

Justification Doctrine in the Prohibition on Torture, Cruel, Inhuman or Degrading Treatment

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‘The notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical, *which, in the particular situation is unjustified*¹’

Abstract

This paper looks at the legacy of a justification doctrine evident in early international jurisprudence that set the threshold for treatment prohibited under international law as torture, cruel, inhuman or degrading treatment or punishment [hereafter the *prohibition*], excusing from its reach deliberately inflicted, potentially severe, suffering proportionately inflicted for a legitimate purpose.

Debates over a ‘threshold’ at which point the prohibition engages, or at which point ‘inhuman’ treatment reaches a level sufficient to be deemed ‘torture’, typically invoke an implicit ‘severity’ threshold. This paper is not primarily concerned with severity or the instrumentality of any ‘severity threshold’ either in engaging the prohibition or in distinguishing categories of prohibited treatment. Neither is the article concerned directly with the legal distinction between categories of prohibited treatment (i.e. the distinction between ‘torture’, other ‘inhuman’, or even any subcategory ‘degrading’ treatment). Rather the article focuses on the

distinction between (i) treatment prohibited, as either torture or other cruel, inhuman or degrading, and (ii) treatment prima facie ‘justified’. What the article looks at is the operation of a ‘justification’ threshold in triggering the prohibition, one that understands ‘justified’ treatment as never reaching the level of, or never amounting to inhuman, cruel or degrading treatment under the prohibition.

The article interprets the current prohibition on torture, cruel, inhuman or degrading treatment as one on ‘unjustified’ inflicted suffering, suggesting that the notion of ‘justifiability’ active in this definition is problematic in encouraging arguments seeking to circumvent the protection afforded under the prohibition. In the absence of a clearly defined notion of the ‘victim’, or circumscribed class afforded protection, this paper both identifies and addresses a correlation between (i) a broadly inclusive contextual scope for the prohibition’s applicability – one that contemplates a broad notion of the potential victim – and (ii) an enhanced role for a justification doctrine in excusing the infliction of [potentially severe] suffering where necessary and proportionate. In light of identified dangers associated with a role for justification doctrine in the definition of prohibited treatment, an alternative is put forward that would

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1) [emphasis added] European Commission on Human Rights in the *Greek Case*, Report of November 1969, (1969) 12 Yearbook 186-510 at para. 186.

redefine the prohibition as one, not on 'unjustified' but one on 'all' suffering deliberately inflicted restricted to contexts of detention, custody, control or other deprivation of liberty.

A brief disclaimer and clarification should also be made at the outset: The article addresses balancing exercises, active in determining the justifiability of treatment, that draw on the nature of its purpose and the degree of its severity. However the author wishes to make clear that the article *in no way means to suggest that proportionality is, or should ever be, active in excusing treatment deemed cruel, inhuman, degrading or even torture*; the article does not, in referring to 'balancing exercises', 'justification' or 'proportionality', mean to invoke, and much less to argue for, any justification doctrine or proportionality that would balance the prohibition against, for example, national security concerns. What the article is concerned with is a degree of balancing between the severity of suffering inflicted and a potentially legitimate purpose, operating *in certain circumstances* either to determine treatment as prohibited as torture, cruel, inhuman or degrading or alternatively to excuse it as 'justified'. It is not, then, balancing exercises which might mitigate (notwithstanding the absolute nature of the prohibition) the infliction of treatment deemed 'cruel, inhuman or degrading', or even that amounting to 'torture', but those balancing exercises which '*precondition*' the triggering of the prohibition that are the subject of the article and of which will be attempted as lucid an analysis as possible. It is in this context that any reference to 'proportionality' in the article is made.

Lastly the author wishes to clarify that anything presented or put forward by the article is done so solely in the interest of securing the maximum protection for the most vulnerable.

Keywords: torture, cruel, inhuman or degrading treatment, definition of, inflicted suffering, justification, threshold, purpose, context

History

The European Commission on Human Rights, in the *Greek case*, found that: 'the notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation is *unjustifiable*';² the notion of 'unjustified treatment', then, setting the threshold for treatment prohibited as torture, cruel, inhuman or degrading.

The European Court of Human Rights [ECtHR] in *Ireland* later found that: 'ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3',³ further considering the 'assessment of this minimum [to be]..., in the nature of things, relative;... depend[ing] on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.'⁴ The Court's focus on the severity of the treatment, both in setting the entry threshold for treatment prohibited under the Convention, and in distinguishing lesser forms of prohibited treatment from 'torture',⁵ suggested, in relation to the threshold for prohibited treatment, a focus very much on the subjective effect, rather than the [un-]justifiability, of the treatment.

Although *Ireland* might have suggested

2) [emphasis added] *The Greek case*, supra note. 1; see also UN Special Rapporteur on Torture, Manfred Nowak: '...there may be some purposes for which deliberately causing severe suffering is justified and, therefore, is not inhuman...' Manfred Nowak, *What Practices Constitute Torture?: US and UN Standards*, 28 (no. 4) *Human Rights Quarterly* 809 (2006), at 821.

3) *Ireland v. The United Kingdom* (Application no. 5310/71), Judgment 18 January 1978, para. 162.

4) *Ibid.* para.162.

a shift away from any centrality of purpose in determining the legal nature of the treatment, and despite reference to the ‘...potential justifiability of inhuman treatment... [having since] been abandoned by the European Court of Human Rights and rejected elsewhere’,⁶ subsequent international and domestic jurisprudence suggests that purpose (under the justification doctrine) still plays a central role in determining the legal nature of treatment inflicting suffering, not only in distinguishing torture from other forms of ill-treatment, but in distinguishing prohibited from ‘justified’ treatment, consistently reflecting the possibility for, in certain circumstances, ‘justified’ deliberately inflicted [and potentially severe] suffering,⁷ so that while the notion of ‘justified inhuman’ treatment has been abandoned, the potential for ‘justified, deliberately inflicted and po-

tentially severe suffering’ survives; the notion of treatment as ‘un-justified’ still central as a pre-condition in engaging the prohibition. ‘Justification doctrine’ does, then, operate, at least along side ‘severity’, to set the entry threshold for prohibited ill-treatment.

Justifiability and the absolute prohibition

It is accepted that as the prohibition is currently understood, a degree of justification or proportionality active in determining the *scope or reach* of what would still be an absolute prohibition (rather than excusing treatment within that category) is not itself necessarily incompatible with an absolute prohibition where that prohibition incorporates the notion of justifiability in to the definition of what it absolutely prohibits.⁸ However, the introduction of a justifica-

5) ‘... the Court must have regard to the distinction, embodied in Article 3 (art. 3), between this notion and that of inhuman or degrading treatment. In the Court’s view, this distinction derives principally from a difference in the intensity of the suffering inflicted ... The Court considers ... that it was the intention that the Convention, with its distinction between “torture” and “inhuman or degrading treatment”, should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering’, para. 167; see also, ‘[though] the acts complained of often occurred during interrogation and, to this extent, were aimed at extracting confessions, the naming of others and/or information, ... the severity of the suffering that they were capable of causing did not attain the particular level inherent in the notion of torture as understood by the Court’, *Ibid.* at. 174.

6) Nigel Rodley, *The Definition(s) of Torture in International Law*, 2002 55 *Current Legal Problems* (Oxford University Press), pp.467-493, at 471.

7) For example in formulations to the effect that ‘... a measure which is of therapeutic necessity...cannot in principle be regarded as inhuman and degrading.

The same can be said about force-feeding that is aimed at saving the life of a particular detainee who consciously refuses to take food’, *Nevmerzhitsky v. Ukraine* (Application no. 54825/00) judgment 5 April 2005, para. 98. See also ‘[a]ny use of force that is not strictly necessary to ensure proper behavior on the part of the detainee constitutes an assault on the dignity of the person... in violation of Article 5 of the American Convention’ [emphasis added], Loayza Tamayo, 1997, *Inter-Am.Ct.H.R. Series C No.33*, para. 57; Castillo-Petruzzi, *Judgment of May 30, 1999, Inter-Am. Ct. H.R. (Ser. C) No. 52 (1999) para.197*; Cantoral-Benavides, *Judgment of August 18, 2000, Inter-Am. Ct. H.R., (Ser. C) No. 69 (2000) para. 96*; also ‘in respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3’ [emphasis added], *Bati and Others v. Turkey*, nos. 33097/96 and 57834/00, judgment of 3 June 2004 at para. 118.

8) so that, for example, it ‘...does not mean that a little CIDT [cruel, inhuman or degrading treatment] may be applied for a legitimate purpose’, Nowak, *supra* note. 2, at 836.

tion threshold, simultaneously defining a category of treatment deemed particularly abhorrent, to be absolutely prohibited, and potentially excusing the deliberate infliction of severe suffering, has seen what in the context of an 'absolute' prohibition might be referred to as an unnatural, and uncomfortable significance attached to the nature of the pro-offered purpose for which suffering is inflicted and the relative severity of that suffering in the determination of scope of the prohibition. So that although the prohibition is proclaimed absolute and non-derogable⁹ proportionality and purpose nonetheless distinguish 'legitimate' from 'prohibited' inflicted suffering.

Such a prohibition sees torture, cruel, inhuman and degrading treatment and punishment defined as the 'unjustified infliction of suffering' of relative severity or purpose; what is prohibited is *not* the deliberate infliction of even severe suffering but the *unjustified* infliction of suffering. This, it is suggested, has left the protection afforded under the prohibition vulnerable to arguments, in the current context of the war on terror, that certain forms of treatment, particularly those not reaching levels sufficient to trigger the definition of torture under the Convention (and with it the only reference to suffering inflicted in the extraction of information or a confession), might be 'justified' in the inter-

ests of national security and so excused from the reach of the prohibition.

Limits to the operation of justification

Though jurisprudence demonstrates that a justification doctrine is operational, at least along side 'severity', to set the entry threshold for prohibited ill-treatment, and potentially excusing deliberately inflicted suffering, jurisprudence also demonstrates that it is at most of restricted significance in that only in limited situations have courts been willing to entertain any balance in considering the legal nature of treatment inflicting even lesser suffering. Instead there is a reluctance¹⁰ to entertain any balance that might excuse as justified the deliberate infliction of suffering beyond a number of circumstances addressed below.

Most situations found to involve a proportionality or justifiability to excuse inflicted suffering fall outside, or beyond, contexts of direct control [e.g. in the affecting of an arrest, quelling a riot etc]; suggesting notions of justification and the balancing of competing interests to be relevant considerations only outside that context. It is a reasonable proposition that once an individual is under 'direct control', in very few situations can any inflicted suffering ever be legitimate.¹¹

However (and it is suggested that the following is the current understanding of the

9) The prohibition on torture is also a *jus cogens* norm; see International Criminal Tribunal for the Former Yugoslavia in Prosecutor v. Furundžija IT-95-17/1, Judgment 10 December 1998 para. 153, and Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment, 16 Nov. 1998, para. 454.

The prohibition on cruel, inhuman and degrading treatment has also been found to amount to a norm *jus cogens* under US Restatement of Foreign Relations law (see section 702(n) and federal court cases involving the Alien Torts Claim Act (see eg, *xuncax v, Gramajo*). The Berlin Declara-

tion on Counter Terrorism and Human Rights, adopted by the entire ICJ Biennial also affirmed CID as *jus cogens*.

10) This might be understood as a reluctance informed by the greater deference to utilitarian arguments – antithetical to human rights – represented by a greater role for any justification doctrine that would balance between the inviolability of the human person or the right to human dignity (their protection from inflicted suffering) and any wider concerns.

operation of justification doctrine in relation to the prohibition), while most situations in which exercises considering the justifiability of treatment operate do fall outside detention situations, a willingness to entertain balancing, or the 'justifiability' of the treatment, can alternatively be understood triggered not by the context in which the treatment takes place, but by the *nature of the purpose* being pursued – affecting an arrest, quelling a riot, administering medical aid, securing of information, extracting a confession, safeguarding national security, etc., with certain purposes, rather than contexts, understood to have been put *beyond* proportionality. So that as currently understood, then, the prohibition operates framed *conceptually*; the scope defined by the operation of justification rather than the existence or absence of context.

Justification doctrine can be understood to operate similar to limitations inherent in rights to freedom of thought, conscience and religion, to freedom of expression and association and to respect for private and family life.¹² A degree of interference with these rights *is* entertained, but that interference will depend for its acceptability, firstly on *the nature of the purpose being pursued* and only secondly on the degree of the interference relative to that aim. In other words, as in the case of any justification for inflicted suffering, only certain purposes entertain the *possibility* of legitimate interference.

Purpose and those 'beyond proportionality'

The defining characteristic of 'torture', distinguishing treatment inflicting suffer-

11) See for example Nowak; 'when the person has been arrested, handcuffed, detained, or otherwise bought under the direct control of the official, *no further use of force or infliction of pain is permitted*' *supra note*. 2, at 837 [emphasis added]. Under international humanitarian law, applicable in the most extreme of situations, it is clear that any suffering inflicted on detainees [right down even to a very low threshold] is prohibited without recourse to proportionality. See, e.g. the Geneva Conventions: 'No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties' Geneva Convention IV, Art. 31; and 'Protected persons...shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.' Geneva Convention IV, Art. 27; also [T]he term 'cruel, inhuman or degrading treatment or punishment' should be interpreted so as to extend the widest possible protection against abuses." UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by General Assembly resolution 43/173 of 9 December 1988, Principle 7.

12) The ICCPR, in article 18(3), provides for restriction of the rights of thought, conscience and religion 'as are prescribed by law' and only to the

extent 'necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others', and under article 19(3) for restriction to freedom of expression to the extent necessary '(a) for respect of the rights or reputations of others [and] (b) for the protection of national security or of public order (ordre public), or of public health or morals.

International Covenant on Civil and Political Rights, GA res. 2200A (XXI) 16 December 1966 entry into force 23 March 1976. The ECHR provides for curtailment of these freedoms only as far as necessary 'in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others' art. 9 [thought, conscience and religion], or in the 'interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary' art. 10 [freedom of expression], *Convention for the Protection of Human Rights and Fundamental Freedoms* 1953 ETS 5 [ECHR], the Inter American Convention on Human Rights 1978, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, provide similar exceptions under art. 12 and 13.

ing of comparable severity,¹³ is the presence of a ‘purposive’ element;¹⁴ the purposive element then, rather than relative severity, informing the abhorrent nature of treatment understood under international law as ‘torture. An absolute prohibition on suffering inflicted in the course of e.g. interrogation, regardless of its severity, sees that purposive element the abhorrent characteristic of treatment deemed ‘torture’ similarly inform the reprehensible, and so prohibited, character of treatment inflicted for the same purpose resulting in suffering of a lesser severity. The listed purposes found in the definition of ‘torture’ under article 1 of the UN Convention against Torture¹⁵ [hereafter *the Convention*] all, with the exception of ‘for discrimination of any kind’, presuppose a context of detention, custody or control. It has been suggested elsewhere that the ‘powerlessness’ of the victim in these situations justifies the aggravated stigma attaching to inflicted suffering to deem that ‘torture’.¹⁶ It is suggested *here* that the ‘powerlessness’ of the

victims in these situations – contexts of ‘control’ – justifies [in addition to justifying the label torture where the severity is sufficiently ‘severe’] the irrelevance of balancing to determine the reprehensible, and so prohibited, nature of treatment for one of these purposes regardless of its severity; justifying its prohibition without recourse to balancing.

A review of the effect the inclusion of a ‘purposive’ element in the definition of torture has, seems to support their having been put ‘beyond proportionality’, beyond ‘justifiability’. ‘Purpose’ is both a category of *mens rea* and a factor in attribution.¹⁷ The inclusion of purpose therefore serves to affect a narrowing of either the required *mens rea* [as the listed purposes do not exhaust the possibilities of intentional infliction] or the rules of attribution [leaving only the infliction of severe suffering as state policy or state sanctioned]. The scale or degree of this narrowing effect is determined by the adopted interpretation of the listed purposes. Interpreted widely to encompass sadistic

13) While it is accepted that both *severity* and *purpose* might distinguish ‘torture’ from ‘other acts of cruel, inhuman or degrading treatment’, the reference here is to the distinguishing factor of treatment of ‘comparable severity’.

14) Article. 1 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984 entry into force 26 June 1987, (and accepted elsewhere as customary law elements of the crime of torture, see, for example, the appeal chamber of the International Criminal Tribunal for the former Yugoslavia [ICTY] in *Prosecutor v. Anto Furundzija*, No. IT-95-17/1-A, (ICTY Appeals Chamber July 21, 1999) at para. 111; see also; *Prosecutor v Delalic and Others*, Case IT-96-21-T, Judgement, 16 Nov 1998, para. 459, and; *Prosecutor v. Kunarac et al.*, Case No.IT-96-23-T & IT-96-23/1-T, Judgement, ICTY TC, 22 February 2001, at para. 469). See, also Nowak, supra note 2.

15) Being ‘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’, Article. 1 of the UN Convention against Torture, supra note 14.

16) Nowak, supra note 2, at 832.

17) ‘...the purposes referred to in article.1 must be understood as having some connection with the interests or policies of the State and its organs’, Burgers and Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (M. Nijhoff Publishers, 1988), at 119.

infliction of pain,¹⁸ the effect on either the rules of attribution or the required *mens rea* is negligible and the purposive requirement seems *de trop*. Interpreted narrowly it sees a corollary narrowing of the rules of attribution and of the required *mens rea*, raising the burden and making a violation harder to establish [something unlikely to have been intended given the nature of human rights protection being focused on achieving maximum protection rather than establishing ‘guilt’]. Given authoritative interpretation of purpose in the wide sense,¹⁹ it is suggested that the rationale of their inclusion is then to indicate the reprehensible nature of treatment inflicted for these purposes and excluding, as policy, these specific purposes from those which should be subject to any balancing even when resulting in less than severe suffering. The list of purposes is then a policy statement as to those having been put ‘beyond justifiability’ and the manifest unacceptability of inflicted suffering for these specific purposes without recourse to severity.

Other purposes

The Convention then, in its specific reference to purposes associated with ‘torture’, establishes the *irrelevance* of any notion of justifiability in relation to the prohibition of treatment inflicted for those purposes. But in relation to suffering inflicted for other purposes, the Convention can also be seen to implicitly establish a justification threshold

to excuse categories of potentially legitimate inflicted suffering. Article 16 prohibited treatment [defined as ‘other acts of cruel, inhuman or degrading treatment which do not amount to torture’²⁰] would seem to cover a broad range of treatment not amounting to ‘torture’, including; treatment inflicted for a listed purpose though not meeting the requisite level of ‘severity’; treatment resulting in both severe and less than severe suffering inflicted for purposes other than those under article 1, and; as well as non-purposive suffering. However the reach of article 16 can not have intended to catch [or excuse] *all* forms of suffering inflicted for any other purpose than those listed in article 1, as there are some circumstances, for example in the effecting of an arrest, in which a measure of inflicted suffering, without being in anyway reprehensible, is inherent in, or collateral to a justified act. Instead the article must contemplate, and must contain, an implied threshold distinguishing ‘cruel, inhuman or degrading [prohibited] treatment’, from all forms of inflicted suffering not amounting to torture. Although the Convention says nothing explicitly about suffering inflicted for any other purpose, or about proportionate suffering in relation to those purposes being excusable, the language used by article 16 (referring to ‘other acts of *cruel, inhuman or degrading treatment or punishment* which do not amount to torture’ rather than ‘other acts of *inflicted suffering* not amounting to torture’) sets up the distinction between

18) The wide reading suggests that ‘...even where a sadistic motive is predominating, there is normally also an element of punishment or intimidation which would bring the act under the definition in article.1 [of the UN Convention]’, or alternatively ‘where a public official performs such an act [sadistic], there is also to some extent a public policy to tolerate or to acquiesce in such

acts’, such policy would there by be driven by intimidation motives.’ Burgers and Danelius, *supra* note 17, at 119.

19) *Ibid.*

20) Article 16 UN Convention Against Torture, *supra* note 14.

all acts of inflicted suffering and those prohibited; demonstrating that the Convention did not seek to prohibit *all* acts of inflicted suffering, instead distinguishing collaterally inflicted, or proportionate, suffering incidental to the pursuit of a legitimate purpose.

The danger of justification

Assertions that '[t]he absolute prohibition proclaimed in article 5 [of the 1948 Universal Declaration of Human Rights] has rarely been questioned',²¹ seem to overstate the infallibility of the protection afforded under the prohibition and fail to acknowledge the threat that a 'justification' doctrine represents to the protection afforded against deliberately inflicted, potentially severe, suffering. That the absolute prohibition on inhuman treatment 'has rarely been questioned' maybe so; but exactly when justification might engage to excuse inflicted suffering as not 'inhuman' is *constantly* questioned. Qualifying terms like 'severe' or 'unjustified' in the definition of what is absolutely prohibited allow for... No, *encourage* a targeted exploitation – creative interpretation – by states of those terms, seeing a proliferation of arguments that, for example, 'the treatment is justified, and so never amounts to prohibited ill-treatment'.

As set out above, it is recognised that at present the potential for justification to excuse inflicted suffering is entertained only for certain and limited purposes. However

there is a danger in a signalled willingness by courts to engage in balancing exercises in certain situations being 'co-opted' either in support of direct arguments for the appropriateness of balancing in other, or all, situations [seeking to erode the list of purposes deemed 'beyond proportionality']; for example, in support of arguments that call for courts to balance the degree of inflicted suffering against the 'purpose' in, e.g. the extraction of information], or at least contributing to a 'fog of ambiguity' surrounding 'justification' and its applicability, exactly when it is relevant and when not.²² This ambiguity is then targeted in the U.S. 'torture papers' and requests and authorisation for enhanced interrogation techniques for use on 'high-value' Guantanamo detainees including Khalid Sheikh Mohammed,²³ thus seeking to effectively circumvent the protection afforded by what is an absolute prohibition.

Arguments put before the European Court of Human Rights by respondent and intervening governments in the case of *Ramzy*²⁴ directly asked the Court for either a broader justification or higher severity threshold in the context of national security, either expanding the contemplated 'justifications' for inflicted suffering to include national security, or raising the entry threshold for Article 3 prohibited treatment so that lower end suffering, inflicted either in the course of refoulement, or even during interrogation would fall beneath that threshold;

21) Edouard Delaplace & Matt Pollard, *Torture prevention in practice*, Torture Volume 16, No. 3, 2006.

22) The term 'fog of ambiguity' used here is taken from 'Taxi to the Dark Side', Alex Gibney [2007] referring to a confusion designed to conceal the nature of rules expressly prohibiting 'coercive interrogation techniques' used on detainees – leading directly to Abu Ghraib.

23) Compiled in *The Torture Papers; The Road to Abu Ghraib*, edited by Karen J. Greenberg Joshua L. Dratel, 2005, Cambridge University Press (ISBN-13: 9780521853248 | ISBN-10: 0521853249).

24) *Ramzy v. Netherlands* App. no.25424/05.

‘...the greater the reach or coverage of Article 3, the more pressing becomes the issue whether a terrorist threat should be wholly left out of account’.²⁵

While these arguments do not argue for an exception to, or directly threaten the absolute status of the prohibition on ill-treatment, they instead argue for a broader justification threshold for what would still be an absolute prohibition, and if accepted would represent a considerable circumvention to the effective protection afforded detainees against deliberately inflicted suffering.

The alternative – a contextually bounded prohibition on all inflicted suffering

The above has attempted (i) to set out current understanding of the operation of justification in excusing proportionate, intentionally inflicted suffering for certain purposes, (ii) to explain other purposes as having been put beyond proportionality, and (iii) to draw attention to the potential for circumvention of a prohibition defined as ‘unjustified inflicted suffering’. This has focused on the role of a justification doctrine currently instrumental in excusing certain forms of deliberately inflicted; a target for arguments

that seek to undermine the level of protection afforded detainees.

What follows suggests an alternative interpretation for the prohibition’s applicability, one that, by restricting the prohibition to contexts of control and at the same time reinterpreting it as one not on ‘unjustified-inflicted suffering’ but one prohibiting all inflicted suffering in a context of control, might effectively ‘purge’ the law of any remnants of ‘justification’ and so avoid ambiguities over its relevance.

Support for such a reinterpretation can already be found. As set out above, the UN Convention does not explicitly refer to prohibited treatment inflicted for other than one of the listed purposes [referring only to ‘other acts of cruel, inhuman or degrading treatment which do not amount to torture’]. And the majority of those listed purposes do presuppose a context of detention or at least control; something interpreted to justify the label ‘torture’ attaching to severe suffering inflicted for one of those purposes.²⁶

In addition, commentary to the drafting of the 1975 UN Declaration against Torture [*Declaration*] and the UN Convention against Torture [Convention] persuasively suggest that,

25) *Ramzy v. Netherlands* App. no.25424/05, Observations of the intervening governments para. 19.

26) See Nowak on ‘powerlessness’ supra notes 2 & 16.

27) *Burgers and Danelius*, supra note 17 p. 120. ‘The 1975 Declaration was drawn up by the Fifth UN Congress on the Prevention of Crime and the Treatment of Offenders in response to a request from the General Assembly ‘to include, in the elaboration of the Standard Minimum Rules for the Treatment of Prisoners, rules for the protection of all persons subject to any form of detention or imprisonment against torture and other cruel,

inhuman or degrading treatment or punishment’. Two years later the General Assembly requested the Commission on Human Rights to draw up a draft convention in ‘light of the principles embodied in the declaration.’ All work undertaken in the framework of the Commission for preparing the present Convention was performed under an agenda item reading ‘Question of Human Rights of all persons subjected to any form of detention or imprisonment (italics added)’. The connection between the phenomenon of torture as dealt with in the Convention and deprivation of liberty is also apparent from articles 10 and 11 which explicitly refer to persons ‘subjected to any form of arrest, detention or imprisonment’.

‘... the history of the Declaration and the Convention make it clear that victims [for the purposes of the Convention] must be understood to be persons who are deprived of their liberty or who are at least under the factual power or control of the persons responsible for the treatment or punishment.’²⁷

Against such an interpretation, subsequent international jurisprudence has, however, seen the prohibition progressively applied beyond contexts of direct control, custody or detention, to e.g.; relatives of disappeared,²⁸ house demolitions²⁹ and to discriminatory policies exercised against minorities.³⁰ These, which *prima facie* appear outside or beyond any context of control, and which cannot be ignored, are situations which would have to be re-interpreted as ones, while not amounting to ‘direct’ control, might amount to ‘factual’ or ‘effective’ control, were an interpretation of the prohibition as one contextually bounded to be adopted.

Conversely, utilitarian exercises in the justifiability of inflicted suffering, for example against rioting prisoners, would have to be interpreted as falling *outside* or *beyond*

the absolute sphere of prohibited inflicted suffering; as situations *not* amounting to ‘direct’, ‘factual’ or ‘effective’ control. The forced used, the subject of an exercised balancing of its relative severity and purpose, would need to be understood as having been applied, beyond the contextual scope of the absolute prohibition; the use of force acceptable to the extent exercised outside, and with a view to ‘returning’ someone to, or [re-]establishing a context of, ‘direct control’. This is instrumental in establishing a context for the law’s *subsequent* applicability.

The adoption of ‘direct’, ‘factual’ or at least ‘effective’ control would, then, have to both (i) explain the application of the prohibition to e.g.; relatives of the disappeared and house demolitions as situations of ‘factual’ or ‘effective’ control, and (ii) exclude those situations in which a degree of justification is employed to determine prohibited from legitimate inflicted suffering; understood as ones other than ‘direct’ or ‘effective’ control, and so falling outside the scope of the prohibition. Semantically, however, the adoption of an ‘*effective*’ control formulation – to see treatment of relatives of disappeared included – might be seen

28) *Cakici v. Turkey* (App.23657/94), judgment of 8 July 1998 (2001) at para. 98

29) *Hajrizi Dzemajl et al. v. Yugoslavia* CAT Complaint No. 161/1999, UN Doc. CAT/C/29/D/161/2000.

30) The ECtHR has interpreted art.3 broadly, not being restricted to contexts of deprivation of liberty; ‘The Convention does not contain any provision relating specifically to the situation of persons deprived of their liberty...’ *Mouisel v. France* (App.67263/01) judgment 14 November 2002, para.38; this is consistently reinforced by the application of article.3 to monitories’ subject to discriminatory policies, *Moldovan and others v. Romania*, judgment no. 2 12 July 2005 (Apps. 41138/98 64320/01), at para.113. The case

concerns the razing of Roma houses in Romania [prior to ratification of the Convention] and the subsequent plight of the Roma applicants; leading to a finding of a violation of article.8 on account of the applicants living conditions aggravated by a general attitude of the authorities which perpetuated the applicants’ feelings of insecurity after razing of the their houses and constituted in itself a hindrance of the applicants’ rights to respect for their private and family life and their homes, going on to find violation of article.3. See also *Cyprus v. Turkey*, (Apps.25781/94), judgment of 10 May 2001, (2001) 35 EhRR 731; concerning the discriminatory treatment of Greek Cypriots in Northern Cyprus; para.305 et.seq. and *East African Asians v. the United Kingdom* adopted on 14 December 1973 (Decisions and Reports 78-A, p. 62...) at para. 207.

to conflict with the adoption of a narrower ‘direct’ control formulation necessary in having rioting prisoners, having been subject to an ‘acceptable’ measure of force, excluded from protection. That is, the expansion of the notion of ‘control’ from ‘direct’ to ‘effective’ to accommodate the prohibitions application to either relatives of disappeared or minority groups subject to discriminatory policies, might see rioting prisoners collaterally subsumed; a collateral subsumation that would then bring back within the sphere of an absolute prohibition on inflicted suffering examples and situations of an accepted/able measure of inflicted suffering.

Secondly, such an interpretation, applied to established jurisprudence, risks defining ‘control’ – ‘direct’, ‘factual’ or ‘effective’ – out of meaningful existence. Jurisprudence [especially that of the ECtHR on degrading treatment] suggests that appropriate contexts for the prohibition’s application actually bridge from custodial situations of direct control, through those of ‘powerlessness’ of the victim, almost to the inevitable unequal position of power of the State to the individual. Cases involving the razing of property where a state’s involvement is limited to a power of intervention not having been exercised,³¹ developments regarding positive obligations,³² and situations in which article 3 of the European Convention on Human Rights has been invoked as a particularly severe violation of article 8,³³ are not easily

comparable to that of a powerless prisoner in ‘direct’, or any other type of subjugation to state officials.

Pre-empting criticism that such a narrow interpretation for the prohibition’s scope – one restricted to contexts of direct control – might see vulnerable groups denied protection, e.g. where disproportionate, violent force is exercised against protestors, such a situation – seeing an immediate inequality of power between the state and its citizens – arguably comes under force used in a situation of control. Situations which would provide the opportunity for such an inequality in power to be exploited are at least suggestive of a measure of control sufficient to engage protection.

The role of ‘proportionality’

Reconciliation of an exercised proportionality with a contextually bounded prohibition on any inflicted suffering, necessitates then both; (i) the re-classification, addressed above, of those situations in which proportionality has been exercised as ones *outside* the scope of the prohibition [adoption of the ‘direct’, ‘factual’ or ‘effective’ control formulation] *and*; (ii) a corollary re-clarification as to the ‘role’ of proportionality – to be instrumental in determining the point at which control is established, and beyond which force [which can then be called excessive or ‘cruel, inhuman or degrading’] is caught by the prohibition. That is, force used

31) Hajrizi Dzemail et al. v. Yugoslavia No. 161/1999, UN Doc. CAT/C/29/D/161/2000 (2002).

32) For example, where States have been found under obligation to provide methods by which protection can be ensured, to provide effective channels for redress and to have in place an effective criminal justice system capable of prosecut-

ing acts of ill-treatment and torture, regardless of whether the conduct is that of State agents or private parties. Aksoy v. Turkey, (App. 21987/93), Judgement 18 December 1996, para. 98.

33) Moldovan et al. v. Romania, No.2 (Apps. 41138/98 and 64329/01) Judgment 12 July 2005 para. 109-113.

in situations initially outside ones of ‘direct control’ being acceptable only to the extent required to establish, and only up until the point it has in fact established, control. Force used *beyond* that necessary to establish control, or subsequent to the establishment of control, would then be subject to the prohibition. This seems to be an understanding of the role of, and limits to, ‘acceptable’ force supported by the Council of Europe’s Committee for the Prevention of Torture; having suggested that force used beyond that necessary to *return the victim to a situation of ‘direct control’* cannot be justified:

‘...the CPT fully recognises that the apprehension of a suspect may often be hazardous, particularly if the individual concerned resists and/or the police have reason to believe that the person might be armed and dangerous. The circumstances may be such that the apprehended person, and possibly also the police, suffer injuries, without this being the result of an intention to inflict ill-treatment. However, no more force than is reasonably necessary must be used. Furthermore, *once apprehended persons have been brought under control, there can never be any justification for their being struck by police officers.*’³⁴

Current understanding is for proportionality to apply in ‘defining the scope of th[e] right’³⁵ as one not to be subject to ‘unjusti-

fied inflicted suffering’ regardless of context, with UN Committee against Torture jurisprudence on excessive use of force by law enforcement officers interpreted as supporting the application of Art.16 CAT ‘... outside the situation of detention or similar control’³⁶. The alternative, set out here, is an interpretation that sees the use of force by security personnel as instrumental in the establishment of ‘direct control’ and the disproportionate measure of force as having been exercised subsequent to the establishment of control; the context for it’s absolute prohibition. As much as force used subsequent to the establishment of control is subject to the prohibition, force *beyond that necessary* to establish control – excessive force – is equally subject to Art. 16. This suggests that only through establishment of the relevant context [‘direct control’] is proportionality instrumental in defining the scope of the prohibition. Interpretations bypassing this role for proportionality open up the possibility for, and indeed expressly endorse, expansion of the scope beyond situations of ‘direct control’ and a corollary enhanced role for proportionality and justification. The re-interpretation equates suffering inflicted within a context of detention, or a wider degree of ‘control’ with unjustified inflicted suffering.

Conclusion

Detainees, those under direct control, or

34) [emphasis added] CPT - Bulgaria, 1995, CPT/Inf (97) 1, para. 31. Near-identical language is used elsewhere, e.g. in CPT - Norway, 1999, CPT/Inf (2000) 15, para. 11; CPT-UK, 2003, CPT/Inf (2005) 1, para. 148. A similar point is made by the CPT regarding the use of force in effecting the expulsion of aliens, see CPT - Spain, 1997, CPT/Inf (98) 9, para. 11. The author ac-

knowledges Yuval Ginbar for drawing attention to these references which, while made in a different context, support the current argument.

35) Nowak, *supra* note 2 at. 836.

36) *Ibid.* at. 834.

those subject to an immediate inequality of power affording the opportunity for such a disproportionate level force are most vulnerable and most at risk from inflicted suffering. Contrasted with a prohibition on ‘unjustified’ inflicted suffering, a contextually restricted prohibition applicable only in situations of control and on ‘any’ rather than only ‘unjustified’ inflicted suffering seems to avoid identified dangers associated with a justification doctrine that necessarily plays an enhanced role in a broader or broadly inclusive prohibition. An absolute prohibition on any inflicted suffering, made possible only by restriction of the prohibition to contexts of control, would see any notion of justifiability excusing inflicted suffering otherwise falling within the sphere of the prohibition’s applicability finally abandoned.

However, two outstanding issues – beyond the semantic strain outlined above in reconciling established jurisprudence with such an interpretation – betray any ‘contextual’ understanding of the prohibition. Firstly, there *are* justifications advanced, and accepted, for the infliction of suffering in situations that cannot realistically be considered other than ones of ‘direct control’; e.g. those of ‘medical necessity’. Only justifications legitimising inflicted suffering as ‘a necessary response to the victim’s own conduct’ or otherwise in regaining or establishing control, fit with an understanding of ‘proportionate’ inflicted suffering as having

been exercised other than under a situation of ‘direct control’. Medical necessity, the ‘potential’ justification contemplated in *Nevmerzhtsky*, and elsewhere, would be an exception, though possibly the only, exception to the rule.³⁷

‘...a measure which is of therapeutic necessity...cannot in principle be regarded as inhuman and degrading’³⁸

This clearly says nothing about ‘returning’ the victim to a situation of ‘direct control’, and would instead support an understanding of the justifiability of treatment relevant, not by the context but by the *purpose* invoked.

However, and this must be the material consideration in whether the re-interpretation of the law is favoured, it is suggested that an exception – possibly the *only* exception to a prohibition on inflicted suffering in control contexts – is not fatal to the exercise in the prohibition’s re-interpretation. Exploitation of an exception that would have to permit the infliction of suffering in the course of a therapeutic measure of medical necessity does not represent, or encourage, the same level of potential for circumvention of the prohibition as the operation of a justification threshold. Re-interpretation of the prohibition as applicable to any inflicted suffering in control contexts, subject to a single exception, provides less opportunity for exploitation of the exception than does the

37) Although the position taken by the government in *Herczegfalvy* might bring such a justification within this type of reasoning; there the government claimed ‘the measures were essentially the consequence of the applicant’s behaviour, as he had refused medical treatment which was urgent in view of the deterioration in his physical and mental health ... *it was only his resistance to all treatment, his extreme aggressiveness and the threats and acts of violence on his part* [emphasis added]

against the hospital staff which explained why the staff had used coercive measures including the intramuscular injection of sedatives and the use of handcuffs and the security bed.’ *Herczegfalvy v. Austria*, (App. 10533/83) 24 September 1992 para. 81.

38) *Nevmerzhtsky v. Ukraine* ECtHR (App. 54825/00) Judgment 5 April 2005, para. 98.

current operation of a justification threshold. As noted, the incorporation of notions of 'severity' or 'unjustified' into the definition of what is prohibited encourage targeted erosion of the total protection afforded detainees.

Secondly, and it is accepted that this might be more problematic, the revised role for proportionality, active in interpreting the establishment of the context for the prohibition's subsequent applicability, contemplates use of force acceptable only, and to the extent exercised, to bring the subject [not yet a 'victim'] under 'direct control'; suggesting that it might be possible to identify the precise point at which such control is established, force becomes 'disproportionate', the prohibition is engaged, and beyond which further force [which can then be called unlawful] is caught by the prohibition. However, such a point is *not* always identifiable. Rather disproportionate force might take the form of a single disproportionate act - not the series of actions leading up to and passing a point at which control is established. This argument, however, is also not fatal, as it is at least arguable that the requisite immediate unequal position of power for such an excessive, disproportionate single act, *would* suggest a degree of control. A single disproportionate act, disguising the point at which control is established, implies the pre-existence of an unequal position of power, the exploitation of which resulting in the infliction of suffering would be prohibited. It might also amount to force used beyond that necessary to establish control - and equally subject to the prohibition.

Finally, the author acknowledges that to root the irrelevance of proportionality in the purpose for which treatment is inflicted, as the current understanding of the law does, rather than the context in which it is inflicted, has the benefit which should not

be abandoned of seeing an irrelevance of severity for determining treatment as *prima facie* prohibited when inflicted for a prohibited purpose. Thus, a very low severity 'entry-threshold' is set, arguably maximising protection.