sections 93 to 102 of the Extradition Act 2003, the Secretary of State must sign off on various extraditions from the United Kingdom. The role of the Secretary of State here raises similar issues to those described above. Firstly, the office holder does not necessarily have any legal training or detailed knowledge of international human rights standards, although they do receive legal advice, and this may risk the extradition of an individual to a State where abuses may occur which would be contrary to Article 3 of the Torture Convention. Secondly the Secretary is an elected official and will always, therefore, be conscious of public opinion and may be too quick to agree to the extradition of individuals seen as dangerous or otherwise undesirable without a full consideration of the risks. There may also be pressure on the Secretary of State to appear tough generally and to achieve a high number of deportations or extraditions regardless of the risks to those involved. While the Secretary receives extensive legal advice, they will make these decisions as a political figure and will be subject to these risks.

In some cases, however, the political nature of the office of the Secretary of State may be advantageous in ensuring that the United Kingdom meets its obligations under the Convention as, where the public are sympathetic to situation faced by those at risk of extradition, they may be able to exert pressure on the Secretary to

block such an extradition. Indeed, it is possible for the Secretary to prevent an extradition from taking place even where it has been approved by the courts. This final check may be welcomed as having the potential to prevent breaches of Article 3 even if the political nature of the office means that the power may not be exercised uniformly although this means that human rights issues must be considered by the courts before the question reaches the Secretary of State. This can be illustrated with reference to the case of Gary McKinnon who, in October 2012, was due to be extradited to the United States of America on computer hacking charges where he would have faced up to 60 years in prison in extremely difficult conditions⁹⁶⁸ despite suffering from Asperger's Syndrome. Secretary of State Theresa May explained her decision with reference to 'human rights' but was not more specific as to which rights or which Conventions were considered beyond saying that she had taken extensive legal advice.⁹⁶⁹ No specific reference is made to the conditions in American prisons but Mrs May stated that:

“After careful consideration of all of the relevant material, I have concluded that Mr McKinnon’s extradition would give rise to such a high risk of him ending his life that a decision to extradite him would be incompatible with Mr McKinnon’s human rights.”

It is not clear whether the view was taken that putting a person in conditions in which they are likely to become so distressed that they may take their own life would violate the prohibition of torture or whether the case was only considered with reference to the right to life under, for example, Article 2 of the European Convention on Human Rights. As discussed below in chapter 9 an analysis focusing on the European Convention would be more typical of the political discourse in this area, especially

⁹⁶⁸ See e.g. UNCAT Concluding Observations and Recommendations United States of America 2006 UN Doc: CAT/C/USA/CO2

⁹⁶⁹ HC Deb HANSARD 16 October 2012 Column 164

since the passage of the Human Rights Act 1998. Much of Mrs May's statement is very clearly political in character:

“Extradition is a vital tool. In a world in which criminals and crimes can easily cross borders, it is vital to the interests of justice and public protection that criminals cannot avoid justice simply by sheltering behind a border, but concerns about the working of our extradition law have grown over recent years. There has been public concern about the extradition regime operating in the European Union, about the European arrest warrant, and about the extradition arrangements outside the EU, principally with the United States.”⁹⁷⁰

The interests of criminal justice are, as has been described below in section 9, often referred to in the defence of measures which may risk violating human rights provisions. The reference to public opinion in this context is concerning as decisions on such matters should be made purely on a legal basis to ensure that they are fully compatible with the provisions of international Conventions including the prohibition of torture. While in some cases, such as that of McKinnon, it may be possible that considering public opinion may better protect the human right of those involved than following the somewhat mechanical processes of extradition procedure, this is unlikely to always be the case. As will be noted below in chapter 9, concerns were raised in Parliament in the context of the extradition of the ‘NatWest Three’ that these individuals had received a much higher level of public support than other suspects facing extradition to the United States for offences carrying comparable or even greater penalties. The NatWest case was specifically contrasted with that of suspected Islamic extremists such as Babar Ahmad.⁹⁷¹ In these cases, far from receiving public sympathy, pressure was put on the government to ensure that these

⁹⁷⁰ *Ibid*

⁹⁷¹ Rob Marris MP HANSARD 12 July 2006 column 1405

individuals were removed from the United Kingdom as soon as possible. Theresa May indeed referred to the extradition of Abu Hamza in support of the extradition arrangements.

While a high level of deference to public opinion may serve to safeguard the rights of some individuals facing extradition and in extreme cases may assist in the prevention of torture, public opinion cannot be relied upon to be uniform. Where the Secretary of State, whose future career depends on public approval, considers these factors rather than the law, there is a risk that the provisions of Article 3 of the Torture Convention will be applied unequally with individuals belonging to particular ethnic or religious groups, or those accused of particular crimes most at risk of being extradited to States where they may face torture. This situation would be contrary to international law not only as the prohibition of torture and associated *non-refoulement* provisions are absolute allowing for no exceptions but also because the prohibition cannot be applied in a discriminatory manner. Article 1 of the Torture Convention includes pain or suffering inflicted "...for any reason based on discrimination of any kind"⁹⁷² in the now widely accepted definition of torture. Article 14 of the European Convention also prohibits discrimination in the application of the other Convention rights including the Article 3 prohibition of torture and cruel, inhuman or degrading treatment.

The Secretary of State sought to get around the issues raised by the political nature of her role by reference to the report of Sir Scott Baker, an independent former judge, into the United Kingdom's extradition arrangements.⁹⁷³ Here, May noted the conclusion that there was no significant imbalance between the 'probable cause' and 'reasonable suspicion' tests required for the extradition of suspects from

⁹⁷² Article 1 United Nations Convention Against Torture and other Cruel, Inhuman or degrading Treatment or Punishment 1984 10 December 1984, in force 26 June 1987 1465 UNTS 85

⁹⁷³ *Op cit.* HANSARD 16 Oct 2012 column 164

the United States and the United Kingdom respectively.⁹⁷⁴ The perception of an imbalance here had provoked significant Parliamentary anger during the debate on the 'NatWest Three'.⁹⁷⁵ Citing this conclusion, May announced her decision not to reintroduce the requirement of a *prima facie* case where this does not currently exist.⁹⁷⁶ This seems to have been driven by a desire to avoid delay, however, rather than any other consideration of human rights issues.

Delays are also a major issue in determining the compatibility of extradition proceedings with the prevention of torture. As Mr McKinnon's MP David Burrowes put it:

"I warmly congratulate the Home Secretary on saving the life of my constituent, Gary McKinnon, today... Today is a victory for compassion and the keeping of pre-election promises. May we make another promise that after the reforms announced today, a vulnerable UK citizen will never again have to endure then years of mental torture, as Gary McKinnon did, and that the British principles of justice and fair play will return to extradition?"

While the reference to torture appears to draw on the ordinary meaning of the word, it is important to note that severe pain or suffering, whether physical or mental is a key component of the definition of torture set out in Article 1 of the United Nation Torture Convention and the protracted nature of this process which also lasted for a number of years in the case of Abu Hamza, noted above, has the potential to cause extreme distress to the individuals concerned and to their families.

Mrs May did make a number of general comments on human rights issues which are consistent with the jurisprudence of the Torture Committee. Reference is made to

⁹⁷⁴ *Ibid* Column 165

⁹⁷⁵ HANSARD 12 July 2006 column 1396 onwards

⁹⁷⁶ *Op cit.* HANSARD 16 October 2012 Column 165

the long periods of pre-trial detention suffered by some individuals extradited pursuant to the European arrest warrant and it is noted that the lack of transparency in the extradition arrangements with the US means that it has not been seen to be fair.⁹⁷⁷ There is, however, little suggestion of any reform to combat this beyond the implementation of a forum bar in situations where the alleged crime is also triable in the United Kingdom and the promise of discussions with other EU Member States regarding the reform of the European arrest warrant.⁹⁷⁸ Possibly the most significant announcement made by the Secretary of State was that:

“I also agree with the Baker review’s recommendation that the breadth of the Home secretary’s involvement in extradition cases should be reduced. Matters such as representations on human rights grounds should, in future, be considered by the High Court rather than the Home Secretary. This change, which will significantly reduce delays in certain cases, will require primary legislation.”⁹⁷⁹

This is encouraging as the passage of such legislation would remove many of the problems described above which risk giving rise to violations of the prohibition of torture. Judges are not elected and may, therefore, be less likely to be swayed by public opinion where this demands the removal of individuals seen as undesirable regardless of the risks they may face or where it calls for members of some groups to be spared where others, facing comparable risks, are to be extradited. It must, however, be noted that judges at the High court will apply domestic law and not the international Conventions which codify the prohibition of torture. Here, again, it is the Human Rights Act 1998 which can provide protection against breaches of the United Kingdom’s *non-refoulement* obligations. By compelling the courts to act in a manner

⁹⁷⁷ *Ibid*

⁹⁷⁸ *Ibid*

⁹⁷⁹ *Ibid* column 166

consistent with the Convention rights including the Article 3 prohibition of torture and to have regard for the jurisprudence of the Strasbourg court in their decision making, this Act has the potential to prevent individuals from being removed to States where they are at risk of treatment which would violate the Torture Convention or Article 3 of the European Convention. It is, however, important, to ensure clarity as to the scope of Article 3 of the European Convention as it is this, and not the Torture Convention which is used in the application of the Human Rights Act. It has been questioned whether Article 3 would apply to cases such as McKinnon with former Secretary of State Alan Johnson noting that “Lord Justice Burnton said in the High Court in July 2009 that Gary McKinnon’s case did “not even approach Article 3 severity” ... She made a decision today that is in her party’s best interest; it is not in the best interests of the country.”⁹⁸⁰ This statement is a cause for concern. Firstly, any ambiguity as to what may or may not result in a violation of Article 3 is likely to result in inconsistent application of the European Convention by the courts which, in turn, may result in the transfer of suspects to States where they may be at risk of torture or other cruel, inhuman or degrading treatment. If, however, Mr Johnson and Burnton LJ are correct to argue that a case such as that of Gary McKinnon does not approach Article 3 severity, then it must be questioned whether the European Convention and the Human Rights Act indeed provide sufficient protection to fulfil the United Kingdom’s obligations under the Torture Convention. This is especially relevant in light of the Torture Committee’s most recent Concluding Observations and Recommendations on the United States.⁹⁸¹ In view of these, it appears difficult to justify the view that the McKinnon case would not engage Article 3 and may lead to questions about the usefulness of this provision if this was indeed the case.

⁹⁸⁰ *Ibid* column 170

⁹⁸¹ *Op cit.* UNCAT Concluding Observations on the United States of America 2006

(iii) Conclusion

The Secretary of State for the Home Department has, in the past exercised significant executive powers over issues of considerable importance to the United Kingdom's compliance with its obligations under the United Nations Torture Convention. The determination of tariff dates for prisoners sentenced to life imprisonment and the authorisation of extraditions being only two examples of this. The role of the Secretary of State in these processes raises a number of issues the most obvious of these being that the political nature of their office inevitably creates a risk that the Secretary will be more concerned about public opinion and the impact of their decisions on their approval ratings than the facts of the particular case or the legal advice which they receive. This danger can be seen in the Parliamentary comments of successive Secretaries of State at least since the passage of the Criminal Justice Act 1967 which make frequent reference to the concerns of the general public and often discuss human rights concerns in far less detail. This creates a risk of the harsh or uneven exercise of these powers. Similar concerns have existed regarding the secrecy that often surrounded these functions of the Home Office. The United Nations Committee Against Torture has frequently cited oversight as a key component in the prevention of torture⁹⁸² but it was frequently impossible to examine the decisions of the Secretary of State in order to determine how they were made and whether any errors had occurred. This also left those who were the subjects of these decisions in a state of uncertainty as to their future, something which itself may amount to ill-treatment. This appears to some extent to have been remedied with the introduction of greater transparency into these processes and the steady transfer of many of these functions to the judiciary. This is

⁹⁸² See e.g. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee Against Torture, General Comment No 2, 'Implementation of article 2 by States parties' 24 January 2008 UN Doc: CAT/C/GC/2

to be encouraged as it removes many of the barriers to compliance with the Torture Convention but the courts must be clear as to what tests they must use. Judges are bound by the Human Rights Act 1998 to act in accordance with the rights set out in the European Convention on Human Rights, including Article 3 which prohibits torture. There has, however, been some debate both in the Parliament and in the courts as to the scope of this provision and unless judges are clear on this issue there will remain scope for breaches of the Torture Convention to occur.

Chapter 9

The Role of the Legislature in the Prevention of Torture

This section will seek to examine the role played by Parliament in upholding the United Kingdom's obligations under the United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984⁹⁸³ and in preventing the commission of torture and ill-treatment. It will examine the weight given in Parliamentary debate to the international law prohibition of torture, with particular reference to the United Kingdom's treaty obligations and the various instruments expressing this as well as to the issue of torture more generally and the effect the practice has on its victims. It will also consider the consistency of the conduct of Parliamentary business with the overall aim of the prevention of torture.

(i) Life Imprisonment and Prolonged Detention

The courts in the case of Myra Hindley,⁹⁸⁴ made reference to a statement made to the House of Commons on 30th November 1983, shortly before the adoption of the UN Convention Against Torture in 1984, by then Secretary of State for the Home Department Leon Brittan concerning the granting of parole to violent criminals and drug traffickers.⁹⁸⁵ This provides some insight into the view taken by lawmakers prior to that Convention of the potential damage this sort of treatment may inflict. While much of the Statement focuses on the needs of society that such offenders should be appropriately punished and on "...the general public concern about the increase in violent crime and the growing criticism of the gap between the length of sentences passed and the length of sentences actually served in certain cases,"⁹⁸⁶ it goes on to make some interesting observations concerning those sentenced to life

⁹⁸³ 10 December 1984, in force 26 June 1987 1465 UNTS 85

⁹⁸⁴ *R v Secretary of State for the Home Department ex parte. Hindley* [2001] 1 A. C. 410

⁹⁸⁵ HC Deb 30 November 1983 HANSARD vol 49 cc505-7W

⁹⁸⁶ *Ibid*

imprisonment. It is suggested that the continued detention of such an individual should be examined as early as three years prior to the date at which they will have served a sentence sufficient to discharge the requirements of 'retribution and deterrence.' This appears primarily to be for the purpose of aiding the transition of the detainee from the prison environment to that of the outside world after a long period of incarceration, usually by way of an open prison. It would also represent good practice in other ways, including the avoidance of the continued and potentially open-ended detention of persons who have already served a period of time sufficient to satisfy the requirements of retribution and deterrence while their cases are examined by the parole board and the Secretary of State and they are prepared for release. It was a situation very similar to this which would prompt criticism of the United Kingdom by the Council of Europe's Committee for the Prevention of Torture in 2008⁹⁸⁷ concerning the plight of those who had been sentenced to indeterminate prison sentences under the Criminal Justice Act 2003. These individuals would be required to serve a specified minimum term for their particular offence but would then remain detained, potentially indefinitely, until they were able to demonstrate that they were no longer a threat to the public. The Committee for the Prevention of Torture noted that this was frequently done through the completion of certain courses offered by HM Prison Service. It also noted, however, that some of these courses were offered only by some prisons with some prisoners being detained for long periods after the completion of their minimum sentence waiting to be transferred to a prison which offered the appropriate courses allowing them to demonstrate that they no longer posed a risk. In the absence of a definite transfer date this could constitute open-ended and potentially indefinite detention, sometimes listed in prison records as

⁹⁸⁷ Council of Europe Committee for the Prevention of Torture Report to the Government of the United Kingdom
CPT/Inf(2009)30 pp28-30

99 years,⁹⁸⁸ which could prove extremely distressing and traumatic for those subject to this regime. The issue of indeterminate sentences which were abolished in 2012 will be considered further in the next section but it is encouraging that the planned and phased release of long-term prisoners was being considered by lawmakers as early as 1983 given the subsequent developments described in section (b) of the jurisprudence of the European Court of Human Rights and the Committee Against Torture as to the potential for such lengthy sentences to violate the prohibition. Here, however, the discussion did refer in any way to any clear prohibition of ill-treatment or to any specific legal provisions. The issue seems to have been addressed in isolation.

Another area in which the issue of indefinite detention has arisen is Part IV of the Anti-terrorism, Crime and Security Act 2001 which allowed for the detention without trial or time limit of foreign nationals certified by the Home Secretary as being suspected of involvement in international terrorism where the nature of the evidence against them would render any trial prejudicial to national security and international human rights standards including the *non-refoulement* provisions of Article 3 of the European Convention on Human Rights and Article 3 of the UN Convention Against Torture made it impossible to deport them. The Parliamentary discussion of the compatibility of these measures with human rights standards focused on Article 5 of the European Convention which protects the right to liberty, although the UN Committee Against Torture would subsequently question the United Kingdom government on these provision under its Convention which corresponds more closely to Article 3 of the European Convention.⁹⁸⁹ Here, once again, it is the Human Rights Act which appears to be the focus of the debate on conformity with legal standards

⁹⁸⁸ *Ibid* p28

⁹⁸⁹ Concluding Observations to Fourth Periodic Report of United Kingdom to the Committee Against Torture UN Doc CAT/C/CR/33/3 parp 2(g)

rather than any international instrument. It is interesting, however, to note that the implication of the discussions is that the Act is seen not so much as a necessary safeguard to protect the public from abuses by the government but as an obstacle to the protection of the public at large from the activities of a minority of individuals. In response to a statement by the then Secretary of State for the Home Department David Blunkett on 15 October 2001,⁹⁹⁰ the then Shadow Home Secretary Oliver Letwin suggested that the judgement in *Chahal v United Kingdom*⁹⁹¹ and the Human Rights Act together rendered the deportation of such individuals "...a serious legislative problem"⁹⁹² and, rather than engaging with the requirements of the European Convention, asked Mr Blunkett to "...confirm the view taken by his predecessor that Parliament can legislate to alter the effect of the Human Rights Act."⁹⁹³ In reference to the proposed detention provisions the debate has focused more on the question of whether these could be brought within the scope of the 1998 Act than that of whether they are truly consistent with the European Convention. With regard to removals, Liberal Democrat MP Simon Hughes did raise questions relating to the consistency of any proposed measures with the 1951 Convention Relating to the Status of Refugees,⁹⁹⁴ suggesting at least some engagement by Parliamentarians with international human rights standards even in the most pressing circumstances. The detention provisions of the 2001 Act were questioned by the Committee Against Torture in their examination of the United Kingdom's periodic report in 2004 at which the delegation sought to defend the policy as a safeguard against the breach of the *non-refoulement* provisions of Article 3 of the Convention.⁹⁹⁵ In December of that year, however, the House of Lords would find in *A v Secretary of*

⁹⁹⁰ HC Deb 15 October 2001 HANSARD vol 372 cc923-39

⁹⁹¹ App No:22414/93

⁹⁹² *Op cit.* HANSARD 15 October 2001

⁹⁹³ *Ibid*

⁹⁹⁴ 28 July 1951, in force 22 April 1954 189 UNTS 137

⁹⁹⁵ UK Statement to the Committee Against Torture at

<http://www2.ohchr.org/english/bodies/cat/docs/UKopening.pdf> Para 33

*State for the Home Department*⁹⁹⁶ that the measures were, in fact, incompatible with Articles 5 and 14 of the European Convention. This would suggest a higher level of protection being offered by the judiciary than the executive or legislature. This may have to do with the fact that the courts lack the inherently political character of the other organs of government. If this is the case it would raise serious concerns for the overall aim of the prevention of torture as the courts will usually become involved only when an act potentially violating the prohibition has already occurred. Section 4(1) of the Human Rights Act 1998 only allows legislation to be declared incompatible with Convention rights once it is encountered in active proceedings, it cannot be used merely to challenge legislation. An effective preventive approach would, therefore, require full engagement by the political organs of government with their obligations under the Human Rights Act in the passage of legislation to ensure that laws are not created which would potentially allow abuses to take place.

(ii) Police and Criminal Evidence Act

As discussed at length in section b(x) in the context of the approach taken by the courts to the prevention of torture in police custody, the venue in which the practice remains at its most widespread globally, the vast majority of the safeguards that exist in UK law are provided for by the Police and Criminal Evidence Act 1984. This Act was passed immediately prior to the adoption in December 1984 of the United Nations Convention Against Torture so the Parliamentary debate surrounding the Act made no reference to the Convention or the jurisprudence of the Committee who have subsequently focused much of their time on the consideration of the issues dealt with by PACE.⁹⁹⁷

⁹⁹⁶ [2005] 2 A.C. 68

⁹⁹⁷ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee Against Torture, General Comment No 2, 'Implementation of article 2 by States parties' 24 January 2008 UN Doc: CAT/C/GC/2

While Parliament did not have the work of the Committee Against Torture at its disposal in debating the Bill, the fundamental procedural safeguards provided for by PACE broadly mirror those later advocated by the Committee. This would suggest that Parliament, albeit with the somewhat limited guidance and best practice examples available at the time, was focused, at least to some extent, on the prevention of acts of torture and ill-treatment at the hands of the police and sought to achieve this aim in what would later be viewed at the most effective manner. A large proportion of the debate focused on specific incidents and particular issues which bear a striking resemblance to those often addressed by the Committee during its examination of States' periodic reports. One major area of concern was evidence that police forces, in particular the Metropolitan Police and the Royal Ulster Constabulary were committing abuses targeted at specific ethnic and minority groups. This is something that remains of great concern to the Committee to this day with questions regularly being raised during the examination of State Party reports about the alleged victimisation of particular minority groups⁹⁹⁸ as well as specific incidents reported to it by non-governmental organisations, some of which causing the death of the victim with others resulting in the police officers responsible receiving minor non-custodial sentences and then potentially returning to duty.⁹⁹⁹ In 2004 the United Kingdom would be praised by the Committee for disbanding the Royal Ulster Constabulary and replacing it with a force more representative of the religious makeup of the community it was to serve.

The debate surrounding PACE focused on the mistreatment by police of members of the Caribbean community. In a debate on 29th October 1984, Sydney Bidwell MP

⁹⁹⁸ See e.g. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee Against Torture, 44th session, Concluding Observations of the Committee Against Torture Switzerland 25th May 2010 UN Doc: CAT/C/CHE/CO/6 paragraph 8

⁹⁹⁹ See e.g. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee Against Torture, 44th session, Concluding Observations of the Committee Against Torture Austria 20 May 2010 UN Doc: CAT/C/AUT/CO4-5 paragraph 12

noted the significant underrepresentation of ethnic minorities in UK police forces as well as the need for greater education and training on immigration and the problems of discrimination for serving police officers,¹⁰⁰⁰ something subsequently emphasised by the Committee not only in relation to the UK but generally.¹⁰⁰¹ Geoff Lawler MP also pointed to statistics suggesting that up to 54% of young people in the Caribbean community felt victimised by the police compared to 15% of young people generally.¹⁰⁰² Something attributed, in a large part, to the abusive exercise of stop and search powers. Some members argued that these arguments had the potential to damage confidence in the police force in a way which may prove detrimental to the public interest. Mr Eldon Smith noted research suggesting police officers were one of the professional groups most admired by the general public¹⁰⁰³ and suggested that accusations of racism were an insult to police officers doing a good job in the community, something strongly contested by Mr Lawler. The Metropolitan Police were later condemned by the Macpherson report into the murder of Stephen Lawrence in 1993 as being 'institutionally racist',¹⁰⁰⁴ with the Royal Ulster Constabulary being criticised by the UN Torture Committee for its involvement in sectarian abuses.¹⁰⁰⁵ Despite some rejection of the allegations of racism, described by Nicholas Winterton MP as "nonsense,"¹⁰⁰⁶ it is encouraging to note that the need for a representative police force to prevent abuses from occurring was being considered by Members of Parliament even prior to the adoption of the Torture Convention. It should be noted, however that this was only in response to reports of such abuses actually taking place. It should also be noted that there is no reference

¹⁰⁰⁰ HC Deb 29 October 1984 HANSARD vol 65 cc1092-8

¹⁰⁰¹ *Op cit.* United Nations Committee Against Torture General Comment No 2 On Article 2

¹⁰⁰² *Op cit.* HANSARD 29 October 1984

¹⁰⁰³ *Ibid*

¹⁰⁰⁴ The Stephen Lawrence Inquiry Report at: <http://www.archive.official-documents.co.uk/document/cm42/4262/4262.htm>

¹⁰⁰⁵ *Op cit.* Committee UN Against Torture Concluding Observations on the United Kingdom 2004 para 2(a)

¹⁰⁰⁶ *Op cit.* HANSARD 29 October 1984

in this part of the debate to the European Convention on Human Rights, Article 14 of which would prohibit this kind of discrimination by the police. The only discussion of existing legal standards related to the Race Relations Act 1976.¹⁰⁰⁷ This would underline the importance of the subsequent Human Rights Act 1998 in forcing Parliament to consider the compatibility of their legislation with the provisions of the European Convention, including Article 3 which prohibits torture and cruel, inhuman or degrading treatment.

In presenting the Bill to the House, Home Secretary Leon Brittan stated that “[t]he public are shocked, and rightly so, and hon. Members write to me, and again rightly so, when tragic incidents occur in police custody.”¹⁰⁰⁸ While he argued that effective police work required extensive powers including ‘stop and search’ and the taking of intimate samples, he accepted that these powers needed to be limited and that safeguards are needed to prevent abuses:

“Indeed, modern policing does not require a general extension of police powers, but rather their reform in light of modern society’s needs. It is crucial that stronger, better, clear safeguards are provided for the individual... Policing by nod, nudge and wink is unacceptable to the police and society alike.”¹⁰⁰⁹

There was also discussion of the limits to the safeguards of the Bill with Gerald Kaufman MP observing that “[t]he overwhelming majority of those detained without charge, and detained incommunicado will be innocent.”¹⁰¹⁰ This shows concern in Parliament as early as 1984 about the potentially damaging effects of incommunicado detention on suspects. It should, however, be noted that Mr Kaufman refers to innocent suspects. The subsequent jurisprudence of the Committee Against

¹⁰⁰⁷ *Ibid*

¹⁰⁰⁸ HC Deb 16 May 1984 HANSARD vol 60 cc378-415

¹⁰⁰⁹ *Ibid*

¹⁰¹⁰ *Ibid*

Torture supports the view that incommunicado detention is not generally appropriate at all regardless of the guilt or otherwise of the suspect. There is argued to be a greatly increased risk of torture or ill-treatment in situations where an individual is under the total control of one or more public officials without any means of communicating with the outside world or explaining what is happening to them.¹⁰¹¹

There was also concern at provisions allowing intimate searches to be conducted by persons other than a doctor, something described by Robert MacLennan MP as “profoundly repugnant.”¹⁰¹² Mr MacLennan also expressed concern that “...the Bill does not back up the code of practice with any effective sanctions for its breach... The Bill would have been enormously strengthened had it included a provision to exclude from a criminal hearing evidence that was obtained either illegally or in violation of the code of practice.”¹⁰¹³ This also reflects subsequent concerns of the Committee Against Torture that climates of impunity may exist in police forces where, even where positive safeguards exist, these may be breached if there is no sanction to deter this and if suspects may be convicted even if evidence is wrongly obtained.¹⁰¹⁴ Among the most effective deterrents against torture would be a system whereby evidence could not be used against a suspect unless it was shown to be properly obtained. Police officers will be less likely to resort to torture if they are aware that in addition to any sanctions they may face, it would render the suspect’s conviction impossible.

In this connection, concern was also expressed at the prospect of detaining suspects for up to 96 hours without charge, although PACE provides, at least in

¹⁰¹¹ *Op cit.* CAT General Comment No 2

¹⁰¹² *Op cit.* HC Deb 16 May 1984 HANSARD vol 60 cc378-415

¹⁰¹³ *Ibid*

¹⁰¹⁴ See e.g. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee Against Torture, General Comment No 2, ‘Implementation of article 2 by States parties’ 24 January 2008 UN Doc: CAT/C/GC/2

theory, for the detained person to have access to a solicitor and to inform someone of their arrest as soon as they arrive at the police station, as discussed in the previous section.

One of the primary justifications for the Bill was that it would serve to simplify the law, although some opposition MPs questioned whether this was in fact the case. This is encouraging as abuses may be less likely to occur where the general public are aware of their rights and both the perpetrator and the victim know that the act is illegal and may result in punishment. Attempts to clarify the law may, therefore, be of benefit to the overall aim of the prevention of torture.

It is possible to conclude, therefore, that although many issues relevant to the prohibition of torture were considered during these debates, these were discussed as specific issues often with reference to particular problems or specific incidents and usually in response to the occurrence of a violation. No consideration was given to the European Convention on Human rights which prohibits torture and inhuman or degrading treatment or punishment although existing domestic legislation such as the Race Relations Act 1976 was considered. This illustrates the importance of measures such as the Human Rights Act 1998 and the Criminal Justice Act 1988 to incorporate, as far as possible, international instruments into domestic law and to ensure that they are considered by Parliament.

(iii)The Human Rights Act 1998

One occasion where Parliamentarians paid more attention to the nature and content of international law provisions prohibiting the use of torture is during the progression of the Human Rights Act 1998 through Parliament. This is not surprising as this Act is unique in British law in the extent to which it makes the provisions of an international Convention directly applicable and requires public authorities, including courts and

Parliament itself, to have regard not only to the provisions of the European Convention on Human Rights but also the jurisprudence of the European Court of Human Rights in a large proportion of their activities. This differs from Sections 134 and 135 of the Criminal Justice Act 1988 which seek to incorporate the United Nations Convention Against Torture into UK law by creating an offense that is at least broadly in line with the terms of the prohibition in Article 1 of that Convention but do not make it directly enforceable in itself in UK courts or policy-making.

As the Bill progressed through Parliament, a large number of questions were raised concerning the nature of the Convention's requirements and the effect they may have on the British legal system. Many of the questions raised betrayed some level of anxiety as to the consequences of the proposed Bill both generally and specifically. Damien Green MP raised concerns that the incorporation of the European Convention rights could result in the politicisation of the judiciary.¹⁰¹⁵ He, together with Sir Brian Mawhinney pressed the then Home Secretary Jack Straw on a comment by the then Lord Chancellor that the Bill would create "immense scope for political and philosophical disagreement' between the House and the courts."¹⁰¹⁶ Mr Straw was quick to reject these concerns arguing that the Bill provided for the maintenance a clear separation of powers and noting that courts would not be able to strike down Acts of Parliament.¹⁰¹⁷ Indeed, Section 6 of the Act provides that any declaration of incompatibility made by a court does not affect the continuing validity of the relevant legislation and will not be binding on the parties to the case in question. This may be read as demonstrating some concern in Parliament at the prospect of surrendering too much of their power to the international legal system, something also evident in another of Straw's answers to this challenge, that the Bill

¹⁰¹⁵ HC Deb 24 November 1997 HANSARD vol 301 cc626-8

¹⁰¹⁶ *Ibid*

¹⁰¹⁷ *Ibid*

would represent an improvement as, quoting the shadow Lord Chancellor, "...it domesticates the powers of the institutions of the Convention with the result that our own judges are now making these decisions instead of the judges in Strasbourg."¹⁰¹⁸ Other concerns raised included the applicability of the Convention rights to serving prisoners. Gordon Prentice MP asked:

*"Do prisoners have any rights under the European Convention? In particular, does Myra Hindley have any way of challenging my right hon. Friend's decision to keep her in prison until she dies, while other people convicted of heinous, revolting and repulsive crimes may be released early?"*¹⁰¹⁹

It was pointed out to Mr Prentice that Hindley had existing rights under the Convention and was already, prior to the passage of the Bill seeking a judicial review of the determination of her tariff date.¹⁰²⁰ The tone of this questioning, however, again suggests some apprehension on the part of Members of Parliament at the prospect of international human rights standards becoming too critical to the running of the UK government, particularly where issues of criminal justice and perceived risks to the public safety have been raised. Indeed on 4th December 1997, Laurence Robertson MP tabled a question as to what assessment had been made on the implications of incorporation of the Convention rights for sentencing practice in the United Kingdom.¹⁰²¹ Alun Michael MP reiterated that the effect of the Bill would be to enable some of those already entitled to take cases to the Strasbourg court to have them heard domestically rather than to impose any new obligations on the United Kingdom.¹⁰²²

¹⁰¹⁸ *Ibid*

¹⁰¹⁹ *Ibid*

¹⁰²⁰ *Ibid*

¹⁰²¹ HC Deb 04 December 1997 HANSARD vol 302 c297W

¹⁰²² *Ibid*

Lord Lester of Herne Hill also tabled a question on the advantages or otherwise of the employment of the Strasbourg court's 'victim test' as opposed to the existing British 'sufficient interest' test of standing to bring claims under the Bill.¹⁰²³ Lord Williams of Mostyn states that the effect of the test would be to exclude what are described as "...academic cases where no victim or potential victim is involved."¹⁰²⁴ While it was certainly not the intention behind the Human Rights Act or the European Convention that such cases should be permitted, this attitude does seem to demonstrate the desire that it should not be frequently used. It could also be argued that a full incorporation of the Convention rights into United Kingdom Law should aim to ensure full compliance with the Convention rather than attempting to remedy individual issues as and when they emerge. Such 'academic cases' may prove valuable in ensuring that the apparatus of the State complies with its obligations under the Convention before any violations occur which may cause harm to victims. Lord Lester also raised concerns about the cost of judicial training in the provisions of the Bill.¹⁰²⁵

In spite of the relatively detailed examination of some aspects of the Convention during the debates, there was no detailed discussion of the prohibition of torture and very little debate surrounding the other substantive Convention rights with the possible exception of Article 5 where the consideration was largely negative in nature reflecting concerns that the Bill may have allowed the European Convention to interfere with the ability of the United Kingdom's justice system to dispense appropriate punishments and, as such, may pose a risk to public safety. There were also concerns about the Bill's apparent potential to politicise the judiciary or interfere with the separation of powers which forms a key component of the Constitution.

¹⁰²³ HL Deb 09 December 1997 HANSARD vol 584 c15WA

¹⁰²⁴ *Ibid*

¹⁰²⁵ HL Deb 12 January 1998 HANSARD vol 584 cc121-2WA

While it is encouraging that Parliament did pass the Human Rights Act in 1998 and that this has since had a positive effect on the enforceability of the Convention rights, the development was viewed at the time and, to some extent, since with suspicion by a number of Members of Parliament. There also appeared, at least at the time, to be some ignorance as to the applicability of the European Convention, with then Home Office Minister Mike O'Brien appearing to express exasperation at some Members' failure to appreciate that the European Convention, and the various rights which this confers were applicable in any case and that the purpose of the act was merely to make these enforceable at the domestic levels. This seems to have been in addition to confusion as to the scope of the Convention rights with one Member asking whether prisoners have any rights under the Convention¹⁰²⁶ and another asking whether the Bill would provide for any right of appeal by the Government or Public Authority to the Strasbourg court.¹⁰²⁷ It may be that the provision of greater training in international law and the protection of human rights would enhance the engagement of Members of Parliament with international Conventions, including those prohibiting the use of torture, and this may also serve to reduce the fear that some Parliamentarians appear to exhibit of the effects the incorporation of international legal obligations may have on the functioning of the United Kingdom's legal system and to combat some of the hostility which seems to be associated with this. This is, as noted above, one of the key recommendations of the United Nations Committee Against Torture in relation to police forces and the military who deal with potentially vulnerable individuals on the front line of their activities. The debates surrounding the passage of the Human Rights Act may suggest it would also be of benefit for those called on to legislate for these groups.

¹⁰²⁶ HC Deb 24 November 1997 HANSARD vol 301 cc626-8

¹⁰²⁷ HC Deb 02 February 1998 HANSARD vol 305 cc528-9W

(iv) UK – US Extradition Treaty

While Parliament does not appear to have engaged in any significant way with the prohibition of torture in the course of debates surrounding the passage of legislation, there has been more comprehensive discussion in the context of individual cases. An example of this can be seen in relation to the House of Commons emergency debate on the UK-US extradition treaty of 2003 which took place on 12 July 2006, the day before the extradition to the United States of three British citizens: David Bermingham, Gary Mulgrew and Charles Darby, ‘the NatWest three’ accused of financial crimes.¹⁰²⁸ Although much of the original debate on this issue centred around the level of Parliamentary scrutiny afforded to the Extradition Act during its passage and the perceived procedural unfairness arising from the disparity between the tests needed to establish grounds for extradition from the United Kingdom and the United States respectively,¹⁰²⁹ a number of members went on to consider the conditions to which these individuals were likely to be subjected if extradited. Douglas Hogg MP took note of the United States Government’s activities at Guantanamo Bay and the “...extraordinarily long prison sentences which are being imposed [in the United States] in respect of matters that would attract very modest sentences in this country.”¹⁰³⁰ Mr Hogg also stated that:

*“I have... seen United States Prisons and frankly they are ghastly. Those that I have seen are an affront to civilization. It seems to me that that is the background against which we ought to consider our attitude to extradition.”*¹⁰³¹

Sir Patrick Cormack added:

¹⁰²⁸ HANSARD 12 July 2006 column 1396

¹⁰²⁹ *Ibid* columns 1396-1401

¹⁰³⁰ *Ibid* column 1421

¹⁰³¹ *Ibid* column 1440

*“My right hon. and learned friend spoke about the appalling conditions in American jails. What has conditioned public opinion in this country perhaps more than anything else over the past two or three weeks are the accounts of the chains, the manacles and the cages, and people who are innocent until proved guilty put in those conditions thousands of miles away from home.”*¹⁰³²

This view was shared by Michael Howard MP who expressed concern at the long period of pre-trial detention which these suspects faced, possibly up to two years.¹⁰³³

Human rights based arguments also featured in the speeches of those who argued in support of the extradition. Rob Marris MP contrasted the level of public and Parliamentary concern being shown for the ‘NatWest three’ with that directed at Babar Ahmad and other Muslim suspects targeted under the treaty raising the possibility of discrimination in its application, something which forms part of the definition of torture found under Article 1 of the United Nations Convention, although this was not mentioned here.¹⁰³⁴ The Solicitor General argued that it would be inconsistent for the United Kingdom not to have an arrangement of this sort with the United States when similar procedures are in place in relation to States such as Russia, Azerbaijan and Albania.¹⁰³⁵ It is certainly true that these States have received criticism from, among other bodies, the Committee Against Torture¹⁰³⁶ and that these have not attracted the same level of attention from Parliament or the public.

It is evident that possible human rights abuses were a primary consideration for many of the Members involved in this debate. Their focus was on specific aspects of the extradition procedure and specific conditions, however, and they did not refer

¹⁰³² *Ibid* column 1441

¹⁰³³ *Ibid* column 1426

¹⁰³⁴ *Ibid* column 1405

¹⁰³⁵ *Ibid* column 1408

¹⁰³⁶ *Op cit.* United Nations Committee Against Torture Concluding Observations and Recommendations

expressly to the United Nations Torture Convention or to the European Convention on Human Rights. This is despite the fact that many of the issues they raised especially in relation to the detention conditions faced by those who were to be extradited were of concern to the Committee Against Torture and the Council of Europe. As discussed above, Parliament has tended to give greater consideration to the requirements of the European Convention since the passage of the Human rights Act 1998 but even this seems to have had little place in this debate. It is certainly encouraging that Parliament does consider the important issues raised by human rights instruments but their failure to address the specific requirement of these has the potential to obstruct the prevention of torture. If Members of Parliament were more aware of the detailed character of the prohibition of torture, it may be possible that more could be done to avoid placing individuals in situations in which it is likely to occur.

(v) The Joint Committee on Human Rights

The only significant consideration given by Parliament to the United Nations Convention Against Torture was by the Joint Committee on Human Rights who did examine the issue of compliance in their Nineteenth Report.¹⁰³⁷ This report was published in 2006 and predated The Committee Against Torture's General Comment No.2 and its guidance on prevention as well as a number of the significant judicial decisions described above. The report focused on the areas raised by the Committee Against Torture in their 2004 Concluding Observations¹⁰³⁸ and focuses on the conduct of the military abroad as well as the use of evidence obtained by torture and the use of diplomatic assurances in extradition proceedings. The questions of

¹⁰³⁷ At: <http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/185/18502.htm>

¹⁰³⁸ *Ibid* Paragraph 5

detention and the fundamental procedural safeguards provided for in PACE and recommended in General Comment No.2 are only discusses as far as they relate to deaths in custody and this is largely focused on prison conditions. The report does not consider in detail the level of consideration given to the Convention by the various decision makers in the legal system but does examine the place of the Convention in the UK legal system with reference to individual complaints. The Joint Committee noted the position of the government at the time that they were waiting to observe the impact of the individual complaints procedure under CEDAW before making a decision but concluded, like the UN Committee, that a declaration should be made under Article 22 as soon as possible.¹⁰³⁹ Unfortunately this recommendation has not been followed in the seven years since the publication of the report and, if anything, the arguments of the UK government seem to have regressed from a professed desire to examine the workings of the procedure under CEDAW to a firm insistence that the procedure would be without benefit to UK citizens. Given the common use of Article 22 in relation to disputes under Article 3 of the Convention it seems difficult to justify this position as anything other than an attempt to facilitate removals in spite of the protection supposedly offered by the Convention.

Another issue of concern to the UN Committee considered in the report is the extraterritorial scope of the Convention, especially as it relates to the armed forces serving abroad. Once again, the Joint Committee echoes the recommendations of the UN committee in calling for an acceptance of the full applicability of the Convention to troops serving overseas.¹⁰⁴⁰ This would include the application of Article 3 of the Convention to the transfer of detainees to Iraqi or Afghan custody and the Joint Committee described itself as less than reassured by the arguments that Article 3 would only be applicable to the removal of an individual from a State's

¹⁰³⁹ *Ibid* Paragraph 32

¹⁰⁴⁰ *Ibid* Paragraph 73

territory.¹⁰⁴¹ The Joint Committee noted that it may be possible only to read the offense of torture as applying to troops serving abroad but argued that it was necessary to apply all of the protection offered by the Convention to those involved in armed conflicts.¹⁰⁴² Once again, as in the case of Article 22, the Joint Committee has made recommendations of a similar character to those put forward by the UN Committee but once again there has been a very limited response to these from the UK government since 2006 and, as outlined in chapter 2 above, the UK would go on to advance very similar arguments at its next appearance before the UN Committee in 2013. This would suggest that, while useful, the work of the Joint Committee has like that of the UN Committee had limited impact on government policy.

Another area considered by the Joint Committee was the use of diplomatic assurances in securing the removal of individuals to States where there may be a risk of torture or ill-treatment. The report noted with concern that

“...the Government’s policy of reliance on diplomatic assurances against torture could well undermine well-established international obligations not to deport anybody if there is a serious risk of torture or ill-treatment in the receiving country. We further consider that, if relied on in practice, diplomatic assurances such as those to be agreed under the Memoranda of Understanding with Jordan, Libya and Lebanon present a substantial risk of individuals actually being tortured, leaving the UK in breach of its obligations under Article 3 UNCAT as well as Article 3 ECHR. We are also concerned that Memoranda of Understanding lack enforceable remedies in an event of a breach of the terms of the Memoranda.”¹⁰⁴³

This demonstrates that Parliament has, at least at Committee level, attempted to engage with the Convention and has developed a comprehensive understanding of

¹⁰⁴¹ *Ibid*

¹⁰⁴² *Ibid*

¹⁰⁴³ *Ibid* Paragraph 131

the obligations contained therein. This has not, however, translated into any real open discussion of the Convention on the floor of the Houses of Parliament and where the European Convention has been considered it has been viewed as an obstruction and a nuisance rather than as a means of protection. The report of the Joint Committee has, like that of the UN Committee had disappointingly little effect on government policy with many of its recommendations remaining unimplemented seven years after its publication and the improvements which have been observed during this period being largely attributable to other factors most notably the European Convention and the Human Rights Act 1998.

(vi) Conclusion

The above can be seen to demonstrate at best moderate and in many ways half-hearted engagement by Parliament with the prohibition of torture at international law, and with international law more generally. It may be noted that many Members of Parliament have been prepared to discuss the protection of human rights in Parliamentary debates even prior to the adoption of the United Nations Convention Against Torture but this has been on an issue by issue basis and usually in response to particular abuses or concerning problems which have already occurred. There is little debate on the provisions of the Torture Convention or the European Convention on Human rights, both of which are binding on the United Kingdom. Parliament has, however, been more willing to consider its own legislation and this has resulted in a substantial step forward following the passage of the Human Rights Act which has required it to consider the European Convention, including the Article 3 prohibition of Torture. This has not solved all of the problems as both during and after the passage of the Act much of the discussion has been hostile with the legislation seen by some

as an obstacle to an effective criminal justice and counter terrorism policy which needs to be worked around. Debates have also been punctuated by frequent references to public opinion which may not be conducive to the full protection of minority rights. The Human Rights Act has, however, forced Parliament to consider the European Convention and similar legislation may have the same effect in relation to other international human rights Convention resulting in a higher level of protection. Debates have also revealed some ignorance as to the scope of human rights instruments and further training for lawmakers on this issue may result in greater engagement with these instruments before violations can take place and a reduced hostility to the protection they offer

Conclusion

From the above it is possible to conclude that the public institutions of the United Kingdom are not paying sufficient regard to the UN Torture Convention and its obligation in all areas of their functions. The absence of any direct effect for the Convention in English Law and of any formal incorporation beyond the basic offence of torture contained in the Criminal Justice Act 1988 has meant that courts have given the issue little consideration and that this has, on occasions, resulted in judgments which can be argued to violate some of the Convention's most vital provisions including the Article 3 non-refoulement provisions. While a clear improvement has been seen here since the entry into force in 2000 of the Human Rights Act, this has not solved these problems. While the courts are now forced to consider the European Convention on Human Rights in their decisions, including Article 3 which prohibits torture and inhuman or degrading treatment, this has not meant that all of the requirements of the UN Convention have been considered. It is arguable that, as evidenced by the *Jones* case, the Strasbourg jurisprudence which the courts have a duty to consider does not go far enough to satisfy the provisions of the UN Convention, especially as they relate to impunity. Even where the Strasbourg jurisprudence represents the strongest available protection of human rights, such as in the case of sentences of life imprisonment without the possibility of early release where the court has gone significantly further than the Committee Against Torture, the UK courts have not construed the scope of Article 3 as widely as the Strasbourg Court resulting in potential violations of Article 3 of the European Convention.

Other difficulties arise in Parliament where elected members have greater regard for public opinion and the preservation of law and order and appear reluctant to act to protect human rights. Again, the passage of the Human Rights Act has served to increase awareness within Parliament of the provisions of the European Convention

but this is often spoken of with hostility and little or no reference is made in major debates to the UN Torture Convention. Even where Parliament seeks to uphold the UK's obligations under the UN Convention, often unwittingly, the powerful role of the politically appointed Secretary of state for the Home Department has often served to render its opposition to potentially abusive measures ineffective. Similarly, while select committees, including the Joint Committee on Human Rights, have considered the UK's obligations under the Convention in some detail and have reached conclusions very similar to those of the Committee Against Torture, very little has been done in practice to implement these recommendations which has resulted in only minimal improvements in the UK's level of compliance.

While the military and police are subject to procedures, especially in the case of the police the Police and Criminal Evidence Act 1984, which impose many of the fundamental procedural safeguards and preventive mechanisms advocated by the Committee Against Torture, this has been done in ways which still allow scope for abuses to take place and measures to deal with severe or systematic failings are often reactive and follow incidents in which lives have been lost where any effective mechanism to combat torture must, as described in chapter 2, focus on prevention.

Improvements to the institutional apparatus of the United Kingdom are, therefore, required in order to ensure full compliance with the UN Convention Against Torture and comprehensive prevention of torture and ill-treatment. While the Human Rights Act has led to some positive developments in this regard, it has not been sufficient or universally effective. Requiring public authorities to also consider the provisions of the UN Torture Convention in all relevant areas of their activities may be the only way to further improve the UK's level of compliance with this Convention.

Conclusion

It is evident from the historical and philosophical studies of torture that it is the appalling damage which torture inflicts upon its victims that makes the practice so useful for those in authority in seeking to achieve their objectives whether these are the maintenance of power or the suppression of any particular individual or group. It is also the gravity of the damage inflicted by torture that renders its eradication so necessary to the avoidance of suffering. Unfortunately the widespread nature of the practice and its usefulness to those who would participate in it would make any total eradication of torture impossible at least in the short to medium term although this must be the ultimate goal of any international legal mechanism aimed at combating torture. It is therefore necessary for such mechanisms to also focus on the prevention of torture in the individual sets of circumstances in which it is most likely to occur. Such a strategy may serve to stop people being exposed to the suffering inherent in the act of torture even where the mentality of the public officials would still allow for it to be inflicted if it were not to be prevented. It is certainly true that provision must be made for the punishment of torturers and the compensation and rehabilitation of victims but this should be secondary to the aim of preventing their suffering in the first place and would, on its own, be clearly unsatisfactory.

The approach taken by the United Nations treaty monitoring bodies, especially the Committee Against Torture would appear largely consistent with this strategy. Its consideration of State Party reports has focused extensively on issues related to eradication and prevention of torture, something evidenced by the comments contained in General Comment No.2¹⁰⁴⁴ and the themes discussed in subsequent Committee sessions. While encouraging the abandonment of the practice of torture where possible, the Committee has focused extensively on the circumstances in which torture is most likely to occur and encouraged States Parties to adopt best practice measures to prevent this from occurring in these situations. Much of the focus in this connection has related to individuals detained in

¹⁰⁴⁴ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee Against Torture, General Comment No. 2, 'Implementation of article 2 by States parties' 24 January 2008 UN Doc: CAT/C/GC/2

police custody as these individuals are among the most vulnerable to torture or ill-treatment. Here the Committee has consistently recommended measures including the provision of access to independent doctors and legal representatives as well as direct communication with friends or family members in addition to the full oversight of detention facilities including with the use of video and audio recording of interviews in order to prevent the secrecy which may lead to impunity for torturers.

In addition to this, the Committee is also using an increasingly wide interpretation of Article 1 of the Convention which defines torture as including acts committed with the consent or acquiescence of a public official. This has led them to focus not just on the stereotypical view of torture as something carried out by officials to further the purposes of the State, the kind of conduct which has been the focus of much of the philosophical and theoretical discussion of the issue of torture, but also to examine some private acts which a State has not exercised due diligence in preventing. This has led it to consider issues such as familial violence, forced marriage and the practices of local leaders and groups operating independently of the State. The result of this has been a much wider examination of States by the Committee and the potential for application of the Convention to many more cases of suffering. This expansion of interpretation has, however, made it even more difficult for the Committee to review all States regularly and in sufficient depth to be able to fully address these issues. Full compliance will only be possible when States accept and actively engage with this approach and with the guidance of the Committee and participate enthusiastically in the struggle against torture. This is unfortunate as the overwhelming majority of the theoretical discussion on torture suggests that it is principally practiced by States in order to further their own interests or to preserve the position of their governments. This cannot be seen as consistent with a voluntary and zealous engagement with the prohibition and it is unlikely that any significant practical benefit will accrue to such States in seeking to combat pain and suffering caused by private individuals.

The developments in the Committee's approach nonetheless represent a positive step in the battle to combat torture but it is questionable as to whether the Committee alone is able to achieve these aims. There are a number of issues which threaten to frustrate the body's

attempts to ensure the prevention of torture on a global scale. Firstly, not all States are party to the Convention Against Torture and, therefore subject to the jurisdiction of the Committee, although the current 163 States Parties do represent the majority of States currently in existence. There is also a significant problem of non-reporting States Parties, nations which through a lack of resources or a lack of commitment to the prevention of torture do not report to the Committee. While the Committee has now adopted a policy of considering the compliance of such States with their obligations under the Convention in the absence of a report, it lacks the time, membership and resources needed to scrutinise all non-reporting States in this way and even if it were possible to do so, it would still prove difficult to ensure compliance with the resulting recommendations. There also exists a problem of States, including the United Kingdom, submitting reports a number of years late. Even where this is not the case, the Convention envisages a four year interval between examinations by the Committee and with each examination lasting only five hours, any improvements in a State's compliance may be gradual, this may be argued to be insufficient in the face of the urgency with which action against torture is required.

In the case of the United Kingdom, some positive developments have been seen following the examination by the Committee of the more recent periodic reports. The more notable examples of these include the repeal of Part IV of the Anti-terrorism, Crime and Security Act 2001 which had allowed for the indefinite detention of foreign nationals suspected of terrorist activities who could not be deported consistently with the rules of non-refoulement contained in Article 3 of the Torture Convention and the European Convention on Human Rights, and the improvement of the justice system in Northern Ireland including the closure of certain notorious detention facilities and the restructuring of the Royal Ulster Constabulary. It may be questioned, however, whether these undoubtedly positive steps can really be attributed to the Committee's recommendations. The changes to the detention regime for suspected terrorists followed the decision of the House of Lords in *A v Secretary of State for the Home Department* which found the provisions of Part IV of the 2001 Act to be incompatible with Articles 5 and 14 of the European Convention on Human Rights, so it was this Convention rather than the Torture Convention which brought about change here. Similarly many of the

developments in Northern Ireland took place as a result of the Good Friday Agreement which took place independently of the Committee. There are also areas on which the Committee has consistently recommended action without any meaningful response from the UK government. The most obvious examples of this are the repeated calls by the Committee for the UK to make a declaration under Article 22 of the Convention allowing the Committee to consider communications from individuals relating to the United Kingdom. The government has insisted that it sees no practical benefits for UK citizens in such a step but, as noted in Chapter 2, it has been suggested that this may be due to fears that such a mechanism would be used extensively by those seeking to avoid removal from the UK. The United Kingdom has also consistently rejected calls by the Committee for an increase in the age of Criminal responsibility, currently 10 years and has also rejected the Committee's views on the extra-territorial scope of the Convention. This should not be read as suggesting that the Committee is not of great value in holding States to account for actions which may breach the Convention and in spreading good practice internationally but that a far greater and more sincere engagement with the work of the Committee by the United Kingdom would be required to ensure full and adequate protection for those subject to UK jurisdiction.

Part of the problem facing the United Kingdom's compliance with the Torture Convention is the rather limited consideration afforded to the Convention by judges in UK courts. Much of the development in this area has been as a result of the Human Rights Act which has required judges to consider the compatibility or otherwise of legislation with the European Convention on Human Rights, including Article 3 which prohibits torture and inhuman or degrading treatment or punishment. This can be illustrated with an examination of the approach taken by the courts to the issue of life imprisonment. Prior to the entry into force of the Act the examination of cases on this issue focused purely on the actions of the decision makers in each case and whether it was consistent with the legal framework as can be seen in the *Hindley*¹⁰⁴⁵ case. A different approach can be seen after the entry into force of the Act with judges actively considering the scope and requirements of Article 3 of the European

¹⁰⁴⁵ *R v Secretary of State for the Home Department ex parte. Hindley* [2001] 1 A. C. 410

Convention, as was the case in *R v Bieber*.¹⁰⁴⁶ This has, therefore, resulted in a greatly increased focus on the prohibition of torture but this has arisen, like many of the developments following the recommendations of the Committee Against Torture, from the Human Rights Act and the European Convention rather than the UN Torture Convention. While it is positive that the prohibition is at least being considered, this may not by itself be adequate. It must be noted that the Court of Appeal in *Bieber* reached the same conclusion as the House of Lords in *Hindley*, albeit through very different reasoning, that the imposition of 'whole life orders' would not amount to a violation of Article 3 of the European Convention. The Strasbourg Court, however, would go on to find in *Vinter v United Kingdom*,¹⁰⁴⁷ that such orders had the potential to do just that. This would suggest that while the Human Rights Act represents a step forward in forcing judges to consider human rights standards and the prohibition of torture, it does not by itself ensure full compliance with these standards. It may be that a similar incorporation of the UN Torture Convention would improve this situation by encouraging judges to consider not only Strasbourg jurisprudence but also that of the Torture Committee in dealing with questions related to relevant issues or examining official practice in the context, for example, of judicial review. Such a measure would be likely to prove onerous for judges but any move to develop a greater awareness among the judiciary and, indeed, public officials more generally of the best practice recommendations of the Committee, especially those contained in General Comment No.2 would have the potential to contribute to the prevention of torture in the situations in which it is most likely to take place. The fact that the UK courts are not always accurate in their interpretation of the scope of human rights norms as evidenced by the judgments in *Bieber* and *Vinter*, also serves to underline the need for full cooperation with international monitoring bodies including the Committee Against Torture in order to ensure full protection for potential victims. This would include recognition of the Committee's competence under Article 22 of the Convention to receive individual communications

¹⁰⁴⁶ [2008] EWCA Crim 1601 para 51

¹⁰⁴⁷ 66069/09

Similar difficulties arise where issues relevant to the Convention are considered by Parliament. The Convention itself is rarely mentioned on the floor of either of the Houses of Parliament. The prohibition of torture, however, has been considered in far greater depth following the passage of the Human Rights Act 1998 which required new legislation to be assessed for compatibility with the European Convention on Human Rights, including the Article 3 prohibition of torture. This has unquestionably resulted in the demonstration of a greatly increased awareness among MPs and peers of the scope of the prohibition and encouraged them to consider in advance the likely effects of their activities. Problems have continued to arise, however, where MPs have misunderstood the nature of the European Convention and have been unsure as to its scope. Many Parliamentarians have also shown considerable hostility to the prohibition and their duty to consider it, viewing its requirements as an irritating and, at worst, dangerous obstruction to the workings of the security forces and the criminal justice system with the potential not only to prevent the proper punishment of criminal offenders but also to expose society to an increased danger of terrorist violence. While it may never be possible to eliminate the desire, especially of MPs to appear unforgiving towards individuals and groups perceived by the electorate to be dangerous or otherwise undesirable, it is certainly true that greater awareness as to the exact nature and scope of the European Convention among Parliamentarians would be likely to encourage a more reasoned and accurate debate on the human rights implications of Parliament's actions. It is for this reason that full and comprehensive training should be provided to all Parliamentarians on the subject of the European Convention, including the Article 3 prohibition of torture. A similar requirement for Parliament to consider the Convention Against Torture in the course of dealing with relevant matters may prove especially helpful in areas where the European convention has failed to make satisfactory progress in the protection of rights such as extradition arrangements. While this may appear somewhat onerous it may be justified on the grounds of the extreme and unique level of physical and psychological harm which torture may inflict on its victims for many years after its commission. The above difficulties with Parliament's relationship with the European Convention, however, would suggest that such a development would by itself be insufficient and that a declaration must

also be made under Article 22 of the Convention to allow for the consideration by the expert and politically independent Committee Against Torture of individual communications where appropriate. While much greater attention has been paid at select Committee level to the requirements of the Convention with the Joint Committee on Human Rights producing a report on the subject of compliance which substantially mirrored the conclusions and recommendations previously reached by the UN Committee, this has had disappointingly little impact on government policy or State practice with limited public awareness and many of the recommendations remaining unimplemented seven years after its publication.

While much of the above may be read as constituting good grounds for pessimism some real improvements have occurred in the last few years in the UK's level of compliance with the Convention, largely as a result of the passage of the Human Rights Act and an even greater level of compliance could be easily achieved. A greater and more sincere level of cooperation with the Committee Against Torture is vital in ensuring full compliance, this would include taking full note of and properly implementing the recommendations of the Committee as well as permitting its review of individual complaints pursuant to Article 22 of the Convention. Further to this, a duty on public bodies to consider the Torture Convention in a similar manner to that in which they are already required to consider the European Convention in their activities would be likely further improve the level of compliance if this were to be accompanied by greater training of public officials and greater public awareness as to the content of the Convention. If these measures were to be implemented they may go a long way towards ensuring the prevention of torture in the United Kingdom. This would certainly prove onerous. Many of the requirements of the Torture Convention are expressed vaguely with clarification coming from the Committee not through widely published judgements on a clearly defined topic as is the case with the European Court of Human Rights, but from general discussions of particular States during twice yearly meetings. The monitoring and continued study of these will represent an increase in the work load of public bodies which would also be required to carry on their existing functions. This would be especially true if the Convention were to achieve universal participation by States and all parties were to report promptly comprehensively. Training can, however be given in this area

and greater monitoring and dissemination of the findings of the Committee would make this possible. Given the increasingly expansive view taken by the Committee of the scope of Article 1 of the Convention and the types of conduct which it covers combined with the greater focus on prevention evident in and since General Comment No. 2, any such requirement, even falling short of full direct effect, would have the potential to dramatically increase the level of protection offered to individuals and to reduce the risk of torture and inhuman or degrading treatment occurring. The conduct of public authorities over the thirteen years since the entry into force of the Human Rights Act demonstrates that they are prepared to follow such duties diligently where they exist and, in view of the unique gravity of the practice of torture and its horrific and irreversible effects on its victims, it is difficult to argue against the view that the issue should be brought to the forefront of public officials' minds during the course of all of their activities.

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