TOWARDS AN ACCEPTABLE WORKING DEFINITION OF ARTICLE 3 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS.

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To Hannah

Abstract

Although examples of the prohibition of torture in domestic law can be found as early as the seventeenth century, it was not until the United Nations' Universal Declaration of Human Rights of 1948 that the prohibition found expression at an international level.

Article 5 of the Declaration states: "No-one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". This phrase has been reproduced almost verbatim in subsequent human rights instruments at the United Nations, in regional human rights treaties, and in many states' constitutions which guarantee civil liberties and human rights.

It is remarkable that despite its ubiquity, the prohibition of torture and ill-treatment as first articulated in the Declaration remains largely undefined. This observation is reinforced when it is noted that, if it is possible to talk of a "hierarchy of rights", the right to be free from torture and ill-treatment must be considered one of the most important. Unlike other human rights documented in international treaties, it is a right from which a State is not permitted to derogate and to which, it is said, it is not possible to compromise.

In less than half a century the prohibition of torture and ill-treatment has undergone a complete metamorphosis. Created with the horrors of the Nazi concentration camps in mind, it must now be considered to amount to a standard against which all conduct leading to a suffering of a certain severity may be tested. Despite this change in the *raison d'etre* of the norm, its interpretation has remained unaltered.

This thesis seeks to challenge the present understanding of the prohibition of torture and ill-treatment and to propose a definition of the phrase "torture, cruel, inhuman or degrading treatment or punishment" which would provide a more satisfactory application of this fundamental right.

CONTENTS

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Definitions

In keeping with the practice developed by the European Commission in the Greek case, reference to "torture and ill-treatment" is made as a synonym for the more lengthy "torture inhuman and degrading treatment or punishment". The word "international" is used to refer to procedures of the U.N. or the International Court of Justice in distinction to procedures available to those countries in a certain geographically area only. These are referred to as regional human rights procedures. The European Commission of Human Rights is referred to for brevity as the "European Commission" or simply the "Commission". Similarly the European Court of Human Rights is referred to as the "European Court" or more usually the "Court". The European Convention for the Protection of Human Rights and Fundamental Freedoms is shortened to "European Convention" or "Convention".

Gender neutral language has been employed throughout this thesis whenever possible. On occasion, however, when writing in the third person plural form would lead to inaccuracy and use of "he/she" would prove awkward the male generic is used being the sex of the writer.

Abbreviations

B.Y.I.L	British Yearbook of International Law.
Coll.	Collection of Decisions of the European Commission of Human Rights.
C.T.S	The Consolidated Treaty Series.
D & R	Decisions and Reports of the European Commission of Human Rights.
E.H.R.R	European Human Rights Reports.
Eur.T.S	European Treaty Series.
I.C.J.Y.B	International Court of Justice Yearbook.
I.L.M	International Legal Materials.
L.N.T.S	League of Nations Treaty Series.
O.A.S	Organisation of American States.
O.A.U	Organisation of African Unity.
Series A	Publications of the European Court of Human Rights; Judgments and Decisions.
Series B	Publications of the European Court of Human Rights; Pleadings, Oral Arguments and Documents.
T.S	Treaty Series.
U.K.T.S	United Kingdom Treaty Series.
U.N.Doc	United Nations Documents.
Yearbook H.R	Yearbook of the European Convention on Human Rights.
Y.B. Int'l Law Commission	Yearbook of the International Law Commission.

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1. EARLY EFFORTS TO PROHIBIT TORTURE IN INTERNATIONAL LAW.

Introduction to Chapter

This Chapter seeks to trace the prohibition of torture and ill-treatment, firstly in domestic law and then internationally.

It notes that initial efforts to outlaw torture and ill-treatment in domestic law were a reaction to practices intended to secure evidence or a confession, but that by the time the prohibition had also found expression in International Law it was intended to protect the individual from all forms of torture and ill-treatment.

The atrocities in Nazi Germany and occupied territories demonstrated that prohibition of "torture" as the practice had traditionally been understood would not suffice. Many of the practices prevalent in Nazi concentration camps would clearly have been outlawed by a provision accommodating only the word "torture". However, some forms of conduct would not, although in representing an affront to human dignity it was clearly desirable that they too should be prohibited.

After some debate, the phrase chosen to provide this extended form of protection at the United Nations, and thereafter in most other international and regional instruments,[1] was:

> "No-one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment".[2]

This Chapter concludes that, bearing in mind the extended purpose of this provision, the prohibition of torture and ill-treatment was inadequately debated at the international level. It is clear that the consequences of extending the prohibition of torture to include ill-

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[1] Infra Chapt.2, pp. 76-77.
[2] U.N.Doc. A/811 (1948).

treatment were not properly considered. More detailed study of the prohibition would have revealed that it would have been advisable to separate the provision into two parts or, alternatively, to have two distinct provisions. The first would prohibit torture providing a freedom from such treatment or punishment which would be absolute. It would ensure that under no circumstances could an individual be subjected to conduct considered tantamount to torture. The second provision would accommodate a prohibition against invasion of the individual's physical integrity which would be considered in relation to all relevant circumstances, including the proven social value, if any, of the conduct in question.

1.1 Early Attitudes Towards Torture.

A survey of modern states demonstrates that the capacity to torture is a characteristic common to all individuals. The belief in its use has penetrated a diverse range of cultures, philosophical and political backgrounds.[3] Amnesty International in its survey of torture in 1984 concluded that over one third of the world's population lived under political regimes which either practiced or condoned torture.[4] Although this report was published prior to the political changes in the former Eastern bloc and the many single-party regimes in African which have since been replaced by more accountable forms of government, Amnesty International's annual survey of 1992[5] reports practices of torture in many countries throughout the world, suggesting that it remains one of the most serious problems to which the international law of human rights must concentrate its efforts.

The first recorded reference of torture is probably that of an Egyptian poet who described how Ramses II obtained information regarding his enemies by torturing some

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[3] See generally Bassiouni, (1978).
[4] AMNESTY INTERNATIONAL TORTURE IN THE EIGHTIES, at 2, (1984).
[5] AMNESTY INTERNATIONAL ANNUAL REPORT, (1992).

Hittite prisoners.[6] Although it is clear that torture was prevalent when early travellers from the West first visited non-Western, classical civilizations,[7] it is to Ancient Greece and Rome, which influenced the philosophy and legal heritage of the West, that it is necessary to turn to examine initial official attitudes toward the practice of torture.

Although both states forbade torture, its practice was not uncommon in either. There is evidence that prisoners of war were sometimes tortured in Ancient Greece.[8] Thucydides notes that during the Peloponnesian war the Corinthians and Syracusans put the captured Athenian commander Demosthenes to death, fearing that he might disclose under torture to their Spartan allies their treasonable dealings with the Athenians.[9] In peace time, however, torture was reserved for slaves and foreigners, who represented the two classes with no legal status in Greek society. The testimony of a slave was only legally admissible if it had been given under torture, even though the evidential value given to such testimony was slight. As Ruthven points out, the torture of slaves was very often a tactical device for calling the opponent's bluff in court.[10]

A citizen of the Roman Empire was subjected to torture for a number of reasons. It was used not only to extract confessions and ascertain the reliability of testimony, but also to secure the retraction of allegiance to the Christian faith. Unlike the Ancient Greeks, the Romans seem to have had a second purpose for torture. In addition to its investigative role, it also developed a punitive function. Sometimes torture would supplement the

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6 The battle against the Hittites took place around 1286 B.C. See generally VANDENBERG, (1979).
7 See for example, in respect of the Far East STAUNTON, (1810), and MURDOCK, (1903).
8 RUTHVEN, at 23, (1978) .
9 Thucydides, History, VII,id.
10 Supra note 8, at 25.

death penalty,[11] which by the second century was applied to *humiliores*[12] as well as slaves and aliens.

Torture experienced the first of its periods of relative disuse in the West with the predominance of the Christian Church, following the collapse of the Roman Empire.[13] It was to resurface towards the end of the eleventh century, its full renassiance coming two centuries later. Torture was considered necessary because it produced *Probation probatissimi*, "the proof of all proofs". Its practice was institutionalised, becoming thoroughly documented and codified throughout most of Western Europe. The Roman Catholic Church, fearing increasing heresy, was forced to condone the practice of torture with the infamous *Inquisito* or "power of investigation". It did so on the basis of a somewhat curious justification. Mob rule was threatening. The burning and torture of heretics was prevalent. The Church maintained that only if it managed to oversee the practice of torture, would its use not be abused.[14]

An examination of the purge against witchcraft in the Middle Ages also requires study of the role of the Church. The bull *Summis desiderantes affectibus* issued by Pope Innocent VIII and published in 1486 condoning the conduct of the Inquisitors in flushing out those "unmindful of their own salvation and straying from the Catholic faith, [that] have abandoned themselves to devils... [and] do not shrink from committing and perpretrating the foulest abominations and filthiest excesses to the deadly peril of their own souls..."[15] had been followed by the torture and execution of many thousands of people.[16]

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[11] Ibid, at 33.
[12] "Humiliores" were those people considered to be "low life", or insignificant.
[13] AMNESTY INTERNATIONAL REPORT ON TORTURE, (1975 ed).
[14] Ruthven, 54, (1978).
[15] Text in "Malleus Maleficarum", Lr.M.Summers, (1948), p.xix quoted from RUTHVEN, at 118, (1978).
[16] Estimates vary as to how many fell victim to the great witch hunt from 200,000 to over two million in two centuries. N.Cohn, at 12, (Ed DOUGLAS, 1970).

It was only when the judicial procedures that led so many people to the stake were challenged by Friedrich von Spee's *Cautio Criminalis* in 1631 that the purge against withchcraft began to lose its momentum.[17] It was his opinion that the majority of those condemed to burn were innocent and that the judicial process made it almost impossible for them to prove their innocence. His attack focused on the abstraction of evidence through torture:

> "What is to be thought of torture? Does it frequent moril peril to the innocent? In revolving what I have seen, read and heard I can only conclude that it fills our Germany with witches and unheard-of wickness, and not only Germany but any nation that tries it. The agony is so intense that to esape it we do not fear to incur death. The danger therefore is that many to avoid it will falsely confess whatever the examiner suggests or what they have excogitated in advance. The most robust who have thus suffered have affirmed to me that no crime can be imagined which they would not at once confess to if it would bring ever so little relief, and they would welcome ten deaths to escape a repetition...".[18]

Although his attack on torture contributed to the decline in reported cases of such conduct and execution of those suspected of sorcery, it was not until the Enlightenment that the movement to abolish the practice of torture itself gained momentum. Beccaria's work *Dei delitti e delle pene* -"On crimes and punishments",[19] was to prove the classic denunciation of torture which was to seriously question its continued use.

Beccaria discussed the motives for judicial torture as

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17 RUTHVEN, at 137, (1978).
18 LEA, H.C 705 (1939) RUTHVEN, ibid, at 138.
19 MANZONI.A., THE COLUMN OF INFAMY. Prefaced by Cesare Beccaria's "Of Crimes and Punishments". Translated by Kenelm Foster and Jane Grigson, (1964).

follows:

> "...The torture of an accused man while the case against him is being prepared is a cruelty consecrated by long usage among the majority of nations, its purpose being to make him confess to the crime, or clarify his contradictory statements, or discover his accomplices, or purge him in some metaphysical and incomprehensible way of infamy, or finally bring to light other crimes which he may have committed but of which he is not accused".[20]

Although Beccaria believed torture to be cruel and barbaric, he concentrated his attack on the practice by arguing that it was inherently unjust. His concern was that torture leads to disequilibrium in punishment, with the innocent always standing to lose more than the guilty:

> "Both are tortured, but the [innocent man] has every chance stacked against him:if he confesses to the crime, he is condemned; if he is declared innocent, he has suffered an undeserved punishment. But the guilty man's situation is in his favour. If he stands up firmly to torture, he is acquitted as if he were innocent, and he will have undergone a lesser punishment instead of a greater one. So the innocent man always loses by torture, while the guilty man stands to gain".[21]

In contending that torture was both irrational and cruel, Beccaria had stated nothing that was entirely original, but his work succeeded because of the "sustained passion of its polemical vigour and the systematic way he attacked, in a short space, the ancient citadel of the Roman law".[22]

Moreover, as Ruthven also points out, his arguments "conformed to the expectations of an influential body of public opinion",[23] a body of opinion which Beccaria was by no means alone in influencing. Montesquieu stated with

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[20] Beccaria, ibid, at 31.
[21] Ibid, at 34.
[22] RUTHVEN, at 13, (1978).
[23] Id.

regard to torture:

> "So many men of learning and genius have written against the custom of torturing criminals, that after them I dare not presume to meddle with the subject. I was going to say that it might be suitable for despotic states, where whatever inspires fear is the fittest motor of government. I was going to say that among the Greeks and Romans, slaves...-but I hear the voice of nature crying out and asserting her rights".[24]

Voltaire's campaign against torture was also influential. By 1740 his friend Frederick the Great had abolished ordinary torture in Prussia. He himself wrote a dissertation condemning torture as "a custom shameful to Christians and civilised peoples and, I dare say, as cruel as it is useless".[25]

It was this thinking, which had influenced the great leaders of the eighteenth century, which began to find expression in the laws of modern states.

1.2 The Prohibition of Torture in Domestic Law.

Although the English Bill of Rights 1689[26] abolished all forms or "cruel and unusual" punishment, it was the French Declaration of the Rights of Man and of the Citizen 1789,[27] which by influencing many other national constitutions, was responsible for promoting major legal protection from torture in domestic law. As Lester notes:

> "The conquests of Napoleon's armies spread not only the Code civil but also the public philosophy and public law of the American and French revolutionaries throughout the European continent. Those legal ideas and systems were also spread, through imperial rule, to other continents".[28]

A study of the constitutions of the former French colonies of the Gabon, the Ivory Coast, Senegal and Upper

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24 ESPRIT DES LOIS VII,7, RUTHVEN, id.
25 MARSTRO, at 28, quoted from RUTHVEN, id.
26 C.1 (2 Will. & Mar. Sess.2).
27 GODECHOT, (1789),
28 Lester, 537 (1988).

Volta provides an indication of the extent to which the French Declaration penetrated the African continent. All of these instruments expressly refer to the Declaration and some have chosen to incorporate its provisions with little alteration.[29] The French Declaration was itself strongly influenced by the American Bill of Rights. A French scholar at the time of the adoption of the Declaration commented in respect of the relationship between the two instruments:

> "cette noble idee, concue dans un autre hemisphere, devait se transplanter parmi nous. Nous avons concouru aux evenements qui ont rendu a l'amerique septentrionale la liberte: elle nous montre sur quels principes nous devons la conservation de la notre".[30]

The prohibition of "cruel and unusual" punishment in the United States, which took place in the same year as the French Declaration, found expression in the following form:

> "Excessive bail shall not be required nor cruel and unusual punishments inflicted".[31]

This provision was taken *verbatim* from the English Bill of Rights 1689.[32] Although in its formative years it was unclear as to whether the Eighth Amendment could be invoked by individuals against both state and federal governments, it was eventually decided in the case of Robinson v. California[33] through the application of the 14th Amendment to the U.S Constitution that it would be available in both cases. The individual's protection against all forms of "cruel and unusual" punishment following this decision was complete.

These early examples of the prohibition of "cruel and unusual punishment" in domestic law in England, the

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29 See here BLAUSTEIN & FLANZ.
30 IMBERT, 12, (1985).
31 See generally Mulligan, (1979).
32 Granucci, (1969).
33 370 US 660 (1962).

United States, and France were followed by many other countries. As new states were created or gained independence from colonial powers, constitutions safeguarding the rights of citizens with respect to their governments became common place, as did the citizens' constitutional right not to be tortured by the state. Norway outlawed torture in 1819;[34] Greece in the 1820s developed constitutional provisions prohibiting torture,[35] as did Portugual in 1826[36] Germany in its constitution of 1849[37] and Ireland in 1937.[38] By the 1920s encouraged by these legal prohibitions, perhaps misled by them too, a European scholar could declare that "torture was a distant relic of the past, a practice forever left behind on man's journey to progress".[39]

The premature nature of this view was graphically illustrated during the Second World War in Nazi Germany and occupied territories. It was the atrocities of torture, human experimentation and inhumane treatment which took place on an enormous scale which were to demonstrate that the war on torture and ill-treatment was not yet over. More importantly, it was German National Socialist legislation which permitted and, to a point, promoted these human rights violations which convinced the international community of the need for supra-national legislation to safeguard minimum fundamental rights. It was in this spirit of "never again" that efforts began to make it the function of International Law to protect the rights of individuals.

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[34] PETERS, 91, (1985). For a list of some 108 constitutions in the world in 1975 prohibiting torture see Ackerman, (1978).

[35] Id.

[36] Id.

[37] See generally HUCKO, (1987).

[38] BLAUSTEIN & FLANZ VIII at 66. The Irish Constitution of 1937 included for the first time a number of unspecified personal rights which were later considered to include freedom from torture and inhuman or degrading treatment or punishment. See judgment of O'Dollaigh C.J. in Ryan v. The Att-G [1965] I.R.294. See generally O'REILLY & REDMOND (1980).

[39] AMNESTY INTERNATIONAL REPORT ON TORTURE, at 29, (1975).

1.3 The Prohibition of Torture in International Law.

In order to determine the manner in which the prohibition of torture found expression in International Law, a brief excursion into the development of the recognition of the individual as a subject of International Law is necessary.

1.3.1 The Development of Concern for Human Rights in International Law.

Oppenheim comments in his work on International Law in 1905:

> "Several writers maintain that the Law of Nations guarantees to every individual at home and abroad the so-called rights of mankind without regarding whether be be a subject of a member State of the Family of Nations, or not....But such rights do not in fact enjoy any guarantee whatever from the Law of Nations, and they cannot enjoy such guarantee, since the Law of Nations is a law between States, and since individuals can not be subjects of this law".[40]

This view of the individual in International Law looked increasingly open to challenge as first bilateral and later multilateral treaties were created documenting specific rights of individuals.

The first international treaty containing provisions expressly concerning individual rights is considered to be the Treaty of Paris 1814[41] in which the British and French governments agreed to co operate in the suppression of the slave trade. Further bi-lateral treaties concerning slavery preceded the International Convention on the Abolition of Slavery and the Slave Trade,[42] providing for "the complete suppression of slavery in all its forms and of the slave trade by land and by sea".[43] Further pre-1945 international concern for the rights of individuals can be seen in the areas of

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[40] OPPENHEIM, (1905), vol.I. Peace, at 346.
[41] State Papers, Vol IV, (1814-15); 63 CTS 171).
[42] LNTS, 60, 253; UKTS 16 (1927).
[43] Art. 1, id.

humanitarian law and the rights of minorities. The Geneva Convention 1864[44] compelled its twelve signatory States to respect the immunity of military hospitals and their personnel, to care for the sick and wounded irrespective of nationality, and to respect the Red Cross emblem. The treaty was first updated in 1929[45] and its provisions were applied to maritime warfare by the Hague Convention No.III 1899,[46] and the Hague Convention No.X of 1907.[47] Minority rights were first documented in an international treaty in the Treaty of Berlin 1878,[48] in which Bulgaria, Montenegro, Serbia, Romania and Turkey all agreed to grant religious freedom to their nationals. Minority rights' treaties after the First World War were of three kinds. First, there were treaties with the allied or newly formed states of Poland,[49] Czechoslovakia, Yugoslavia,[50] Romania[51] and Greece.[52] Secondly, there were minority rights treaties with the ex-enemy states of Austria,[53] Bulgaria,[54] Hungary,[55] and Turkey.[56] Thirdly, a number of states were required to make declarations regarding the rights of minorities as a condition of entry into the League of Nations. These states included Albania,[57] Lithuania,[58] Latvia,[59] and Iraq.[60]

Despite the above examples of the rights of individuals being recognised in International Law, the theory of legal positivism prevailed in juridical thinking[61] up to

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[44] State Papers, 55:43; 129 CTS 361.
[45] UKTS 36 (1931).
[46] State Papers, 91:963; UKTS 11 (1901)..
[47] 205 CTS 359.
[48] 153 CTS 171.
[49] (Versailles, 28 June 1919), (1919); UKTS 4 (1919).
[50] (St Germain-en-Laye, 10 September 1919), UKTS 11 (1919).
[51] (Trianon, 4 June 1920), UKTS 10 (1920)..
[52] (Sevres,10 August 1920), 28 LNTS 226.
[53] (The Germain-en-Laye, 10 Sept 1919). UKTS 11 (1919).
[54] (Neuilly, 27 November 1919) UKTS 5 (1920).
[55] (Trianon,4 June 1920) UKTS 10 (1920).
[56] (Lausanne, 24 July 1923) UKTS 16 (1923).
[57] (21 October 1921); 9 LNTS 174.
[58] (12 May 1922) State Papers 118:876.
[59] (7 July 1923) 22 LNTS, 393.
[60] (30 May 1932) International Legislation Vol VI, 39 (1932-34).
[61] For a description of legal positivism see STEGHART, 12, (1983).

the turn of the 20th century. The predominance of positivism, together with the strict application of the doctrine of national sovereignty, effectively prevented the international community from criticising any one nation for falling short of acceptable standards of treatment of its nationals.

Less than 50 years on from the first edition of Oppenheim's work on International Law, its bold rejection of individuals as subjects of International Law had to be considerably revised to account for a radical change in popular juridical thinking and what effectively must be considered a revolution in terms of the status of the individual in International Law.[62] Sieghart accounts for this development in the following way:

> "The apotheosis - and the consequent downfall of [legal positivism] came in national Socialist Germany in the late 1930's and early 1940's, where historically unprecedented atrocities were perpetrated by the regime there and then lawfully in power upon some millions of its own citizens. Many of these atrocities were carried out with complete legality under National Socialist legislation: the domestic laws authorised, and paralleled, the pernicious injustice installed under the constitution of a sovereign State. According to the strict doctrine of national sovereignty, any foreign criticism of those laws was therefore formally illegitimate; according to the strict positivist position it was also meaningless".[63]

It was the creation of the United Nations' Charter which epitomised this change; Professor Lauterpacht observed that its effect was that the individual had been "transformed....from an object of international compassion into a subject of international right".[64]

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[62] In the 8th edition of OPPENHEIM, (1955) the text was revised as follows "....the quality of individuals as subjects of International Law is apparent from the fact that, in various spheres, they are , as such, bound by duties which International Law imposes directly upon them. The various developments since the two World Wars no longer countenance the view that, as a matter of positive law, States are the only subjects of International Law. In proportion as the realisation of that fact gains ground, there must be an increasing disposition to treat individuals, within a limited sphere, as subjects of international law", 638-639.

[63] SIEGHART, 14, (1983).

[64] LAUTERPACHT, at 4, (1950).

1.3.2 The United Nations Charter 1945.[65]

The genesis[66] of the United Nations' Charter is considered to be the Atlantic Charter[67] of August 14 1941, with its call for "freedom from fear and want". This international concern for individual welfare was consolidated by the Declaration of January 1942 by the 26 "United Nations" then fighting the Axis powers. It provides:

> "that complete victory over their enemies is essential to defend life, liberty, independence and religious freedom, and to preserve human rights and justice in their own lands as well as in other lands".[68]

It was, however, the Dumbarton Oaks proposal in 1944 for the establishment of a U.N. that would, *inter alia*, "promote respect for human rights and fundamental freedoms", which was to cement concern for human rights at an international level.[69] This request found expression in Articles 55 and 56 of the United Nations Charter.

Article 55 provides that:

> "the United Nations shall promote...universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion".[70]

Article 56 states:

> "all members pledge themselves to take joint and separate action in co-operation with the organisation for the achievement of the purposes set forth in Article 55".[71]

The use of the word "pledge" in Article 56, scholars agree, amounts to a legal obligation on the part of

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65 T.S 67 (1946).
66 For an account of the gestation of the international law at the United Nations relating to human rights see HUMPHREY, (1984).
67 AJ, 35 (1941), Suppl, at 191.
68 AJ, 36 (1942), Suppl, at 191.
69 SIRGHART, at 14, (1983).
70 Supra note 65.
71 Id.

member states to promote and protect human rights.[72] However, the content of this legal obligation was unclear, hence it was decided that an International Bill of Rights should be drawn up detailing the rights and freedoms which States were required to recognise.[73]

1.3.3 The International Bill of Rights

It was largely because a number of influential non-governmental organisations criticised the United Nations Charter for being too weak with regard to provisions protecting human rights[74] that it was decided that an International Bill of Rights should be drawn up separately detailing fundamental rights and, possibly, an international procedure through which they might be invoked.[75] The Preparatory Commission in late 1945, recommended that the Economic and Social Council should set up a Commission on Human rights to prepare an International Bill of Rights.[76] The first session of the U.N.Commission began in January 1947.[77] It proposed that the International Bill should have three sections. The first would be a declaration, the second, a convention containing legal obligations and the third would concern "measures of implementation".[78]

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[72] See for example AKEHURST, at 75, (1985); and GANJI, 116-118, (1962). The British Government has stated that it considers that Articles 55 and 56 impose on member Governments of the U.N. the positive obligation to pursue policies to promote human rights and to cooperate with the U.N. organs to that end. Parliamentary Debates (Commons, vol. 960, col.89, written answers, 11 Dec. 1978).

[73] U.N.Doc. E/CN.4/AC1/3/Add.1 at 2, (1947).

[74] ROBERTSON, 24, (1989).

[75] Humphrey, The U.N.Charter and the Universal Declaration of Human Rights, in (EVAN, LUARD, 1967).

[76] E.S.C.Res.5, 1 U.N. ESCOR 163, U.N. Doc. E/20 (1946).

[77] E/CN.4.AC.1/14.

[78] Id.

1.3.3.1 The Universal Declaration of Human Rights 1948.

A Drafting Committee was set up to prepare a draft Manifesto or Declaration[79] on the basis of a draft that had been submitted by the Secretariat. This, following a series of amendments and revisions, became the draft Universal Declaration on Human Rights. The Declaration was adopted by the General Assembly at its third session in December 1948 by Resolution 217 (III).[80] The Chairperson of the drafting committee to the declaration was Eleanor Roosevelt who described it as:

> "first and foremost a declaration of the basic principles to serve as a common standard for all nations".[81]

She added:

> "It may well become the Magna Carta of all mankind".[82]

Although it was a comment that may have been considered aspirational at the time, today it is one that fails to reflect the dynamic effect the Declaration has had on the development of the international law of human rights. It provided the impetus for the development of protection of human rights under customary international law, as well as the foundation of the two international covenants which were to codify further the rights first articulated in the Declaration. Moreover, the Declaration was to inspire numerous national constitutional provisions relating to human rights, in addition to the activities of non-governmental organisations.[83]

Resolution 217 (III) included not only the text of the Universal Declaration, but also the requirement that work should continue on the remaining parts of the

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79 U.N. Doc E/383.
80 Dec.10, 1948,G.A.Res.217A (III),U.N.Doc.A/810, at 71 (1948).
81 ROBERTSON, 26, (1989).
82 Id.
83 For example, the statute of Amnesty International refers to the Universal Declaration of Human Rights and its detail is based on the draft of the International Civil and Political Covenant.

International Bill of Rights. After considerable debate it was decided that the Commission should draft not one but two Conventions - a protracted process which was to take 18 years, finally resulting in the International Civil and Political Covenant 1966,[84] and the International Economic, Social and Cultural Covenant 1966.[85] The "International Bill of Rights" has now been supplemented by two optional protocols to the former treaty. The first, the Optional Protocol to the Civil and Political Covenant, provides an individual complaints procedure,[86] the second, the Second Optional Protocol to the Civil and Political Covenant[87], provides for the prohibition of the death penalty in peace time.

Before it is possible to conclude this survey of international instruments confirming the status of the individual as a proper subject of International Law, it is necessary to note that there are now a number of treaties, which are commonly referred to as specialised treaties,[88] at the United Nations. Many of these have detailed and expanded further the rights documented in the "International Bill of Rights". Three examples are the International Convention on the Suppression and Punishment of the Crime of Apartheid,[89] the International Convention Against Torture,[90] and the International Convention on the Rights of the Child.[91]

Finally, in addition to the United Nations' efforts to draft standards relating to human rights, there are three

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84 The International Covenant on Civil and Political Rights, G.A.Res.2200, 21 U.N.GAOR,Supp. (No.16) 52, U.N.Doc A/6316 (1966), UKTS 6 (1977), hereinafter cited as Civil and Political Covenant. As of 1 August 1992 this Covenant had been ratified by 104 States, U.N.Multilateral Treaties Deposited with the Secretary-General St/Leg/Ser.E/10.

85 GA Res. 2200, 21 UN GAOR Supp. (No.16) at 49, UN Doc.A/6316 (1966), Id. As of 1 August 1992 this Covenant had been ratified by 109 States, ibid.

86 Ibid. As of 1 August 1992 the Optional Protocol had been ratified by 63 States, Id.

87 U.N. Doc. A/C.3/35/C.75.

88 SIEGHART, 58, (1985).

89 G A Res 3068 (XXVIII).

90 The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. G.A.Res.A/Res.A/Res/39/46 (1984), UKTS 107. See generally Bottered, (1984).

91 Cm. 1976, T.S No.44 (1992).

regional organisations which have produced instruments codifying international human rights.[92] The Council of Europe[93] has documented civil and political rights in the European Convention on Human Rights and Fundamental Freedoms 1950[94] and its additional protocols.[95] The Organisation of American States[96] has two principal human rights instruments: the American Declaration on the Rights and Duties of Man 1948[97] and the American Convention on Human Rights 1969.[98] The Organisation of African Unity[99] is responsible for the African Charter of Human Rights 1985[100] which documents civil and political rights, as well as emphasizing the rights of "peoples".

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92 For a comparison and appraisal of these instruments see Weston, (1987).

93 The Council of Europe is a regional organisation of 28 European states whose aim is "To achieve a greater unity between its Members for the purpose of safeguarding and realizing the ideals and principles which are their common heritage and facilitating their economic and social progress". Preamble, Statute of the Council of Europe (May 5, 1949). See generally ROBERTSON, 1-25, (1972).

94 European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov.4, 1950, Eur.T.S.No 5, (entered into force, Sept.3,1953) hereinafter the "European Convention" or the "Convention." As of June 1993 there were 28 contracting states to the Convention, Information Sheet No. 32, Council of Europe, Strasbourg 1994. See generally BEDDARD, (1980); FAWCETT, (1987); COHEN-JONATHAN, (1989); VAN DIJK & VAN HOOF, (1990). For a comparative study between the Convention and the American Bill of Rights see JANIS & KAY, (1989).

95 There are now ten additional protocols to the Convention Protocol (No.1), 1952, Eur.T.S. No.9; Protocol (No.II) 1963, Eur.T.S. No.44; Protocol (No.III), 1963, Eur.T.S. No.45; Protocol (No.IV), 1963, Eur.T.S. No.46; Protocol (No.V), 1966, Eur. T. S. No.55; Protocol (No.VI), 1983 Eur.T.S. No.114; Protocol (No. VII), 1984, Eur.T.S. No.117; Protocol (No.VIII), 1985, Eur.T.S. No.118; Protocol (No.IX), 1990, Eur.T.S. No.140; Protocol (No.X), 1992, Eur.T.S. No. 146.

96 The Charter of Bogota 1948 reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L/V/ii.71 Doc.6 Rev.1 (1987), established the Organisation of American States (OAS) to strengthen peace and security, ensure peaceful resolution of disputes, provide for common action in the event of aggression, and promote economic, social and cultural development. ROBERTSON, at 162, (1989).

97 OAS Res.XXX, adopted by the Ninth International Conference of American States (Mar.30-May 2,1948), Bogata, OAS Off.Rec.OEA/Ser.L/V/I.4 Rev. (1965).

98 American Convention on Human Rights, Nov. 22, 1969, OAS Off.Rec.OEA/Ser.L/V/II.23 doc.21 rev. 6 (1979) (entered into force, July 18,1978), UKTS 53 (1980).

99 The Charter of the Organisation of African Unity article II states the aims of the OAU to be to "Promote the unity and solidarity of the African States", "to eradicate all forms of colonialism from Africa" and "to promote international co-operation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights", 479 U.N.T.S. 39 (1963). ROBERTSON, at 200, (1989). See generally MALDI, (1989).

100 Banjul Charter on Human and Peoples' Rights, June 28, 1981, OAU Doc. CAB/LEG/67/3/Rev.5 (1981). ILM, XXI, 1982, p. 58.

In conclusion, since 1945 and the formal expression of concern for human rights at an international level in the United Nations' Charter, what has developed is an intricate patchwork of human rights standards, consisting of a collection of regional and universal instruments concerned with the protection of human rights. As a result of these instruments it became possible to project the prohibition of torture and ill-treatment onto an international platform.

The efforts to draft a provision outlawing torture and ill-treatment for the purposes of these international instruments shall now be examined.

1.4 Genesis of an International Provision Prohibiting Torture and Ill-Treatment.

Although the American Declaration on the Rights and Duties of Man 1948[101] preceded the adoption of the Universal Declaration by a matter of a few months, it is to the Universal Declaration that it is necessary to turn to trace the origins of the modern day international norm prohibiting torture and ill-treatment.

Article 5 of the Universal Declaration provides that:

> "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment".[102]

The article, along with the remainder of the Universal Declaration, was prepared principally by the U.N. Commission on Human Rights[103] and its Drafting sub-committee.[104] It is these two bodies, together with the Economic and Social Committee[105] and the General Assembly's

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101 AJ, 43 (1949), Suppl, at 133.

102 Universal Declaration G.A.Res. 217A, U.N.Doc A/810, at 71, (1948).

103 The Commission was established by the Economic and Social Council in 1946 to investigate and research the question of an International Bill of Rights. E.S.C. Res. 5, 1 U.N Escor 163, U.N.Doc. E/20 (1946).

104 E.S.C Res.46 (1947). Doc E/325.

105 The Economic and Social Council (E.C.O.S.O.C) is a principal organ of the United Nations consiting of 54 members. Article 62 of the United Nations Charter provides:

Third Committee[106] and then its plenary session, which have been responsible for the form the provision now takes.

The initial proposal for the anti-torture provision suggested by the U.N Secretariat was:

> "No one shall be subjected to torture, or to any unusual punishment or indignity".[107]

The proposal was first considered by the Drafting Committee, where Koretsky of the Soviet Union questioned the principles which lay behind the grouping together of torture, physical integrity, and cruel punishments in the Secretariat's proposal.[108] Malik's response was to state that they had been grouped together as "natural rights of the sheer physical body of man".[109] Concern was expressed that the proposal did not adequately define the notion of torture. Malik, from Lebanon, asked "whether forced labour, unemployment, or dental pain might be considered torture".[110] He concluded, however, that in light of events in Nazi Germany, it was preferable to "err on the side of vagueness than on the side of legal accuracy"[111] when

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1. The Economic and Social Council may take or initiate studies and reports with respect to international economic, social, cultural, educational, health and related matters and may make recommendations with respect to any such matters to the General Assembly, to the Members of the United Nations, and to the specialised agencies concerned.
2. It may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all.
3. It may prepare draft conventions for submission to the General Assembly, with respect to matters falling within its competence.
4. It may call, in accordance with the rules prescribed by the United nations, international conferences on matters falling within its competence.

106 The Third Committee is one of the Main Committees of the General Assembly. The Main Committees consider agenda items referred to them by the General Assembly. They prepare reports which include draft resolutions for submission to the General Assembly. U.N Department of Public Information, Handbook of the United Nations and the Specialised Agencies 24-25, (1949).

107 Commission on Human Rights, U.N. Doc. E/CN.4/AC.1/3/Add.1, at 20 (1947). It seems that the phrase was inspired by a number of domestic provisions which accompanied the initial report. See here HUMPHREY, at 17, (1984).

108 E/CN.4/AC.1/SR.16, at 8.

109 Id.

110 Id.

111 Commission on Human Rights, U.N.Doc. E/CN.4/AC../SR.23, at 3, (1948).

drafting the prohibition. The Australian delegate Harry, confirming Malik's approach, stated that:

> "if any specific kind of torture were mentioned, the Commission might also have to include other types, such as mental torture and torture from involuntary experimentation".[112]

It was this question of the specificity of the proposed anti-torture and ill-treatment norm which was to plague the drafters, not only of the Universal Declaration and the International Civil and Political Covenant, but also the European Convention. The dilemma to be confronted on each occasion was how to define a norm definite enough to indicate the types of conduct to be outlawed, but at the same time sufficiently general not to exclude the many types of torture which the ingenuity of the human mind in the future might create.

Mindful of the criticisms relating to the vagueness of the Secretariat's initial proposal, the Drafting Committee considered an alternative proposal from the United Kingdom delegate. This read as follows:

> No person shall be subjected to:
>
> (a) torture in any form;
>
> (b) any form of physical mutilation or medical or scientific experimentation against his will;
>
> (c) cruel or inhuman punishments.[113]

This proposal, together with the original initiative of the Secretariat and further suggestions submitted by the United States, was forwarded in the Drafting Committee's report to the Commission on Human Rights. At its subsequent session, the Commission set up three working groups charged with the duty of finalising a declaration,

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[112] Commission on Human Rights, U.N.Doc. E/CN.4/AC.1/SR.3, at 13, (1947).
[113] Commission on Human Rights, U.N.Doc E/CN.4/AC.1/4/Add. 1, at 1, (1947).

detailing a more specific convention, and considering implementation measures for the instruments agreed.[114]

Further discussion relating to the proposed provision outlawing torture and ill-treatment took place during the meeting of the Working Party on an International Covenant on Human Rights. This Working Party chose to divide the United Kingdom proposal into two parts, retaining the term "torture in any form" in the first, and using "cruel" as a modifier for "inhuman dignity" in the second.[115] Delegates at the second session of the Drafting Committee followed this action by discussing the meaning of the words used in the draft, such as "cruel" or "inhuman". Wilson of the United Kingdom complained that the words "cruel or inhuman" were too subjective. What may be considered to be covered by each term, he argued, varied from one country to another.[116]

It was during the third session of the Commission on Human Rights that the provision prohibiting torture was joined to that outlawing slavery or involuntary servitude.[117] This, from the point of view of defining a satisfactory working definition of torture and ill-treatment, was regrettable because, when the draft Declaration was debated article by article by the General Assembly's Third Committee, it became preoccupied with the promulgation of an acceptable definition of slavery, at the expense of further discussion of the content of the anti-torture provision.[118] Later a sub-committee on style once again separated the two freedoms, a decision unanimously approved by the General Assembly.[119]

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[114] U.N.ESCOR, Supp. (No.1) 4, U.N.Doc. E/600, (1948).

[115] Commission on Human Rights, Report of the Working Party on an International Convention on Human Rights, U.N.Doc.E/CN.4/56 (1947) Part II, arts. 5 & 6, at 4, 6.

[116] Commission on Human Rights (30th mtg.) 213, U.N.Doc. A/C.3/SR.109 (1948).

[117] U.N. Dep't of Public Information, These Rights and Freedoms, 22, (1950).

[118] The main problem encountered with the slavery prohibition was that the French text omitted the phrase "involuntary" which appeared in the English version. After considerable debate it was decided to omit the word from the English version as well, ibid, at 23.

[119] Ibid, at 24. See G.A. Res.217A, U.N. Doc. A/810, at 73, (1948).

The origin of the final form of the Universal Declaration adopted by the General Assembly is unclear. Klayman claims that it was prepared by the Secretariat's Division on Human Rights, although his authority for this is unclear.[120]

Accepting that the source of what is now Article 5 of the Declaration is uncertain, a literal reading of the provision suggests that the words chosen were intended to reflect a descending scale of suffering to be outlawed, with torture at its most extreme end and degrading treatment at the other. There is certainly no indication that the terms used were selected because they would provide an exact indication of the types of conduct that were to be outlawed, whilst leaving others unaffected. Indeed, it is clear that this question of specificity was one that had not been adequately resolved by the time of the adoption of the Universal Declaration. However, as at the time of the adoption of the Declaration it had already been accepted that it was to be followed by a second instrument giving further detail to its provisions, this problem of lack of definition was one that for the time being could be overlooked. As Klayman notes:

> "while not articulated, much of the pressure to clarify the torture prohibition was eased as a result of the decision to follow the U.N. Declaration...with another set of international instruments which would contain machinery for the implementation of the human rights guarantees".[121]

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[120] Klayman, 460-461, (1978).

[121] Id. At the first session of the Drafting Committee, there were two competing views advanced concerning the form the "International Bill of Rights" should take. One view was that the Declaration should be non binding. The other was that it should be in the form of a convention or multilateral treaty, providing legally binding rights. A compromise was reached with the Draft Committee deciding to prepare two documents: a declaration containing general principles of human rights followed by a legally binding instrument defining specific rights. 10 U.N. G.A.O.R, Annexes (Agenda Item 28-II) 2, U.N. Doc A/2929, (1955).

Thus far, it is possible to conclude only that the drafters had created a norm outlawing all suffering of a type yet to be resolved.

1.4.1 Adoption of a Provision Prohibiting Torture and Ill-Treatment in the Civil and Political Covenant.

Considering the limited debate of the provision prohibiting torture and ill-treatment during the drafting of the Declaration, it would not have been unreasonable to expect further elaboration of the provision in the Civil and Political Covenant. This is particularly so when it is recalled that the two instruments had distinct objectives. The former was intended as a "common standard of achievement",[122] the latter as a legally binding instrument. The Civil and Political Covenant was accompanied by an number of "monitoring" procedures[123] intended to promote international accountability, each one capable of highlighting those areas of domestic law which did not comply with the standards documented in the Covenant.

Bearing in mind the differing purposes of the two instruments, it would have appeared incumbent upon the drafters of the Civil and Political Covenant to articulate more elaborate and detailed provisions than those first expressed in the U.N. Declaration. As the Covenant was legally binding on ratifying states which could be called to account before an international tribunal, the importance of providing a reasonable indication of the content of the rights and duties the State would be required to recognise upon ratification was not lost.

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[122] Preamble to the Universal Declaration, supra note 80.

[123] These were accommodated in Articles 40 and 41 of the Civil and Political Covenant supra note 84 and in the Optional Protocol to the Civil and Political Covenant supra note 85. Infra, Chapt. 2 at p. 77. ROBERTSON, at 41-72, (1989).

An inspection of the Civil and Political Covenant indicates that most of the rights documented therein have been more comprehensively defined than in the U.N. Declaration. For example, Article 6 of the Covenant gives considerably more detail to the right to life than its earlier counterpart in Article 3 of the U.N. Declaration.[124] Similarly, the right to a fair trial, in contrast to the Declaration, is comprehensively documented,[125] as are the occasions in which freedom of assembly, free speech, and freedom of thought, conscience, and religion may be restricted.[126]

It may appear surprising therefore that Article 7 of the Covenant chooses to replicate Article 5 of the Covenant adding only "In particular, no one shall be subjected without his free consent to medical or scientific experimentation".[127]

This may be explained by reference to the problems the drafters experienced in elaborating a satisfactory legal norm. Once again, central to these difficulties was the

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[124] Article 3 of the Universal Declaration provides:
"Everyone has the right to life, liberty and the security of person"., supra note 80.
Article 6 of the Civil and Political Covenant provides:

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious of crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.
3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorise any State Party to the present Covenant to derogate in any way from any of the obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.
4. Anyone sentenced to death shall have the right to seek pardon or communication of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.
6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant, supra note 84.

[125] Article 14, id.
[126] Articles 18, 19, 21 and 14, ibid.
[127] Article 7, ibid.

problem of specificity, matched against the desire not to define a norm that would unnecessarily restrict its reach.

The Commission of Human Rights, still occupied with the duty of promulgating an International Bill of Rights, discussed two main proposals for an anti-torture and ill-treatment norm.[128] One followed closely the language of Article 5 of the Universal Declaration.[129] The other was based on the original British proposal to the Drafting Committee in 1947 dealing with scientific and medical experimentation.[130] Eventually the two were merged becoming draft Article 7,[131] which was adopted as part of the text of the Civil and Political Covenant by the General Assembly on December 16, 1966.[132] Once again, the definition of torture did not receive comprehensive attention. This was because delegates were preoccupied this time, not with another right joined with the Article, but with the proposed phrase singling out for additional emphasis the question of medical or scientific experimentation.[133]

What proved problematical was defining a provision which would outlaw the types of atrocities practiced by the Nazis, without, at the same time, making impossible necessary scientific and medical experimentation. A World Health Organisation representative advised against the addition to the original version in the Declaration fearing that it would prevent proper scientific inquiry.[134] This area involved a number of complicated issues which

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128 U.N.ESCOR, Supp. (No.1) Annex B at 25, U.N. Doc. E/600 (1948).

129 It stated: "no person shall be subjected to torture or to cruel or inhuman punishment or to cruel or inhuman dignity." 5 U.N. ESCOR, Supp. (No.1) Annex B, Art. 7, at 25, U.N.Doc. E/600 (1948).

130 This states: "It shall be unlawful to subject any person to any form of physical or scientific experimentation against his will." Id, at Art 6.

131 Commission on Human Rights 10th Session. 16 U.N. ESCOR, Supp. (No.8) 42, U.N.Doc. E/2447 (1953).

132 G.A. Res. 2200, 21 U.N. GAOR, Supp. (No.16) 49, U.N. Doc. A/6316 (1967).

133 Klayman, at 468, (1978).

134 Communication of the Director-General of the World Health Organisation, U.N. Doc E/CN.4/359 (1950).

were frequently discussed during the drafting of the Article, but, it seems, never satisfactorily resolved. For example, consent to medical procedures would effectively disqualify the provision from application, but where consent was impossible because the patient was unconscious or incompetent the situation was less clear.

The question of "justification" for torture and ill-treatment was raised only once during the consideration of Article 7 and received little attention. This was put in issue, although not explicitly, by the Yemen delegate, Zebara, who expressed concern that the norm "implicitly condemned certain modern scientific methods currently applied by many countries to track down criminals, methods which were authorized by law".[135]

His comment reflected a question which was central to the protection the provision was to offer against torture and ill-treatment. What needed to be resolved was whether the protection from such treatment was absolute, or whether in certain circumstances it could be limited. Consideration needed to be given to whether there were any circumstances in which, although a given form of treatment or punishment could be said to amount to torture and ill-treatment, it would not violate a provision outlawing the same, because the conduct could be said to be justified, for reasons, for example, of state security or crime prevention. It was this issue which should have been the focus of the drafters' attention, instead of, or at least in addition to, their efforts relating to medical and scientific experimentation. It was because, as stated earlier,[136] the utility of the practice of torture was doubted, as much as a reaction to the nature of the practice itself, that torture was rejected as acceptable State behaviour. It needed to be clarified whether there were any circumstances in which torture and ill-treatment might be

[135] 5 U.N.GAOR, C.3 (290th mtg.) 122, U.N. Doc. A/C.3/SR.290 (1950).
[136] Supra, p. 26.

considered acceptable. It followed, therefore, that the creation of a satisfactory provision prohibiting torture would have required, at the very least, not only an indication of the types of conduct to be prohibited, but also the question of "justification" to be addressed. This the drafters failed to provide. It was left unclear as to whether there could be any justification for conduct amounting to torture or ill-treatment, and if so, what this may be.

1.4.2 The Adoption of Article 3 of the European Convention at the Council of Europe.

If the position relating to justification for torture and ill-treatment was left ambiguous at the United Nations, the situation could not have been more different at the Council of Europe. During the discussion of the drafting of the provision to prohibit torture and ill-treatment in the European Convention the following request was made and accepted:

> "therefore, I ask this Assembly to announce to the whole world that torture is wholly evil and absolutely to be condemned and that no cause whatever-not even the life of a wife, a mother or a child, the safety of an army or the security of a State-can justify its use or existence. I say that if a State, in order to survive, must be built upon a torture chamber, then that State should perish".[137]

The work for the drafting of Article 3 was based on the following recommendation:

> "Art.2-In this Convention, the Member States shall undertake to ensure to all persons residing within their territories:(1) Security of person, in accordance with Articles 3, 5, and 8 of the United Nations Declaration".[138]

Although the final wording of Article 3 of the Convention is an almost exact restatement of Article 5 of the

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[137] Delegate Cocks. Council of Europe Collected Edition of the Travaux Preparatoires, (1975), Vol II, at 40.

[138] Recommendation to the Committee of Ministers, Eur. Consult, Ass., 1st Sess., Doc.No. 108, at 261 (1949).

Universal Declaration,[139] the *travaux preparatoire* to the Convention are considerably more helpful to those attempting to decipher the intention of the drafters of the provision than the U.N. counterpart because of the suggested amendments to it made by the British delegate, Cocks.

Cocks was concerned that Article 5 of the Universal Declaration did not emphasize adequately the condemnation of torture. He proposed an amendment to Article 1 of the original Committee recommendation, calling upon the Committee of Ministers to draft a human rights treaty which would illustrate that:

> "torture is wholly evil and absolutely to be condemned and....no cause whatever...can justify its use or existence".[140]

This read as follows:

> "The Consultative Assembly takes this opportunity of declaring that all forms of physical torture, whether inflicted by the police, military authorities, members of private organisations or any other persons are inconsistent with civilized society...and must be prohibited. They declare that this prohibition must be absolute and that torture cannot be permitted by any purpose whatsoever, either by extracting evidence for saving life or even for the safety of the State".[141]

Cocks also advocated an amendment to Article 2, which

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[139] The minor difference being the omission of the adjective "cruel" in the Convention provision. The Committee of Experts on Human Rights of the Council of Europe, concluded that the inclusion of the word "cruel" in the United Nations texts did not amount to any difference in substance. Council of Europe, Committee of Experts on Human Rights: Problems Arising from the Co existence of the United Nations Covenants on Human Rights and the European Convention on Human Rights, Doc. H(70)7 (1970). An inspection of the travaux preparatoire to the Convention provides no indication as to why the word "cruel" was omitted from the Convention.

[140] Supra note 137, at 40.

[141] Amendment, Eur. Consult. Ass., 1st Sess., Doc. No.91, at 236, (1949).

provided:

> "in particular, no person shall be subjected to any form of mutilation, or sterilization, or to any form of torture or beating. Nor shall he be forced to take drugs nor shall they be administered to him without his knowledge and consent. Nor shall he be subjected to imprisonment with such an excess of light, darkness, noise or silence as to cause mental suffering".[142]

These suggested amendments were significant because they attempted to achieve two purposes. The first was to indicate clearly in the text itself that there was to be no justification possible for torture. The second was that an effort had been made to indicate the types of conduct to which the prohibition should be applied.

In choosing to raise directly the issue of "justification", Cocks was calling for international debate of a vital component of the torture debate which the United Nations had failed to address properly.[143]

The delegates objected to Cocks' amendments for fear that, in seeking to specify the types of conduct the proposed provision was to prohibit, it would unnecessarily limit its scope. Teitgen argued that it was better "simply to state that all torture is prohibited".[144] However, Klayman, it is submitted, is right to point out that Cocks' examples were intended to amplify the importance of the prohibition and were by no means intended to be exhaustive.[145]

Eventually Cocks agreed to withdraw his amendments after it was accepted that what he was proposing was already encompassed in the language to be used. Sir David Maxwell

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[142] Amendment, Eur. Consult., 1st Sess., Doc. No.90, at 235, (1949).

[143] Cocks' objection to justification for torture was that such a practice debases the torturer as well as the victim, and was not a proper instrument of a civilized nation "...It would be better even for society to perish than this relic of barbarism to remain", supra note 137, at 38.

[144] Eur. Consult. Ass. Deb., 1st Sess. (Part II at 596.) (Sept. 8, 1949).

[145] Klayman, at 472, (1978).

Fife commented:

> "by the method which we have adopted, in drafting the Resolution, Mr Cocks point is covered. There is no doubt that those who join the ultimate Convention will undertake the cause which he has so movingly put before us; they will undertake that no one will be subjected to torture".[146]

At this point it is necessary to note that there were two alternative proposals for drafting styles for the Convention. One was a system of "simple enumeration" and the other was termed "precise definition". The United Kingdom Delegation, favouring the latter approach considered that it was necessary:

> "to make it quite clear what was the nature and extent of the obligations to be assumed by the States party to the proposed Convention".[147]

It was the dilemma of ensuring clarity, without unduly restricting the scope of Article 3, that was the central issue in the drafting process and the same one which the drafters of the International Bill of Rights at the United Nations had found problematical. In the end, after further representations to the Consultative Assembly, the Committee of Ministers, preferring the style of simple emuneration of rights, chose to reproduce the wording of Article 5 of the Universal Declaration.[148]

Although Cocks' amendments were not adopted for the reason identified, much is owed to him for forcing debate on the issue of justification, which had been addressed so inadequately at the United Nations.

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[146] Eur. Consult.,Ass., 1st Sess. at 42, (Part II) (1949).
[147] Supra note 137, Vol III, at 254-256, (1976).
[148] Letter from the Committee of Ministers to the President of the Consultative Assembly, Eur.Consult., Ass., Ordinary Sess. (Part II), Doc. No.11, at 600, 603 (1950).

1.4.3 Comments on the Drafting of the Prohibition of Torture and Ill-treatment.

From the above inspection of the genesis of the international prohibition of torture and ill-treatment, it is possible to arrive at the following conclusions pertinent to this thesis.

The prohibition of torture in International Law was created at a time when the Nazi holocaust was still fresh in the minds of its drafters. As these practices demonstrated, it was clear that any provision intended to safeguard the "natural rights of the sheer physical body of man" would be required to provide protection against many types of conduct, including some which could not be described properly as amounting to torture as it is commonly understood. Practices such as human experimentation and the detention of individuals in inhuman prison conditions were clearly also in need of prohibition. These were not, however, types of conduct which fitted comfortably inside a prohibition which mentioned only torture. In adopting the term "No-one shall be subjected to torture or to cruel or *inhuman or degrading treatment or punishment*" the drafters of the provision had succeeded in creating a provision which had the potential to offer the individual complete protection against all forms of conduct threatening his or her dignity and humanity.

This absolute protection, although commendable, nevertheless presented a considerable problem with respect to the application of the provision, e.g, how to distinguish between conduct which might be considered tantamount to inhuman or degrading treatment or punishment which clearly needed to be prohibited by the provision, and treatment which might result in equal amounts of suffering being inflicted on an individual, that was not to be prohibited. Eleanor Roosevelt's example was a case in point. She expressed concern during the discussion of the U.N. anti-torture and ill-treatment

provision that the proposed article must not outlaw the practice of compulsory vaccinations which was in use at the time in the United States of America.[149] The drafters of the prohibition, however, provided no indication as to how this dilemma of discriminating between different types of suffering was to be resolved.

It is submitted that the drafters could have attempted to resolve this difficulty in one of two ways. First, by introducing the concept of justification into the provision prohibiting torture and ill-treatment. A given form of conduct would be examined initially to ascertain the level of suffering involved. If this was beyond a certain threshold it would then be necessary to determine whether the conduct could be considered justifiable for a given reason. Compulsory vaccinations, for example, might be justified on the grounds of protection of public health. Other treatment, such as personal body searches by customs officers or prison officers, which might otherwise be considered degrading, could be justified on the grounds of public security or the protection of others. But this would have had the disadvantage of implying that some forms of torture might also be justifiable. The lesson from the teachings of Beccaria and his contemporaries which first led to the condemnation of torture in domestic law was that torture was never justifiable, as its usefulness was unproven, and later, because it was contrary to the "natural rights" of the individual. Although this question of justification for torture had not been directly discussed at the United Nations, it is clear that in the immediate aftermath of the Nazi atrocities no concept could be accommodated in a provision intended to exclude, *inter alia*, torture. This view is confirmed by the more thorough consideration given to the same provision at the Council of Europe.

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[149] Doc E/800. BOSSUYT, at 51, (1987).

A second possibility at the disposal of the drafters was to deny that the clause applied to certain forms of treatment or punishment, such as compulsory vaccinations, because it did not satisfy the exact definition of "torture" or "inhuman" or "degrading" treatment. The problem here, however, was that they were unwilling to provide an exact definition of what amounted to torture and ill-treatment for fear that they would unnecessarily restrict the reach of the provision. This method therefore was also unworkable.

This dilemma could have been resolved in the following manner. Instead of choosing to add to the prohibition of torture, it would have been preferable to create a second provision altogether, in which a limited concept of justification could be accommodated thereby allowing certain types of conduct satisfactory consideration. This second provision might have protected, for example, the individual's right to physical integrity which could be denied only in certain restricted circumstances. Alternatively, the drafters could have indicated that the prohibition they chose to create contained in effect two regimes. Within the first, that of torture, no concept of justification could be admitted. In the second, which consisted of the remainder of the provision, justification issues could be addressed. The advantage of such an understanding of the prohibition would have been that certain types of conduct, which although far removed from the types of treatment many of the drafters had in mind when creating the provision, but which nevertheless raised issues relating to the proper treatment of individuals, could be adequatley examined with regard to all the relevant circumstances, including its social value, without jeopardizing the absolute protection from torture which was clearly required in International Law. It is this point which will be developed later in the thesis.[150]

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[150] See infra Chapt. 6.

To conclude, what had been created was a norm which, despite its importance, had been ill-defined and inadequately considered. Not only had the drafters deferred to a subsequent body the difficult task of defining the terms they chose to adopt, but they also made that task more difficult by choosing to join the phrases "torture" and "inhuman and degrading" treatment, which would have been better considered separately.

2. THE IMPORTANCE OF DEFINING THE TERM: "TORTURE, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT."

Introduction to Chapter

This Chapter examines the importance of developing a satisfactory understanding and application of the international norm prohibiting torture and ill-treatment. It concludes that, although the individual as a subject of International Law is a relatively recent phenomenom, international instruments documenting human rights standards now have considerable significance for ratifying States. This is because the State may be required to account for its actions at an international level, and also because the individual may be able to invoke a right documented internationally in domestic courts. This requires that the provisions in international treaties relating to human rights, including the right to be protected from torture and ill-treatment, are satisfactorily interpreted, providing the State with a reasonable indication of the rights it has a duty, in International Law, to secure to individuals within its jurisdiction.

For the purposes of this thesis, this Chapter will be in two parts. The first considers the effect of international human rights norms on domestic legal systems. The second considers the international consequences of a State violating a fundamental right documented at a supra-national level.

2.1.The International Law of Human Rights and Domestic Legal Systems.

International human rights law may be said to have an influence on domestic legal systems in one or more of three ways.[1]

First, it may be applied directly into domestic law, having a status comparable to "statute law".[2] Secondly, human rights standards may be invoked in national courts through the application of customary international law. Thirdly, constitutional courts may refer to international human rights standards when interpreting a constitution or bill of rights. These shall each be examined in turn.

2.1.1 The Application of International Treaties into Domestic Law.

International Law does not require a common approach by States with respect to the method of internal application of international treaties.[3] The effect of a treaty in domestic law is dependent upon the law of each State. Scholars, however, have studied the question of the relationship between international treaties and domestic law by identifying two separate approaches.[4] One is referred to as "monist", and the other is termed "dualist". Dixon describes the latter as follows:

> "Dualism denies that international law and municipal law operate in the same sphere, although it does accept that they deal with the same subject matter. For dualists such as Triepel, international law regulates the rights and obligations of individuals within states. International law deals with the subject matter on the international plane, whereas municipal law deals with the subject matter internally".[5]

In those states that apply a dualist approach to international treaties such as, for example, the United

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[1] Hartman, 659, (1983).
[2] JACOBS, 141, (1987).
[3] See generally STARKE, 71-91, (1990).
[4] BROWNLIE, (1990) 33-57, "The Relation of Municipal and International Law."
[5] DIXON, 71, (1993).

Kingdom and Denmark, a treaty has no effect in domestic law, other than through national rules purporting to incorporate the treaty. Therefore, although both Denmark and the United Kingdom have ratified the Civil and Political Covenant,[6] Article 7 of the treaty outlawing torture and ill-treatment is likely to have, at best, only a persuasive effect in national courts without direct incorporation of the U.N. instrument. This is not to say that international treaties are unable to provide rights to individuals in those States which are "dualist" and choose not to incorporate treaties directly into domestic law. As the operation of the European Convention demonstrates, decisions of the European Commission and Court[7] have afforded individuals protection of their human rights in countries such as the United Kingdom, which have not incorporated the European Convention into domestic law, by persuading the legislature to introduce new legislation to protect more adequately a right documented in the European Convention. In the United Kingdom, the case of Malone v. United Kingdom,[8] which preceded the Interception of Communications Act 1985,[9] is often referred to as an example of a decision of the European Court which led to a change in the law in the United Kingdom. The Education Act of 1986 following the Court's decision in the case of Campbell and Cosans v. United Kingdom,[10] is also frequently quoted as another example.

Dixon describes the "monist" position as follows:

> "The monist theory supposes that international law and municipal law are simply two components of a single body of knowledge called law. "Law" is seen as a

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6 Supra Chapt. 1, note 84.
7 For discussion of "monism" and "dualism" with regard to the European Convention see VAN DIJK & VAN HOOF, 11-12, (1990).
8 Series A. 82, (1982).
9 Halburys Statutes 4th ed, vol.45, 416-430.
10 Series A. 48, (1982).

> single entity, of which the "municipal" and "international" versions are merely particular manifestations".[11]

In those states commonly referred to as "monist" in their approach to International Law, such as Belgium, France, and the Netherlands,[12] a treaty which has been ratified by the State and has entered into effect at the international level automatically enters into force in domestic law. In the Netherlands, the Constitution states that it is a legal and constitutional duty for the courts to apply self-executing rules of International Law even if they conflict with rules of national law:

> "Regulations which are in force in the Kingdom of the Netherlands shall not be applied if this application is not in conformity with provisions of treaties or decisions of international organisations which are binding upon everyone".[13]

Similarly, by virtue of Art. 93 of the Constitution of the Netherlands, decisions of international organisations may have direct effect and, therefore, the force of law. It follows that any domestic legal provision not compatible with the Civil and Political Covenant, and the European Convention, both of which have been ratified by the Netherlands, is likely to require modification by the legislature of the Netherlands, or alternatively, the domestic courts will choose to apply the international provision. For example, in a case dated 10 October 1978, the Hoge Raad upheld the decision of the Court of Appeal, which suspended the application of Articles 423 and 424 of the Code of Criminal Procedure because the person indicted had not been informed of the charge in a language he understood, as required by Article 6, paragraph 3 of the Convention.[14] Similarly, in a judgment dated 31 May 1978, Voerman v. Municipality of Riderkerk, the Raad van Staat (Council of State) accepted the appellant's plea that the refusal to grant him permission

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[11] DIXON, 69, (1993)
[12] JACOBS, (Ed. 1987).
[13] Art. 94 of the Netherlands Constitution. BLAUSTEIN & FLANZ, Vol XII, at 24.
[14] NJ (1979), no.144, quoted from DRZEMCZEWSKI, 90, (1983).

to erect an aerial violated Article 10 of the European Convention.[15] In a more recent decision of the European Court of Human Rights it was stated that the practice of using an anonymous witness in criminal proceedings did not comply with the Convention.[16] In light of the decision, a court in the Netherlands suspended a term of imprisonment in a similar case.[17]

In the United States of America it has long been accepted that the U.S. Constitution declares a treaty to be the "law of the land".[18] However, with regard to human rights treaties, it has yet to be resolved as to what is their exact effect in U.S. domestic law. This is because the courts have effectively limited and, at times, even negated their effect by referring to the concept of self-executing treaties or self-executing provisions of treaties.[19] As early as 1829 the U.S. Supreme Court stated in unambiguous terms that:

> " Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in the courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision".[20]

However, there is still confusion as to whether many treaties and provisions of treaties may be applied directly in domestic law, because they were not intended to have direct application.[21] In the well-known authority

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15 Bulletin of the NJCM, 90, (1979) no. 14, 23.
16 Kostovski Case, Series A. 166, 21, (1990).
17 Vervuele, J., quoted from (Ed. DELMAS-MARTY, 1993) at 211,
18 Foster v Neilson, 2 Pet.253 (U.S. 1829).
19 As JACOBS notes, (1987) at xxvii, terms such as "direct effect", and "direct applicability" are also used but not consistently.
20 Jackson, at 148, (Ed. JACOBS 1987).
21 There is an exhaustive amount of scholarly writing on the subject of "self-executing" provisions and treaties. See for example Riesenfeld (1980); Iwasawa, (1986); Paust (1988); Damrosch, (1991); and more particularly for questions of human rights Schachter, (1951); Schuluter, (1973); Stotter, (1976); Siegal, (1991); .

of Sei Fujii v State[22] it was stated that:

> "In determining whether a treaty is self-executing courts look to the intent of the signatory parties....."[23]

In applying this approach, it has been decided that the human rights provisions of the United Nations' Charter, and the Universal Declaration are not self-executing.[24] The Civil and Political Covenant is considered by most scholars to be self-executing.[25] However, the reservations attached to the recent ratification of the Civil and Political Covenant by the United States make it clear that the provisions of the Covenant are not to have direct effect, and are only valid insofar as they comply with the rights and freedoms documented in the U.S. Constitution, as interpreted by the U.S. Supreme Court.[26] It may be concluded, therefore, that Article 7 of the Covenant prohibiting torture and ill-treatment is unlikely to be directly applicable to the individual in the jurisdiction of the United States.

2.1.2 Application of Human Rights Standards in Domestic Courts by Reference to Customary International Law.

It is clear from the above survey of States that, in the absence of protection from torture and ill-treatment in domestic law, an individual's ability to claim protection by invoking international provisions depends largely on the effect a State chooses to give to International Law in its own domestic system. However, even in those States such as the United States of America in which provisions of international human rights instruments may not be available to the individual to enforce in domestic

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22 38 Cal.2d 718, (1952).
23 Id, at 721. See here Jackson, (Ed. JACOBS 1987) at 165-168.
24 See generally with regard to the United States and International Human Rights standards Newman & Weisbrodt, (Ed. LUTZ, HANNUM, BURKE, 1989).
25 See for example Lillich, (1989).
26 See here in relation to the recent ratification of the Covenant by the United States Strossen, (1992)

courts, the freedom from torture and ill-treatment may be enforced by the application of customary international law which includes a prohibition against such conduct.

Under Article 38(1) of the Statute of the International Court of Justice, international custom is recognized as a source of International Law. Although the International Court of Justice has, on occasion, applied customary international law in its judgments,[27] it is to the practice of enforcing the same source of law in domestic courts that it is necessary to turn when considering the question of enforcement of rights by the individual. This is because the individual, in not having *locus standi* before the I.C.J. can seek to enforce customary international law only in domestic courts. At this stage, it must be noted that, although to date it is possible to find only a few examples of cases where the individual has successfully enforced a right codified in customary international law, its importance must not be underestimated. This is because, although few in number, they indicate that in cases where human rights are not guaranteed to the individual in the form of a constitution or international treaty the possibility may still exist for the individual to claim rights by referring to customary international law. This possibility, as yet underdeveloped, Meron argues,[28] offers some potential for the enforcement of individual rights not properly protected by domestic legislation. First of

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[27] See for example the case of Right of Passage over Indian Territory Case (Portugal-India) ICJ (1960) 6, where the I.C.J. decided, inter alia, that a particular practice between two states only, which is accepted by them as law, may give rise to a binding customary rule inter partes. In the Asylum case I.C.J. Reports (1950), 266 the I.C.J. refused to accept that rules relating to asylum had become part of customary international law: "...there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law..." id, at 276-277. In the case concerning U.S. Nationals in Morocco I.C.J. Reports, (1952) 199, the I.C.J. stated: "In the present case there has not been sufficient evidence to enable the Court to reach a conclusion that a right to exercise consular jurisdiction founded upon custom or usage has been established in such a manner that it has become binding on Morocco", id.

[28] See the concluding remarks of MERON, 246-248, (1989).

all, however, it is necessary to recount the development of customary international law and identify certain of its characteristics.

2.1.2.1 The Development and Recognition of Customary International Law.

Custom is the oldest, and the original source of International Law.[29] Customary rules were rules which developed over a long period of usuage and came to be recognized as customary rules of law by the international community.[30] There is evidence that, as far back as Ancient Greece, rules of war and peace were recognized by customary international law.[31] With the development of greater international trade came the need for more thorough codification of customs and usuage. In the absence of an international court to effectively police these codes it was domestic courts which were called upon to enforce the same which were responsible for the continued development of customary international law. As evidence that domestic courts followed broadly similar patterns in recognizing and applying customs considered part of International Law, Starke cites the decision of the U.S. Supreme Court in The Scotia.[32] The facts of the case may be summarized as follows. In 1863 the British Government adopted a series of regulations intended to prevent collisions at sea. Similar rules were soon adopted in the United States of America and by the governments of all of the leading maritime nations. A British vessel, *The Scotia*, collided with an American ship, *The Berkshire*, and sank. The court decided that the case was to be resolved in accordance with the customary rules of International Law, which had evolved through the widespread adoption of the British regulations. It explained its reasoning as follows:

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29 OPPENHEIM, 25, (1992).
30 Id.
31 Id.
32 (1871) 14 Wallace 170.

> "This is not giving to the State of any nation extra-territorial effect. It is not treating them as general maritime laws, but it is recognition of the historical fact that, by common consent of nations, these rules have been acquiesced to as general obligations. Of that fact we think we may take judicial notice. Foreign municipal laws must indeed be proved as facts, but it is not so with the law of nations".[33]

Before an international custom is accepted as binding in law, two tests must be satisfied.[34] The first relates to the material content of the rule, the second to the psychological aspects involved in the formation of the customary rule.[35] With regard to the former, in the German case of Lubeck v. Mecklenburg-Schwerin,[36] the court decided that a single act of a state or its agency could not create any rights in custom. Conduct, it concluded, to lead to custom must be regular and repeated. Minor deviations from a practice are unlikely to affect recognition of a customary rule, although material departures are likely to weaken the case in favour of recognition of a rule in customary international law.[37]

The second requirement of customary international law is sometimes referred to as the *opinio juris sive necessitatis*. This is the need to establish that there is a "mutual conviction that the recurrence...is the result of a compulsory rule".[38] Starke explains this condition as follows:

> "Recurrence of [a] usuage or practice tends to develop an expectation that, in similar situations, the same conduct or the abstension therefrom will be

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[33] Ibid, at 188.
[34] LAUTERPACHT, 61, (1970).
[35] Id.
[36] Annual Digest of Public International Law Cases 1927-8, NO.3.
[37] Cf Anglo-Norwegian Fisheries Case ICJ (1951) 116, at 138.
[38] Judge Negulesco of the Permanent Court of Justice, Pubm PCIJ (1927) Series B. No 14, at 105.

> repeated. When this expectation evolves further into a general acknowledgment by states that the conduct or the abstension therefrom is a matter both of right and of obligation, the transition from usage to custom may be regarded as consummated".[39]

From decisions of the Permanent Court of International Justice, such as the Lotus case,[40] it is possible to conclude that ascertaining the *opinio juris* is a matter of inference from the circumstances of each case. General recognition of the custom would appear to underline the nature of the court's inquiry in establishing the *opinio juris*. In the English courts, the question of recognition of the rule has been expressed in the following manner:

> "it is a recognized prerequisite of the adoption in our municipal law of a doctrine of public international law that it shall have attained the position of general acceptance by civilised nations as a rule of international conduct, evidenced by international treaties or conventions, authorities' textbooks, practice and judicial decision. It is manifestly of the highest importance that the Courts of this country before they give the force of law within this realm to any doctrine of international law, should be satisfied that it has the hallmarks of general assent and reciprocity".[41]

2.1.2.2 Application of Human Rights in Domestic Courts by Reference to Customary International Law.

The Courts in England have, on occasion, acknowledged that certain human rights are recognized by customary international law, including the right not to be subjected to torture. For example, in the case of Oppenheimer v Cattermole,[42] Lord Cross of Chelsea considered that a Nazi decree stripping Jews of their nationality was invalid since it was contrary to what he considered to be a common customary human right. He stated:

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[39] STARKE, id, at 38-39, (1989).
[40] Pub PCIJ (1927), Series A No.10.
[41] Compania Naviera Vascongasdo v. Steamship "Cristina", [1938] AC 485,497.
[42] [1976] AC 249,278 (HL).

> "To my mind a law of this sort constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognize it as law at all".[43]

In Ahmad v Inner London Education Authority,[44] Lord Scarman admitted that the courts:

> "..will interpret statutory language and apply common law principles, wherever possible, so as to reach a conclusion consistent with our international obligations".[45]

Meron states that there are a number of jurisdictions which have followed the English precedent of treating recognizable customary international law as part of the law of the land when considering questions of human rights.[46] For example, explicit reference to international customary law can be found in the Australian case of Koowarta v. Bjelke-Petersen and Others 1982.[47] Stephen J, considering the question of racial discrimination, commented:

> "it was contended on behalf of the Commonwealth that, quite apart from the [Racial Discrimination] Convention, Australia has an international obligation to suppress all forms of racial discrimination because of respect for human dignity and fundamental rights and thus, the norm of non-discrimination on the grounds of race is now part of customary international law as both created and evidenced by state practice and as expounded by jurists and eminent publicists. There is, in my view, much to be said for this submission....".[48]

In the Federal Republic of Germany the Supreme Constitutional Court was required to consider whether customary international law prevented the Court from extraditing a man to Turkey, the result of which would be to subject him to a sentence for which he had already

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[43] Ibid, at 277.
[44] [1977] 3 WLR 396, 406 (CA).
[45] Id, 406.
[46] MERON, at 134, (1989).
[47] 68 Int'l L.Rep. 181 (1985).
[48] Meron, at 118, (1984).

been punished.[49] Citing Article 14(7) of the Civil and Political Covenant, Article 8(4) of the American Convention, and Article 4 of the Seventh Protocol to the European Convention, the Court found that:

> "[a]ll of these circumstances justify in any case the conclusion that, in the sense of article 25 of the Basic Law, the principle ne bis in idem is a general rule of international law which prohibits a second conviction of a defendant in the same state based on the same facts".[50]

In the United States of America, the concept of customary international law with regard to the enforcement of human rights has attracted some judicial attention and considerable academic commentary.[51]

The classic statement on customary international law in U.S. courts is to be found in the Paquete Habana,[52] in which Justice Gray stated:

> "International law is part of our law and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination".[53]

The leading case concerning recognition of human rights through customary international law in the United States is Filartiga v Pena-Irala,[54] where an action was taken in New York against a Paraguayan police official for torture of a third Paraguayan citizen whilst living in Paraguay.[55] Because the cause of action did not rise under any international treaty, the court was required to consider

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49 1987 Neue Juristische Wochenschrift [NJW] 2155.
50 Ibid, at 2158.
51 As examples of the academic commentary see: Schrader, (1982); Hartman, (1983); Maier, (1989); Praust, (1990); Simma, (1992).
52 175 US 677 (1900).
53 Ibid, at 700.
54 630 F. 2d 876 (2d Cir.1980).
55 Jurisdiction for the action was claimed under the Alien Tort Claims Act (28 USC 1350) which states: "the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States".

whether the prohibition of torture was provided by customary international law.[56] Citing Articles 55 and 56 of the United Nations' Charter as evidence that concern for human rights was now expressed in International Law, the court decided that, although there was no general agreement as to the exact content of the rights, they did, as a bare minimum, include a prohibition against torture.[57]

However, in the case of Tel Oren v. Libyan Arab Republic,[58] another action was brought under the Alien Tort Claims Act by victims of a P.L.O. attack on a bus in Israel. Judge Bork refused to accept that customary international law provided the plaintiff with a cause of action. International instruments such as the Universal Declaration and the International Civil and Political Covenant, he stated, are not intended to be judicially enforceable because a number of them contain rights of such a general nature that they are incapable of traditional judicial application. The decision in Von Dardel v. U.S.S.R,[59] just a year after the Tel Oren case, indicates that Judge Bork's remarks did not signify an end to the use of customary international law in the enforcement of human rights in the domestic courts of the U.S. In this decision, although the Court dismissed the action on a technical matter, it did appear to acknowledge that individuals could, in certain circumstances, invoke rights in U.S. courts by reference to customary international law.

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[56] The academic commentary on the case is extensive. As a selection see Rusk, (1981); Blum & Steinhardt, (1981); George, (1984); Randall, (1986).
[57] Supra note 54 at 882.
[58] 726 F.2d 774 (DC Cir.1984).
[59] IRL, 77, (1988).

2.1.2.3 Comments on the Prohibition of Torture and Ill-treatment in Customary International Law.

Whilst accepting the feasibility of enforcing human rights by the application of customary international law in domestic courts, the number and content of these rights has yet to be settled. However, it is possible to state a number of rights which are recognized in customary international law. It is long settled that freedom from torture is one such right. In addition to the many judicial cases recognizing the content of customary international law as including the matter of torture, the Restatement (Third) of the Foreign Relations Law of the United States, which lists generally accepted violations of the customary international law of human rights, is unambiguous in its reference to torture. Comment n(d) of section 702 of the Restatement recognizes freedom from "torture or other cruel, inhuman or degrading treatment or punishment", as being a *peremptory* human right.[60]

It is important to note that the international prohibition of torture and ill-treatment is considered peremptory. This is because it is possible for a state not to be bound by customary international law, simply by virtue of the fact that it dissents from the practice as it develops.[61] However, it is firmly established that the prohibition of torture is considered *jus cogens*. This is the concept, in International Law, that there exist some principles which are so compelling that they invalidate any ordinary provisions of a treaty or custom in conflict with them.[62] A State, therefore, is not permitted to derogate from standards in International Law considered *jus cogens*, of which torture is one. In the Inter-

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[60] Also recognized as the same are: genocide, slavery or slave trade, the murder or causing the disappearance of individuals, prolonged arbitrary detention, systemic racial discrimination. See generally Meron, (1986).

[61] Restatement (Third) of the Foreign Relations Law of the United States 102(2) (1987) comment b provides: "A principle of customary law is not binding on a state that declares its dissent from the principle during its development".

[62] AKEHURST, 40-41, (1984). See generally Christenson, (1988).

American case of Roach and Pinkerton v. United States,[63] the Inter-American Commission accepted that execution of juveniles was prohibited *jus cogens* and thus the United States was unable to derogate from the prohibition of such provisions in customary international law. This case remains an important illustration of the significance of customary international law, because it enabled a tribunal to find a State in violation of a human rights norm, in a way other than the application of a provision documented either in a national or international instrument.

It is at this point that it is necessary to consider a matter relating to the prohibition of torture and ill-treatment as being *jus cogens* in nature. Article 53 of the Vienna Convention on the Law of Treaties 1969[64] provides that a norm to be considered "jus cogens" must be one "accepted and recognized by the international community of States as a whole".[65] It follows, therefore, that if it is correct to conclude that the norm prohibiting torture and ill-treatment is "jus cogens", there must be evidence that States agree to its prohibition. A survey of State practices suggests that there is agreement in respect of the outlawing of conduct which may generally be described as tantamount to torture.

Amnesty International states that, although a third of the world's governments practice or condone torture, they are unanimous in condemning its use. Although a minority of States, it seems, fail to take practical steps to implement this condemnation, it does appear that there is unanimous agreement that it is unacceptable, for example, to seek to interrogate an individual by the extraction of finger nails or by breaking limbs. However, as soon as conduct is considered which is removed from this extreme

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[63] Case No. 9647, Inter-Am C.H.R. 147, ser.L/V/II.71,doc.9 rev.1(1987), reprinted in 21.3 Human Rights: The Inter-American System 61, 73, (1988).

[64] ILM 8 (1969) 679.

[65] Id.

end of cruelty universal consensus becomes more difficult to find. Indeed, as soon as conduct is considered which has been recognized by the European Court as being "degrading", but not inhuman or tortuous, considerable disagreement can be expected between states as to whether it is conduct properly falling within the torture and ill-treatment prohibition. In the European Court of Human Rights decision of Tyrer v. U.K[66] it was decided that judicial corporal punishment was degrading and contrary to the European Convention's provision which oulaws torture and ill-treatment. A cursory glance at a number of legal systems indicates that this punishment is not only *not* prohibited, but is actually provided for by domestic law.[67] Similarly, the decision in Soering v. United Kingdom,[68] indicates that there may be disagreement between the U.S. Supreme Court and the European Court of Human Rights as to whether facing the "death row phenomenon" amounts to inhuman and degrading treatment.[69] This is despite the fact, that as noted earlier,[70] the U.S. Constitution contains a clause prohibiting "cruel and unusal" punishment which derives from the English Bill of Rights. It is submitted that there is little evidence to support the view that conduct which may raise implications for that part of the norm which prohibits inhuman and degrading conduct is also prohibited "jus cogens". It follows therefore, that the norm prohibiting torture and ill-treatment in its current form with regard to the concept of "jus cogens", is naturally separated into two sections. The first is the prohibition of torture, which is "jus cogens", and the second is the prohibition of inhuman and degrading treatment or

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66 Series A. 26, (1978).

67 See for example the Malaysian authority of Public Prosecutor v. Tan Hock Hai 1983 1 M.L.J 163 where the defendant was sentenced to imprisonment and 10 strokes, and AMNESTY INTERNATIONAL ANNUAL REPORT 1992, report on Sudan at 241 "a new penal code based on the NSRLC's interpretation of Sharia (Islamic) law introduced in March [1991]...it reintroduces judicial amputations and floggings..."

68 Series A. 161, (1989).

69 Gregg v. Georgia, 428 U.S.153,173 (1976). See generally on the legality of death row conditions as examined by U.S Courts, Quigley and Shank, (1989).

70 Supra Chapt. 1, at p. 28.

punishment, which is not. This would appear to be a compelling argument for acknowledging that the norm contains two quite separate regimes. The first which outlaws torture and is a prohibition "jus cogens" in law. The second, prohibits inhuman and degrading treatment or punishment and is not. It is this point which will be developed in Chapter 6 of this thesis.[71]

2.1.3 Reference to International Human Rights in Constitutional Interpretation.

The importance of achieving a satisfactory understanding of the prohibtion of torture and ill-treatment can only be fully appreciated when a third means by which international human rights norms can influence domestic law is discussed. This is the technique of using international norms to interpret the meaning of constitutional provisions,[72] referred to by Hartman as the "weak" theory of enforcement of international human rights standards.[73]

A number of constitutional courts engage in this practice. For example, the Spanish Constitutional Court, in referring to its own prohibition of torture and ill-treatment, has referred to the jurisprudence of the European Commission and Court of Human Rights.[74] When it is remembered that there are some 24 Commonwealth countries that have transplanted the European Convention into their own constitutions,[75] it is not difficult to understand the importance constitutional courts give to the decisions of international bodies such as the European Court of Human Rights and the U.N.Human Rights

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71 Supra Chapt. 6, at p. 234.

72 There is considerable academic commentary on this subject. See Martineau, (1983); Perry, (1981); Builder, (1981); Henkin, (1984); Lillich & Hannum (1985); Lillich, (1985); Rasche, (1990).

73 This theory maintains that the courts are required to consider the international definition of human rights within the framework of constitutional interpretation. Hartman, at 659, (1983).

74 FREDRERI, (Ed) (1981). See generally Amnesty International, (1985)

75 See here Lester, 56, (1984).

Committee. It is true that reference to international human rights instruments by domestic courts in developing countries is not uncommon when interpreting a constitution or a bill of rights. The Constitutional Court of Nigeria has, for example, referred to the human rights instruments of the United Nations on a number of occasions.[76] The Supreme Court of India has sometimes referred to the Civil and Political Covenant in its decisions.[77] The Judicial Committee of the Privy Council, which is the final court of appeal in some criminal and civil matters for a number of British Commonwealth countries,[78] has referred to international human rights instruments on several occasions. In Pratt and Morgan v.A-G for Jamaica[79] the Privy Council examined, *inter alia*, section 17(1) of the Jamaican Constitution, which prohibits torture and ill-treatment, after considering a decision of the United Nations Human Rights Committee[80] and jurisprudence of the European Court of Human Rights.[81]

In the United States, Perry, in advocating reference to international norms for constitutional interpretation, acknowledges that there is neither textual nor historical justification for interpreting the U.S. Constitution with reference to human rights standards.[82] He offers a functional justification for such a "non-interpretive review", based upon what he refers to as the "American religious self-understanding", an understanding which includes the responsibility to realize, if only

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[76] In Ademole & Others v. Jakande & Others [1981 1 N.C.L.R. 262] the court in examining a number of rights documented in the Nigerian Constitution stated: "having regard to the language used in the provisions of the constitution of fundamental rights...and the fact that the Constitution was influenced by the United Nations Universal Human Rights [sic] the provisions [are] to be generously interpreted to give full effect to the fundamental rights and freedoms referred to...", id, at 272. See generally AJOMO, (1989).

[77] Jolly Georg Verghese v. Bank of Cochin AIR (1980) Supreme Court, p. 470. See generally on the U.N. Covenants in relation to the Constitution of India AGRAWAL (1983).

[78] For the present jurisdiction of the Privy Council see Information sheet of the Privy Council "Judicial Committee of the Privy Council: Jurisdiction as at August 1992", (1992).

[79] [1993] 4 All E.R. 769.

[80] Ibid, at 781.

[81] Ibid, at 785.

[82] Perry, supra note 72, at 281.

"partially and fragmentally...a higher law".[83] The U.S. Supreme Court has occasionally adopted this interpretive technique when interpreting the meaning of the Eighth Amendment to the Constitution prohibiting "cruel and unusual" punishment [84] In Oyama v California,[85] the Court recognized that its decision was consistent with the human rights provisions of the United Nations Charter. In Coker v Georgia,[86] the Justices looked to the practices of other states to determine whether capital punishment for rape amounted to "cruel and unusual" punishment, and conducted a similar exercise in Edmund v Florida,[87] involving an accomplice to felony murder. In Thompson v Oklahoma,[88] information regarding the international position relating to execution of juveniles was relied on by the plurality[89] in finding that the imposition of the death penalty on persons below the age of sixteen at the time they committed the offence violated the Eighth and Fourteenth Amendments.[90] Therefore, although under this heading it can be seen that development of a satisfactory definition of torture would assist courts in formulating national provisions, it is when national constitutional courts are compelled to take cognizance of international norms that such a definition will take on added significance. This, as Justice Scalia indicated in Stanford v Kentucky[91] and Wilkins v Missouri,[92] the U.S. Supreme Court, is not prepared to do. In the Stanford decision the judge stated:

> "We emphasize that it is American conceptions of decency that are dispositive, rejecting the contention of petitioners and their various amici that the sentencing practices of other countries are relevant. While "the practices of

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[83] Id, quoting Bellah (1973). For the interpretivists response to this understanding of the constitution see Bork, (1971); Rehnquist, (1976) BERGER (1977);
[84] Perry, 281, (1981).
[85] 332 U.S.633 (1948).
[86] 433 U.S.584, 592-93 n.4 596 n.10 (1977).
[87] 458 U.S. 782, 796-97 n.22 (1982).
[88] 487 U.S. 815 (1988).
[89] Ibid, at 830-31 (plurality opinion).
[90] Ibid, at 838.
[91] Stanford, 109 S.Ct.2980.

> other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely an historical accident, but rather so "implicit in the concept of ordered liberty" that it "occupies a place not merely in our mores, but, text permitting, in our Constitution as well", they cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people".[93]

To summarise this brief examination of the manner in which fundamental rights expressed at an international level have had an effect in domestic legal systems it may be said that despite the relative infancy of international human rights as a source of binding rights and therefore as "law", their effect has not been insignificant. It is clear from the above study that in some jurisdictions the right documented internationally not to be subjected to torture and ill-treatment will be available to the individual by the direct application of the provision into domestic courts. In other jurisdictions the protection may be provided to the individual by means of interpreting constitutional provisions in accordance with international human rights standards. In other, albeit isolated, cases the individual may claim freedom from torture and ill-treatment in jurisdictions which recognise that the freedom is part of customary international law which is enforcable in domestic courts.

So far this analysis has considered the importance of the prohibition of torture and ill-treatment from the point of view of the individual. However, the significance of defining its scope and content can only be fully appreciated if it is considered in relation to the State's duties in International Law.

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[92] Id.
[93] Ibid, at 2975.

In the Barcelona Traction Case[94] the International Court of Justice stated that "droits fondamentaux de la personne humaine" create obligations *erga omnes*[95]. The Law Commission considered this to mean that there are:

> "a number.....of international obligations which, by reason of the importance of their subject-matter for the international community as a whole, are - unlike the others - obligations in whose fulfilment all States have a legal interest".[96]

In light of the above it is submitted that the right not to be subjected to torture and ill-treatment as the principal component of the "droits fondamentaux de la personne humaine" is properly considered a right which the State has an international duty to provide. Failure to do so represents a breach of its obligations not only to individuals in its jurisdiction, but also to other States and the international community. Persistent acts of torture and ill-treatment will be perceived as a threat to the peace and security upon which the principles of International Law are founded and conduct to which other states have a legitimate interest in seeking to overcome.

Having noted the importance of defining the content and scope of the prohibition of torture and ill-treatment from the point of view of the State, it is necessary to consider finally the manner in which States may be made accountable internationally for human rights violations and the sanctions which may follow a finding that a state has failed to adequately protect individuals in its jurisdiction from torture and ill-treatment.

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94 Barcelona Traction, Light & Power Co.,Ltd. (New Application) (Belg.v.Spain), 1970 ICJ Rep.4 (judgment of Feb. 5).

95 Ibid, 32.

96 [1976] 2 Y.B Int'l L. Commission, pt.2 at 99, U.N. Doc. A/CN.4/1976/Add.1 (pt.2).

2.2 The International Consequences for a State Considered to Have Violated Fundamental Human Rights Standards.

The importance of arriving at a satisfactory understanding of the international norm prohibiting torture and ill-treatment can be seen when the consequences for a State considered to be in violation of it are fully considered. This requires the discussion of two areas. First, the many "monitoring" procedures which have the capacity to expose violations internationally of human rights abuses must be examined. Second, the effect of the standing of a State in the international community must be considered.

2.2.1 State Accountability to International Bodies : Human Rights Monitoring Procedures

2.2.1.1 International (United Nations) Treaties.

At the United Nations, Article 5 of the Universal Declaration of Human Rights 1948[97] has been repeated almost verbatim in Common Article 3 of the four Geneva Conventions (1949),[98] Article 7 of the International Civil and Political Covenant 1966,[99] the U.N Declaration on the Protection of All Persons from Torture and Other Cruel,

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97 Resolution 217 (III) Art. 5 "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment".

98 This prohibits "cruel treatment and torture of persons taking no active part in hostilities". It also proscribes "outrages upon personal dignity, in particular, humiliating and degrading treatment or punishment".

99 Art. 7 "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation".

Inhuman or Degrading treatment or Punishment (1975)[100] and the U.N.Torture Convention 1984.[101]

Although the U.N. Torture Convention contains a procedure requiring States Parties to submit reports on the measures they have taken to give effect to the Convention to the Committee on Torture,[102] it is the monitoring procedures of the International Civil and Political Covenant which have to date proven to be the most effective in highlighting human rights violations.

These are divided into three categories. The first is the inter-state procedure.[103] This allows one State to take another to the Human Rights Committee alleging a violation of a right in the Covenant. [104] The second, is the reporting procedure,[105] which requires the ratifying states to submit periodic reports[106] to the Committee, indicating the measures taken to safeguard the rights documented in the Covenant. The Committee is empowered to make comments on these reports, communicating them to the State Party, and also to the Economic and Social Committee of the United Nations.[107] Although the only sanction available to the Human Rights Committee in this procedure is one of publicity, this can at times prove

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[100] Art. 3 provides: "No State may permit tolerate torture or other cruel, inhuman or degrading treatment or punishment. Exceptional circumstances such as a state of war or a threat of was, internal political instability or any other public emergency may not be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment". The same can also be said of the numerous special rules and codes of conduct such as the U.N Standard Minimum Rules for the Treatment of Prisoners (1957); the U.N. Code of Conduct for Law Enforcement Officials (1979); Art. 5, the U.N Principles of Medical Ethics (1982) Principle 2.

[101] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1985, G.A.Res.A/Res/39/46 (1984). Hereafter U.N. Torture Convention. See generally BURGERS & DANELIUS, (1988).

[102] Art.19. BURGERS, id, at 4.

[103] Art.41 Civil and Political Cov, supra Chapt. 1, note 84.

[104] This to date, has not been used by any State recognizing the competence of the Committee to receive such petitions, McGOLDRICK, 37, (1990).

[105] Art. 40, Civil and Political Covenant, supra note 103 and McGOLDRICK, ibid, pp. 62-119.

[106] At present these reports are submitted every 5 years or whenever the Committee deems it appropriate. Art 40, id.

[107] Ibid, McGOLDRICK, at 96, (1991).

formidable. This weapon of publicity will be discussed below.[108]

Not infrequently, the State will be asked to account for action taken with regard to a certain area of rights within its jurisdiction, and its efforts to implement suggested improvements may be reviewed at a later date.[109] Although the language of the Reports of the Human Rights Committee demonstrates restraint and diplomacy, in an attempt to maintain a constructive dialogue with States, it has, on occasion, been extremely critical of States. For example, Sir Vincent Evans in discussing a Soviet Report commented:

> "Reports had been published of healthy persons being interned in Soviet psychiatric institutions for political or punitive reasons, which would appear to be a clear violation of the terms of [article 7]".[110]

He continued:

> "....some of the sentences meted out in previous years to persons convicted of political offences seemed excessively severe to observers in other countries. It would be appreciated if some comments could be made to assist the Committee in its understanding of this matter".[111]

On occasion, members of the Committee have chosen to go as far as making specific allegations against a number of States of practicing torture. Examples can be found in the Reports concerning Iran,[112] Afghanistan,[113] El Salvador,[114] Uruguay,[115] and Chile.[116]

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108 Infra, at pp. 83-84.
109 McGOLDRICK, at 81, (1991).
110 Ibid, at 363, quoting Sir Vincent Evans from SR 108 pr.50.
111 Id.
112 Doc.A/37/40, pr. 309.
113 Doc.A/40/40, pr. 598.
114 Doc.A/42/40, pr. 160.
115 Doc.A/37/40, prs. 272, 278.
116 Docs.A/34/40, pr. 80; A/39/40, prs. 463-64.

Finally the Optional Protocol to the Civil and Political Covenant[117] provides for the individual applications procedure allowing an individual the right to petition the Human rights Committee alleging a violation of the Covenant. The Committee is empowered to "forward its views to the individual and the state concerned".[118] It is through this mechanism that the Committee has brought to the attention of the international community violations of "torture, inhuman and degrading treatment or punishment on a number of occasions.[119]

2.2.1.2 Regional Human Rights Treaties.

There are two regional treaties dealing specifically with torture. They are the Inter-American Convention to Prevent and Punish Torture 1985,[120] and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 1987.[121]

The latter treaty, recalling the definition of torture in Article 3 of the European Convention,[122] is innovative in providing for on-site inspection by an international body of the Council of Europe to visit any place it so requests.[123] To date this has led to a number of reports that have, on occasion, been extremely critical of member States. For example, a report of the Torture Committee

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117 Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res 2200 (XXI), U.N.Doc. A/6316 (1966).

118 Art 5, id.

119 See for example the many cases against Uruguay including Ambrosini v. Uruguay (Doc.A/34/40, p.124); Antonaccio v. Uruguay (Doc.A/37/40, p.114); Lanza and Perdoma v. Uruguay (Doc.A/35/40, p.111); Massera v. Uruguay (Doc.A/34/40, p.124).

120 25 ILM 519. It is interesting to note that this treaty is the first to abandon the standard definition first utilized in the Universal Declaration. Art. 2 to the Convention provides: "For the purposes of this Convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for the purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish".

121 UKTS 5 (1991). See generally Cassese, (1989).

122 Council of Europe, Doc H (87). Reprinted in 27 ILM (1988) 1152.

123 Art 2, ibid.

with regard to the United Kingdom chose to describe a number of its prisons as having conditions leading to "inhuman and degrading" treatment for its prisoners.[124]

The three regional treaties dealing with civil and political rights: the African Charter 1981,[125] the American Convention on Human Rights 1969[126] and the European Convention on Human Rights and Fundamental Freedoms[127] all provide legal obligations on States parties to comply with the standards documented in each.[128] Each of these treaties has at least one tribunal charged with the task of ensuring that ratifying States comply with its terms.

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[124] REPORT TO THE UNITED KINGDOM GOVERNMENT ON THE VISIT TO THE UNITED KINGDOM CARRIED OUT BY THE EUROPEAN COMMITTEE FOR THE PREVENTION OF TORTURE AND INHUMAN AND DEGRADING TREATMENT OR PUNISHMENT (CPT) CPT/Inf (91) 15. The Report noted "that the CPT's delegation found that the conditions in the three male local prisons visited were very poor. In each of the three prisons there was a pernicious combination of overcrowding, inadequate regime activities, lack of integral sanitation and poor hygiene. In short, the overall environment in which the prisoners had to lead their lives amounted, in the CPT's opinion, to inhuman and degrading treatment", para. 229.

[125] ILM 21 (1982) 58. The African Charter on Human and People's Rights was adopted in 1981 and came into force in Oct 1986. It is administered under the auspices of the Organisation of African Unity (O.A.U). Art. II of the Charter of the O.A.U states that its aims are to "promote the unity and solidarity of the African States"...."to eradicate all forms of colonialism from Africa" and "to promote international co-operation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Right". Robertson, , at 200, (1989). As of 1988 the Charter had been ratified by 35 States. (J.Marie, IX International instruments relating to human rights, Human Rights Law Journal, IX, 113 (1988). See generally on the African Charter Umozurike, (1983); Ojo & Sesay, (1986).

[126] ILM, 9(1970) 673. The American Convention was adopted in 1969 and came into force in 1978. It is administered under the auspices of the Organisation of American States, (O.A.S) which was established in 1948 in Bogota. Its governing instrument the Charter of Bogata states the purposes of the O.A.S as including the strengthening of peace and security, the peaceful settlement of disputes, and the promotion of economic, social and cultural development. ROBERTSON, at 162, (1989).

[127] For a comparison of these three human rights treaties see Weston, Lukes, and Hnatt, (1987).

[128] The American Convention Art 1 provides: "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights...." Art. 2 states: "Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt,...such legislative or other measures as may be necessary to give effect to those rights or freedoms." Art. 1 of the African Charter states: "The Member States of the Organisation of African Unity....shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them. Under Art. 1 of the European Convention states parties are required to "secure to everyone within their jurisdiction the rights and freedoms defined in set forth in" the Convention. Under Art. 53 states parties are obliged to abide by the decision of the European Court of Human Rights.

In the Council of Europe, it is not uncommon for an adverse decision emanating from either the European Commission of Human Rights[129] or the European Court of Human Rights[130] to expose deficiencies in domestic laws which require amendment. Following the decision in Tyrer v United Kingdom,[131] the United Kingdom discontinued the use of corporal punishment for a criminal offence. Following Campbell v. United Kingdom,[132] the U.K. was required to examine carefully its policy relating to corporal punishment in schools to ensure that it was compatible with Protocol 1 Article 2 of the Convention.[133] In Marcx v.Belgium,[134] the Court considered that changes were necessary in Belgian Law which discriminated against certain children born out of wedlock. Perhaps the most significant case reflecting the development of the international law of human rights is the decision of the Court in Soering v.United Kingdom.[135] The case concerned the request of the United States of America for the return of Soering from the United Kingdom to face two charges of capital murder. If returned, he would have had to face the "death row phenomenon" and possible execution. He contended that if the U.K. chose to extradite him it would be responsible, for subjecting him to "inhuman and degrading treatment contrary to Article 3. The European Court of Human Rights unanimously agreed. As a general rule, the international mechanisms designed to protect human rights become operative only *after* the violation has occurred. The Soering decision is important as an example of the capacity of human rights systems to *prevent* violations.

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[129] The Commission consists of experts acting in their individual capacity in numbers equal to that of the High Contracting Parties to the Convention, Arts 19-23. See ROBERTSON, at 109-112, (1989).

[130] The European Court consists of a number of judges equal to that of the Members of the the Council of Europe. Art 38. They are elected for a period of nine years. See ROBERTSON, at 113-115, (1989).

[131] Series A. 26, (1978).

[132] Series A. 48, (1982).

[133] 4 E.H.R.R. 293 (1982).

[134] Series B. 29, (1982)

[135] Series A. 161, (1989).

Although the European Convention enforcement machinery is dependent to a large extent on the goodwill of States in taking remedial action following case decisions, in the final resort there is also the possibility that a State considered to have committed serious human rights violations can be expelled from the Council of Europe.[136]

2.2.2 Declarations of Human Rights Violations and the Standing of a State in the International Community.

A study of the promulgation of international human rights standards suggests that international agreement, particularly across the universal spectrum, is often only possible by searching for a basic common consensus. Once this has been achieved, it is then possible to develop standards that are more exacting. A study of the drafting of the International Bill of Rights supports this point.[137] It began with the Universal Declaration consisting of "common standards" and was followed by the two international covenants, both of which provide detailed and legally binding duties on States.

It is because the international standards at the United Nations are often considered to represent no more than this basic standard that considerable significance is attached to compliance with them. Moreover, despite being basic standards, they have achieved significant international status, because they have been assented to by a majority of the members of the United Nations, and vicariously, a majority of the world's population.[138]

States are often able to deflect criticism of their human rights record by responding that the allegations made relating to the same were politically motivated. This reaction is difficult to justify as against international tribunals, which consists, of experts sitting in an

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136 Arts 3 and 8 of the Statute of the Council of Europe.
137 See generally HUMPHREY, (1984).
138 For ratifications see supra Chapt 1. note 84.

independent capacity and not as representatives of their governments.[139]

The sanction of publicity available to international human rights tribunals, which in many cases remains their most potent means of persuading states to comply with international standards, can prove formidable. Analysis of the European Convention mechanism suggest that states go to considerable lengths through the Convention's conciliation procedure to avoid having to have "their dirty linen washed in public". As a result of the inter-state case against Greece[140] in 1967 which alleged violations of a number of rights under the European Convention, the activities of the Greek government came under close scrutiny by the international community. Greece, anticipating expulsion, withdrew from the Council of Europe in 1969.[141]

The power of this weapon of international exposure varies in accordance with a number of factors. These include the existing standing of the State in the international community and its sensitivity to allegations of human rights transgressions.[142] This itself may be dependent on a number of factors. The recent trend towards linking international trade with respect for human rights is a case in point. In 1990 a E.C. trade agreement with Argentina, at the latter's insistence, links trading status with a continuing respect for human rights in that

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139 Art. 28(3) Civil and Political Covenant, states that the members of the U.N. Human Rights Committee "shall be elected and shall serve in their personal capacity".
Members of the European Court are elected by the Consultative Assembly to the Council of Europe, Art. 39.(1). Art. 39 (3), provides "The candidates shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognized competence".

140 Yearbook H.R. XII 186 (1969). For an excellent account of the efforts to bring to the attention of the world community through the use of human rights procedures the human rights abuses in Greece during the time of the Greek dictatorship of the 1960's see AMNESTY INTERNATIONAL REPORT ON TORTURE, 79-105, (1975). See generally BECKETT, (1970).

141 The State withdrew its membership in Dec 1969 but renewed it in 1974 following the downfall of the Colonel regime.

142 JOYCE, (1978), Chapt. 3 "The Mobilisation of Shame".

country.[143] Lome IV, an international trade agreement with African, Pacific and Caribbean countries also makes reference to the importance of human rights standards.[144] Political aspirations of States seeking to align themselves with other international actors or to join international institutions may also be a relevant consideration. Turkey, for example, has in recent years made considerable efforts to improve its standing in the international community with regard to human rights, as it seeks to be considered for membership of the European Community.[145]

Conclusion

Although the individual is a relatively new subject of International Law, it is clear that he or she may expect considerable assistance in claiming a number of fundamental rights from this source of law. The tentacles of international human rights law have in less than half a century penetrated national legal systems in a variety of ways thereby assisting in the enforcement of human rights. However, from the examination of the techniques through which this has happened, by direct application of international provisions, through customary international law, or constitutional interpretation, one factor is clear: for these mechanisms to work it is essential that it is possible to obtain a reasonable indication of the content and scope of rights documented internationally. If this requirement is not satisfied domestic courts will be unwilling to refer to international human rights norms as a satisfactory indication of acceptable State conduct with regard to individuals.

International exposure and declarations to the effect that a State has violated a basic human right can prove to be a formidable disincentive to States that promote or

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143 Trade Agreement between the E.C. and Argentina signed April 12, 1990.
144 Article 5(2) and Annexes IV, V and VI of the Fourth Lome Convention. T.S No. 47 (1992).
145 See The Guardian, 14 April, 1987.

permit violations of human rights. However, it is because this sanction can be so effective and has important repercussions for States that it is necessary to provide adequate indications as to the nature and content of the rights which States are under a duty internationally to protect. Just as the individual has a right under the International Civil and Political Covenant for state actions to be carried out "according to law"[146] and under the European Convention for measures to be "prescribed by law",[147] then so must states, in themselves being subjected to a system of "higher law", be allowed to expect the same. The force of the above conclusion, when considered in relation to the right not to be subjected to torture and ill-treatment, is reinforced when it is recalled that this right, "jus cogens" in nature, is to be regarded as one of the most important of all fundamental human rights.

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[146] This phrase or others similar appear frequently in the substantive provisions of the treaty in addition to the duty placed on each State Party by Art. 2 (2) to "...take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the the rights recognized in the present Covenant."

[147] This is essentially the requirement that the law is "forseeable" and "accessible." See VAN DIJK & VAN HOOF, at 578-583, (1990). The European Court of Human Rights has stated in respect of the requirement of foreseeability "the law must be adequately accessible; the citizen must be able to have an indication that is adequate, in the circumstances, of the legal rules applicable to a given case", Sunday Times v. United Kingdom Series A. 30, 31, (1979).

3. THE EUROPEAN CONVENTION AND THE DEVELOPMENT OF THE INTERNATIONAL LAW OF HUMAN RIGHTS.

Introduction to Chapter

The purpose of this Chapter is to assess the contribution the European Commission of Human Rights and the European Court of Human Rights have made to the development of the international law of human rights. This is necessary as it provides three observations important to this thesis.

The first, is that although it remains correct to describe the European Convention as subsidiary to national legal systems for the protection of human rights, it is clear from the volume and complexity of applications taken to the European Commission to date that an elaborate and well-defined system of law is required to resolve the many disputes between the State and individuals which are not satisfactorily settled at a domestic level. A thorough understanding of each substantive right of the Convention, including Article 3, is therefore a pre-requisite for an acceptable operation of the European Convention enforcement machinery.

The second observation relates to the effect the European Court's dynamic interpretation of the European Convention has had on the prohibition of torture and ill-treatment. It is argued that the nature of the prohibition, the wording of which is virtually identical in every human rights treaty, has been completely transformed. Intended initially to prohibit the most serious forms of torture and ill-treatment, it has now become a standard against which all forms of conduct leading to suffering of a minimum severity may be examined.

The final observation made in this Chapter concerns the contribution the jurisprudence of the European Commission of Human Rights and the European Court has made in developing and advancing the status of the individual as a subject of International Law. It is concluded that this development requires, and to a point compels, a reappraisal of the relationship between State and individual in International Law. Initially, this relationship was characterized by consideration of what amounted to a reasonable concession on the part of the State regarding its sovereignty. Decisions of the European Court now suggest that this approach is better substituted for one based upon the effective application of human rights to the individual. It is this emphasis on the "sovereignty of the individual" which will be important later in this thesis, when a satisfactory definition of torture and ill-treatment is proposed.[1] The material to substantiate these claims is discussed later in this Chapter.[2]

3.1 The Development of an International Human Rights System for Europe.

Laski observed in 1948 that the Second World War had shown that: "the principle of national sovereignty ha[s] exhausted its usefulness".[3] Immediate postwar international relations were characterised, not by efforts to preserve independence, but to promote inter-dependence which would strength a region that had been torn apart by the effects of two world wars in less than half a century.

It was amid the "rarefied mood of European entente"[4] that, in parellel with economic developments, efforts at a

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1 Infra Chapt. 5, pp. 194-202.
2 Infra, pp. 110-113.
3 LASKI, at 3, (1948).
4 BEDDARD, at 19, (1980). Beddard comments of the birth of the Convention.."It is interesting to speculate whether at any time in the history of this Continent, either before or since, such a step could have been taken", id.

European level were made to reaffirm in international instruments the political ideals documented in the Charter of the United Nations. On 17 March 1948 the Brussels Treaty was signed by Belgium, France, Luxembourg, the Netherlands and the United Kingdom. They confirmed their resolve:

> "To fortify and preserve the principles of democracy, personal freedom and political liberty, the constitutional traditions and the rule of law, which are their common heritage".[5]

In the same year various European interest groups joined together in a Congress of Europe in The Hague under the Chairmanship of Winston Churchill. This meeting resulted the following year in the Statute of the Council of Europe, which was signed by the five states of the Brussels Military Alliance.[6] Article 1 of the Statute provides that the aim of the Council of Europe is:

> "to achieve a greater unity between its Members for the purpose of safeguarding and realizing the ideals and principles which are their common heritage and facilitating their economic and social progress".[7]

Article 1(b) states that this:

> "shall be pursued through the organs of the Council by discussion of questions of common concern and by agreements and common action in economic, social, cultural, scientific, legal and administrative matters and in the maintenance and further realisation of human rights and fundamental freedoms".[8]

It is Article 3 however, that is important from the point of view of the development of human rights standards. It

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[5] ROBERTSON, at 2, (1972). State Papers vol 150, 672.
[6] State Papers vol 154, 509.
[7] Statute of the Council of Europe (May 5, 1949), Eur. T.S. No.8.
[8] Id.

states:

> "Every Member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council ...."[9]

As Robertson concludes:

> "the maintenance of human rights and respect for the rule of law are not only included among the objectives of the Council of Europe, they are actually made a condition of Membership".[10]

It was these constitutional provisions which provided the basis for the development of a human rights instrument similar to that planned at the United Nations:[11] the European Convention on Human Rights and Fundamental Freedoms signed on 4 November 1950[12] Although criticised for failing to adopt a number of rights originally proposed by the Assembly of the Counil of Europe, the Convention was, in the words of Lord Layton, "a most important landmark in European history".[13]

The Convention entered into force on 3 September 1953, when the required minimum of ten States had ratified the treaty.[14]

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[9] Id.
[10] ROBERTSON, at 3, (1972).
[11] Infra, Chapt.1, pp. 33-35.
[12] Robertson concludes with regard to the drafting of the Convention:
"If the negotiations seemed slow and protracted at the time, continuing as they did from August 1949 to November 1950, that period of fifteen months seems in retrospect astonishingly short when it is compared with the period of eighteen years (from 1948 to 1966) that was required to give birth to the United Nations Covenants." Supra note 10, at 14.
[13] Ibid, at 13.
[14] ROBERTSON, at 16, (1977); UKTS 71 (1953). By the end of 1974 it had been ratified by eighteen states. By June 1993 there were 28 contracting states to the Convention. Info. Sheet No.32 at 1, Strasbourg, (1994).

3.3 Initial Acceptance of the Competence of the Commission and Court to Receive Individual Petitions.

The acceptance of the individual petitions procedure and the jurisdiction of the Court was a gradual process. Sweden was the first to accept the right of individual petition on 4 February 1952,[15] with Ireland and Denmark ratifying in 1953.[16] Following an Assembly Recommendation[17] in that same year urging all States to ratify the Convention and the First Protocol, Iceland, the Federal Republic of Germany, and Belgium accepted the right of individual petition in 1955, bringing the total to six, the minimum needed for the procedure to become operational.[18] By 1974, 13 of the 18 Contracting States had accepted the petition procedure under Article 25.[19] As of March 1994 all those States which had ratified the Convention had recognized the right of the individual to petition the Commission.[20]

It was not until September 1958 that the Court came into operation, following the recognition of its jurisdiction by eight members of the Council of Europe being the minimum number required before the Court could become operative.[21] By 1974 its jurisdiction had been accepted as compulsory by fourteen of the eighteen Contracting Parties. By March 1994 all Contracting States of the Council of Europe had recognized its competence.[22]

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15 ROBERTSON, id.
16 Id.
17 Recommendation 52 September 1953, id.
18 ROBERTSON, supra note 36, at 16.
19 The remaining countries accepted the petitions procedure on the following dates: Iceland 1955; Belgium 1955; Federal Republic of Germany 1955; Norway 1957; Luxembourg 1958; Austria 1958; the Netherlands 1960; the United Kingdom 1966; Italy 1973; Switzerland 1974; France 1982; Liechenstein, Greece 1985; Malta 1987; Turkey 1987; Cyprus 1989; San Marino; Finland 1990; Hungary 1992; Czech Rep. 1992; Poland 1993. See Chart of Signatures and Ratifications 01/03/94, Council of Europe.
20 Id.
21 See ROBERTSON, at 195 (1977). The eight were: Ireland 1953; Denmark 1953; the Netherlands 1954; Belgium 1955; Federal Republic of Germany 1955; Luxembourg 1958; Austria 1958; Iceland 1958.
22 Supra note 14.

3.4 The Petitions Procedure before the European Commission of Human Rights.

The Commission may be required to consider two types of petitions. Under Article 24 it may receive what are commonly referred to as inter-state complaints where one State alleges that another Contracting State has failed to respect the terms of the Convention. To date, the Commission has been required to consider 12 such cases.[23] Article 25 permits an individual, non-governmental organisation, or groups of individuals to petition the Commission, once a number of conditions regarding admissibility have been satisfied.[24] The Commission, upon finding that the petition is admissible, will draw up a report and attempt to reach a friendly settlement between the parties in dispute. If this is not possible, the case will be referred to the Committee of Ministers, which, if the complaint has not been forwarded to the Court after three months have elapsed, will determine whether there has been a violation. At present, it is only the Commission or an interested State which has the competence to refer cases to the Court. This does not mean however, that the individual is not represented before the Court. This is because the Court has, over a period of time, given a very wide interpretation to its rules of procedure, which now effectively allow the individual the possibility of presenting her/his case before them.[25] In the case of De Wilde, Ooms and Versijp v Belgium,[26] the Court considered that, by virtue of Rule 29(1) of the Rules of Court, the delegates of the Commission "may have the assistance of any person of their choice"[27] who may be called upon to make oral presentations before the Court. This granting of *locus standi* indirectly before the Court has now been provided

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[23] Survey of Activities and Statistics, at 22, Council of Europe, (1992).
[24] Articles 26 and 27 of the Convention.
[25] Rule 29(1) of the Rules of Court allows the delegates of the Commission to "have the assistance of any person of their choice" who may be called upon to appear and make oral representations before the Court.
[26] Series A. 12, (1971), at 6-8.
[27] Id, at 7.

directly to the individual by the revised Rules of Procedure of the Court.[28] Rule 30(1) states:

> "The applicant shall be represented by an advocate authorised to practice in any of the Contracting States and resident in the territory of one of them or by any other person approved by the President. The President may, however, give leave to the applicant to present his own case subject, if need be, to his being assisted by an advocate or other person as aforesaid".[29]

Further, it seems that the *locus standi* of the individual will be fully confirmed with the coming into force of Protocol Nine to the Convention.[30] This allows the individual to request that her/his case be considered before the Court independently of the Commission or an interested State.

3.5 The Enforcement and Nature of the Judgments of the European Court of Human Rights

Under Article 50, the Court is empowered to award "just satisfaction".[31] This often amounts to little more than a finding by the Court of a violation of the Convention by the State concerned.[32] The Court has, however, interpreted the Article to empower it to award compensation to the victim. In Neumeister v. Austria,[33] the Court decided that Article 5(3) had been violated and awarded compensation amounting to 30,000 Austrian schillings. The Court may also award small sums of compensation in cases where it considers that, although a violation of the Convention

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28 See generally Whitfield, (1988).
29 Rules of Court (as in force 20 April 1992).
30 Eur. T.S. 140. Protocol No.9 will enter into force after 10 ratifications. As of May 1992 it had been ratified by Austria, Czechoslovakia, and Norway. Info. Sheet No.30. Strasbourg, 2, (1993).
31 The full text of Article 50 is:
"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the present Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party", supra, note 14.
32 For example Golder v. United Kingdom Series A. 18, (1975) at 23.
33 Series A. 8, (1974) at 16-21.

has been established, the loss to the applicant was slight. For example, in Engel v. Netherlands,[34] the Court awarded a symbolic D.fl 100, after deciding that the loss to the application as a result of the State's violation of Article 5(1) was not significant.

Under Article 53, States are required "to abide by the decision of the Court in any case to which they are parties". Supervision of decisions is carried out by the Committee of Ministers.[35] Although the Convention system depends largely on the goodwill of States in putting into effect the findings of the Commission and Court, in the event of political pressure being unable to persuade States to comply with a Court's decision, Article 8 of the Statute of the Council of Europe allows the Committee of Ministers to suspend and ultimately expel a State which has seriously violated its obligations as a member of the Council of Europe.[36]

3.6 Early Decisions of the Commission and Court - a Tale of Judicial Conservatism and Teleological Self-Restraint.

The early decisions of the Commission illustrate clearly that its members were aware that they were operating within a legal system still in its infancy, and as such, fragile and yet to gain the full confidence of member States. Decisions of the Commission proceeded unadventurously and with caution, reflecting the concern to demonstrate to States that decisions would at all times be taken with full cognizance of their consequences for member States.

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[34] Series A. 22, (1976) at 3.

[35] Article 54, supra note 14.

[36] Article 8 of the Statute of the Council of Europe, provides: "Any Member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such Member does not comply with this request the Committee may decide that it has ceased to be a Member of the Council as from such date as the Committee may determine", Eur. T.S No. 8.

No decision of the Commission in its early years, with the exception of the inter-state Greek case,[37] could be said to have presented difficulties for domestic legal systems or have had serious political repercussions. An example of the Commission's caution can be found in the 1963 decision of Iversen v Norway.[38] In this case Norwegian legislation was examined for compatibility with Article 4 of the Convention, which prohibits, *inter alia*, forced labour.[39] By Norwegian law, junior dentists could be compelled to work for a period of time in particular areas of northern Norway in which there was a shortage of dentists. The majority of the Commission, six in total, decided that Article 4 of the Convention had not been violated. Four of the six considered that there was no question of forced or compulsory labour, because the employment was only for a short period of time, was adequately remunerated and was in keeping with the practice of the dentistry profession in Norway, which was freely chosen by the applicant. Two of the majority disagreed however with this reasoning, considering that it did amount to forced labour, but that it did not violate Article 4 because it satisfied part (c) of paragraph 3, which states that "forced or compulsory labour" does not include "any service exacted in case of an emergency or calamity threatening the life or well-being of the community". Four of the Commission considered however, that the facts of the case indicated

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[37] This case involved an inter-state action against Greece taken collectively by the Governments of Norway, Sweden, Denmark, and the Netherlands. Yearbook XII (1969).

[38] Yearbook VI, 278, (1963).

[39] The full text of Article 4 reads as follows:

"1.No one shall be held in slavery or servitude.

2.No one shall be required to perform forced or compulsory labour.

3.For the purpose of this Article the term "forced or compulsory labour" shall not include:

(a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention during conditional release from such detention;

(b) any service of a military character or, in case of conscientious objectors in countries where they are recognized, service exacted instead of compulsory military service;

(c) any service exacted in case of an emergency or calamity threatening the life or well being of the community;

(d) any work or service which forms part of normal civic obligations", supra note 14.

forced or compulsory labour and that the application should be admitted for review on the merits. In the light of this divergence of opinion within the Commission as to the decision and its reasoning, it is difficult to consider it satisfactory that the case was declared manifestly ill-founded.[40] Professor Jacobs summarises the events surrounding the decision as follows:

> "It is hard to escape the conclusion that the Commission's decision to reject the application was influenced by political considerations. The case had caused considerable controversy in Norway and the decision coincided with a decision of the Norwegian Government to renew its declaration accepting the Commission's competence under Article 25 for a period of only one year".[41]

It was because during the Commission's early years only a few States had accepted the Article 25 procedure,[42] and only 3 of these had accepted the right of individual petition indefinitely, that the Commission was not well placed to be particularly activist in interpreting the Convention. For a considerable period of time the Commission was required to nurture a system of law which was directed along a completely unchartered path and one which member States would be happy to see the Commission to go no further, if its decisions were considered to produce unnecessary difficulties.

Similar considerations applied to the European Court. States, in the early days of the European Convention, were slow to accept its optional jurisdiction. Therefore, the Court was compelled to approach cases with restraint and little adventurism, allowing States few opportunities to question its decisions as being unnecessarily interventionalist.

As late as 1976, in the case of Handyside v United Kingdom,[43] the Court demonstrated its willingness to defer

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40 VAN DIJK & VAN HOOF, at 245, (1990).
41 JACOBS, at 40, (1975).
42 Supra p. 90.
43 Series A. 24, 1-37, (1976).

to State discretion and invoke a wide margin of appreciation in favour of the Respondent Government.[44] In this case, the Court was required to consider whether the United Kingdom had, in seizing a publication it considered to be obscene, entitled the "Little Red School Book", violated Article 10 of the Convention which protects free expression. Despite the fact that the book was already in circulation in some parts of the United Kingdom, where no measures had been taken against publication and that the original Danish translation was freely available in most member States of the Council of Europe, the Court considered that the action of the U.K. government was "necessary" in a democratic society. The Court stated:

> "By reason of their direct and continuous contact with the vital forces of their countries, States' authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements [of the protection of morals] as well as on the "necessity" of a "restriction" or "penalty" intended to meet them".[45]

It was shortly after this decision that a change in the nature of the Court's jurisprudence may be detected. This coincides with the date by which, as noted above,[46] a large majority of member States of the Council of Europe recognized the competence of the Court. It is in assessing this change in the Court's approach to the interpretation of the Convention that it is possible to assess properly the modern-day importance of the jurisprudence of the European Commission and Court.

This requires an examination of a number of its most important decisions since the Handyside case. Those selected for the purposes of this exercise are: Tyrer v

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[44] The "margin of appreciation" may be said to be the discretion allowed the State in determining the extent to which a right or freedom may be restricted. See VAN DIJK & VAN HOOF, 585-606, (1990).

[45] Handyside, supra note 43, at 22.

[46] Supra p. 90.

United Kingdom;[47] Campbell and Cosans v United Kingdom;[48] The Sunday Times v.United Kingdom;[49] Soering v. United Kingdom.[50]

Tyrer v United Kingdom The facts of the Tyrer case may be briefly described as follows. Anthony Tyrer, a 15-year-old school boy living on the Isle of Man, was convicted of assault and was sentenced to be birched. This consisted of three strokes across his bare posterior. The birching "raised, but did not cut, the applicant's skin and he was sore for about a week and a half afterwards".[51] He petitioned the Commission alleging that he had been subjected to degrading treatment contrary to Article 3. In seeking to defend the practice, the Attorney General of the Isle of Man referred to a number of factors. He submitted before the Court that there was considerable support for this type of punishment in the Isle of Man. He mentioned that there were a number of safeguards in place to ensure that the punishment[52] was effected according to specific procedures. He mentioned that the punishment had been practiced on the Island for many years, and that it was necessary as a deterrent, not only for the local population, but particularly for the many young visitors to the Isle of Man.[53] The Court, despite the force of some of these arguments, decided that the punishment was degrading and in violation of Article 3. Although the Court claimed that the decision was special on the facts of the case, Judge Sir Gerald Fitzmaurice, it is contended, was right to point out in his dissenting judgment that it clearly amounted to a decision outlawing judicial corporal punishment in every case.[54]

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47 Series A. 26, (1978), and Series B. 24, (1977-78). See Chapt. 6, pp. 210-217.
48 Series A. 48, (1982).
49 Series A. 30, (1979).
50 Series A. 161, (1989).
51 Tyrer, supra note 47.
52 This included a medical examination prior to the birching which was carried out in the presence of a doctor a parent, ibid.
53 Tyrer, ibid, at 76.
54 Tyrer, ibid, at 24. See also Mylniec, (1985).

There was considerable reaction to the decision in both mainland Britain and the Isle of Man, with a number of commentators calling for a review of the United Kingdom's position in respect of the European Convention. With regard to the position of the Court, the case prompted Professor Zellick to comment:

> "The period when the judges of the Court moved with great caution, lest they forfeited the confidence of member States and thus jeopardised the future of the Convention, appears to be at an end...."[55]

The Tyrer case was the first of a series of cases involving the practice of corporal punishment in the United Kingdom. In Campbell and Cosans v United Kingdom,[56] it fell to be determined whether corporal punishment in schools was compatible with the Convention. It is commonly forgotten that the schoolboys had not actually been subjected to corporal punishment. What was in dispute was whether the threat of the punishment was sufficient to raise an issue with Article 3. The Court did not consider that this was the case although it did find that the United Kingdom, in refusing to allow parents to decide whether their child could be caned at school or not, had failed to respect the wishes of parents to education of their children in accordance with their philosophical convictions, in violation of Protocol 1 Article 2 of the Convention. The consequences of this decision were not insignificant. As Sir Vincent Evans was to note in the case, it left the United Kingdom with a number of possibilities. The first was separate schools for those parents wishing their children to be caned and those who did not. The second possibility was separate classes for the two groups, which he considered was not practicable. A third was a system allowing parents the right to exempt their children from corporal punishment in the school. A fourth which he did not mention, was of course complete abolition. This was the eventual outcome

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[55] Zellick, (1978).
[56] Campbell and Cosans v. United Kingdom, supra note 48.

in state schools. The effect of the Education Act 1986[57] was to outlaw corporal punishment in British state schools.

The case caused considerable controversy not only in Scotland, but also the remainder of the United Kingdom, and was heavily criticised by the many groups which still favoured corporal punishment.[58] Although the question of the compatibility of corporal punishment with the Convention has yet to be fully resolved,[59] the decision remains an important example of the Court's work which prompted a member State to review and amend its legislation to conform with the Convention.

In The Sunday Times v. United Kingdom,[60] just two years before the decision in the Campbell case, the Court demonstrated that it was prepared to take decisions in relation to rights other than Article 3 which would have been unlikely in its early days. This case concerned an application challenging an injunction obtained in a English court prohibiting the publication of an article in the Sunday Times discussing the so called thalidomide tragedy before an action relating to the matter was due to be heard in court. The European Court considered that the action was not necessary in a democratic society for maintaining the authority of the judiciary and the need to secure a fair trial and declared that the United Kingdom had violated Article 10.

The decision was considered to have amounted to a very narrow interpretation of the State's margin of

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[57] Halsbury's Laws of England, vol 15, para.125.

[58] In 1974 Terry Casey, the then General Secretary of the National Association of Schoolmasters/Union of Women Teachers was quoted as saying that "the swish of the cane" was "one of the essential sounds" of education." Quoted from "Corporal Punishment in Schools-the law" Information Sheet of the Children's Legal Centre, London. In 1978 the National Association of Heads and Matrons of Assessment confirmed its belief in the use of corporal punishment as a deterrent for hard core offenders under 14 years of age. (TES) Feb, 10, at 99, (1978).

[59] See here the recent corporal punishment cases of Costello-Roberts v. United Kingdom, Series A. 247-A (1992), and Y v. United Kingdom, Series A. 247-C (1992).

[60] Series A. 30, (1982).

appreciation, and as such, a departure from the earlier case of Handyside, where it was considerably wider. In that case, it will be recalled that the Court stated that the national courts were in a better position than international judges to assess what action might be considered "necessary" in respect of Article 10(2).[61] In the Sunday Times case the Court was clearly prepared to be more interventionist, stating that the margin of appreciation does not mean:

> "that the Court's supervision is limited to ascertaining whether a respondent State exercised its discretion reasonably, carefully, and in good faith. Even a Contracting State so acting remains subject to the Court's control as regards the compatibility of its conduct with the engagements it has under the Convention".[62]

Although this change in approach to the doctrine of the margin of appreciation may be attributed, not to a developing sense of judicial adventurism, but to the rights involved, it remains a good example of a decision which had a demonstrable impact on a domestic legal system. In 1981 the Contempt of Court Act[63] was passed incorporating the findings of the European Court of Human Rights.[64]

It is, however, the case of Soering v United Kingdom[65] which better than any other authority illustrates that the Court must be considered to have entered a new period of decision making when compared with its early judgments. It was in this case that the Court demonstrated that, not only were the European Court judges prepared to reach a decision that would create considerable difficulties for a member State, but also that their reasoning was not going to be adversely

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61 Seris A. 24, (1976) 26-27.
62 Supra note 49, at 35-37.
63 Halsbury's Statutes vol 11 177.
64 During the passage of the Contempt of Court Bill the Government spokesman conceded that legal advice had been taken to ensure that the Bill did comply with both the European Convention and the Sunday Times case. Hansard (HL) vol 415, col 655.
65 Supra note 50.

influenced by a world superpower, the United States of America, which also had a strong interest in the outcome of the case.

The facts of the case may briefly be described as follows. Jens Soering, a German national, living in the United States of America, murdered the parents of his girlfriend on the latter's prompting. They were later arrested in the United Kingdom and extradition proceedings were commenced at the request of the State of Virginia. Soering, in an attempt to resist return to the United States and, with it, the "death row phenomenon" and possible execution, claimed that the United Kingdom would be responsible for subjecting him to "inhuman and degrading treatment" if it permitted extradition in such circumstances. The Commission considered, albeit on a slim 6-5 majority vote, that the United Kingdom would not violate Article 3 if it chose to honour its extradition treaty with the United States and return Soering. The Court, however, unanimously decided, that the United Kingdom would violate Article 3 if it permitted extradition to go ahead.[66]

The Court's decision was significant for a number of reasons. First, it demonstrated that the European human rights system has developed to the extent that it is now able, albeit in exceptional circumstances,[67] to take preventive measures to ensure that a violation of a human right does not occur, in distinction from its more usual procedure, which is *post facta*, i.e operative only after the violation has taken place. Secondly, it represented a departure from an earlier case involving very similar facts, that of Kirkwood v United Kingdom.[68] In this case

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[66] The outcome of the affair was that the British Government agreed to return Soering after assurances that from the U.S. that he would not be charged with capital murder.

[67] These are dealt with under the Rule 36 procedure, which allows the Commission to request the government concerned not to take any further action until the Commission has had time to consider the application. It is normally invoked in cases of extradition or expulsion.

[68] 37 D & R 158, (1984).

the applicant claimed that his return from the United Kingdom to the State of California to face trial for capital murder and possible sentence of death (including exposure to the death row phenomenon) would result in him being subjected to inhuman treatment. The Commission declared the case inadmissible on the grounds that it was manifestly ill-founded and stated:

> "....the Commission recalls its finding in the Kirkwood case that the treatment the applicant was likely to endure in the circumstances of the case did not attain the degree of seriousness envisaged by Article 3 of the Convention".[69]

Although the two cases may be distinguished on the facts (in the Soering case special attention was given to the nature of the applicant, considered to be young, vulnerable and mentally unstable),[70] it represents a significant development in the jurisprudence of the Court relating to the death penalty under the Convention. This is because the Court rejected the submissions in favour of extradition with such force[71] that it must now be questioned whether the death penalty can be said to be compatible with the Convention despite the fact that express provision is made for it in Article 2 of the treaty.[72]

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[69] Series A. 161, para. 151 (1989).

[70] Soering was said to have been suffering from a psychiatric syndrome called folie a deux. This was described as "a well-recognised state of mind where one partner is suggestible to the extent that he or she believes in the psychotic delusions of the other", para. 21, supra note 50.

[71] See for example the comments of Judge De Meyer who stated that capital punishment is "not consistent with the present state of European civilization", 11 E.H.R.R. (1989) at 484.

[72] Quigley & Shank, (1989) state: "The Court might, in future cases, limit its holding to the facts of Soering and rule that it is permissible to extradite a person of mature years who did not have the mental condition that made Soering particularly fearful of death row. Given, however, the Court's strong language about death row conditions, it is unlikely that it will so limit its holdings", at 270.

Thirdly, the Soering case clearly demonstrated that the Court would not be deterred from protecting the right of an individual even if this required a judgment which would create considerable difficulties for the member State concerned and attract fierce criticism from a state power as influential as the United States of America.

In discussing the above cases of Tyrer v. U.K. Campbell and Cosans v. U.K. The Sunday Times v. U.K and Soering v. U.K. it is important to note that they are representative of the nature of judgments which are now possible because of the developing interpretation of the Convention given by the Court. They are not isolated examples of where the Court has chosen to depart from a strict textual interpretation of the Convention to arrive at what it considers to amount to a just decision in the particular case. Instead, they represent markers in a series of cases that illustrate the manner in which the Court has developed its interpretation of the Convention to ensure the effective enforcement of human rights in member States. To complete this study of the Court's jurisprudence, it is necessary to briefly examine the manner in which the Court has developed its interpretation of the European Convention making the above decisions possible.

3.7 Interpretation of the Convention by the European Court of Human Rights.

Guidance for standard treaty interpretation is to be found in the Vienna Convention on the Law of Treaties.[73]

Article 31 (1) provides:

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[74]

Article 32 of the Vienna Convention further specifies:

> "recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31..."[75]

In Golder v.United Kingdom[76] the Court accepted that it should be guided by Articles 31-33 of the Vienna Convention subject to "any relevant rules of the organisation" of the Council of Europe.[77] The rules of the organisation, as noted earlier,[78] require both "maintenance" and "further realization" of human rights.[79] That has allowed, and to an extent required, the Court to take into account first and foremost the object and purpose, not only of the Council of Europe, but of the European Convention.

Professor Bernhardt, judge at the European Court of Human Rights, has explained this understanding of the Convention by noting the special nature of human rights treaties, arguing that they belong to a separate category with regard to techniques of interpretation. This is because, he notes, they are not concerned with "the mutual

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[73] ILM 8 (1969) 679.
[74] According to Art. 31 para.(2) "context" must be understood to include the text of the treaty itself.
[75] Id.
[76] Series A. 18, (1975).
[77] Id, at 14.
[78] Supra pp.88-89.
[79] Id.

relations and the exchange of benefits between sovereign States".[80] He continues: "Instead, they proclaim solemn principles for the humane treatment of the inhabitants of the participating States".[81]

A dynamic interpretation of the Convention is therefore permitted of the Court and is, to a certain extent compelled, if rights which are commensurate with the "developing standards of decency that mark the progress of a maturing society" are to be recognized and developed.[82]

The Court's modern-day understanding and application of the Convention may be compared with that attributed to the constitutions of the United States and Canada.

With regard to the former, the dynamic interpretation of the U.S. Constitution was explained in the Weems v. United States[83] as follows:

> "Time works changes, brings into existence new conditions and new purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth...."[84]

Dickson J of the Canadian Supreme Court described the interpretation of constitutional provisions safeguarding human rights as follows:

> "A constitution...is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and when joined by a Bill or a Charter of Rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and develop over time to meet new social, political and historical realities often unimagined by its framers".[85]

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80 Bernhardt, at 65, (Ed. MATSCHER & PETZOLD) (1988).
81 Id.
82 Phrase borrowed from the judgment in Trop v. Dulles 356 U.S 86.
83 217 U.S.349 at 373, (1910).
84 Id.
85 Hunter v Southam [1984] 2 S.C.R. 145 at 155, (1984) 11 D.L.R. (4th) 641 at 649.

Mirroring this approach by the supreme courts of North America, the European Court acknowledged in the Tyrer case that the Convention is to be interpreted as a "living instrument.[and]..in light of...present day conditions".[86] This interpretive approach has been confirmed subsequently in a number of cases, including Marcx v.Belgium[87] and Dudgeon v. United Kingdom.[88]

It is not only the special nature of human rights treaties that leads the Court away from the traditional interpretive approach of international treaties. What is also a factor is that many of the terms of the Convention are borrowed directly from national law. Bernhardt states:

> "Since human-rights conventions are designed to set standards for the internal order of States, they use notions which are familiar to and employed in national law. "Arrest or detention", "criminal offence", "court", "witness", "legal assistance", "family life", "freedom of expression", "freedom of peaceful assembly", "freedom of association with others" (expressions which are all used in the European Convention on Human Rights) are notions which have no traditional connotation in international law; they refer to the internal legal order and have been coined primarily by the language used in the municipal law of States".[89]

This reliance on national legal concepts also has the effect of moving the Court away from the role of an arbitrator of an international treaty and closer to that commonly associated with constitutional adjudication. It is this question of the modern-day status of the Convention that finally requires examination, before conclusions pertinent to this thesis may be drawn.

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[86] Series A. 26, (1978) para.31.
[87] Series A. 31, (1979).
[88] Series A. 45, (1982) para.60.
[89] Ibid, para's, 66-67.

3.8 The European Convention: Constitution or International Treaty.?

Gearty comments on the Convention: "It is not improbable that the Court will emerge over time as a supreme court of Europe, at least so far as human rights are concerned".[90] To support this view reference may be made to a number of cases including Airey v.Ireland[91] and Feldbrugge v. Netherlands[92] In the Airey case, the Court interpreted Article 6, which provides for a right to a fair trial, and includes a right, in certain circumstances, to legal aid. This decision was described by Merrills "...as an extreme application of the effectiveness principle".[93] He continued:

> "Since the Court has neither the authority nor the competence to act as legislature, there is much force in Judge Vilhjalmsson's view that "at least at this particular stage of the development of human rights" the approach favoured by the majority in Airey "would open up problems whose range and complexity can not be foreseen but which would doubtless prove to be beyond the power of the Convention and the institutions set up by it".[94]

In the Feldbrugge case, the Court was required to consider whether a decision relating to provision of social insurance fell within Article 6(1) of the Convention. Article 6 provides, *inter alia*, that an individual has a right to a fair trial in the "determination of ....civil rights and obligations".[95] The minority of the Court in the decision looked to the object and purpose of Article 6(1) and concluded that there was no basis for the "judicialisation of procedures for allocation of public welfare benefits..."[96] The majority decided, however, that Article 6 did apply, considering that to exclude the application of the

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[90] Gearty, at 89, (1993).
[91] Series B. 30, (1982) 32.
[92] Series A. 99, (1986). For an analysis of this case see Warbrick, 711-714, (1989).
[93] MERRILLS, at 93, (1988).
[94] Ibid, at 94.
[95] Art.6, supra note 14.
[96] Supra note 92, para.35.

Article would be to deny to the individual a right crucial to individuals.

Warbrick makes the following comment regarding the Feldbrug decision:

> "This is not merely vehement centralisation of rights but an assertion of an active role for judicial review. If pursued vigorously by the Court, this process will transform the Convention into a constitutional bill of rights rather than an international convention.
>
> The majority's approach will have profound repercussions if it is sustained in future cases. It seems to mark a clear passage across the divide, however difficult it may be to define exactly, between international and constitutional interpretation. Even on the minorities technique, the reach of the Convention into national legal systems has been substantial and unanticipated".[97]

For some influential figures in the Council of Europe, it is exactly a "constitutional bill of rights" which is aspired to. Professor Treschel, Second Vice-President of the Commission, recently stated when discussing the question of merging the two organs of the Commission and Court:

> "I am convinced.....that the merger of the Convention organs into a permanent Court should be envisaged, if the Convention for the protection of Human Rights and Fundamental Freedoms is to continue to be shining example of the regional protection of human rights.
>
> However, is this not taking the Utopian view? I think not. My reason? It lies in the true Utopia, which is the back drop to our Convention. What I mean is the Utopia of the European Confederation and its Constitutional Court seeing to the observance of human rights. A Court endowed with other powers and whose judgments would become effective immediately".[98]

It is unclear at present what authority there is for this gradual transformation of the Court into a fully fledged Constitutional Court, other than the requirement in the

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[97] Warbrick, at 714, (1989).
[98] Merger of the European Commission and European Court of Human Rights, (1987).

Statute of the Council of Europe to secure the "maintenance" and "further realisation" of human rights.[99]

If it is necessary to attribute an exact description to the nature of the instrument the Court must now be said to be applying, it may be that neither "international treaty," nor "quasi-constitution," nor, for that matter, "European Constitution" will suffice. The Convention is perhaps more properly described, as Drzemcewski argues, as *sui generis*,[100] i.e. an instrument unique in itself and unlike, at present, any other.

Whatever the most satisfactory description of the Convention, it is clear from the above survey of cases and interpretive techniques that the Court has been required to examine and develop rights over a wide spectrum of public law. Although it is correct to consider the Convention protection machinery as being subsidiary to national systems, it nevertheless has been required to develop an elaborate adjudicative system to deal with the many and varied cases which are not resolved satisfactorily at a domestic level.

To the variety of cases discussed above might be added Cossey v. United Kingdom,[101] concerning the right of a transexual to official recognition of a change in sex, Kjeldsen, Busk Madsen and Pedersen v. Denmark,[102] concerning compulsory sex education in schools, and X v. Federal Republic of Germany,[103] concerning the sale of contraceptives, all of which required careful analysis of prevailing social attitudes towards each of these subject areas. Not only has the Court been required to address cases considered by many to be on the very fringes of public law concepts, such as in the Feldbrugge case, but

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[99] Art. 1(b) supra note 8.
[100] Drzemczewski, 54, (1980). But see Muchlinski, (1985) who rejects the third order nature of the Convention.
[101] Series A. 184, (1990).
[102] Series B. 21, (1978) 44
[103] Yearbook XIX, (1976) 277.

it has also been required to adjudicate in cases which suggest that the Convention may now have significance for practitioners not directly concerned with public law issues. The commercial lawyer now has reason to consider the terms of the European Convention and the jurisprudence of the European Court. For example, in Lithgow v. United Kingdom,[104] the Court was required to consider whether the nationalisation of various ship building companies in the U.K. amounted to a violation of Protocol 1 Article 1, which protects the rights to peaceful enjoyment of property. This case involved an in-depth examination of the means of calculating compensation for property acquired as a result of a State's policy of compulsory acquisition orders. The Court announced its decision, having first carefully considered its method of interpreting the Convention in the light of International Law, in a judgment which ran to some 86 pages. From the decision in the Traktorer Aktiebolag case[105] and in Pudas v. Sweden[106] it is clear that the Convention may provide a remedy to those in business who have been refused permission by the State to begin or continue trading. The Court's dynamic interpretation of the European Convention has, it may be concluded, extended its application into many areas of public and private law and, therefore, most lawyers, whatever their practising interests would be well advised to become familiar with the Court's jurisprudence.

3.9 The European Convention and the Status of the Individual as a Subject of International Law.

The phrase "International Law" was first used by Bentham in 1789.[107] He considered International Law as relating to the mutual transactions between sovereign states throughout the world. It was not until after the Second

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[104] Series A. 98, (1986) 38.
[105] Series A. 159.
[106] D & R 40 (1985) 234.
[107] BENTHAM, at 96, (Ed. BURNS & HART, 1970).

World War that this definition was required to be revised to include the rights of individuals.[108]

The immediate postwar expression of concern for human rights in the United Nations Charter has now developed as a result of declarations and international human rights treaties, to the extent that it is correct to consider the individual as a full subject of International Law.[109] Any acceptable definition of International Law must now account for this development.[110] The jurisprudence of the Court is important because it has not only confirmed the individual as a legitimate subject of International Law but has significantly enhanced the individual's standing in this regard. The first active human rights "enforcement" procedure at the United Nations level was its system of State reporting. Its purpose was to "monitor" State compliance with the international covenants, as opposed to providing individuals with the possibility of claiming a right as against a State at an international level. The importance of the Strasbourg adjudication procedure is that it has provided the individual with the machinery to challenge State behaviour. It has developed satisfactorily a procedure which allows the individual, sometimes with the assistance of a lawyer, but in many cases without, the possibility of enforcing a human right in a supra-national court. In so doing, it has transformed the nature of the individual's status as a subject of International Law from beneficiary or passive recipient of rights to active claimant.

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[108] Supra Chapt. 1, pp. 33-33.

[109] Janis, at (1984). See generally Komarov, (1980).

[110] "International Law" may be defined as "The standard of conduct, at a given time for states and other entities subject thereto": It includes "(a) the rules of law relating to the functioning of international institutions or organisations, their relations with each other, and their relations with States and individuals; and (b) certain rules of law relating to individuals and non-State entities so far as the rights or duties of such individuals and non-State entities are the concern of the international community." Tre Traktorer AB, quoted from PARRY AND GRANT (1986).

To substantiate this observation it is necessary to recall two points. The first, as noted above, is that the individual now has what may be termed "conditional"[111] *locus standi* before the Court. He or she can expect to appear before the Court, if the Commission or an interested State party so requests. Upon the coming into effect of the Ninth Protocol, which will permit the Court to grant leave to an individual to present a case before the Court independent of the consent of Commission or the interested State party, it seems that even this limitation of the individual's standing will be removed. Until such time, it must be remembered that the interested State party itself does not have the right to deny an individual access to the Court. It has the competence to ask that a case be forwarded to the Court, but not the ability to prevent it, if the Commission so decides. The standing of the individual and States is not as unevenly balanced as it may at first appear.

The second point in support of the contention that the jurisprudence of the Commission and Court has strengthened the standing of the individual in International Law concerns the volume of case law. The Commission has now dealt with over 20,000 cases[112] Since December 1990 the Court has considered some 189 cases, and found a violation in 130 of them. From these statistics, it is clear that, as far as member States of the Council of Europe are concerned, the major actor in bringing actions before an international tribunal in the form of the European Court is not other States, but the individual. The significance of these figures can be fully appreciated when they are compared to the statistics of the International Court of Justice, which does not recognize individuals as competent to petition

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[111] Whitfield, at 40, (1988).
[112] The Council of Europe and Human Rights, 5, (1993).

the Court.[113] The first case entered in the General List of the Court was submitted on 22 May 1947.[114] Between then and 31 July 1991 the Court has had to deal with a total of 86 cases, i.e, 66 contentious cases and 20 advisory cases. In those cases it gave 52 judgments and 21 advisory opinions.[115] It is clear that this is a insignificant number when compared with the many complaints lodged by individuals in Strasbourg. There are clearly few A small number in comparison to the many complaints lodged by individuals against States in the Council of Europe. These figures are themselves reinforced when placed alongside others involving individual applications before international tribunals. In European Community law, during the period 1953 to December 1989 there have been 1,997 preliminary rulings and a total of 4,656 direct actions.[116] As of August 1990 there have been 418 placed before the Human Rights Committee for consideration with regard to the the Optional Protocol.[117]

Finally, when considering the effect of international procedures in respect of the position of the individual, it is worth recalling the comments of Merills concerning the European Convention. He states:

> "When governments know that policies must be justified in an international forum an additional element enters their decision-making. Thus, with the State's obligations to the individual as a constant background to official deliberations, the impact of a treaty such as the European Convention is likely to be out of all proportion to the number of cases in which conduct is actually challenged".[118]

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[113] Art. 34(1) of the Statute of the International Court of Justice states: "Only States may be parties in cases before the Court", UKTS 67 (1946). The Statute of the Court is annexed to the Charter of the United Nations and is published by the Court in the volume I.C.J. Acts and Documents No. 5, pp. 60-89.

[114] Corfu Channel (U.K. v. Albania) I.C.J. Reports (1949), p. 4.

[115] I.C.J.Y.B. 3 (1990-1991).

[116] This includes actions brought by E.C. officials. Synopsis of the Work of the Court of Justice of the European Communities in 1988 and 1989, at 20, (1990). See generally Harding, (1992).

[117] Doc. A/44/40, pr.614, as updated.

[118] MERILLS, at 1, (1988).

Conclusion

From the above survey of the development of the European Convention, three conclusions are pertinent to this thesis.

The first is that, although the Convention is properly described as a mechanism subsidiary to national laws and constitutions for the enforcement of human rights, it is clear that the variety and complexity of applications to the Strasbourg organs necessitate a thorough and comprehensive system of dispute resolution. The complexity and diversity of legal concepts illustrated by the cases of Tyrer, The Sunday Times, Cossey, and Feldbrugge, indicate that a comprehensive understanding of each substantive article of the Convention is a pre-requisite for its satisfactory application.

Secondly, it is equally clear that the European Court's dynamic interpretation of the Convention has transformed the nature of many of the substantive rights documented in the treaty. Article 6, created to safeguard the right to a fair trial, has now been interpreted to include the right to institute proceedings to review an individual's right to social security benefits.[119] Article 8, intended to protect, *inter alia*, the right to privacy, now has implications for the State's treatment of homosexuals,[120] in addition to many other concepts, such as access to children[121] and care records,[122] more readily identified with concepts relating specifically to family law. Similarly the application and, it might also be said, the very *raison d'etre* of Article 3 has changed. Created as a provision to outlaw torture, with the human rights abuses committed in Nazi Germany and occupied territories still very much in mind, the Article has developed to the point where it may be considered to amount to a standard

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[119] Supra note 92.
[120] Supra note 88.
[121] Hendriks case, D & R 30 (1982), p. 5.
[122] Gaskin v. United Kingdom, Series A. 160, (1989).

against which all forms of treatment or punishment to which the individual may be subjected can be compared. The Tyrer case marked its application to judicial corporal punishment, the Campbell case to school discipline, and the Soering case to extradition, the death penalty and imprisonment. This transformation of the Article remains the most compelling argument in favour of the development of a satisfactory understanding and application of the norm prohibiting torture and ill-treatment.

Finally, this examination of the development of the Court's jurisprudence indicates that the Court's interpretation of the Convention has advanced the status of the individual to a degree where it is advisable, and perhaps obligatory, to reappraise the relationship between the individual and a State in respect to the international law of human rights. This relationship was characterized initially by concentrating upon what might be considered to amount to a reasonable concession on the part of the State in favour of greater rights for the individual. State sovereignty was still in the foreground of this legal relationship. The effect of the jurisprudence of the Court is that this approach must be considered to be in need of review. The European Court's pursuit of the effective enforcement of human rights has advanced the status of the individual as a subject of International Law to the stage where it is more accurate to emphasise the importance of the sovereignty, not of the State, but the rights of the individual. It is this observation that is important for later in this thesis, when an acceptable definition of torture and ill-treatment is proposed.

4. TOWARDS AN UNDERSTANDING OF THE COMPONENT PARTS OF ARTICLE 3 OF THE EUROPEAN CONVENTION.

Introduction to Chapter

Article 3 is one of only a few substantive rights[1] to the European Convention from which it is not possible to derogate even in time of war or public emergency.[2] It is the only article which does not accommodate qualifications or exceptions, and as such, must be regarded as one of the most important rights documented in the European Convention.[3] It may appear anomalous therefore, that it remains the shortest article in the Convention, providing a freedom from torture and inhuman or degrading treatment or punishment, but no accompanying definition of these phrases, or examples of the types of conduct likely to be prohibited by them.

As noted in Chapter 1,[4] this latter omission may be explained by reference to the fact that the drafters of the provision were concerned that, to provide examples of conduct prohibited by the article, would be to imply that any practice not listed would be outwith the scope of the article and consequently permissible. This would not serve to deter the torturer, but to encourage her/his ingenuity to invent a form of treatment equally as painful and repugnant as any listed, but incapable of

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[1] Derogations are permissible to all rights in Part 1 of the Convention except Art. 2 (the right to life), Art. 3, Art. 4 (para.1) (freedom from slavery or servitude), and Art. 7 (non retrospective legislation), European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov, 1950, UKTS 71 (1953).

[2] Article 15(1) states: "In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under the Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its obligations under International Law", ibid.

[3] For discussion as to whether there may be said to be a "hierarchy of rights" see Meron, (1986). Warbrick, (1989), notes of the Convention: "There is a growing practice of regarding some rights as more important than others, so that the burden on the State to justify its interference is correspondingly higher". He quotes Abdulaziz v United Kingdom, (Series A. 94, para. 78) (1985), requiring "very weighty reasons" to justify discrimination on grounds of sex; Dudgeon v United Kingdom, (Series A. 45, para. 52) (1981), requiring "particularly serious reasons" for interference with sexual activities, "a most intimate aspect of private life", at 720.

[4] Supra Chapt. 1, pp. 38-43.

being classed within any of the categories contained in the provision. The former omission relating to the definition of the terms accommodated in the provision can be understood when it is recalled that there was considerable difficulty both at the United Nations and the Council of Europe in reaching a consensus as to what treatment or punishment should be the focus of the article.[5] Not wishing to jeopardize the future of the prohibition, or the instruments themselves, the drafters effectively passed on this complex task to others, a possibility not available to the European Commission and the European Court of Human Rights which were the first tribunals required to give effect to the prohibition.

This Chapter seeks to analyze the nature of the prohibition which was passed to the European Commission and Court. It suggests that Article 3, although simple in form, is nevertheless highly complex and requires to be examined in a number of stages. It is argued that the prohibition is properly considered as having three component parts. They are: applicability; qualification; and compatibility. The Chapter concludes that the failure to recognize these principal elements, and to develop a satisfactory understanding of each, has resulted in confusion and an unsatisfactory application of the prohibition of torture and ill-treatment.

4.1 Towards An Acceptable Dissection of Article 3.

The article, although brief, is nevertheless extensive in its application. It is for this reason that it is better discussed in sections, facilitating a proper understanding of the complexities of the prohibition. The Commission and Court have chosen to discuss Article 3 by considering "torture" and then by assessing the categories of "inhuman" and "degrading" treatment or punishment. This approach began in the Greek case[6] and has

[5] Id.
[6] Yearbook XII, 186, (1969).

been followed subsequently without exception. It is perhaps because of this that scholars of the subject have also chosen to discuss the prohibition in a similar fashion.[7]

A study of Article 3 jurisprudence suggests that this approach does not promote clarity and understanding. This is because it operates from the assumption that the function of the Commission and Court relating to Article 3 is to outlaw certain practices considered to be degrading, inhuman or tortuous. This is one of its tasks. But it does not take full cognizance of their role which is considerably more complex. This is so for a number of reasons.

First, as with any public right, it needs to be determined as against whom the prohibition may be enforced. The individual can expect protection from acts of the State, but it must also be resolved as to whether he or she can expect protection from the acts of other individuals, and if so, to what extent.[8] The first question to be resolved by the Commission, therefore, is whether the protection of Article 3 is available to the particular applicant.

The second difficulty to which the Commission must address itself is the type of conduct it may be called upon to review for compatibility with Article 3. The phrase, in accommodating the word "treatment" as well as punishment, is potentially all-encompassing. It would seem therefore, that it is available to the individual following a sentence of the court, but also during her/his pre-trial or even pre-charge encounters with the authorities. More importantly, and this is the area which introduces considerable complications into the operation of the prohibition, the word "treatment" also means that

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[7] See for example Doswald-Beck, (1978); Spjut, (1979); Duffy, (1983); Sudre, (1984); RODLEY, at 71-95, (1987); VAN DIJK & VAN HOOF, at 227, (1990).

[8] See generally for a discussion of state and individual responsibility for acts of torture RODLEY, Chapt.8, (1987) (Ed. LUTZ, HANNUM, BIRKE, 1989).

the provision is available to test not only State conduct but also other conduct which may be unconnected with the State such as for example, the activities of private medical personnel and their treatment of patients. There appears no valid reason why, subject to the considerations noted above, Article 3 should not be applicable to the individual while sat in the dentist's chair or lain on the surgeon's table, for this too is "treatment" in the common sense of the word which is frequently, but not necessarily always, for the benefit of the patient.

Commendable though this potentially unlimited protection may be, it introduces a considerable difficulty into the application of Article 3. The clause is not a provision outlawing all treatment of a certain severity. As Sir Gerald Fitzmaurice correctly observes:

> "..if Article 3 is interpreted literally, any infliction of pain severe enough in degree to amount to torture would involve a breach of that provision whatever the circumstances in which it had occurred - for instance, the case of an army surgeon who amputates a leg on the battlefield under emergency conditions and without anesthetic. In all such cases...the "victim" is, according to the ipissima verba of Article 3 "subjected to torture" which the Article states that "No one may be"-ever, even if in certain instances, or up to a point, the subjection is voluntarily accepted".[9]

Article 3, it may be observed, prohibits only that conduct of a certain severity which may be considered as falling into one or more of the terms provided. It follows, therefore, that any operation of the prohibition must accommodate a mechanism which selects from this unlimited source of conduct, treatment or punishment which leads to a particular degree of suffering to be considered degrading, inhuman or tortuous. The task of the tribunal seeking to apply Article 3 is to identify the element or elements which *qualify* the conduct as being within one or more of these categories.

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[9] Separate Opinion of Judge Fitzmaurice, Tyrer v. U.K Series A. 26, 23-24, (1978).

This problem of "qualification", it can be seen, is a fundamental component of the prohibition. It is one, however, which the Commission and Court have failed to acknowledge expressly and, indeed, the importance of determining a satisfactory "qualifier" appears not to have been fully considered. The reasons for this oversight will be examined later in this Chapter.[10]

It is submitted that the third issue which the Commission and Court must address when considering Article 3 is the issue of justification. It must be resolved whether, even though the conduct qualifies into one or more of the categories accommodated in the article, it may still be said not to violate the provision because the conduct is justifiable for a particular reason. Although dismissed by the drafters of the provision[11] as having a rightful place in the anti-torture and ill-treatment equation, it is submitted that it is no longer possible to reject summarily the concept of justification for conduct which would otherwise be declared contrary to Article 3. This is because in 1948, when the prohibition was conceived, the drafters had in the forefront of their minds the most severe forms of suffering comparable to that which took place in Nazi Germany and occupied territories.[12] To date, Article 3 has undergone a complete metamorphosis, being utilized to test the detention of mentally ill patients,[13] the use of corporal punishment in schools[14] and racial discrimination.[15] These types of conduct are far removed from the classic conceptions of torture that, as long ago

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10 Infra, pp. 130-137.

11 Supra, Chapt. 1, at pp. 47-50.

12 Cocks recalled "the nazis stamping with their jackboots upon the faces of women and Jews. Then more ingenious forms of torture were applied. People had their toenails or their finger torn out, or they had their teeth drilled with holes and filled with acid". Collected Edition of the Travaux Preparatoire, vol II, Council of Europe, at 38, (1975).

13 No. 7994/77, Kotalla v. the Netherlands, Dec.6.5.78, D & R 14,238; B v. United Kingdom, Comm. Report 7.10.81, D & R 32, 5.

14 Campbell & Cosans Series A. 48, (1982); Warwick v United Kingdom, Res. DH (89) 5 of 2 March 1989; Costello United Kingdom, Series A. 247-C, (1992) and Y v United Kingdom, Series A. 247-A, (1992).

15 The East African Asians Case, 3 E.H.R.R.76.

as Beccaria in the 18th Century, were rejected as being unjustifiable.[16] Although it remains an important function of Article 3 to prohibit torture, it is perhaps misleading to describe the article today as an anti-torture and ill-treatment provision. It is contended that it is more properly considered as amounting to a standard against which all forms of conduct, leading to suffering of a certain severity, can be tested. It becomes necessary, therefore, to reappraise the concept of justification to determine whether it must now be considered to have a proper place in this assessment process. This third component part of the prohibition for the purposes of this research will be referred to as the "compatibility" stage. This is because it will be asked whether, despite the fact that a given form of conduct may be considered as tantamount to torture or inhuman or degrading treatment or punishment, it may still be said to be compatible with the torture and ill-treatment prohibition because it is justifiable on certain, albeit restricted, grounds.

The failure to identify the breakdown of the provision as described above has, it is submitted, on occasion caused considerable confusion. An inspection of the jurisprudence of the European Commission and Court provides examples of inconsistent statements and decisions. Much of this, has been caused by an inconsistent use of the definition of each term employed in Article 3, or what, for the purposes of this research, is more properly called the "qualification" consideration. Difficulty has also arisen because the Commission and the Court have confused the two stages of "qualification" and "compatibility". For example, in the Northern Ireland case[17] the Court stated that there can be no justification for any conduct amounting to degrading, inhuman or tortuous treatment. However in relation to the

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[16] Beccaria, An Essay on Crimes and Punishment, RUTHEN, at 9, (1978).
[17] Ireland v. United Kingdom, 2 E.H.R.R, 25, (1978).

same case the then President of the Commission, Sir James Fawcett, stated:

> "What ill-treatment constitutes inhuman treatment or torture will depend upon its character and the circumstances in which it it is inflicted; the notion of inhuman treatment or torture is not then absolute".[18]

He continued:

> "Severe physical suffering, deliberately imposed by medical and particularly surgical treatment, may be justifiable. In other words, there are situations in which severe ill treatment[19] is justifiable in the individual interest or the public interest".[20]

Fawcett, it is submitted, is right to state that the treatment mentioned does not violate Article 3. But it is acceptable practice, not because it is tortuous treatment which is justifiable, but because it is conduct that does not qualify in the first instance as being tortuous, or for that matter inhuman or degrading. Fawcett's remarks illustrate the confusion between the question relating to what conduct qualifies as belonging within one or more of the categories provided in Article 3, and which of these, if any, may still be considered compatible with the prohibition. The question of "justification" is properly addressed in determining compatibility with Article 3 of conduct considered to be tortuous, inhuman or degrading. Whether it qualifies as that sort of conduct in the first place is an altogether different matter, in which, the concept of justification has no rightful place. To permit "justification" to enter the definition of torture and ill-treatment would be to confuse two distinct elements of the prohibition. Allow the two to merge and the definition becomes complicated at an early stage. Moreover, if it is necessary to compromise the freedom protected by Article 3, it is submitted that it is more

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[18] Report of the Commission, Series B.23/I, 495, (1976-1978).
[19] The Commission used the words ill treatment to cover the remainder of the provision that does not apply to torture.
[20] FAWCETT, at 496, (1987).

sensible to do this by adopting a system which acknowledges the existence of the freedom in every situation, while accepting that there are a limited number of situations in which it may be restricted. This is preferable to an application of the prohibition of torture and ill-treatment which incorporates "justification" into the definition of Article 3 and permits certain suffering by denying that the freedom, on occasion, exists at all. At first sight the difference between the two approaches may not be considered significant, particularly where the same "justification" issues are in operation. It is contended that the first is to be preferred, however, because it makes it clear when the freedom is being compromised and at what point the need for close scrutiny of conduct is at its highest.

To conclude, it is submitted that Article 3 is better discussed by examining, first, the "applicability" of the provision; second, the question of "qualification" and third, the issue of "compatibility".

4.1.1 The Question of "Applicability" of Article 3.

In determining the applicability of Article 3, two questions must be addressed. First, it must be resolved as to what type of conduct the prohibition applies. Secondly, it must be determined whether Article 3 may be invoked as against every type of perpetrator.

The first question is resolved without difficulty. Article 3 provides that the provision is to apply to both *punishment* and *treatment* leading to suffering of a certain severity. It follows, therefore, that the prohibition is applicable to all penalties imposed following an offence at law[21] in addition to *treatment*,[22] a

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[21] BLACK'S LAW DICTIONARY (6th Ed. 1990) defines "punishment" as "Any fine, penalty, or confinement inflicted upon a person by the authority of the law and the judgment and sentence of a court, for some crime or offence committed by him, or for his omission of a duty enjoined by law. A deprivation of property or some right".

noun sufficiently wide to cover every other sort of conduct to which a person may be subjected leading to suffering of a certain severity.[23]

This contrasts with the anti-torture and ill-treatment provision in the United States Constitution which is restricted to consideration of "punishments"[24] which may be said to violate the Eighth Amendment of the U.S. Constitution which prohibits "cruel and unusual" punishment and so relates only to treatment following sentence of a court.[25] It also contrasts with the U.N. Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment,[26] which, although choosing to repeat the phrase adopted by the Council of Europe, also adds that torture "does not include pain or suffering arising from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners".[27] In so providing, the U.N. Torture Convention is prevented from applying to conduct which may lead to particularly severe suffering simply because it is coloured by lawful sanction.[28] As such, it must be doubted whether the treaty has any application to, for example, judicial capital punishment. Unlike Article 3 to the Convention, it is unlikely that it may develop into a vehicle for challenging the very efficacy of lawful penal measures.[29]

The second question concerning applicability of the Article 3 relates to the status of the perpetrator. Again a comparison with the United Nations' instruments is

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[22] "Treatment" is: 1. the process or manner of dealing with a thing; 2. something done in order to relieve or cure an illness or abnormality". OXFORD DICTIONARY, (3rd Ed. 1988).

[23] This question of severity of suffering is discussed in Chapt. 5, at pp. 153-168.

[24] See supra Chapt. 1, at note 31.

[25] Ingraham v. Wright, 525 F.2d 909, 915 (5th Cir. 1976).

[26] G.A.Res.A/Res/39/46 (1984), UKTS 107.

[27] E.S.C.Res.663(c), 24 U.N.ESCOR Supp. (No.1) at 11, U.N. Doc.E/3048 (1957).

[28] As such it must be opened to criticism in containing a considerable loophole. See BURGERS & DANELIUS, at 46-47, (1988).

[29] Cases such as Tyrer v. U.K, for example, demonstrate clearly that Article 3 has become, inter alia, a standard against which lawful penal measures may be tested. See infra Chapt. 6 at pp. 209-216.

useful. Article 1 of the U.N. Torture Convention provides that the suffering must be:

> "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".[30]

During the drafting of the U.N. Torture Convention there was some debate as to whether the prohibition of torture should be limited to acts committed by public officials.[31] During a meeting of a working group concerned with the drafting of the instrument in 1979, a proposal was made to include acts of private individuals within the definition of torture. This proposal was rejected by the working group because its members considered that domestic legislation would adequately deal with acts of private individuals.[32] It was pointed out that the purpose of the Convention was to provide protection against acts committed by the State.[33] However, the individual could also expect the State to protect her/him from the activities of an individual acting in her/his own capacity, by having in place criminal and civil laws to prevent and discourage such practices. In the absence of such legislation or effective enforcement of it, Article 1[34] of the Convention becomes effective.[35]

In determining whether a similar position is reflected in Article 3 of the European Convention, it is noted that

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30 Supra note 26.

31 See generally BURGERS & DANELIUS, at 45, (1988).

32 Commission on Human Rights: Report on the Thirty-Fifth Session,U.N.ESCOR,Supp.(No.6),U.N.Doc.E/CN.4/L.1470 (1979).

33 Id.

34 Article 1 of the Convention states: The High Contracting Parties shall secure within their jurisdiction the rights and freedoms defined in Section I of this Convention. Id. See also Botterud, at 73, (1984).

35 But cf here Art. 3 of the Inter-American Convention to Prevent and Punish Torture which provides: "The following shall be held guilty of the crime of torture:

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

b. A person who at the instigation of a public servant or employee mentioned in subparagraph (a) orders, instigates or induces the use of torture, directly commits it or is an accomplice thereto". OAS Treaty Series No.67, OEA/Ser.A/42 (SEPF). See generally BUERGENTHAL, NORRIS, SHELTON, (1990).

this provision contains no equivalent restriction relating to the status of the perpetrator. However, the immediate conclusion is not necessarily that the application of Article 3 of the European Convention is wider than that provided at the United Nations. This is so for a number of reasons.

First, Articles 24 and 25 of the Convention permit individuals to petition the European Commission alleging a violation of the Convention by States parties to the Convention and not other individuals.[36] If the Convention is to provide rights to the individual as against, not the State, but another individual, then these rights must still be sought in a tri-partite fashion, involving the relationship between the State and the two individual parties.

Secondly, in the Greek case[37] the Commission stated:

> "Acts prohibited by Art 3,... will engage the responsibility of a Contracting State *only if they are committed by persons exercising public authority*".[38]

Such a comment would appear to exclude the possible application of the prohibition to the individual acting completely in her/his own capacity. However, Duffy contends that this statement should be given little attention.[39] His skepticism of the early Commission comment, it is submitted, is justified because it is clear from later decisions of the European Court of Human Rights that the State is under an obligation to regulate relations between individuals.

This issue of State liability for regulating the behaviour of individuals to each other is one that is beginning to receive some judicial and academic

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[36] See Appl.6956/75, X .v United Kingdom, D & R 8 (1978), 103; VAN DIJK & VAN HOOF, at 77, (1990).
[37] Yearbook XII, 186, (1969).
[38] Id, emphasis added.
[39] Duffy, at 324, (1983).

commentary at the level of the European Convention and it is to this subject that it is necessary briefly to turn.

4.1.1.2 State Responsibility for the Conduct of Individuals.

Although there is no indication from the *travaux preparatoires* that rights and freedoms in the Convention were intended to apply as between individuals it is submitted that Van Dijk is right to observe:

> "nothing in the Convention prevents the States from conferring Drittwirkung[40] upon the fundamental rights and freedoms within their national legal systems in so far as they lend themselves to it".[41]

Of course, the individual is likely to avoid the considerable complexity and uncertainty involved in the process of basing an application on the concept of liability of the State for the actions of an individual if it can be established that her/his rights have been violated by the State directly. "State liability" has been interpreted widely. In Cosans v. United Kingdom[42] the Commission accepted that the State was responsible for the actions of the local education authorities. In the so-called "closed shop cases" the Commission decided that British Rail, being a public industry, came under the responsibility of the United Kingdom, and that the applications were admissible *ratione personae*.[43]

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[40] This is a reference to the theory from German law of the application of rights to legal relations between individuals. "Drittwirkung is more accurately Drittwirkung der Grundrechte or the third party effect of fundamental rights/"effets quant aux tiers des droits fondamentaux", CLAPHAM, note 8, at 90, (1993).

[41] VAN DIJK & VAN HOOF, at 16, (1989). Van Dijk distinguishes two interpretations of the concept. The first is that provisions of the Convention *apply* in mutual legal relations between private individuals, and not only in legal relations between an individual and the public authorities. According to the second view, Drittwirkung of human rights only applies when the individuals can *enforce* his rights against another individual, id, at 15.

[42] See Application No. 7743/76, Cosans v United Kingdom, D & R 12, 140 (149).

[43] Application No. 7601/76, Young and James v United Kingdom, Yearbook XX (1977), p. 520, (560-562) and Application No. 7806/77, Webster v United Kingdom, D & R 12 (1978), p. 168, (173-175).

In the absence of a direct connection between the State and the offending conduct, however, attributing state liability for human rights violations becomes more problematic. The individual may be assisted by seeking to establish that there was in existence what has become known as an "administrative practice".[44] In the Greek case this was said to exist when two elements could be shown. The first it considered to be:

> "an accumulation of identical or analogous breaches which are sufficiently numerous and interconnected to amount not merely to isolated incidents or exceptions but to a pattern or system".[45]

The second element, that of official tolerance, was explained as follows:

> "though acts of torture or ill-treatment are plainly illegal, they are tolerated in the sense that the superiors of those immediately responsible, though cognizant of such acts, take no action to punish them or to prevent their repetition; or that a higher authority, in face of numerous allegations, manifests indifference by refusing any adequate investigation of their truth or falsity, or that in judicial proceedings a fair hearing of such complaints is denied".[46]

However, it is clear from the recent decisions of X and Y v. The Netherlands[47] and Plattform Arzte fur das Leben[48] that it is not necessary for the indivdual to go as far as establishing official tolerance before the issue of State liability will arise. The Court accepted in these decisions that State liability will arise in cases where positive measures are required to protect the rights of one individual from the activities of another. In respect of Article 11 of the Convention the Court stated: "Like Article 8, Article 11 sometimes requires positive

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[44] The Commission has accepted that the local remedies rule need not be applied in those cases were an "administrative practice" can be shown. It is in this respect that the concept is most often discussed.

[45] Application No. 176/56, Greece v United Kingdom, Yearbook II (1958-59), p. 182, (1964).

[46] Report of 5 November 1969, Greek case, Yearbook XII (1969), p. 196.

[47] Series A. 91, (1985).

[48] Series A. 139, (1988).

measures to be taken, even in the sphere of relations between individuals, if need be".[49]

It is submitted that the above developments can be summarised in the following manner. Although the Convention is essentially a treaty concerned with the relationship between the State and individuals, it can be seen that this also includes the duty on the State to prevent interference with an individual's rights by a private person. Therefore, with regard to Article 3 of the Convention, it may be concluded that the State is obliged to ensure that the individual is adequately protected from all forms of "torture" or "inhuman" or "degrading" conduct to which he or she may be subjected even if the person responsible for the conduct is acting entirely in her or his private capacity. This it must do by having in place legislation prohibiting conduct likely to amount to a violation of Article 3 and the means by which this legislation may be effectively enforced. In addition to this duty, the State must not itself directly participate in conduct that violates Article 3. It may be concluded, therefore, that the individual is protected under Article 3 from all conduct of a certain severity, whether its source is the State, an agent of the State or a private individual. Article 3, it can be seen, accommodates a potentially unlimited prohibition of torture and ill-treatment.

This unlimited application of the prohibition is to be commended. Torture, traditionally considered to be the domain of the agent appointed by the State to extract evidence or confessions, must now be attributed a more up-to-date meaning. It must be correct that the modern understanding of the prohibition not only includes the medieval torturer, but does not exclude from consideration punishments which may follow from court decisions and are in full compliance with the remaining

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[49] Id, para.32.

terms of the Convention, such as corporal or capital punishment. The conduct of the surgeon likewise must not be excluded from the application of the prohibition, for although the medical practitioner normally acts with the complete interests of the patient in mind, the latter must not be denied the protection of Article 3 in the unlikely situation that the treatment is not intended primarily for her/his benefit. The provision prohibiting torture and ill-treatment in the International Civil and Political Covenant provides expressly for this event in stating:

> "In particular, no one shall be subjected without his free consent to medical or scientific experimentation".[50]

Moreover, the State must not be allowed the possibility of disclaiming the application of the prohibition by contending that the conduct was carried out by a person belonging to a category outwith the scope of Article 3. It follows that the provision is not only relevant to the servant of the State briefed to secure a confession from an individual, but must be available to the person who performs a compulsory abortion[51] and the doctor who performs non-consensual sterilization.[52]

This unlimited scope of the Article introduces a considerable difficulty. This is to distinguish between those acts of a certain severity that must be condemned as amounting to torture or ill-treatment, and those (which may possibly result in an equivalent amount of pain and suffering) which must not. It is to this difficult question of "qualification" of conduct that it is now necessary to turn.

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[50] Article 7, UKTS 6 (1977).
[51] See infra Chapt.5 at p. 190.
[52] For a discussion of the same see Kennedy, at 81, (Ed BLACKBURN & TAYLOR, 1991).

4.1.2 The Question of "Qualification" of Conduct for the Purposes of Article 3.

The European Convention was adopted in 1950[53] and came into force in 1953.[54] It was not until 15 years later in the Greek case[55] that the Commission first attempted to define the terms included in Article 3, and in so doing determine which factor, or factors, would qualify conduct as belonging within one or more of the three categories mentioned in the provision.

The case involved an inter-state application[56] against Greece by the governments of Denmark, the Netherlands, Norway and Sweden alleging violations of a number of the substantive rights guaranteed in Part I to the Convention. The Commission embarked on an exhaustive inquiry into the violations alleged, including on-site investigations, culminating in an extensive report of almost 700 pages concluding that the government of Greece had been responsible for denying its citizens a number of fundamental rights protected by the Convention.[57]

Often referred to as a useful illustration of the operation and effect of the inter-state procedure,[58] the case represents the starting point for those seeking to determine a definition of the terms contained in Article 3.

At the time of the Greek case, Greece had not recognized the competence of the European Court under Article 46 of the Convention. It fell to the Commission to attempt to give flesh to the bare-boned terms of Article 3.

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53 See Chapt. 3, pp. 87-89.
54 Id.
55 Yearbook, XII, 186, (1969).
56 Article 24 of the Convention. For information on the 18 cases that have been taken to date under this Article see "The European Commission of Human Rights: Organization, Procedure and Activities". Information Note by the Secretary to the European Commission of Human Rights, Council of Europe, at p. 5.
57 Supra note 55.
58 Art. 24 provides: "Any High Contracting Party may refer to the Commission, through the Secretary-General of the Council of Europe, any alleged breach of the provisions of the Convention by another High Contracting Party", supra note 1.

The Commission began by elaborating on the terms of Article 3 and defining them in relation to each other. Torture, the Commission observed, was in every case also to be considered inhuman treatment; and all conduct that could be said to be labelled inhuman must also be considered degrading.[59]

The Commission then defined each term in isolation. Degrading treatment, it stated, occurs if conduct:

> "grossly humiliates [an individual] before others or drives him to act against his will or conscience".[60]

Inhuman treatment, the Commission stated, is conduct which:

> "deliberately causes severe suffering, mental or physical which, in the particular situation is unjustifiable".[61]

Torture, the Commission concluded, is:

> "inhuman treatment or punishment which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and...is generally an aggravated form of inhuman treatment".[62]

The definition of conduct said to amount to inhuman treatment proved troublesome in incorporating the concept of justification. The understanding of the article, following comments made by the drafters to the Convention,[63] was that there was no justification for any treatment contrary to the provision. It was also considered unsatisfactory because, as torture had been defined in relation to inhuman treatment, it followed by inference that "justification" had also been incorporated into the definition of torture. This apparent judicial

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[59] Yearbook XII, at 186, (1969).
[60] Id. In a more recent case it was said to amount to measures which "constitute an insult to the applicant's human dignity". Application No. 8930/80, X, Y and C v. Belgium (unpublished) quoted from VAN DIJK & VAN HOOF, at 228, (1990).
[61] Supra note 59.
[62] Id.
[63] See supra Chapt. 1, at pp. 48-50.

faux pas was rectified in the Northern Ireland case.[64] Here the Commission stated in unambiguous terms:

> "there can never be under the European Convention or under international law, a justification for acts in breach of that provision".[65]

Incorporating this amendment into the original understanding of the article by the Commission, it follows that the principal means by which the Commission and the Court qualify treatment from the unlimited field covered by the prohibition is by looking for the additional element of *intent* to cause suffering. This is true for torture and inhuman treatment, but when considering degrading treatment the "qualifying" factor is not an intent to degrade, but that degrading treatment *resulted* from the conduct.

An alternative interpretation of the above definitions is as follows. The Commission was seeking to outlaw all deliberate acts which had the foreseeable result of severe suffering. If this is correct it is likely to provide protection against a greater amount of conduct than the definition previously discussed. It would prohibit all deliberate conduct which resulted in suffering even though the suffering was not intended merely foreseeable. Its effect is to eliminate a causal link between act in question and its result. As long as the act was itself a deliberate one it does not matter that no suffering was intended as long as it was foreseeable. Unlike the first interpretation discussed above, it would provide protection against a person who deliberately drives a motor vehicle whilst drunk and causes injury to another which although not intended was considered by most to have been foreseeable. "Foreseeability" would, of course, require further consideration to determine whether it should be

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[64] Series B.23/I (1976-1978).
[65] Ibid, at 390.

attributed a subjective or objective application. Although it is correct that the Commission in the Greek case does not refer explicitly to "intent", it is submitted that the earlier interpretation stated above is to be preferred. This is because the Commission uses the term "deliberate" in relation to the suffering which *results* not the *act* that causes it to occur. The question properly posed therefore, is whether the suffering was deliberate i.e. intentional, not the act which brought it about.

In the Northern Ireland case the Court effectively added a further qualification. The Court stated that conduct "must attain a minimum level of severity if it is to fall within the scope of Article 3".[66]

No mention is made of this additional element[67] in the *travaux preparatoire*[68] and as such it must be regarded as an example, albeit a minor one, of judicial creativity.[69] Although lacking a treaty justification for its incorporation into the Article 3 equation, it can be defended in enabling the Commission to dispose of cases which, although relevant to Article 3, are so trivial that they must be considered frivolous and an abuse of the individual application procedure.

It may be concluded that there are three elements relevant to this process of conduct selection. One - severity - is common to the other two. For both qualifiers of "intent" and "result" it is necessary to

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[66] Series A. 25 (1978), para. 162. See also Tyrer v. United Kingdom, Series A. 26, 14, (1978).

[67] Cf European Union Law where there is a similar provision, performing a not dissimilar function, in vetting those cases that merit scrutiny before a supra national tribunal. The De Minimus Principle enables the European Court of Justice to disregard certain agreements that might otherwise have implications for Article 85 (relating to restrictive trade agreements and concerted practices between private undertakings) when they have little or no appreciable effect on trade. See STEINER, at 16-17, (1992).

[68] Collected Edition of the Travaux Preparatoires, Vols I -VIII, Council of Europe, (1975).

[69] Likewise, the origins of the De Minimus principle can be traced to the case of 5/69 Volk v. Vervaecke, (1969) ECR 295.

show that the suffering which was intended, or resulted was severe. However, this is the only common ground which the two remaining qualifiers share. In the torture and inhuman section the "qualifier" is "intent" to cause suffering of a certain severity. For "degrading" conduct, what is important is not "intent" but the "result" of the treatment or punishment. These qualifiers, it can be seen, are fundamentally different in their approach. The former requires an inquiry into the intent of the State in order to ascertain the purpose of the conduct. The latter requires an investigation into the effect of the conduct. Considered together, there can be no objection to this dual approach. It appears advantageous to have a separate qualifier to catch that form of conduct which, for whatever reason, may not qualify for consideration in the other category. However, the position looks less satisfactory when the further observations of the Commission are considered.

In the Greek case the Commission stated that the principal factor which separates the three categories mentioned in the Article is severity:

> "It is plain that there may be treatment to which all these descriptions apply, for all torture must be inhuman and degrading treatment, and inhuman treatment also degrading".[70]

This was followed by the Court in the Northern Ireland case[71] where it stated that the distinction between torture, inhuman and degrading treatment derives principally from a difference in the intensity of the suffering inflicted.[72] Scholars of the Article have similarly accepted that this is a correct understanding

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[70] Supra note 55.
[71] Supra note 66.
[72] Ibid, at 41, para. 167.

of the break-down of the prohibition.[73] What they identified was a sliding scale of severity. For this to operate in practice it would require that any qualifier would necessarily have to remain constant. However, this is not so on the facts. In the very same case it developed one qualifier for the degrading treatment category which was distinct from a second which related to the remainder of the provision. As such, one must question which of the two approaches must be allowed to stand for they contradict and can not co-exist.

It may be possible to explain this anomaly in the following way. Severity between degrading and inhuman treatment is to be considered on a parity. Conduct which may not qualify in this first category may be admitted into the second. What then may be said to exist is three categories. The first concerns torture which qualifies all treatment intended to cause suffering of a particular severity, usually with an added purpose. The remaining two categories concern a level of severity equal to one another, but less than that to be found in the torture category. What distinguishes these two categories from one another is not severity, but the qualifier. For inhuman treatment it is "intent"; for degrading treatment it is the "result" of the conduct which may or may not qualify it into the section.

However, there is no evidence in the *travaux preparatoire* to the Convention that this interpretation was intended, and the Commission and the Court have never made comments which may be considered as acknowledging its existence. They have both preferred to consider the terms of the provision to be linked and separated by a descending

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[73] See for example RODLEY: "So for torture to occur, a scale of criteria has to be climbed. First, the behaviour must be degrading treatment; second, it must be inhuman; and third, it must be an aggravated form of inhuman treatment, inflicted for certain purposes", at 73-74, (1987); VAN DIJK & VAN HOOF, "...one may conclude that the difference between the three kinds of treatment and punishment prohibited in Article 3 is mainly one of gradation in the suffering inflicted", at 227, (1990).

scale of severity. This interpretation must, therefore, be rejected and considered unworthy of further mention.

This point relating to the imbuilt contradiction may be considered an academic one, because it is necessary only for the individual to prove that the conduct in question is prohibited by one of the categories for it to be considered a violation of Article 3. But this observation fails to take into account two important factors. The first is that consistency is important in the application of the prohibition, because, although a finding of a violation may be the only issue important to the applicant, whether the conduct amounts to torture, inhuman or degrading treatment or punishment can be of considerable significance to the State. Far greater political consequences may be expected to attach to a finding that a State is guilty of practising torture as opposed to inhuman or degrading treatment or punishment. McGoldrick, in assessing the importance of the Human Rights Committee in distinguishing between the terms as used in Article 7 of the Civil and Political Covenant states:

> "...the distinctions between the prohibitions are crucial in terms of reputation, international standing, the level of reparation to be afforded, and propaganda value".[74]

Secondly, if the prohibition is to be considered as consisting principally of a ladder of severe treatment to be outlawed, it follows that any qualifier, or qualifiers, must operate so as to admit the most extreme forms of suffering into the torture category, and the less severe into the inhuman category, and the less severe still, into the degrading categories.

The unsatisfactory nature of the present position relating to the "qualification" of conduct can also be considered unacceptable when the possible classification

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[74] McGOLDRICK, at 371, (1991).

of certain types of conduct is examined. In the case of Cyprus v. Turkey,[75] a breach of Article 3 was said to have taken place because the State did not prevent its soldiers from raping women in the territory occupied by Turkey. In such an example it may be argued that the victim is subjected to suffering in every case which amounts to at least degrading treatment. Under the present understanding of the prohibition however, it may not be possible to classify the conduct as tortuous or inhuman if it could be established that the perpetrators acted not to inflict harm or suffering but for reasons of their own sexual gratification. It would appear increasingly anomalous and unacceptable that conduct involving less physical or emotional suffering may be capable of qualification into the inhuman and tortuous categories, when on a strict application of the qualifiers recognized in the Greek case, the suffering experienced by the rape victim will always be required to be considered in the degrading component of the prohibition.

To conclude the discussion of the contradictory nature of Article 3 on the aspect of qualification, it is necessary to mention the case of Abdulaziz Cabales and Balkandali v. United Kingdom.[76] It was here that the Court considered that there had been no violation of Article 3 because there was no "intent" on the part of the State to degrade the applicant.[77] It may be argued that this case indicates that the Commission was attempting, beginning with the Greek case, and following its statements relating to severity, to develop a "qualifier" based throughout on "intent". It may be hypothesized that the Commission overlooked the fact that this would be impossible with the definition of degrading treatment or punishment it developed in the same case. If the approach in Abdulaziz is to be followed, it may be concluded that this

[75] Report of 10 July 1976, Cyprus v. Turkey, 18 Yearbook H.R.82.
[76] Series A. 94, (1985).
[77] Ibid, at 42.

qualifier of intent applies constantly throughout. However, until such time as definite remarks are forthcoming to this effect, from either the Commission or the Court, which resolve this inherent contradiction, it is necessary to proceed on the basis that it still stands and that there are in effect two principal qualifiers for Article 3.

4.1.2.1 The Inconsistency in Use of Qualifiers.

If the Commission made a poor start by building into the definition of Article 3 an inhereht contradiction, it has continued to inject confusion by applying the "qualifiers" of "intent" and "result" inconsistently, or by exchanging one for the other and on occasion by abandoning them altogether.

Article 3 jurisprudence is replete with examples of decisions which have been taken without reference to the qualifiers identified first in the Greek case.

For example, a strict application of the "intent" "qualifier" by the Court in Soering v.United Kingdom,[78] would have made the decision impossible.[79] This is because, although it could be said that the likely result of Soering's return to the United States would have been that he would have suffered inhuman and degrading treatment, it could not be said that the U.K *intended* this to happen. Technically, therefore, the Court was right to decide the case with reference to degrading, but not inhuman, treatment.

Similarly, in the judgment in the Northern Ireland case[80] the Court found that the actions of the security forces at Ballykinler to be "discreditable and reprehensible",

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[78] Soering v. United Kingdom, Series A. 161, (1989).
See generally Breitenmoser and Wilms, (1990); Lillich, (1990); Warbrick, (1990).

[79] The European Court decided that extradition of Soering to the United States to face "the death row phenomenon" would violate Article 3 as it would subject the applicant to inhuman and degrading treatment. See supra Chapt. 6, pp. 217-222.

[80] Series A. 25, (1978).

but not in violation of Article 3 because they "were the result of lack of judgment rather than an intention to hurt or degrade".[81] This lack of intent would, it is argued, clearly have excluded the conduct from the inhuman category of the prohibition, as currently understood, but not the degrading component of Article 3.

Likewise, in considering degrading treatment, in Application No. 2291/64[82] the petitioner complained of having to wear handcuffs in the street. It was decided that this treatment was not degrading as there was no intent to degrade present. Again a strict application of the test developed in the Greek case would arguably have produced a different outcome, as the result of the treatment and not its purpose would have been the determinative factor. Similarly, in the Tyrer case[83] the Commission spent much time examining the motive for the punishment and whether its deterrent value had been established.[84] A strict application of the test in the Greek case makes this unnecessary on the way to a decision concerning Article 3.

4.1.2.2 The Inherent Failing of the Present Qualifiers

The use of the qualifiers of "intent" and "result" can be criticized for more than inconsistency. A fundamental objection to their use is that they qualify conduct which does not merit the attention of the prohibition, whilst disqualifying some types of conduct that properly require the attention of Article 3.

If torture is to be defined by reference to intent, it would follow that any suffering, irrespective of its severity, which could not be said to be intentional would be incapable of being classed within this category of the prohibition, even though a possible or even likely result

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81 Ibid, para. 181.
82 Coll. 24, at 20.
83 Report of the Commission, Series B. 24, (1977-1978).
84 Ibid, at 24-25,

of the treatment is that severe pain would be experienced by the recipient. The death penalty, although intended as a means of terminating life, and usually, in many States, administered in the most painless form possible,[85] nevertheless involves, a considerable amount of mental distress and physical pain. To exclude conduct such as capital punishment from the torture category because the suffering was not intentional but simply incidental or even accidental is, it is contended, unacceptable.[86]

Likewise, the individual who inflicts pain on the recipient not for any specific purpose but for her/his own gratification is again incapable of being considered within this category. The person who inflicts suffering on a detainee as punishment for the victim's political beliefs, or for his own sexual gratification may not consider that he or she is engaging in torture. The recipient however, is unlikely to be able to distinguish between this treatment and any inflicted with a definite purpose and would rightly contend, subject to a sufficient degree of suffering being present, that the two types of conduct should be classed in the same category. There is much to be said for the observation made by Sir Gerald Fitzmaurice in the Northern Ireland case:

> "torture is torture whatever its object may be or even if it has none, other than to cause pain, provided it is inflicted by force".[87]

To quote Bion of many centuries ago:

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[85] The history of capital in the United Kingdom at least, demonstrates a exhaustive search for the most painless form of execution. The Royal Commission on Executions considered that death by hanging at the time of report was preferable to all other forms of execution although it was difficult to determine the amount of physical suffering the victim is likely to experience in a given case. Report of the Royal Commission on Capital Punishment 1949-53 (Cmd. 8932).

[86] This approach has been criticized from a number of different sources, most notably Amnesty International which has contended, since including concern for torture as part of its mandate, that capital punishment is, in every case, tortuous.

[87] Separate Opinion, para. 33, Series A. 25, (1978).

> "children may stone frogs in sport but they do not die in sport but in earnest".[88]

Precisely the same objections concerning the definition of torture may be made in relation to the Commission's definition of "inhuman" treatment. Again, predicated on an "intent" inquiry it is likely to exclude all conduct that, although unintentional, nevertheless may have resulted in severe suffering. Similarly, consideration of capital punishment is, in most cases, theoretically excluded from this category and relegated for consideration to the degrading component of Article 3.

More disconcerting than the fact that, as illustrated above, the inquiry into "intent" theoretically excludes that sort of treatment which may be considered to be the proper focus of Article 3, is the fact that it also includes within the category of inhuman treatment conduct that was clearly never intended to be the focus of Article 3. For example, a strict intent inquiry would not necessarily exclude from the application of the prohibition the surgeon acting for the benefit of her/his patient and with the patient's full consent. This is because it may not always be possible to state that the surgeon did not intend suffering to occur, albeit as part of long-term treatment which would eventually benefit the patient. Some medical treatment necessarily involves transient pain and suffering intended simply to flush out ailments likely to cause greater suffering.

A close examination of the qualifier to the degrading component of Article 3 further illustrates that it fails to include or exclude conduct many would consider to appropriate for the satisfactory operation of Article 3.

It will be recalled that in the Greek case[89] the Commission considered that:

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[88] Origin of quote unknown.
[89] Yearbook XII, 186, (1969).

> "treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others or drives him to act against his will or conscience".[90]

This definition provides two possibilities for qualification into the degrading category. The first is where the individual is able to prove that he or she was grossly humiliated before others. The second is where it can be shown that the individual acted against her/his will or conscience. The two exist in an "either/or " relationship: it is necessary to establish one but not the other. Dealing with the second possibility, it appears inadvisable to concentrate the definition of treatment on the reaction of the victim to it. As Klayman points out, this is regrettable because:

> "Under such a definition, a victim of degrading treatment who can endure greater indignities and abuse will not act contrary to his will or conscience despite the fact that the prohibited conduct has occurred".[91]

The first element to the qualifier is ambiguous, and is open to two interpretations. The first is that others considered the victim's treatment grossly humiliating. The second, and more likely, is that to be grossly humiliating it must come to the attention of others.

Perhaps seizing on this ambiguity, the Commission just two years later in the East African Asians case[92] chose to disregard this qualifier in favour of another. This is similar; here they said that treatment of a person was degrading if it:

> "lowers him in rank, position, reputation or character, whether in his own eyes or in the eyes of other people".[93]

Any ambiguity remaining was dispelled by the combination of a first entirely subjective, then an objective, test.

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90 Id.
91 Klayman, at 492, (1978).
92 Yearbook, XIII, 928, (1970).
93 Ibid, at 972.

Again the test is "either/or"; it is not necessary to show both that the victim felt the treatment lowered him in rank and that others were of the same opinion.

The comments made in Campbell and Cosans v. United Kingdom[94] must be seen as questioning whether this approach is too wide. Here the Court observed:

> "first that a threat directed to an exceptionally insensitive person may have no significant effect on him but nevertheless be incontrovertibly degrading; and conversely, an exceptionally sensitive person might be deeply affected by a threat that could be described as degrading only by a distortion of the ordinary and the unusual meaning of the word".[95]

In the subsequent case of McFeeley v United Kingdom,[96] the Commission rejected the applicant's submission that having to wear prison uniform was degrading. This the Commission determined, however deeply and sincerely the applicants felt to the contrary suggesting that a more objective approach to the meaning of "degrading" was to be preferred.

Following this *dicta*, it would appear fair to conclude that an entirely subjective test is not to be used and that much of the qualifier in the East African Asians case must be considered as having been revised. The exact content of the qualifier for the degrading component of Article 3 remains unclear. In a more recent case, the qualifier was said to be those measures that "constitute an insult to the applicants' human dignity".[97]

This question of a satisfactory qualifier for Article 3 is examined in detail in Chapter 5. For the present, it is sufficient to conclude that the definitions elaborated in the Greek case amount to qualifiers which are unsatisfactory and have not been consistently applied.

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[94] Series A. 48, (1982).
[95] Ibid, para. 30.
[96] Application No.8317/78, McFeeley v. United Kingdom 3.E.H.R.R. 161, paras. 45 and 51.
[97] Application No. 8930/80, X, Y and C. v. Belgium (unpublished).

4.1.3 The Question of "Compatibility" for the Purposes of Article 3.

Once the questions of applicability of the prohibition and qualification of conduct have been addressed, it remains to be determined whether, even though the conduct has qualified as belonging to one or more of the categories in Article 3, it may be said not to violate the provision. This will be possible only if it is accepted that the ill treatment is "justifiable" or, in other words, that the conduct although amounting to inhuman or degrading treatment or punishment, is justifiable for a particular reason.

The concept of justification, it will be recalled,[98] was originally incorporated into the definition of inhuman treatment, and by implication also the definition of torture first put forward by the Commission in the Greek case. This development encountered strong criticism,[99] and it fell to the Commission ten years later in the Northern Ireland case[100] to correct what many considered to be its earlier mistake. To understand the importance of this case, and the manner in which the Commission chose to rectify its earlier position, it is necessary to examine the decision at length.

The case involved an inter-state application submitted by the Irish government on December 16 1971 alleging that the United Kingdom had violated Articles 3, 5, 6, 14 and 15 of the Convention. It was alleged that the special powers of internment introduced as a result of the continuing increase in civil disorder, violence, and terrorism had deprived many persons of their liberty and

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[98] Supra p. 132.

[99] See for example Klayman who stated in 1978 "By introducing the notion of justifiability into the definition of torture, albeit through incorporation by reference, the Commission has opened the way for arguments about the circumstances under which interrogation is used. Respondent governments will be quick to cite the gravity of the situation, the possibility of harm to others, and the threat to the security of the state in justification of their acts of torture", Klayman, at 493, (1978).

[100] Report of the Commission Series B. 23/1, (1976-78).

that the practices of the British Army had resulted in a number of detainees being subjected to ill treatment.

After an extensive inquiry into the operation and consequences of conduct authorized by regulations pursuant to the Civil Authorities (Special Powers) Act 1922,[101] with the collection of numerous testimonies taken from witnesses at venues in Ireland, London and Strasbourg, the Commission, unable to secure a friendly settlement, drew up its report on January 25 1976. Referring to sixteen illustrative practices selected by the Irish government as representative of the kind of violations it was alleging, it was concluded that the combined use of the so called five techniques[102] amounted to torture or inhuman or degrading treatment or punishment in the cases of fourteen of the detainees and to inhuman and degrading treatment with regard to a number of other individuals.

The case was referred by the Commission to the European Court. Before the Court, the United Kingdom did not dispute the findings of the Commission relating to Article 3 and gave an unqualified assurance that the "five techniques" would not in any circumstances be re-introduced as an aid to interrogation.

The Court, in examining the cases of detainees, held in unidentified centres during August and October of 1971, decided that the practices under review aroused fear, anguish and inferiority capable of humiliating and debasing the detainees and possibly breaking their physical or moral resistance. By sixteen votes to one the Court held that the five techniques constituted inhuman and degrading treatment. It further held by thirteen votes to four that the use of the practices did not amount to torture since they did not occasion suffering

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101 For the background to the special circumstances relating to this Act see Lowry, at 261, (1976); O'Boyle, (1977).

102 The five techniques consisted of hooding, subjection to noise, wall-standing, deprivation of sleep, food and drink.

of the particular intensity and cruelty implied by the word.

With regard to its consideration of treatment meted out in the Autumn of 1971 in Palace Barracks the Court unanimously held that those held in custody had been subjected to inhuman and degrading treatment but not to torture.

Although the United Kingdom did not seek to excuse or condone any of the acts of ill treatment,[103] it graphically described the situation in Northern Ireland remarking that there was existing at the time:

> "an undisputed emergency which was a matter of life and death, of limbs and sight destroyed, of deliberately shattered knee caps, of bombs and flying glass, of burning homes and of riot".[104]

In choosing to refer explicitly to such factors it had effectively put in issue the question of justification.

This issue of "justification" had already been considered in the official British inquiry into the allegations of ill treatment in Northern Ireland. The inquiry, led by Sir Edmund Compton,[105] concluded that although there had been physical ill treatment by the security forces, no brutality had taken place. This they considered to amount to:

> "an inhuman or savage form of cruelty, and that cruelty implies a disposition to inflict suffering, coupled with indifference to, or pleasure in the victim's pain".[106]

This restrictive definition of the type of person who is capable of brutality allowed the Security Forces easily to evade accusations of misconduct. It also enabled the

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[103] Series A. 25, at 339, (1978).
[104] Ibid, at 355.
[105] Report of the Enquiry into Allegations Against the Security Forces of Physical Brutality in Northern Ireland Arising out of Events on the 9th August 1971, Cmnd. No. 4823, (1971).
[106] Id, at 23.

committee to avoid stating that although disreputable, it considered that the conduct of the security forces was justified due to the exigencies of the situation.

The hostile reaction to the Compton Report[107] led to the government appointing a second committee to inquire into the interrogation practices of Northern Ireland. This investigation, leading to the Parker Report,[108] preferred to explain its conclusion with reference not to an unreasonably restrictive definition of ill treatment, but to the concept of "justification".

The Committee stated:

> "We think that such expressions as "humane" "inhuman" "humiliating" and "degrading" fall to be judged by such a [dispassionate observer] in the light of the circumstances in which the techniques were applied, for example, that the operation is taking place in the course of urban guerrilla warfare in which completely innocent lives are at risk: that there is a degree of urgency".[109]

Lord Gardiner, in a minority but forceful report, disputed the majority's acceptance of justification. He did so in a most graphic manner, stating:

> "Under this definition, which some of our witnesses thought came from the Inquisition, if an interrogator believed, to his great regret, that it was necessary for him to cut off the fingers of a detainee one by one to get the required information out of him for the sole purpose of saving life, this would not be cruel and, because not cruel not brutal".

It was with these reports already produced that the Commission approached the task of correcting its earlier dicta on "justification" in the Greek case.

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[107] Mr. Brendan Corish, leader of the opposition Labour Party in Ireland, described the Report as "horrifying and hypocritical". He stated that it was unbelievable that having described a terrifying range of tortures in specified cases the Report should attempt to whitewash these practices as mere "ill-treatment". The Times, 17 Nov. 1971, p. 2, col (e). See also The Times, 17 Nov. 1971, p. 1(a); 18 Nov. 1971, p. 5 (e);

[108] Report of the Committee of Privy Counsellors appointed to consider Authorized Procedures for the Interrogation of Persons Suspected of Terrorism, Cmnd.4901, (1972).

[109] Id, at 7.

It did so by stating in unambiguous terms as follows:

> "there can never be under the European Convention or under international law, a justification for acts in breach of that provision".[110]

In support of this position, the Commission cited Article 15 of the European Convention and Article 3 of the Geneva Conventions of 1949, in addition to the United Nations Declaration against Torture.[111]

Article 15 of the Convention allows Member States to derogate "in time of war or other public emergency threatening the life of the nation"[112] from a majority of rights and freedoms set forth in the Convention. This provision does not apply to Article 3.[113] It is clear, therefore, that the freedom contained in the provision is one that is to apply at all times and in every situation, even during periods of acute civil disorder.

The Court, following the example of the Commission, confirmed that the concept of justification did not properly belong in any definition of the terms used in Article 3.[114] Concerned that the Commission's earlier statements might be interpreted as endorsing torture in certain circumstances, it is contended that they were correct to do so. However, it is submitted that the manner in which they chose to do this is to be regretted and that an opportunity to develop a satisfactory operation of Article 3 was lost. It will be recalled that the Commission in the Greek case had been criticized for implying that it was possible to justify not only inhuman and degrading treatment but also torture. This they had done by defining torture by reference to its definition

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110 Series A. 25, 379, (1978).
111 Id.
112 Art. 15 para. 1 provides "In time of war or other public emergency threatening the life of the nation any High Contracting party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law". European Convention, supra note 1.
113 Art. 15 para. 2, id.
114 Supra note 17.

of inhuman treatment, which included the phrase "which in the particular situation is unjustifiable".[115] The Court, therefore, took the opportunity of stating that there were no circumstances in which a breach of Article 3 could be justified. A possibility also available to the Court was simply to detach the two definitions leaving the definition of inhuman treatment as it was, and to define torture separately. This would have allowed the protection from torture to be absolute, as was intended by the drafters of Article 3. It would also have permitted the Commission and the Court to consider the remainder of the prohibition in relation to a number of factors, such as the social value of the conduct, which would be vital to a proper review of the types of treatment and punishment likely to be challenged under the "inhuman and degrading" components of Article 3.

This, it must be noted, the Court could have done without prejudicing the outcome of the decision in the Northern Ireland case. Instead of explaining the "five techniques" as being inhuman, and as such immediately contrary to Article 3, it would have been possible to state that the conduct was inhuman and then to address the issue of justification. Finding that the conduct led to severe suffering, the United Kingdom could have been under a strong burden to justify its actions. This burden, the Court may have considered, the United Kingdom would not discharge by referring to the state of emergency existing at the time. Alternatively, and this is the preferred solution, the Court might have considered that the five techniques amounted to torture and should, therefore, be immediately declared contrary to Article 3. The problem with the Court's approach, it is submitted, is that in rejecting completely the notion of justification for any conduct which may fall within the terms of Article 3, it foreclosed the possibility of allowing many forms of

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[115] Supra p. 132.

treatment and punishment full and proper consideration.[116] This rejection of any concept of justification in the interpretation of the prohibition has had the effect of placing the Court in a judicial straightjacket, making impossible a proper consideration of a number of the "new areas" identified earlier[117] to which the Article has now been applied.

At present, it is sufficient to note the effect which the complete rejection of justification has on the application of the prohibition. It becomes apparent that, as no concept of justification is accepted, then once it is determined that a given conduct qualifies as amounting to either torture or inhuman and degrading treatment, it will automatically follow that the conduct is incompatible with Article 3, because the state is prevented from submitting any defence to the application.

The effect of this is that the two separate tests of "qualification" and "compatibility" are merged into one. The test of qualification is also that of violation. This position invites inquiry into two areas. The first is to ascertain the effect that this merger has on the qualification stage of the prohibition. The second is to inquire as to whether the rejection of the compatibility stage of Article 3 allows for a proper consideration of the types of conduct to which the prohibition now applies. These points will be investigated in Chapters 5 and 6.

Conclusion

For the present it is sufficient to note that the current application of the prohibition is confused. It is erratically applied and unsatisfactorily reasoned. To apply Warbrick's comment on the reasoning in the Soering case to the interpretation of Article 3 generally it

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[116] This point will be developed further in Chapt. 5, infra, pp. 186-194.
[117] Supra Chapt. 3, p. 111.

suggests nothing more than a series of preferred outcomes with individual rationalizations for each decision.[118] Little indication is given to either the individual or the State as to whether a given form of treatment or punishment is likely to be compatible with Article 3. The time for a radical reappraisal of the understanding and application of the prohibition of torture and ill-treatment is now due.

[118] Warbrick, at 1079, (1990).

5. DETERMINING WHAT CONDUCT QUALIFIES FOR REVIEW UNDER ARTICLE 3 OF THE EUROPEAN CONVENTION.

Introduction to Chapter

The variety of cases brought before the Commission regarding Article 3 of the European Convention is extensive. As noted in Chapter 3,[1] this may be explained because it is applicable to all forms of treatment or punishment which result in suffering of a certain severity, irrespective of the status of the person responsible for the conduct, the capacity in which the individual is acting and whether his or her actions are considered compatible with, or even required by, domestic law.

This unlimited application of the norm demands that a satisfactory mechanism is devised to separate applications into two categories. Into the first must be placed all treatment or punishment which, although involving severity sufficient to raise an issue with Article 3, must be dismissed from further consideration because it is clearly not conduct which requires review for compatibility with a provision prohibiting torture and ill-treatment. Into this second category must be placed all that conduct which does require further consideration for compatibility with Article 3. Corporal punishment, the Commission has considered, is one type of conduct that falls into the second category.[2] Treatment of immigrants seeking to settle in the United Kingdom is a second.[3] Refusal to acknowledge a change in sex, the Commission has accepted, is a third.[4]

Bearing in mind the unlimited applicability of Article 3, this process of conduct selection must have the following characteristics. It must be able to determine in which of the two classes a given conduct belongs and it must also

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[1] Supra Chapt. 1, pp. 45-46.
[2] Tyrer v. United Kingdom Series A. 26, (1978). Infra, Chapt. 6, pp. 209-216.
[3] East African Asians v United Kingdom, Yearbook XIII, 928, (1970), infra, Chapt.6, 222-227.
[4] Dec. Adm. Com. Application No. 6699/74, 15 Dec 1977. D & R 11 p. 16 (23-25).

give both the State and the individual an indication as to whether any particular form of conduct is likely to qualify for further review under the terms of Article 3. It is contended that the current approach of the Commission and Court does not satisfy these criteria. It is the purpose of this Chapter to investigate why this is the position, and also to establish, and for succeeding chapters to substantiate, how this problem of "qualification" may be satisfactorily resolved.

As noted earlier,[5] it will be recalled that the Commission has decided that to *"qualify"* conduct into the torture and inhuman component of the prohibition of torture and ill-treatment, there must be an *"intent"* to cause the suffering on the part of the State. For treatment or punishment to qualify as degrading, the Commission has concluded that it is not the intent of the State which is important, but the *"result"* of the conduct. In addition to what, for the purposes of this Chapter and research, is referred to as the "qualifiers" of "intent" and "result" mentioned above, it was stated in the East African Asians case,[6] that the suffering experienced by the recipient must be of a certain severity. This severity requirement will be referred to, for reasons which will be explained shortly, as the *"disqualifier"*. A study of these two factors, which between them determine which conduct requires review with the prohibition of torture and ill-treatment, allows an indication as to why the Commission has failed to provide the consistency required for the purposes of Article 3. The concept of severity will be discussed first. Because, it is also necessary to understand the role and assessment of severity for the purposes of Chapter 6 of this thesis, it is proposed that it should be examined in detail in this Chapter.

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[5] Supra Chapt.4, pp.130-133.
[6] Supra note 3.

5.1 The Concept of Severity of Suffering:its Dual Role.

5.1.1 Severity of Suffering: its "Disqualification" Function.

In the Tyrer case,[7] it was said that, for treatment to come within Article 3, a certain level of severity of suffering must be present. As noted earlier,[8] the effect of this finding is to add a further requirement to the provision. It reads into the prohibition a condition not stipulated in the text and might in effect be read to amend Article 3 as follows:

> "No-one shall be subjected to torture, inhuman or degrading treatment or punishment *leading to suffering of a minimum severity*".

Although this interpretation lacks support from a literal reading of the Article, it may be defended by reference to the *travaux preparatoire*, and from a functional point of view. It is evident from an inspection of the *travaux preparatoire* that the drafters of the norm had the most serious of violations in mind.[9] Cock's prolific examples of torture mentioned have already been stated in Chapter 1.[10] The *travaux preparatoire* to the European Convention suggest that the norm was intended to be applied only in those cases which involve severe and not moderate suffering. Similarly, its introduction may be defended from a functional perspective. There are a number of applications submitted every year to the Commission for which, although they may be said to have come from applicants adversely affected by the actions of another, there is clearly no case for consideration under Article 3. For example, in Application No. 6619/74[11] the Commission was asked to find that the state in preventing

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[7] Supra note 2, at para.30.
[8] Supra, Chapt.4, p. 133.
[9] Supra, Chapt.1, pp. 47-48.
[10] Id.
[11] Dec. Adm. 10 Dec 1975, (unpublished).

the applicant from using the title "Honary Doctor of Divinity" had subjected him to degrading treatment. In Application No.7630/76,[12] the petitioner alleged that it was inhuman to have to do a job which he was overqualified to do. In Application No.7729/76,[13] the Commission decided that the applicant had not been subjected to degrading treatment when a Member of the United Kingdom Government made public his case by openly discussing in Parliament the plans to deport him. These applications clearly required to be disposed of in a quick and summary fashion, allowing the Commission the maximum amount of time to consider those cases raising real and serious issues under Article 3. This is done, it is accepted, most effectively by reference to the issue of severity.

An alternative method of disposing of applications, such as those mentioned above which fail to raise issues worthy of consideration under Article 3, might be to accept that all conduct to which an individual may be adversely affected is degrading, but to consider some treatment justifiable and some not. The complaint concerning the unsuitable employment might then be declared justifiable on, for example, grounds of economic interest. The unwanted publicity in Parliament might be defended in the interests of democracy. Such an alternative, however, is clearly not to be preferred because of the difficulty of constructing a satisfactory concept of "justification" which would, at such a level, be able satisfactorily to select and dispose of conduct which may, or may not, raise real issues with a provision outlawing torture and ill-treatment. The theory, lacking as it does any support by reference either directly to treaty provisions or to the *travaux preparatoire* of the European Convention, need not be discussed further.

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[12] D & R 7 p. 161.
[13] D & R 7 p. 164.

It is important to note at this stage that the first function of the severity requirement is entirely to dispose of cases which do not involve a sufficient degree of suffering on the part of the applicant to justify examination of the case under Article 3. This function, and indeed its second which will be discussed shortly,[14] is not to be confused with an inquiry to determine whether the suffering is of a sufficient severity to qualify the conduct for review under the norm. It is important to emphasize that at all stages the severity requirement never has the capacity to "*qualify*" treatment for review under Article 3. This function is the preserve of the "qualifiers" recognized in the Greek case of "intent" and "result", which between them determine which conduct qualifies for review under Article 3. This point may be illustrated by recalling Sir Gerald Fitzmaurice's example mentioned in the Tyrer case[15] of the surgeon amputating the soldier's leg on the battlefield without anesthetic; this indicates that even the most extreme suffering inflicted on a person does not automatically qualify treatment into any one of the three categories in Article 3. What does, according to the present understanding of the norm, is the "*intent*" of the surgeon or the "*result*" of his treatment. The severity requirement, it follows, does not have the capacity to "*qualify*" a given conduct into one or more of the categories mentioned in Article 3. It only has the capacity to *disqualify* treatment or punishment as raising no issue with Article 3. It is for this reason that, in this role, the severity requirement can properly be referred to as the "*disqualifier*".

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[14] Infra p. 162 & p. 166.
[15] Supra note 2, at p. 20..

5.1.2 Severity of Suffering: its "Classification" Function

As well as disqualifying conduct from further review, the concept of severity of suffering performs a second function. The Commission has stated that the principal component separating the categories in Article 3 is severity of suffering.[16] "Severity" it follows, determines whether conduct is to be considered degrading, inhuman or tortuous. This function of "severity" in determining into which of the three categories the conduct must be said to fall will, for the purposes of future reference, be referred to as the *classification* function.

It is worth noting at this point that a violation of Article 3 will already have been determined. Assessing severity is important to enable the Commission to attribute a classification to the conduct which accurately reflects the seriousness of the breach of Article 3. It has nothing to do with the process of determining whether Article 3 has been violated in the first place. Again, it can be seen that this is a function reserved entirely for the qualifiers of "intent" and "result".

The above examination of the dual tasks of "severity" are essential to a satisfactory understanding and operation of Article 3. It is important, therefore, to devise an acceptable means of assessing severity so that its dual functions of "disqualification" and "classification" may be performed as consistently as possible and it is to this problem of assessing the severity of suffering that it is now necessary to turn.

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[16] Supra Chapt. 4, at p. 135.

5.2 The Assessment of Severity of Suffering.

Measuring severity of suffering is a difficult process. It is one which is clearly not at present, nor indeed is it likely to be in the future, scientific. For the purposes of this research, the problems in assessing severity of suffering will be examined by studying, first suffering caused by the infliction of physical pain, and then psychological or emotional suffering. It will be noted, however, that even this apparently simple and innocuous division may not be acceptable to many physiologists.[17]

5.2.1 The Assessment of Pain.

Physiologists are unable to measure the level of pain a person is experiencing at a given moment. There is to date no accepted method of assessing accurately pain thresholds.[18] Fuse and Fujita explain current efforts to assess pain as follows:

> "As pain is a subjective experience, there is no precise method to quantitate it objectively. There are two approaches: the first is the use of laboratory techniques to measure the patient's reaction to experimental pain, such as sensory decision theory analysis. This method is a psychophysical procedure to distinguish between a person's criteria for reporting pain and the sensory experiences induced by noxious stimuli. The second is the use of tools to assess pain by the patient's description. Many kinds of rating scales, including visual analogue scales, have been used to evaluate the intensity of clinical pain, but they can not assess the quality of pain..."[19]

It may be considered that the lack of progress in the field of pain measurement may be attributed to an unwillingness rather than an inability to remove existing obstacles preventing progress in determining accurately pain thresholds. The abuses which the accurate charting of pain may be put to are readily apparent. It would be

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[17] Infra p. 161.
[18] Turk & Rudy, 27, (1990).
[19] Fuse & Fujita, 286, (1992).

invaluable to the torturer to know the amount of pain his or her subject was feeling at any given moment in the uncertain process of inflicting enough pain to be unbearable, but at the same time not fatal. However, further advances in this area would undoubtedly be of use for many legitimate medical uses. Accurate assessment of pain is considered important in the treatment of cancer[20] and for dealing with post-accident trauma, in addition to the management of pain in nursing care.[21]

The process of assessing severity of suffering is further complicated because, even if pain can be measured, an individual's immunity or resistance to it is variable from person to person. It may vary as between sex, race, age, culture and even ideology. The ancient Cappadocians who lived as outlaws, were said to have practiced torture on each other to loosen their muscles and increase their tolerance to pain.[22] In East Africa, men and women undergo an operation, in which the scalp and the underlying muscles are cut in order to expose a large area of skull. Although no anaesthetics or pain-relieving drugs are used the patient shows no apparent signs of discomfort.[23] Faith in a cause or belief can result in a person's fear of pain being reduced. Suffering, and even death, may be viewed not as the dreaded consequence of a particular action, but as stages on the way to victory and martyrdom. Similarly, ability to sustain morale under torture is variable between individuals. Some individuals may be more successful in seeking refuge from the reality of their situation than others.[24] Perhaps one of the most remarkable examples of cultural determinants in pain perceptions is given by Melzack and Wall.[25] They describe

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[20] Ibid, 290.

[21] Christoph, 11, (1991). In respect of nursing care Christoph states: "....given the deleterious effects pain may have for the critically ill or injured patient, pain assessment must be given a high priority to develop effective management plans", id.

[22] RUTHVEN, at 68, (1978).

[23] MELZACK & WALL, 17, (1988).

[24] See generally on this point AMNESTY INTERNATIONAL, at 44, (1975).

[25] Supra note 23.

a ritual still practised in a particular part of India as follows:

> "The ceremony derives from an ancient practice in which a member of a social group is chosen to represent the power of the gods....What is remarkable about the ritual is that steel hooks, which are attached by strong ropes to the top of a special cart, are shoved under his skin and muscles on both sides of the back.....at the climax of the ceremony in each village, he swings free, hanging only from the hooks embedded in his back, to bless the children and crops. Astonishingly, there is no evidence that the man is in pain during the ritual; rather, he appears to be in a "state of exhaltation".[26]

Added to the physical pain resulting from torture must be its mental effects. Two identical physical acts may produce entirely different stress responses. The emotional effects of sexual intercourse depend entirely upon the scenario in which it takes place. In the absence of consent, the nature of the act becomes entirely different and is likely to be accompanied by severe stress and emotional after-effects. Similarly, the needle that pierces the skin to inject a drug into the blood stream is likely to result in little stress if it is perceived by the patient to be for his or her benefit. The same cannot be said if the drug is administered in a situation which could be described as pharmacological torture.[27] These observations may be summarized by the comment that inherent in any suffering resulting from torture is the hate or animosity which is conveyed inter-personally through the conduct, and it is often this that in the long term is the most damaging to the victim. This suffering, however, is the most difficult to quantify and

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[26] Ibid, at 16-17.

[27] A report by AMNESTY INTERNATIONAL, (1985), mentions with regard to the practice of pharmacological torture in the U.S.S.R in the 1970's: "The drugs most commonly used on dissenters are the powerful tranquilizers (commonly referred to as neuroleptic drugs) aminazin, haloperidol and triftazin; insulin and sulphazin. Among other drugs which have been applied to prisoners of conscience and other inmates are tizertsin, sanapax, etaperazin, phrenolon, trisedil, mazheptil, seduksin and motiden-depo. These drugs have been administered by various means, including injections, solutions for drinking and tablets", at 197.

there has yet to develop a satisfactory method of accurately assessing it.[28]

Amnesty International[29] questions whether it is even possible for the purposes of assessing severity of treatment to discuss its effects in the terms of the "physical" and the "psychological":

> "The first difficulty, particularly that of discussing experiences of pain, arises from the traditional and convenient habit of considering "body" and the "mind" as discrete entities. This theoretical separation has been, by and large, axiomatic in cultures with religious and philosophical roots as diverse as the Judaeo-Christian and the Hindu. But, however appropriate this concept of a mind-body dichotomy may appear to be in the development of moral and behavioural norms, it poses severe obstacles to a proper understanding of certain human phenomena such as pain. In spite of the research which yet needs to be done in this field, it is nevertheless significant ....that contemporary pain studies, as well as research into psycho-somatic illnesses and stress, point to increasing acceptance of a synthetic (i.e.unified) concept of the body/mind relationship. It has become unacceptable to insist upon a division between "physical" and "mental" experiences of pain. This development prevents one from cataloguing torture methods and efforts according to discrete categories of the physical and psychological".[30]

If this is correct, it follows that any attempt to departmentalise likely effects of torture into the physical and the psychological are inadvisable; and that treatment may only be assessed with regard to its effect taken as a whole. Research, it may be concluded, has been unable to assist the Commission's task of determining when a given threshold of suffering has been reached. It has, however, been able to suggest that an obvious starting point in the process of assessing the physical and then the psychological affects of treatment is misguided.

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[28] Supra note 19.
[29] AMNESTY INTERNATIONAL, (1975).
[30] Id, at 39-40.

This brief excursion into the problem of assessing severity of suffering allows us to draw a conclusion which may have been anticipated at the commencement of the exercise. That is, in the absence of scientific data which may provide indications of the likely suffering of an individual in a given situation the assessment of severity of suffering for the purposes of Article 3 is an entirely subjective one. At present, when performed by members of the Commission and the Court, it is restricted only by the deliberations of colleagues, previous case law and public criticism of their eventual decision.

Left not to the art of science, but of language, the Commission, it may be concluded, is required to perform an important task in an area in which the scientist is largely unable to assist in providing an indication as to what should be considered common ground and a mutual starting point in the uncertain process of assessing severity of suffering. Personal, subjective opinions circulate unrestrained except by contemporary opinion and the need to develop consistent jurisprudence with regard to the severity requirement. It is against this background that we proceed to evaluate the Commission's attempts to date to identify severity thresholds important for the purposes of Article 3.

5.2.2 The Assessment of Severity of Suffering for its "Disqualification Function".

In the East African Asians case,[31] although the Commission stated that there must be a minimum level of severity before Article 3 applies, it gave no indication as to when the level of severity may be said to have been reached. In the subsequent Northern Ireland case,[32] it was said that severity is not synonymous with discomfort or with disagreeable treatment. It indicated that it is something more than this, but it was unable to provide

[31] Supra note 3.
[32] Series A. 25, (1978).

indications as to what this may be. The Court did, however, provide an indication, not as to when a given severity threshold may be considered to have been satisfied, but as to what factors may be taken into account when assessing severity. It stated:

> "ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, the age and state of health of the victim,etc".[33]

In the absence of a formula indicating where this severity threshold may be located, it is necessary to attempt to plot its co-ordinates by reference to cases which have been considered to fall marginally on one side of the severity line or the other. These cases may be identified because what was in dispute was whether the conduct could be said not to be tortuous or inhuman but degrading, and because in many of them there were a number in either the Commission or the Court who disagreed with the majority, considering that the conduct was properly placed on the other side of the severity threshold.

In the Tyrer case,[34] the Court considered that subjecting the applicant to corporal punishment amounted to degrading but not inhuman punishment. Tyrer, a 15 year old school boy, was subjected to 3 strokes of the birch on his bare posterior. The Court decided that it was degrading "because the very nature of judicial corporal punishment is that it involves one human being inflicting physical violence on another human being", and due to the fact that "he was treated as an object in the power of the authorities [constituting] an assault on precisely that which is one of the main purposes of Article 3 to protect, namely a person's dignity and physical

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[33] Id, at 65.
[34] Supra note 2.

integrity".[35] Sir Gerald Fitzmaurice, in his dissent, considered that the punishment did "not involve the level of degradation required to constitute a breach of Article 3...".[36] In the Northern Ireland case[37] he explained that he considered that the terms "inhuman" and "degrading" should be confined to the sorts of ill-treatment member States of the Council of Europe would have had in mind midway though the twentieth century, in the aftermath of war and atrocity.[38] In the case of Campbell and Cosans v United Kingdom,[39] the Commission accepted that it was possible to consider that subjecting a person to the imminent threat of torture could amount to degrading treatment.[40] The mere threat of corporal punishment was not, however, of sufficient severity to be considered degrading treatment. In Warwick v United Kingdom,[41] the Commission accepted that the caning of a 16 year old school girl amounted to degrading treatment. In this case the applicant was struck on her hand three times by her headmaster in the presence of another male teacher. The Committee of Ministers, however, was unable to reach the two-thirds majority required to endorse the decision.[42] In the more recent case of Costello-Roberts v United Kingdom,[43] the Commission did not feel that subjecting a 7 year old school boy to three "whacks" with a gym shoe amounted to degrading treatment.[44] However, in Y v. United Kingdom,[45] where the applicant was caned for poor standards of discipline, the Commission considered that he had been subjected to degrading treatment. He had been hit twice causing "four wheals to appear on his buttocks, with swelling and bruising, [and] considerable pain for

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35 Id, at p. 16, and Chapt. 6, at pp. 212-217.
36 2 E.H.R.R. (1978) 1, at 20.
37 2 E.H.R.R. (1978) 25.
38 Ibid, at 117.
39 Series B. 42, (1980-83).
40 Id, at 43-44.
41 Application No. 9471/81 Report of 18 July 1986, para. 88.
42 Resolution DH(89) 5 of 2 March 1989.
43 Application No.13134/87 Adopted 8 October 1991. Series A. 247-C, (1992).
44 Id, p. 52.
45 Application No.14229/88. Report of the Commission 8 Oct 1991. Series A. 247-A, (1992).

some time after the act itself".[46] In McFeeley v. United Kingdom,[47] the Commission did not appear to consider that subjecting the prisoner to a "strip" and "body" search amounted to sufficient severity of suffering for the purposes of Article 3. This was despite the fact that a body search sometimes involved inspection of the prisoner's rectum, albeit with the use of a mirror to avoid physical contact. In the case of Reed v United Kingdom,[48] the applicant complained that having to live for three weeks in a prison cell, infested by cock roaches, and otherwise uncomfortable, amounted to degrading treatment or punishment. The Commission, referring to the special circumstances surrounding his application, including the shortage of standard cells due to the disruption caused by major repair work to the prison, concluded that no violation had been established. In Application No.9105/80,[49] the Commission stated that the applicant's separation from her parents, brothers and sisters at her tender age was likely to cause her pain and anxiety, but was not sufficient to raise an issue under Article 3. Similarly, in Application No.6564/74,[50] the Commission did not consider that having to share underwear and toilet articles with other prisoners amounted to degrading punishment, stating that the "alleged hardships are obviously not of such a grave nature that they could be said to constitute inhuman or degrading punishment within the meaning of [Article 3]".[51]

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[46] Id, at 12.
[47] Application No.8317/78, 15 May 1980. D & R 20 p. 44 (85-86). See also Application No.8697/79, 9 December 1981 (unpublished); Application No.8983/80, 9 December 1981 (unpublished).
[48] Application No. 7630/76, 6 December 1979. D & R 19 p. 113, (137).
[49] 6 July 1981 (unpublished).
[50] 21 May 1975. D & R 2 p. 105.
[51] Id.

5.2.3 Assessment of Severity of Suffering for its "Classification Function".

With regard to the second function of severity, that of classification, an examination of the Northern Ireland case,[52] is useful. The Commission considered that the so called "five techniques" amounted to torture. This was despite the fact that they were of a type of treatment quite removed from the unsophisticated and brutal practices traditionally considered to amount to torture. The case was then brought before the Court. The United Kingdom did not dispute the findings of the Commission in relation to its classification of the practices of the British Army as amounting to torture.[53]

The "five techniques" it will be recalled included: enforced wall standing,[54] hooding[55], noise[56], sleep deprivation[57] and a diet of bread and water.[58]

In attempting to marginalise the room for error in this process of determining on which side of the "torture/inhuman" line these techniques must be said to rest, it is pertinent to refer to research regarding techniques of sensory deprivation (SD), which were central to the purpose of the five techniques. Shallice in his study of the SD effects of the practices under

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[52] Report of 25 January 1976, Series B 23/I (1976-1978).

[53] Id, at 411.

[54] This, according to the detainees, consisted of facing a wall with hands placed high above the head on the wall with legs apart being forced with battons to maintain this posture until collapse and then being restored to the posture. Records showed that this continued often for four to six hours at a time. Series B. 23(1) 1976-78, at 267.

[55] This involved the wearing of a navy or black coloured bag of tightly woven or hessian cloth at all times except during interrogation, id.

[56] It was alleged that between periods of interrogation detainees were held in rooms where there was continuous noise which was loud and deafening and resembled the escaping vapours of compressed air, the roar of steam, the whirling of helicopter blades or a drill, id.

[57] It was stated that the detainees were deprived of sleep for two or three days or were allowed very little sleep throughout their detention, id.

[58] The petitioner alleged that they had been provided with bread and water or on occasion deprived of food and drink altogether for two or three days, id.

scrutiny in the Northern Ireland case,[59] referred to the following experiment:

> "In an experiment in England, fully described in the Lancet of 12 September 1959, 20 men and woman volunteer members of a hospital staff, aged between 20 and 55, were each placed in a "silent room" standardized up to a mean sound pressure level of 80 decibels, and the further sensory deprivation consisted of having to wear translucent goggles which cut out patterned vision, and padded fur gauntlets. On the other hand they had four normal meals a day when they were visited by colleagues on the hospital staff and could take off the goggles, and they had "dunlopillo" mattresses on which they could sleep or rest, or they could walk about. They were promised an amount of paid time off equal to that spent in the room and were asked to stay there as long as they could.
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> Six remained for 48, 51, 75, 82 and 92 hours, but 14 of the 20 gave up less than 48 hours (two of them after only 5 hours), the usual causes being unbearable anxiety, tension or attacks of panic. Dreams were invariable in those who slept for any length of time and in a quarter of the 20 included nightmares of which drowning, suffocation, killing people, etc. were features. These were the results, although they were volunteers in their own hospitals who knew that there was no reason for any panic and who were not submitted to any wall-standing or deprived of any food or sleep".[60]

Shallice relates this experiment to the treatment of the detainees in the Northern Ireland case as follows:

> "If we turn to people undergoing SD in a non-experimental situation, where the situation would be phenomenologically very different, the stressful nature of SD becomes even more apparent...In the Ulster situation the internees had a thick black bag over their heads, were subject to a loud masking noise, had to remain in a fatiguing and painful fixed position while dressed in a boiler suit...Sleep was prevented and food was inadequate. Thus cognitive functioning would be impaired. Pain would be present both from beatings and from the use of the "stoika" position at the wall. Finally anxiety must have been at a high level for the internees even before sensory deprivation began, especially as no one knew...that they were to be arrested and subjected to the depersonalisation

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[59] Shallice, (1973).
[60] Id, at 385.

> and disorientation of the arrest and initial imprisonment process. Thus one would expect the positive feedback process....to operate starting from an initially high level of stress...with cognitive functioning impaired so that rational defences would be impossible".[61]

Despite experiments such as these, which provide a reasonable indication of the likely levels of stress and pain which individuals in a particular situation are likely to have suffered, it is still possible, in the absence of the most horrific and unsophisticated techniques traditionally considered to amount to torture, for disagreement to exist as to whether conduct may be classified as belonging to one of the categories mentioned in Article 3 as opposed to another. This was indeed illustrated by the Court in the Northern Ireland case, which, disagreeing with the views of the Commission, decided that the conduct was inhuman but did not amount to torture. Despite research such as that of Shallice's which suggests that SD techniques as applied in the Northern Ireland case are properly classified as tortuous, Sir Gerald Fitzmaurice was still within his rights of judicial interpretation to state that the treatment was inhuman and that torture should be reserved for conduct that "involves a wholly different order of suffering".[62]

Although it is far from satisfactory to allow judges to classify conduct in accordance with a concept for which there is no satisfactory means of measurement, for the present it does not appear possible to do better. If judges' perception of what amounts to torture, inhuman or degrading conduct is considered to be unsatisfactory, it is only the views of their fellow judges or public criticism of their chosen categorization which may persuade them to review their approach in future Article

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[61] Id.

[62] "If the five techniques are to be regarded as involving torture, how does one characterize e.g having one's finger-nails torn out, being slowly impaled on a stake through the rectum, or roasted ver an electric grid?" Sep Op. supra note 32 at para. 35, p. 138.

3 cases. A study, at least of the corporal punishment cases, suggests that the Court's interpretation of that conduct with regard to Article 3, has not been out of touch with the mood in Europe regarding physical chastisement of school children. Similarly, at present we must be satisfied that the majority of judges at the European Court of Human Rights have felt able to decide that corporal punishment for a criminal offence must be considered degrading,[63] that facing the "death row phenomenon" can be inhuman[64] and that *falanga*[65] is tortuous.

Having examined thus far in this Chapter the question of severity of suffering and established that it has no role in "qualifying" conduct for review for compatibility with Article 3, it remains to justify the observation made earlier[66] in this thesis that the present "qualifiers" of "intent" and "result" are not satisfactory. Before this task is carried out, it is necessary to examine the range of conduct which has been challenged as incompatible with Article 3. This will provide an indication of the variety of treatment and punishment and range of applications to which the "qualifiers" must be expected to satisfactorily operate.

5.3 The Variety and Range of Conduct Challenged as Incompatible With Article 3.

It was in the Greek case,[67] that the Commission first attempted to define the terms accommodated in Article 3. This was a case involving the very type of conduct and severity of suffering that the drafters of the Article had in mind. However, it was clear from early

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[63] Tyrer supra note 2. Infra Chapt. 6 at pp. 210-217.
[64] Soering v United Kingdom Series A. 191, (1989).
[65] This was described by the Commission in the Greek case as: "....the beating of the feet with a wooden or metal stick or bar which, if skilfully done, breaks no bones, makes no skin lesions and leaves no permanent and recognisable marks but causes intense pain and swelling of the feet." The Greek case, Yearbook XII, (1969), at 499.
[66] Supra Chapt.4, 139-143.
[67] Id.

applications to the Commission alleging a violation of Article 3, that the prohibition of torture and ill-treatment in the Convention was to be invoked in cases involving conduct significantly less serious than that attributed to the Greek government and of a type altogether different from the traditional concepts of torture clearly in the minds of the drafters of the provision.

Early applications alleging a violation of Article 3 were considered to raise no real issues with the provision and it is clear that the Commission felt able to dispose of such cases with little accompanying explanation. For example, the first Article 3 complaint decided by the Commission was Application No.26/55.[68] The applicant alleged that the Federal Republic of Germany had violated his rights under Article's 2, 3, 8, 13 and 17 of the Convention. The Commission declared that he had submitted no evidence in support of his allegations and the application was declared manifestly ill-founded. In Application No.28/55,[69] the applicant complained, *inter alia*, that Article 3 had been violated because of his improper treatment in a mental asylum. The petition was declared inadmissible for non-exhaustion of domestic remedies. In Application No.462/59,[70] the petitioner alleged that being subjected to a "hard bed" regime amounted to inhuman and degrading treatment. The Commission considered that the application did not indicate that Article 3 had been violated. Similarly in Application No.1753/63,[71] the applicant complained that detention in an isolation cell, together with inadequate medical treatment, amounted to a violation of Article 3. The Commission in that case decided that the applicant had failed to submit evidence substantiating his allegations, in addition to the question of non-

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[68] (Unpublished).
[69] (Unpublished).
[70] Yearbook II (1958-59) p. 382.
[71] Yearbook VIII, p. 174, (186).

exhaustion of domestic remedies. In Application No.3448/67,[72] the petitioner, a prisoner, claimed that his treatment at the hands of prison officers amounted to inhuman and degrading treatment or punishment. He complained that he was brutally beaten by prisoner officers after refusing to leave his cell. To prevent him yelling, a towel was placed over his face causing him to lose consciousness. He was then placed in an isolation cell 2 metres by 3 and ordered to put on light clothes despite the cold. The cell contained no furniture and he was forced to eat like an animal on the floor. His hand during this time was bleeding heavily from an injury, and he was unable to stand because of a pain in his foot. The following day he was released from his isolation cell, and informed that he would be charged with assault and violent resistance if he lodged a complaint. Remarkably, the Commission considered that in the circumstances of the case, the force used against the applicant was not excessive, and was not, therefore, contrary to Article 3.

It is interesting to note that, even before the Greek case, the Commission was required to consider cases in which the State had not at the time of the application physically harmed the applicant or even subjected him to any treatment which might be said to violate Article 3. What was in dispute was the intended or future action of the State with regard to the individual. In 1959, the Commission recognized that Article 3 may have significance for a state's treatment of foreigners in entering or leaving a country. It stated:

> "Whereas under general international law a State has the right, in virtue of its sovereignty, to control the entry and exit of foreigners into and out of its territory; and whereas it is true that a right or freedom to enter the territory of States, members of the Council of Europe, is not, as such, included among the rights and freedoms guaranteed in Section 1 of the Convention; whereas, however, a State which signs and ratifies the European

[72] Application No. 3448/67 17 May 1969 Coll. 30 p. 56 (62-68).

> Convention of Human Rights and Fundamental Freedoms must be understood as agreeing to restrict the free exercise of its rights under general international law, including its right to control the entry and exit of foreigners, to the extent and within the limits of the obligations which it has accepted under that Convention".[73]

These *dicta* were followed in Application No.984/61,[74] which concerned the expulsion of the petitioner from Belgium. Here the Commission stated:

> "the deportation of a foreigner to a particular country might in exceptional circumstances give rise to the question whether there had been "inhuman treatment" within the meaning of Article 3 of the Convention; whereas similar considerations might apply to cases where a person is extradited to a particular country in which, due to the very nature of the regime of that country or to a particular situation in that country, basic human rights, such as are guaranteed by the Convention, might be either grossly violated or entirely suppressed".

These cases marked a line of jurisprudence which were to allow the individual the right to challenge the actions of a member state of the Council of Europe in cases of the individual's extradition, expulsion, deportation or repatriation from a State, or transfer to or refusal to enter a State. What has effectively been constructed out of Article 3 is a right to asylum,[75] and it is in fact this aspect of the provision which has given rise to more petitions than any other, and indeed to one of the Convention's most important cases, that of Soering v United Kingdom.[76]

Asylum cases, however, are not the only examples of applications far removed from the type of application envisaged by the drafters of Article 3. Application No.2248/64,[77] required the Commission to consider whether

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[73] Application No. 434/58, 30 June 1959. Yearbook II p. 354 (372)..
[74] Application No. 984/61, 29 May 1961 Coll.6 p. 39 (40).
[75] Einarsen, at 61, (1990).
[76] Supra note 64.
[77] Yearbook X, p. 170, (174); Coll.22 p. 23 (26)

deficient social security contributions amounted to a violation of Article 3. In 1967 the Commission was seized by the first of many complaints relating to what may be referred to as the "sex change" cases. In Application No.2567/65,[78] the Commission stated:

> "Whereas, in regard to the applicant's complaint of inhuman treatment in that he has not been permitted to undergo an operation to change his sex, an examination of the case as it has been submitted does not disclose any appearance of a violation of the rights and freedoms set forth in the Convention and in particular in Article 3 in view of the fact that the applicant has been transferred to a special prison where he is under the care of medical specialists who have carefully considered his case".

In Application No.2568/65,[79] the Commission was required to consider whether the refusal to allow the applicant to continue to practice as a lawyer after more than twenty years as a member of the Belgium Bar amounted to inhuman and degrading treatment. In Application No.3141/67,[80] the applicant submitted, *inter alia*, that in being fined 20 DM for failing to observe the highway code his rights under Article 3 had been violated.

Although created with the most severe forms of treatment or punishment in mind, it is clear that even before the elaboration of the terms used in Article 3, the Commission was required to consider the provision prohibiting torture and ill-treatment with regard to a variety of conduct which was different to that its drafters may have had in mind and which involved a severity of suffering very much less than that suggested by the comments of Cocks.[81]

Cases subsequent to the Greek case illustrate how the potential applicability of the prohibition of torture and

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[78] 31 May 1967, (unpublished).
[79] Coll. Dec. 26 pp. 10-17, 1968.
[80] Application No.3141/67, 30 September 1968 Coll. 27 p. 117, (118) 8.
[81] See supra Chapt.1, 47-49.

ill-treatment, made possible by the wording chosen for the provision, has been realized.[82] An examination of Article 3 jurisprudence suggests that it may be divided, for discussion purposes, into the following categories:

1, Extradition, deportation, expulsion, refusal of entry, repatriation, transfer to another country for trial;
2, Treatment of detainees by prison or police officers;
3, Cases relating to discrimination;
4, Medical treatment of persons;
5, Duration of punishment or detention;
6, Miscellaneous.

5.3.1 Category One: Extradition, repatriation, etc.....[83]

As noted earlier, the Commission first recognized the possible application of Article 3 to cases involving a State's treatment of foreigners in entering or leaving a country in 1959 in Application No.434/58.[84] Since that date, the Commission has considered Article 3 with regard to cases of extradition, deportation, expulsion, refusal of admission in a State, repatriation, and transfer of an individual from one State to another. For example, in Application No.2143/64,[85] the Commission considered whether extradition of the applicant to Yugoslavia to face a jail sentence raised an issue with Article 3. In Application No.6583/74,[86] the Commission was required to consider whether the applicant's expulsion to Libya would result in a violation of Article 3. In Application No.6315/7,[87] the applicant complained that his transfer from Germany to France would result in him being subjected to treatment contrary to Article 3 because, he contended, France would then deport him to Algeria. In

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[82] Supra Chapt 3. pp. 96-104..
[83] This category is interesting because it sometimes requires at least a superficial review of the human rights standards in the receiving country. To date applicants have tried to use the Strasbourg machinery to resist being returned in a number of different cases.
[84] Yearbook II, (1958-59), 354.
[85] Yearbook VII, (1964) pp.314-330.
[86] 18 July 1974, (unpublished).
[87] 30 September 1974. Yearbook XVII, p. 480.

Application No.7011/75,[88] the repatriation of children from Denmark to South Vietnam was considered by the Commission in light of Article 3. In Application No.8008/77,[89] the Commission was required to consider whether the State's refusal to allow the applicant to enter the country amounted to inhuman and degrading treatment or punishment.

At this point it must be noted for later in this thesis[90] that these cases often require the Commission to examine the standard of human rights protection in the receiving country. In Soering v. United Kingdom,[91] for example, the Commission and the Court engaged in a full examination of conditions on death row in the State of Virginia and the Court accepted *amicus curia* briefs with regard to the same matter from, *inter alia*, Amnesty International.[92]

5.3.1.2 Category Two: Treatment of Detainees by Police or Prisoner Officers.

In the Greek case the Commission was required to consider the most horrific forms of treatment of detainees, such as "falanga",[93] insertion of pins under the nails, the burning of detainees with cigarettes and the kicking of the male genital organs. In the Northern Ireland case the Court was required to consider the so called "five techniques" which were used against detainees which the Court declared inhuman and degrading.[94] However, over a period of time, applications relating to treatment of prisoners and detainees have developed to the extent that Article 3 has been used to challenge, in addition to severe ill-treatment of detainees, day-to-day prison conditions, prison regulations and measures relating to

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88 3 October 1975. Yearbook XIX, p. 416, (450-454).
89 17 March 1981, (unpublished).
90 Infra Chapt. 6.
91 Supra note 64.
92 Amnesty International, Comments Submitted to the European Court of Human Rights on the Soering Case. (April 12, 1989).
93 Supra note 67.
94 Supra note 52 and 56.

discipline. For example, in Application No. 2749/66,[95] the applicant complained that his solitary confinement for 10 months for 20 hours a day constituted a violation of Article 3. In Application No.7408/76,[96] the applicant complained that the penalty of 7 days arrest, "sleeping hard" and restriction of food to 700 g. of bread per day amounted to a violation of Article 3. In Application No.2567/65,[97] the Commission considered that matters arising in the course of the applicant's detention, such as the removal of postage stamps, detention in a punishment cell, sleeping hard and being prevented from writing to the editor of a newspaper, did not amount to a violation of Article 3. In Application No.4937/71,[98] the Commission considered that Article 3 had not been infringed where the applicant complained that the authorities had made it difficult for his family to visit him in prison. In a not dissimilar case, Application No.5712/72,[99] the Commission rejected the submission of the applicant that being kept 3,000 miles away from his home and family in the Bahamas, amounted to a violation of Article 3. In the Zeidler-Kornmann case,[100] the applicant complained that being roughly handled and placed in a straight jacket amounted to inhuman and degrading treatment. The Commission, however, accepted that these measures had been progressively applied becuase of the applicant's deteriorating behaviour and that there had been no violation of Article 3.[101] In Application No.1753/63,[102] the petitioner alleged that he was forced to share a cell with prisoners suspected of suffering from tuberculosis, and that during a hunger strike, he was forcibly fed with food containing an overdose of salt. He also complained that he was kept for

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95 16 December 1966. Yearbook X, p. 382, (382).
96 11 July 1977, D & R 10 p. 221, (221-222) .
97 31 May 1967, (unpublished).
98 24 March 1972, (unpublished).
99 18 July 1974 Coll.46 p. 112 (116).
100 Op. Com. 18 Jan. 1968, para. 64-65, p. 93.
101 Id.
102 15 February 1965. Yearbook VIII p. 174, (186)

a considerably length of time confined in a dark cell, and that these factors, collectively, amounted to a violation of Article 3. The Commission concluded that at that particular stage of the proceedings it was not in possession of sufficient facts to reach a decision on the issues raised under Article 3 of the Convention.[103] In Application No.3226/67,[104] the Commission rejected the submission of the applicant that being handcuffed upon removal from prison amounted to a violation of Article 3. In Application No. 7219/75,[105] the applicant's claim that being stripped naked upon reception into prison was treatment that should be considered degrading was rejected by the Commission..

On a number of occasions Article 3 has been invoked to test the adequacy of medical treatment afforded a detainee. For example, in Application No.8224/78,[106] the Commission was required to consider whether the State's medical treatment afforded a prisoner, aged 74, suffering from diabetes and cardio-vascular disorders, raised issues with Article 3. The Commission considered that as the applicant was receiving appropriate medical attention there had been no violation of Article 3.[107] In Application No.6840/74,[108] the applicant complained that the administration of a drug during his imprisonment resulted in him feeling restless and irritable. The Commission concluded that the application should be declared admissible so that the allegations made could be investigated further.[109] The Commission has been required to consider whether, due to the poor health of the detainee, any detention at all was compatible with Article 3. This was the case in Application No.6181/73,[110]

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103 Ibid, at p. 187.
104 13 December 1968, (unpublished).
105 16 December 1976, (unpublished).
106 D & R 18 p. 100.
107 Ibid, at p. 122-24.
108 12 May 1977 Yearbook XXI, p. 250, (278).
109 Ibid, at p. 282.
110 5 October 1974. Yearbook XVII, p. 430 (446-452).

where the Commission was required to consider whether detention of the applicant who was almost completely blind, amounted to inhuman and degrading treatment or punishment. The Commission considered that in the circumstances of the case Article 3 had not been violated.[111]

Finally, the Commission has been required to consider whether disappointment following a legitimate expectation on the part of a prisoner amounted to a violation of Article 3. For example, in Application No.7994/77,[112] the Commission was required to consider whether expectation of release followed by subsequent disappointment, would render continued detention inhuman. The Commission declared "disappointed hopes of being released do not constitute, for a prisoner...inhuman treatment where he can be reasonably expected to assess realistically the chances of his being released".[113] Similarly, in Application No.9089/80,[114] the Commission was required to decide whether refusal for parole could amount to inhuman and degrading treatment of the applicant. It concluded that Article 3 had not be violated.

5.3.1.3 Category Three: Discrimination.

It was in the East African Asians case[115] that another possible use of Article 3 became apparent. Noting the inherent limitations of Article 14 of the Convention which prohibits discrimination only with regard to other rights provided in Part 1 of the Convention, the Commission acknowledged that "discrimination based on race could, in certain circumstances, of itself amount to degrading treatment within the meaning of Article 3". It continued:

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111 Ibid, at p. 452.
112 6 May 1978. D & R 14 p. 238, (241-242).
113 Ibid, at p. 288.
114 9 December 1980, (unpublished).
115 Application No.4403/70, 10 October 1970. Yearbook XIII, p. 928, (994).

> "....the Commission considers that it is generally recognized that a special importance should be attached to discrimination based on race, and that publicly to single out a group of persons for differential treatment on the basis of race might, in special circumstances, constitute a special form of affront to human dignity".

In Application No.5302/71,[116] the applicants, both citizens of the United Kingdom but resident in Goa, claimed that in being denied the right to enter the country of which they were citizens they were subjected to mental torture and to inhuman and degrading treatment. The Commission rejected their application, refusing to accept that their particular treatment was inhuman or degrading. In the case of Abdulaziz, Cabales and Balkandali,[117] the Commission seems to have implied that "sexual and other forms of discrimination" may be degrading to the degree that it raises an issue with Article 3.[118] This, it is contended, is an acceptable development of Article 3 jurisprudence relating to discrimination, for there appears to be no valid reason why any of the categories of people mentioned in Article 14 should enjoy a level of protection greater or lower than any of the others. Further, it is contended that the classes mentioned in Article 14 should not be considered exhaustive for Article 3 cases. In Application No.14455/88,[119] treatment of gypsies by local authorities was a question properly raised, it is submitted, in relation to Article 3.

5.3.1.4 Category Four: Medical Treatment.

It is clear that although there have only been a few cases to date involving medical treatment of individuals this is a category of applications which might prove of considerable significance in the area of medical law and of patient consent. For example, in Application

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[116] Coll. 44, p. 29, (47) (1973).
[117] Series A. 94, (1985), pp. 56-57.
[118] VAN DIJK & VAN HOOF, 240, (1990).
[119] D & R 40, p. 34.

No.8070/77,[120] the applicant complained that he and his wife had not been told about any possible after-effects of an operation on the latter, and that this raised an issue with the "inhuman and degrading component of Article 3". In Application No.8518/79,[121] the Commission was required to consider whether compulsory medical treatment against the wishes of the applicant amounted to a violation of Article 3. It was concluded that even if the medication was administered under constraint the treatment was not inappropriate in light of the malady of which the applicant was suffering and that Article 3 had not been violated.[122] In Application No.6870/75,[123] the Commission was asked to consider whether treatment given to a mentally ill person violated Article 3. It considered that the application should be admitted for further examination.

5.3.1.5 Duration of Punishment and Sentence.

It has long been settled in the United States of America that disproportionately heavy sentences can have implications for the Eighth Amendment to the U.S. Constitution, which prohibits "cruel and unusual" punishment. A similar approach with regard to Article 3 has yet to be fully developed by the Commission or the Court. However, in Application No.5471/72,[124] the Commission accepted that "an exceptionally harsh punishment for a trivial offence might raise a question under Article 3...". In the circumstances of that case, where the applicant had been sentenced to five years' imprisonment for robbery, it was not accepted that an issue fell to be considered in respect of Article 3. In Application No.7994/77,[125] the Commission questioned whether it was compatible with Article 3 to detain a

[120] 9 October 1978 (unpublished).
[121] 14 March 1980. D & R 20 p. 193, (194).
[122] Id, at p. 194.
[123] D & R 10 p. 37, (65-67).
[124] 9 February 1973 Coll. 43 p. 160, (160).
[125] 6 May 1978. D & R 14 p. 238, (240-241).

person in prison for life without hope of release. The Commission stated:

> "...issues may arise under Article 3 in relation to any lawful sentence of imprisonment as regards the manner of its execution and its length.In the latter context, the treatment of persons serving long term prison sentences and particularly life sentences has given rise to increasing concern. The General Report on the Treatment of Long-Term Prisoners prepared by the Sub-Committee No. XXV of the European Committee on Crime Problems in 1975 considered that "It is inhuman to imprison a person for life without any hope of release"(para.77 of the Report). Furthermore, Resolution (76) 2 on the Treatment of Long-Term Prisoners adopted by the Ministers' Deputies of the Council of Europe on 17 February 1976, recommended to Governments of Member States, inter alia, to "adapt to life sentences the same principles as apply to long-term sentences and to ensure that a review of sentences with a view to determining whether or not a conditional release can be granted should take place, if not before, after eight to fourteen years of detention and be repeated at regular intervals".

Although at present it is clear that this question of length of sentence has yet to be fully considered in Strasbourg, it may be expected that any mechanism qualifying conduct for further review is likely to be called upon to address this question in the future.

5.3.1.6 Category Six: Miscellaneous.

The diversity of applications within which the qualifier adopted by the Commission has to work can only be fully appreciated when cases are mentioned that cannot be classed in any of the groups above.

For example, in Application No.9427/78,[126] the applicant alleged that the courts in the Netherlands, in refusing him access to his child, were subjecting him to a punishment which was degrading. The Commission, noting that the actions of the authorties were in complete conformity with Article 8 of the Convention did not

[126] Hendriks Case, D & R 29, p. 5.

consider that Article 3 had been breached.[127] In Application No.2248/64,[128] it was inadequate social security benefits which had to be assessed for compatibility with Article 3. The Commission concluded that there was no case to answer under this provision. In Application No.2568/65,[129] it was the refusal of permission for the applicant to carry on his professional practice as a lawyer which required the Commission's attention with regard to Article 3. Similarly, in Application No.7299/75,[130] the applicant complained that the act of striking him off the register of the Medical Council and thereby banning him from practicing medicine was degrading within the meaning of Article 3. This application was declared admissible for further consideration on the merits. Likewise, in Application No.8185/78,[131] it was alleged that the sanction of permanent retirement of the applicant amounted to degrading treatment. In Application No.6619/74,[132] the applicant complained that the Austrian authorities' refusal to permit him to use the title of "Honorary Doctor of Divinity" amounted to degrading treatment. In Application No.7729/71,[133] the Commission rejected the applicant's complaint that being subjected to public defamation without possibility of redress amounted to degrading treatment.[134] The petitioner in Application No.6699/74,[135] complained that although she had undergone a sex change, the German authorities had refused to recognize her change in name and that this amounted to a breach of Article 3. This application was admitted for consideration on the merits.[136] In Application

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127 Id.
128 6 February 1967. Yearbook X p. 170, (174).
129 Supra note 79.
130 4 December 1979. D & R 18 p. 5, (29-30).
131 6 March 1980, (unpublished).
132 10 December 1975, (unpublished).
133 17 December 1976. D & R 7 p. 164, (172).
134 Id, at p. 176.
135 15 December 1977 D & R 11 p. 16, (23-25).
136 Ibid, at p. 25.

No.8817/79,[137] the petitioner complained that the denial to him of identity papers amounted to degrading treatment. The Commission concluded, however, that this treatment raised no issue with Article 3. In Application No.11201/84,[138] the petitioner complained that an arbitration decision depriving him of 12 million dollars amounted to inhuman and degrading treatment. Again, the Commission considered that this did not amount to treatment which could be considered inhuman or degrading. In Application No.12728/87,[139] the trauma of being forced to face what the applicant considered to be a dangerous journey by motor vehicle, was alleged to amount to inhuman treatment. This application was declared inadmissible. In Application No.15601/89,[140] the applicant considered that the requirement of compulsory participation in a stressful court hearing amounted to inhuman and degrading treatment but this complaint was declared manifestly ill-founded.

This examination of Article 3 jurisprudence serves to illustrate that not only is the Article frequently in dispute, but that it has been invoked for a variety of reasons, many of which are very different to the type of case that the drafters of Article 3 would have considered raised an issue with a provision prohibiting torture and ill-treatment. What must also be realized is that the categories examined are not exhaustive. In the same way that in the late Fifties few contracting states would have considered that corporal punishment in schools would have presented problems for a member State with regard to Article 3, it cannot be said that there are not other forms of conduct which may soon be challenged for compatibility with Article 3. The death penalty was originally provided for by Article 2 of the Convention. However, in light of the recent decision in Soering v

137 10 October 1980, (unpublished).
138 (unpublished).
139 (unpublished).
140 (unpublished).

United Kingdom,[141] and the increasing number of ratifications of Protocol No.6,[142] its compatibility with Article 3 of the Convention must be open to increasing doubt and further applications contesting its compatibility with Article 3 must be expected.[143]

It is pertinent at this point to recall that the interpretation of Article 3 is important not only to States Parties to the Convention, but also because it provides useful jurisprudence to other international tribunals charged with the duty of overseeing the enforcement of, *inter alia*, provisions outlawing torture and ill-treatment. Applications invoking Article 7 of the International Civil and Political Covenant could quite possibly be required to receive an even wider range of cases than those submitted to date to the European Commission. Remembering that the States which may ratify the First Optional Protocol to the Civil and Political Covenant are not restricted to those members of the Council of Europe,[144] applications under Article 7 challenging practices as diverse as non-consensual sterilization,[145] compulsory abortion,[146] and female circumcision,[147] cannot be considered impossible.

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141 Supra note 64.

142 As June 1993 there were 20 contracting states to Protocol No. 6, Information Sheet No. 32, (1994).

143 Judge J.De Meyer, concurring in the Soering decision, argued that the death penalty violated human rights law. Article 2 of the European Convention he stated does not "reflect the contemporary situation, and is now overridden by the development of legal conscience and practice", supra note 64, at 51-52. With regard to extradition and the death penalty Quigley & Shank state: "It may only be a matter of time before the European states and the European Court of Human Rights take the position that extradition is improper where prosecuting officials in the requesting state are seeking the death penalty", at 267, (1989).

144 Supra Chapt. 2, at pp. 76-79.,

145 Such a petition is not unlikely in member States of the Council of Europe. The problem of non consensual sterilization is particularly problematical in cases concerning the mentally ill. See for example the English cases of Re B (a minor)(wardship: sterilization) [1987] 2 All ER 20; and Re F (Mental Patient:sterilization)[1989] 2 WLR 1025 (CA) 1063 (H.L.) where the courts were required to decide whether it was lawful to sterilize a mentally handicapped woman of 17 (Re B) or of 36 years of age (Re F).

146 There are reports that in China's cities, a strict one-child policy means compulsory abortion in the event of a second pregnancy: Grace, C., "Who believes in a woman's right to choose", "The Guardian", 11 August, p. 15, (1992).

147 Infra note 158.

What is apparent from this brief survey of Article 3 jurisprudence to date, and of possible areas in which it may be invoked in the future, is that there is clearly a need to develop a satisfactory "qualifier" which is able to select conduct from an infinitely large subject area, which is considered to require further review for compatibility with the provision prohibition torture and ill-treatment, and to dispose of that conduct which does not. It must, in this process of conduct selection, allow both the State and the individual a reasonable indication as to whether a given conduct is likely to qualify for review with Article 3. The present approach to "qualification", it is submitted, fails to do this. It is contended that this is so for two reasons.

The first is that it qualifies and disqualifies inappropriate conduct. This point will be demonstrated shortly by examining a number of different forms of conduct.[148]

The second is that the "qualifier" is combined with the compatibility section of the prohibition of torture and ill-treatment. It was noted earlier[149] that the effect of rejecting "justification" as having any proper place in the application of Article 3 effectively closes the compatibility section of the norm. The result of this, it will be demonstrated, is that since the two sections of the norm are forced to merge, the "qualifier" is also required to perform the function of determining whether the conduct in question violates the norm. It will be shown that in performing this added function, so as not to arrive at decisions which are not manifestly absurd, the concept of "qualification" has been loosely applied and, on occasion, it has been abandoned altogether. Complete inconsistency in the application of the "qualifier", it is submitted, is the result.

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148 Infra pp. 188-192.
149 Supra Chapt. 4, at pp. 150-51.

The most alarming deficiency with regard to the points raised above, however, is that the system does not effectively allow proper consideration of the many areas to which the Article 3 now applies. This point will be examined in detail in Chapter 6.[150] At present it is necessary to return to the first two points made above. These claims are substantial and the remainder of this Chapter is devoted to substantiating them both.

5.4 The Inadequacy of Concentrating on "Intent" and Result" for reasons of Qualification.

In Chapter 4 it was first argued that the present approach relating to "qualification" is unsuitable for the task of selecting conduct for further review under Article 3.[151] This section of the Chapter seeks to justify this observation by way of illustration. It is proposed that a number of different types of treatment or punishment will be examined, all of which are assumed to be of a sufficient level of severity to satisfy the severity requirement for Article 3. It will be demonstrated that a strict application of the "intent qualifier" disposes of conduct which requires review for compatibility with the norm. Furthermore, and more alarmingly, it qualifies conduct which does not merit qualification under the norm. This is particularly disconcerting because it will be recalled from Chapter 4, that, once a given conduct has qualified for review, because the compatibility section of the norm is foreclosed, in theory at least a finding of a violation must follow.

To illustrate the operation of the "qualifier", it is proposed that 7 different types of treatment will be considered. They are: the infliction of suffering to secure a confession or evidence; capital punishment; corporal punishment; compulsory abortion; heart surgery;

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[150] Infra Chapt. 6, pp. 203-241.
[151] Supra, Chapt. 4, pp. 140-144.

female circumcision; and rape. These have been chosen because they represent three distinct classes of application. The first consists of cases which have already been taken to the Commission, such as corporal punishment. The second consists of examples which clearly require to be disqualified from further consideration under Article 3, such as heart surgery. The third consists of examples of conduct which may possibly at a later date be required to be assessed for compatibility with a provision outlawing torture and ill-treatment, either regionally at the Council of Europe, or at a universal level at the United Nations. This third category includes compulsory abortion and female circumcision. It may be argued that, bearing in mind that these practices are alleged to have taken place in countries which offer no prospect of accepting international supervision of their human rights standards, it is unnecessary to take into account such conduct. However, it must be remembered that it is important to determine what qualifies as torture and ill-treatment not only from the point of view of facilitating international enforcement machinery, but also for reasons outside of this process. It is true that international mechanisms are just one method of forcing countries to improve their human rights standards. The work of NGO'S is considered vital in this sphere. A satisfactory means of determining what amounts to torture and ill-treatment and therefore, unacceptable behaviour, is essential to their work.

For the purposes of these examples it will be assumed that the severity requirement has in every case been satisfied.

5.4.1 Conduct No.1 Suffering Inflicted to Extract Information or a Confession.

With regard to this conduct, it can be seen that as the suffering is deliberately inflicted, under the present

understanding of the norm, the conduct will qualify for consideration under Article 3, and it need not be discussed further.

5.4.2 Conduct No.2 Capital Punishment.

With regard to this conduct the matter is far less clear. This is because it is difficult to attribute to the state the element of intent to cause the degree of suffering which is likely to result from awaiting execution, in addition to any suffering which may occur during the execution itself. A study of the many states worldwide which carry out executions[152] demonstrates that it is often justified on retributive grounds, reflected in the commonly quoted biblical aphorism of "an eye for an eye". Inherent in this philosophy is a desire to match the taking of one life for another. That is its main purpose and the *raison d'etre* of the punishment. Any suffering involved in awaiting the punishment and the execution itself is incidental and on occasion also accidental. Classifying it as "intent", therefore, is a difficult process. A study of capital punishment before abolition in the United Kingdom illustrates this point. The history of the punishment in the United Kingdom demonstrates a concerted effort to find and perfect the most efficient and painless form of execution. In the Royal Commission Report on Capital Punishment[153] research was conducted to determine whether a technique had been perfected which provided an immediate and painless execution. That the Royal Commmission was unable to answer this question in the affirmative may have been a factor in introducing the moratorium on capital punishment which eventually led to its abolition 1969.[154] In any event, it was clear from the Report that the purpose of execution was to dispose of life, not to torture the person sentenced to death.

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[152] UNSDRI, The Death Penalty - a bibliographical research, 539, (1988). See generally HOOD, (1989).
[153] 1949-53 (Cmd. 8932).
[154] POTTER, at 203, (1993).

The unsatisfactory nature of "intent" as a "qualifier" when considering capital punishment can be seen when it is realized that the State that is able to demonstrate that the infliction of severe suffering was not intended as part of the penalty of execution is likely to be outwith the application of the norm, even though the result of the penalty may be that considerable suffering is inflicted on the applicant. Similarly, the State which is found to intend suffering as being part of the sentence of execution can expect that its programme of executions would qualify for consideration under the norm. The result to the individual is of course in every case the same. It is submitted that it is absurd that the State's operation of the death penalty may or may not qualify for review depending upon whether the pain inflicted was deliberate, incidental or even accidental.

5.4.3 Conduct 3: Corporal Punishment.

This punishment would seem to qualify without difficulty under the "inhuman" component of the norm as it is accepted that its purpose is to inflict suffering on the individual. Whether the practice would qualify as degrading would depend upon the "result" of the punishment. As noted earlier,[155] the Commission has considered that this depends on the facts of each case. It has decided in a number of cases that the corporal punishment in question was degrading although its decision in the Costello-Roberts case[156] is a clear indication that the Commission does not consider that corporal punishment "per se" is contrary to Article 3.

5.4.4 Conduct 4: Compulsory Abortion.

The practice of compulsory abortion is reported to have taken place in some parts of China and Tibet, as part of

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[155] Supra Chapt. 4, at p. 143.
[156] Series A. 247, (1992).

China's strict policy regarding birth control.[157] This practice perhaps demonstrates better than any other the unsuitability of "intent" as a "qualifier" for Article 3. This is because a strict application of "intent" in this case makes qualification of the practice of compulsory abortion into the torture or inhuman categories of the norm unlikely. If the conduct were to be reviewed for compatibility with the present torture and ill-treatment norm, it would be possible to establish that severe suffering is likely to result from such treatment, but proving that it was intended would be more problematical. A State may choose to defend the practice by reference to the intention of the authorities, which it may contend is to control an escalating birth rate. This, clearly, should not exonerate the State from liability for such a practice. Its effect is the same, because it can be used as evidence of the intent of the state which may not be to inflict suffering, but to combat the problem of over-population. "Intent", as the "qualifier" here, is shown to be very unsatisfactory indeed.

5.4.5 Conduct 5: Heart Surgery.

This treatment has been chosen for consideration for two reasons: first, because it is evidently of benefit to the patient, because without it there is a very real possibility that the patient's suffering is likely to be severe and indeed that the patient may even die; secondly, because, although for the benefit of the patient, the treatment in its early stages and later in its post operative stages can lead to the patient experiencing considerable discomfort and pain. It is a good example of medical practices which recognize that for the relief of long-term suffering it is often necessary to induce or allow transient suffering to occur at a preliminary phase. It is difficult to exclude the argument that the treatment involves the deliberate

157 Supra note 146.

infliction of pain. A strict application of the "intent" "qualifier", it may be observed, is in danger of qualifying the conduct for review even though it is for the benefit of the patient and that the suffering intended by the surgeon is likely to be far less severe and for a shorter period than if the treatment is not administered.

5.4.6 Conduct Six: Female Circumcision.

The World Health Organization estimates that 90 million females have been subjected to genital mutilation.[158] At present, genital mutilation is practised in more than 25 countries in Africa as well as in parts of Asia and the Middle East.[159]

In cases involving such conduct it is difficult to state that there is an "intent" to cause suffering. Indeed, in some cultures the treatment would be administered in the belief that it was for the social good of the recipient. Again the "intent" approach of the Commission and the Court fails to qualify a type of practice which urgently requires scrutiny for its compatibility with a provision prohibiting torture and ill-treatment. It is accepted that under the present understanding of the norm it may qualify as degrading, but it must be questioned whether such classification would be adequate to reflect the level of suffering which may be experienced in many cases.

5.4.7 Conduct Seven: Rape.

This practice requires to be discussed in a manner different to that with regard to the above examples. This is because, although a State may enact a practice of compulsory abortion and capital punishment which has

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[158] See generally Slack (1988); Walker, (1993). For research on the subject see Passmore, (1986).

[159] Slack, ibid at 444.

consequences for the norm under discussion, the same cannot be said with regard to rape. This conduct requires to be examined, not in the State's capacity of compelling its performance, but in its failing to outlaw it and punish those who commit it. A State, for example, which allows the crime continually to go unpunished or indeed refuses to concede that it is a crime at all, should properly, it is submitted, find itself accountable for refusing to protect its citizens from treatment which may amount to torture or to inhuman or degrading conduct. In this context, the investigation into "intent" would require to be slightly different in comparison to that above. To bring the omission of the State successfully inside the norm with regard to the "intent" qualifier it would need to be established that the State intended to subject women in its society to suffering, in deliberately failing to acknowledge that rape is a crime and to deter it by punishing offenders. This is a difficult exercise. Attributing "intent" in such a manner would require close inspection and thorough understanding of the culture pertaining to the State in question to examine the purpose for its actions or inactions.

A further problem is encountered when attempting to classify rape for the purposes of Article 3. In the case of Cyprus v. Turkey[160] the Commission considered that Turkish soldiers, in committing rape whilst in control of a certain part of Cyprus, had engaged in inhuman and degrading treatment. However, a strict application of the "qualifiers" currently operated by the Commission and Court makes this finding difficult to justify. That is because of the difficulty in attributing an intent on the part of the perpetrators to inflict suffering. It undoubtedly would have been the "result" of their conduct but this is sufficient only to classify it as degrading and not inhuman. Again the current approach regarding qualification is shown to be inadequate.

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[160] 4. E.H.H.R. 482.

5.5. Improving the Present Approach to Qualification Based on "Intent" and "Result".

It may be considered that the approach of the Commission need only be amended slightly for it to operate in an acceptable way. If the example of capital punishment is considered, the immediate response to the deficiency highlighted is to amend the "intent" approach slightly, so that it may be possible to qualify capital punishment in particular circumstances. This might be done for example, by adding to "intent" a more objective element such as "or was it reasonably likely that such suffering would result?" The effect of this additional element would be to qualify capital punishment if the Commission was satisfied that the method of execution was reasonably likely to cause the applicant suffering of a severity that it must be regarded as either degrading, inhuman or amounting to torture. Likewise, corporal punishment, compulsory abortion, female circumcision and rape could all expect, after a similar inquiry, to be qualified into one or more of the component parts of Article 3, upon a finding of sufficient severity. The problem, however, is that this additional element would make the exclusion of the surgeon's legitimate activity even less unlikely. This is because it is difficult to say that it is not reasonably likely that the suffering experienced by the patient was going to result from the conduct of the surgeon. There is a danger, that, subject to adequate severity of suffering, his or her conduct may be considered not only degrading but also inhuman or even tortuous. Not only does this amended approach risk qualifying some types of the surgeon's conduct but also that of dentist, the physio-therapist and many others in professions which involve the infliction of pain on another person.

It can be seen that what this amendment amounts to is not a qualifier at all, but a systematic acceptance of almost

all suffering of a certain severity.[161] This leads us to recall the comment of Sir Gerald Fitzmaurice when he said that Article 3 is not a clause which outlaws all treatment of a certain severity, but only that of a certain type. Such an amendment, it must be concluded, is to be rejected in failing to discriminate adequately for the purposes of a satisfactory operation of Article 3.

It is submitted that it is preferable to adopt a qualifier based on consent of the recipient to the treatment or punishment. If this were to be done, the problems discussed above in respect of the qualification of conduct such as compulsory abortion, female circumcion and capital punishment would arise less frequently. To demonstrate this statement it will be necessary to reconsider the categories discussed above in light of the qualifier proposed.

5.6 The Qualification of Conduct Based on Consent.

When considering the first of the categories considered above, namely suffering inflicted in order to extract information or a confession, it can be seen that an approach based on consent will qualify the conduct in question in the absence of the consent of the recipient. Of course in such an example it is difficult to think of one scenario where the individual is likely to consent to such treatment. One example may be where both parties have agreed that it is desirable to recover certain information which it may only be possible to extact by administering a truth drug such as sodium pentathon. It will be recalled that Sir Gerald Fitzmaurice in the Northern Ireland case[162] questioned whether the purpose of the treatment was important in determining whether Article 3 had been violated because, he said, the pain

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[161] The one area that it might not include would be the example of the causing of suffering of a person that was accidental and completely unforeseen. An example being perhaps the car crash victim who suffers a broken leg due to the driving of another motorist.

[162] Series A.25, (1978).

experienced, in many cases is likely to be the same.[163] In concentrating on consent to determine what conduct qualifies as torture or ill-treatment, it is clear that his concerns are incorporated into the operation of the Article. It is the state of mind of the recipient of the treatment or punishment and not the party responsible for it which is important when considering the matter of qualification of treatment or punishment. However, the inquiry into the purpose of the conduct must not be disregarded completely. This is because it may be relevant to the severity of the suffering of the individual. It may be considered, for example, that the animosity conveyed from perpetrator to the recipient in the process of attempting to extract information is likely to increment stress levels of victims. Recalling the treatment under review in the Northern Ireland case, it may be concluded that the inquiry into the purpose of the "five techniques" would only be relevant in so far as it may aid the tribunal in determining the severity of the suffering experienced.

When considering corporal and capital punishment it is reasonable to expect that a tribunal would presume that there is an absence of consent on the part of the individual who has, or will be, subjected to the punishment. However, certain circumstances can be anticipated where this presumption might be rebutted. For example, where the person sentenced to death has since waived her/his rights of appeal and a petition has been presented by another person on her/his behalf. In such a situation it might be anticipated that the State would contend that the condemned person has in effect consented to the proposed punishment. Similarly, in respect of corporal punishment there might arise a situation in which the applicant was given a choice between corporal punishment and, for example, a prison sentence. Where the individual chose the former punishment the State might

[163] Id, Sep Opin, para.33, n.19.

argue that the applicant had effectively consented to the punishment.

In both of the above cases the alleged consent of the individual would require close scrutiny. It would be necessary to resolve whether the consent given should be invalidated due to incapacity of the indivdual concerned, or any duress or threat to which s/he may have been subjected. In the example concerning capital punishment above, it would be expected that close attention would be paid to the conditions under which the individual was kept and the effect this might have had on his/her will to contest the punishment in proceedings likely to prolong detention in such conditions. Similarly, where the applicant is allowed to choose between corporal punishment and a sentence of imprisonment the tribunal would be expected to examine carefully any argument to the effect that there was no valid consent. This argument would be particularly difficult to dismiss where the alternative of a prison sentence was inordinately long.

Similar scruntiny would be necessary when considering the remaining categories of conduct mentioned in section 5.4.1 above. On each occasion the tribunal would be required to determine whether the consent should be rendered invalid on the grounds of incapacity, duress or threat.

It will be recalled from section 5.6.1 that with the present approach to qualification difficulties are encountered in qualifying for review capital punishment, compulsory abortion and female circumcion and also in disqualifying from review at this stage, heart surgery. Assuming that consent is not given or is found to be invalid the practice of compulsory abortion female circumscion would qualify for review. On the otherhand, open heart surgery would not qualify for further consideration in circumstances where the patient had been

fully informed of the risks and consequences of such treatment.

While it is not proposed that a qualifier based on consent is without difficulties of its own, it is suggested that it does discriminate more efffectively between conduct requiring further review and other treatment or punishment which does not.

5.7 The Consequences of Rejecting the Concept of Justification for Conduct that may Fall Within the Terms of Article 3.

The present situation regarding the qualification of conduct is also unsatisfactory because, as noted in Chapter 4, the two stages of "qualification" and "compatibility" are effectively merged into one. This is because the Commission and the Court do not accept that there can be any justification for treatment said to be degrading, inhuman or tortuous. Once found to qualify into any one of these three categories, a violation must follow. The "qualification" stage, in essence, is also the point at which a violation will, or will not, be found. The Commission, it is submitted, in using the inadequate "qualifiers" of "intent and "result" has been forced on occasion to apply them loosely or abandon them altogether so as not to qualify conduct which clearly raises no issue with Article 3 and it is not able to dispose of by contending that for a given reason the conduct was justifiable. The result, it is contended, is complete inconsistency in the application of the qualifier, allowing little reliable indication of the conduct likely to qualify for consideration under the norm.

These observations may be illustrated by examining the following cases. They are: Soering v United Kingdom,[164]

[164] Supra note 64. See for a discussion of the case Chapt. 6, pp. 217-223.

McFeeley v United Kingdom,[165] Application No.3448/67,[166] and Reed v United Kingdom.[167]

In the *Soering case* the "intent" and "result" qualifiers, it is submitted, were effectively abandoned. A study of both the Commission and the Court's decisions does not indicate any attempt to determine whether the United Kingdom could be said to have *intended* that the applicant be subjected to inhuman treatment upon his return to the State of Virginia, U.S.A. The eventual finding that the U.K would be guilty of subjecting Soering to inhuman and degrading treatment or punishment if it permitted his return is another example of the erratic application of the "qualifiers". This is because it is only with the greatest of difficulty that it is possible to attribute a finding of *intent* to cause the suffering on the part of the United Kingdom. "Reasonable likelihood" of such suffering resulting would qualify the conduct as inhuman treatment, but it is clear from the jurisprudence of the Court that the "qualifier" is not this wide. It is restricted to "intent" only. The Court was correct, however, to find that the applicant would be subjected to degrading treatment, because this, from the facts, would have been a possible "result" of the United Kingdom's action.

It is important to examine the remaining three cases by first remembering that the Commission has declared that there can be no justification for treatment contrary to Article 3. It cannot be said, therefore, that for reasons of prison security a person can be tortured to reveal details of an escape plan. Further, the Commission is unable to declare that it is acceptable for a person to live in inhuman conditions because there was no money available to provide him or her with adequate detention facilities. Likewise, it is not possible to say that

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165 McFeeley et al. v. U.K, 3 E.H.R.R. 161.
166 Coll. 30, p. 56.
167 D & R 25 p. 5, (1982).

torture is justified because of the applicant's own behaviour.

In McFeeley v. United Kingdom, the applicant complained that in being given a personal body search, which sometimes involved the inspection of his rectum with a mirror, he had been subjected to inhuman and degrading treatment or punishment. In the case of Reed v U.K the petitioner complained that the poor conditions of his cell, which contained cockroaches, amounted to degrading treatment. In Application No.3448/67,[168] drawing blood from the applicant and subjecting him to a severe beating, was, he claimed, a violation of Article 3. In seeking to dispose of these cases, as identified earlier[169] the Commission could have choosen to refer to insufficient severity or utilize its principal "qualifiers" of "intent" and "result". Considering the latter first, it can be seen that although it may be difficult to qualify the treatment in the above cases under the "intent" category, it is likely that the conduct may qualify as degrading, because the "result" of living in a cell inhabited with cockroaches, or of having one's rectum inspected, or of being subjected to a severe beating, is that it is possible that the victim is likely to feel degraded. It follows therefore, that if no violation is to be declared, the cases cannot be disposed of by the Commission's "qualifier" of "intent" and "result".

In the McFeeley case the "qualifier" was abandoned altogether. The decision focused on the need for such treatment in "light of prison security." This, when carefully analysed, effectively amounts to a finding that the treatment qualifies as degrading conduct, but was, in the circumstances, justifiable.

Similarly, in Reed v United Kingdom, the Commission chose to dispose of the Article 3 point with reference to the

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[168] 7 May 1969 (unpublished).
[169] Supra pp. 154-156.

exceptional circumstances of the case.[170] This included the repairs to the prison which were taking place at the time of the alleged violation, requiring prisoners to be accommodated in cells of a temporary nature, and because of the heavy numbers of inmates which H.M.'s.Prison Winchester was required at the time to hold due to rioting in H.M's Prison Hull. This reasoning, again resembles a decision to the effect that the applicant had been subjected to degrading treatment, but that in the circumstances it was considered justifiable. In Application No.3448/67, it is submitted, the treatment afforded the prisoner clearly amounted to at least degrading treatment, but conduct which in the circumstances the Commission considered was "justifiable". It is another illustration of the Commission's abandonment of the "qualifier" and resort to the concept of "justification" to dispose of an application. It is contended, however, that in the circumstances there was no alternative. From the facts, it is clear that the applicant was subjected to conduct which could be described as degrading and, in addition, possibly inhuman. The qualifiers, it follows, would have admitted the conduct for consideration if properly applied as it is likely that the "result" of the treatment was that the applicant felt degraded. The "disqualifier" would not have assisted the Commission in disposing of the application. This is because the treatment in the case was undoubtedly severe. In ordinary circumstances it is clear, following decisions such as that in Tyrer[171] and Warwick,[172] that the severity requirement would most likely have been satisfied. The applicant's own behaviour is of course an issue. His conduct, however, is not related to the assessment of the severity of his suffering, but instead to whether the treatment given to him could in the circumstances be said

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[170] Supra note 167, at p. 9.
[171] Supra note 2.
[172] Supra note 41.

to be "justifiable". The case, therefore, could only be disposed of by invoking "justification" issues, and not by the use of the severity disqualifier. If the Commission had chosen to apply the severity disqualifier in the case, it would lead to the alarming conclusion that, before a person is entitled to the protection of Article 3, they must be subjected to treatment of a severity greater than that displayed in Application No.3448/672.

It is submitted that the decision in the McFeeley case was correct. It would be unacceptable if prison authorities were prevented from using the security measures in dispute in Mc Feeley, as it was clearly required for reasons of prison security. Likewise, in Application No.3448/67 it would be unjust to consider that the prison officers had been guilty of a violation of Article 3 without considering the applicant's own difficult behaviour. Aspects such as prison security, accommodation problems at a prison and the prisoner's own conduct have no relevance to the question of qualification. They are properly considered, it is contended, at the stage of compatibility.

It will be shown in Chapter 6 that it would have been better to approach the decisions by reference to "justification" issues such as the security concerns in the McFeeley case, the difficult circumstances in Reed, and the applicants own behaviour in Application No.3448/67.[173]

Conclusion.

For present purposes it is sufficient to conclude that the effect of merging the two stages of qualification and compatibility is that the former becomes indeterminate and inconsistent. It is clear that a consistent

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[173] An inspection of the decisions in each do in fact demonstrate that it was these issues that had persuaded the Commission that there had been no violation.

application of the qualification component is only possible when it is separated from the third element of the norm, that of compatibility. It is equally clear that the "qualifiers" of "intent" and "result" adopted at present fail to perform satisfactorily the task required of them.

The remaining Chapter seeks to propose a more suitable qualifier for the prohibition of torture and ill-treatment. It also attempts to establish the importance of recognizing the category of "compatibility" and not merely because it will allow for a satisfactory operation of the "qualifier". It will be shown that without recognition of the "compatibility stage" by the acceptance of the concept of "justification", it is impossible to address satisfactorily the many areas to which the prohibition of torture and ill-treatment is now being utilized.

6. THE CONCEPT OF JUSTIFICATION AND ARTICLE 3.

Introduction to Chapter.

The purpose of this Chapter is twofold: first, to demonstrate that the present interpretation of Article 3 is unable to provide adequate review of the types of treatment or punishment which the European Court is now being asked to consider; secondly, to propose a method of review which would perform this function satisfactorily.

The Chapter seeks to justify this first position by studying the Court's assessment of judicial corporal punishment in the Tyrer case. To assist in determining whether this was satisfatory or not it will be necessary to examine early in this Chapter the modern criteria for assessing punishment as well as the review of corporal punishment carried out by the Advisory Council on the Treatment of Offenders, which was asked to consider the practice in 1960 with a view to its reintroduction.[1] To support the conclusion that the failings demonstrated in the Tyrer case[2] are not particular to corporal punishment, a review of other forms of treatment or punishment is undertaken. This is done by studying the extradition case of Soering v. U.K,[3] the prisoner treatment cases of McFeely v U.K,[4] and Reed v. U.K,[5] the racial discrimination applications in the East African Asians case[6] and, finally, the practice of compulsory vaccination.

It is argued that the deficiencies inherent in the present understanding of Article 3 are not present in the method of review proposed in this Chapter which is to be preferred for a number of reasons. The first is that it offers a satisfactory review of the "new areas" to which

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1 Infra pp. 207-210 & note 20.
2 Infra note 34 & 37.
3 Series A. 161, (1989).
4 3 E.H.R.R 161.
5 Application No. 7630/76, D & R 25, (1980) pp. 5-18.
6 Yearbook XIII, (1970) 928, and 3 E.H.R.R 76.

Article 3 is now being applied. The second is that, unlike at present, it makes possible the exclusion of conduct without, in many cases, precluding its return. The third is that it comprises a mechanism which recognises that the Convention is no longer operating in territory where it has always been considered that there are "right" or "wrong" answers, but in an area requiring "preferred solutions" or "more appropriate state behaviour". These conclusions will be discussed in detail later in this Chapter. To begin, it is necessary to examine briefly the methods of assessing punishment and the development of penal policy.

6. The Assessment and Purposes of Punishment.

Standard works on the moral foundation and aims of punishment identify three main principles.[7] These are: deterrence, retribution and rehabilitation.

The first two of these have become established cornerstones of penal philosophy throughout the ages.[8] Punishment in it simplest form appears to be a response to the need of individuals to avenge the wrong committed by others whilst making it clear that criminal behaviour can never lead to worthwhile profit or gain.[9]

Rehabilitation on the other hand is considered to be incidental to the purposes of retribution and deterrence.[10] Its origins, although attributed by Bean[11] to the time of the Second World War, are considered by others to go back further, to the turn of the 20th century.[12] The focus on rehabilitation as a fundamental objective of penal policy, which represented a drift away from the emphasis on the deterrent and retributive

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7 BENN AND PETERS, (1959); BEAN, (1981).
8 HUDSON, at 1, (1987).
9 Id.
10 Id.
11 BEAN, (1976).
12 ROTHMAN 1980, and GARLAND, at 7, (1990).

elements of punishment, resulted from the belief that the State not only had the power, but also the duty to intervene and assist those individuals who would otherwise be destined for a life of crime and delinquency.[13]

The order of importance and priority afforded these objectives of punishment has, however, over the course of time often changed. By the later 1960s the penal system of the United Kingdom contained many examples of sentencing policy with rehabilitation of the offender as its primary purpose. Little more than 20 years later the emphasis in criminal justice moved away from considering the needs of the individual offender and concentrated instead on the seriousness of the offence he or she had committed. In England and Wales, with the entry into force of the Criminal Justice Act 1993,[14] it seems that the position has altered again. This statute, which amends earlier sentencing legislation, gives the sentencing court greater power to consider the criminal history of the offender before determining the most appropriate punishment.

An examination of penal policy in member States of the Council of Europe demonstrates that even between countries considered to be relatively politically and culturally homogenous a consensus concerning the purpose of punishment is unlikely to be achieved. Following the Eighth Criminological Colloquium of the Council of Europe 1987 the Select Committee of Experts on Sentencing was established to, *inter alia*, examine "the drawing up of general sentencing principles which would enable the development of a coherent and consistent sentencing policy in Europe with the co-operation of the judiciary".[15] This led to Recommendation No R (92) 17

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[13] Supra note 8, at 7.
[14] S.66(6) of the Criminal Justice Act 1993.
[15] See Report "Consistency in Sentencing" Strashourg, (1992), Recommendation No. R(92) 17 adopted by the Committee of Ministers 19th Oct 1992.

concerning consistency in sentencing.[16] The recommendation recognizes the various rationales for sentencing, such as deterrence, rehabilitation and resocialization, individualization, retribution and "just deserts" and incapacitation.[17] However, it was doubted that there could be a consistent approach to sentencing across the membership of the Council of Europe. Although Appendix A.5 mentions that the rationales for sentencing should be reviewed from time to time[18] the Appendix does not state that one rationale is preferrable or should be given priority over another.[19]

This brief excursion into the purposes of punishment and penal policy provides an indication of the factors which require consideration when assessing the efficacy of a given punishment. It also suggests, it is submitted, that developments in penology have not been in a constant direction. They have not been characterized by the trial and complete rejection of certain principles of punishment in favour of others, but by the frequent emphasis on one in preference to, but not complete exclusion of, others. Until such time as a consistent approach to punishment is developed over time and one which is common to all States in the Council of Europe it is submitted, that if a given form of punishment is

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[16] Adopted by the Committee of Ministers of the Council of Europe on 19 October 1992 and prepared by an expert committee under the authority of the European Committee on crime Problems (CDPC). Resolutions concerning various aspects of criminal or penal policy include: Res (66) 18 on collaboration in criminological research; Res (66) 25 on the short-term treatment of young offenders of less than 21 years; Res (73) 17 on short-term treatment of adult offenders; Res (73) 24 on group and community work with the offenders; Res (73) 25 on methods of forecasting trends in criminality; Res (76) 2 on the treatment of long term prisoners; Res (76) 10 on certain alternative penal measures to imprisonment; Rec.R. (82) 17 on the custody and treatment of dangerous prisoners; Rec. R (83) 7 on participation of the public in crime policy; Rec. R (84) 10 on the record and the rehabilitation of convicted persons; Rec.R (87) 1 relating to European inter-state cooperation in the penal field; Rec.R (87) 20 on social reactions to juvenile delinquency. Publications List In the Field of Crime Problems. Council of Europe A listpub. (1992).

[17] Id.

[18] Ibid, at 6.

[19] Id.

rejected by the European Court of Human Rights it is better considered shelved and not completely disgarded.

Before examining the review of judicial corporal punishment by the European Court in the Tyrer case, it is useful to add to the above observations a study of the Advisory Council's review of the practice in 1960.

6.1 The Review of Corporal Punishment by the Advisory Council on the Treatment of Offenders.

In January 1960 the Advisory Council on the Treatment of Offenders was asked to consider whether there were grounds for re-introducing any form of corporal punishment as a judicial penalty for any categories of offences or of offenders.[20] Its members considered the punishment in the light of a number of factors. First, although it is unclear as to what weight was attached to the following observation, its Report[21] noted that 74% of the population considered that corporal punishment should be the penalty for some offences.[22] Considerable time was spent assessing the arguments for corporal punishment as a deterrent. It was noted that those who supported the re-introduction of judicial corporal punishment did so by referring to the increase in offences of violence against the person since the abolition of the punishment. The Advisory Council also observed, however, that this did not take into account the fact that such crimes had been rising prior to abolition and that there was no discernible increment in this rise after 1948, when the practice was officially outlawed. It concluded, with regard to the deterrent aspect of judicial corporal punishment, that it was not an especially effective deterrent immediately before its abolition, and that its

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[20] CORPORAL PUNISHMENT: REPORT OF THE ADVISORY COUNCIL ON THE TREATMENT OF OFFENDERS at 16. (Cmnd.1213), 1960. This is commonly referred to as the "Barry Report"

[21] Id.

[22] Ibid, at 7.

abolition "did not result in an increase in the offences for which it was previously imposed".[23]

The Council also considered in detail the question of the reforming propensities of the punishment. It stated that there was considerable medical support for the view that the offender would not profit from a beating and that s/he might commit further offences in consequence of having been beaten.[24] It was noted that medical witnesses were agreed that, if an offender already had a substantial element of resentment in her/his make-up, judicial corporal punishment would be likely to make it worse. It considered that the offender would be inclined to bitterness, and therefore more and not less likely to behave in an anti-social manner. It studied the finding of the Cadogan Committee[25] which, several years earlier, had examined the question of judicial corporal punishment. This Committee concluded that judicial corporal punishment could only be justified on the basis of its value as a deterrent and that the deterrent argument was not made out from a careful analysis of crime statistics relating to particular offences committed between 1908 and 1930.[26] In order to make a comparable analysis, the Council asked the Home Office Research Unit to study crime figures for the period 1941 to 1948. The Council concluded:

> "The subsequent studies have produced similar results to those of the study made by the Cadogan Committee, and have confirmed that Committee's conclusion that there was little difference between the subsequent records of men who were flogged and those who were not flogged: in fact the subsequent records of those flogged were slightly worse".[27]

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[23] Ibid, at 15.
[24] Ibid, at 12.
[25] Report of the Departmental Committee on Corporal Punishment (the "Cadogan Report") Parliamentary Papers 1937-38, Vol.9.
[26] Supra note 20, at 3.
[27] Ibid, at 16.

It noted that the Criminal Justice Act 1948, which abolished judicial corporal punishment, introduced principles of constructive punishment designed to have the effect of reforming individuals. However, it was considered that corporal punishment was likely to destroy any constructive work that may be achieved with the offender. The Council stated:

> "It is incompatible with the effects of probation or any form of custodial training. Such constructive methods depend largely for their success on the establishment of a proper relationship between the offender and those in authority,...and this is unlikely to be achieved if the treatment begins with a beating".[28]

The Council then examined the practical considerations of reintroducing judicial corporal punishment. One consideration of particular concern was the possible disparity in the use of any punishment. Some courts, it concluded, would award a particular punishment frequently, others not at all. It feared that the inevitable public comment on these disparities would be detrimental to the administration of justice, which constituted another factor militating against the reintroduction of judicial corporal punishment.[29] The Council also expressed concern at the fact that, before the court could decide on the suitability of the punishment for the particular offender, various social and medical reports would be required. This would involve probation officers and psychiatrists, many of whom regarded judicial corporal punishment as wrong in principle and would be reluctant to facilitate its use.[30] Delay in administering the punishment was, however, the Council's most serious practical objection to corporal punishment.[31] It noted that there were many who considered that, if corporal punishment were to be effective at all,

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[28] Ibid, at 17.
[29] Ibid, at 20.
[30] Id.
[31] Ibid, at 22.

it had to be promptly administered.[32] This, the Council observed, would not always be possible owing to the delay pending appeal against the punishment and the wait for psychiatric reports, etc.[33]

6.2 The Review of Corporal Punishment in the Tyrer Case by the Commission and Court.

6.2.1 The Commission in the Tyrer Case

The facts of the Tyrer case[34] may be stated briefly as follows. Anthony Tyrer, a 15 year old school boy on the Isle of Man,[35] was reported to his school master by a prefect for taking beer into the school.[36] Tyrer later set upon the prefect, along with others, and was duly convicted for assault occasioning actual bodily harm. He was sentenced to be birched, which involved three strokes across his bare posterior which in the event caused his skin to be "raised but not cut..."[37] and to be "sore for about a week and a half afterwards".[38]

The practice of the authorities at the time was to carry out the punishment only after a medical examination and in the presence of a doctor and at least one parent.[39] It would be administered by a police constable with two other constables holding the recipient down.[40] A senior officer would also be in attendance.[41]

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32 Ibid, at 20.
33 Ibid, at 19-26.
34 Report of the Commission, Eur. Court. H.R., Series B. 24.
35 The Isle of Man is not a part of the United Kingdom, but has since 1765, been a British territory. By Convention, although Westminister Parliament has competence to legislate for the Island, this function is abdicated in favour of the Tynwald Government of the Isle of Man. Tynwald claims to be the oldest continuous Parliament in Europe. Oral Submission of Corrin, J Attorney-General of the Isle of Man, Tyrer Case, European Court, id, at 64-65.
36 It is perhaps interesting to know that the consequences of this action was that Tyrer was also caned by the Headmaster - an action, as later cases were to demonstrate which itself had implications for the Convention.
37 Series A. 26, at 7, (1978).
38 Id.
39 Id.
40 Id.
41 Id.

The matter of the application in Strasbourg attracted considerable local interest, with a petition being collected with some 31,000 signatures, (approximately two-thirds of the voting population of the Isle of Man) calling for the retention of corporal punishment.[42] The practice on the Island also attracted attention in the United Kingdom, and resuled in considerable political debate and press coverage.[43]

Unable to reach a friendly settlement under the terms of Art. 28(1)(b) of the Convention, the Commission considered its opinion. It concluded that Tyrer had been subjected to "an assault on human dignity" which constituted degrading treatment or punishment contrary to Article 3.[44] The opinion of the Commission is significant not only because of the eventual decision, which is considered to be persuasive before the Court, but because it chose to abandon completely its earlier approach to the determination of the meaning of Article 3, as begun in the Greek case. It will be recalled that it was in this decision that the Commission began by defining the terms torture and inhuman treatment and then proceeded to consider what type of conduct fell into which of the categories in the Article. This approach was continued, albeit by revising the aspect of "justification", in the Northern Ireland case. The Commission in the Tyrer decision declared that the case under review differed from the previous Greek and Irish cases, which involved allegations of atrocious ill-treatment,[45] and proceeded to explain its conclusion without any reference to its earlier jurisprudence.

Commission member Kellberg, acting as Principal Delegate to the Commission, summarized the Commission's reasoning

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[42] Supra note 34, at 75.

[43] See for example an article in the "The Times" entitled "Britain's embarrassing appearance at European Court of Human Rights - Propaganda chance the Russians are not expected to miss", at p. 2, January 16, 1978.

[44] Supra note 34, at 29.

[45] Ibid, at 23.

before the Court in the following manner.[46] To begin with, the Commission doubted the value of the punishment under consideration as a deterrent to juvenile offenders' future misconduct.[47] It also took into account the general circumstances surrounding the punishment, i.e. it being administered long after the offence, by strangers, and accompanied by a "kind of ritualism".[48] Finally, Kellberg stated that the Commission had also taken into account the fact that corporal punishment as a criminal punishment had been abolished in most member States of the Council of Europe, and in Great Britain.[49]

6.2.2 The Court in the Tyrer Case.

The Court, while endorsing the Commission's opinion that the punishment was degrading, was, however, quick to stress the existence of a number of factors it considered suasive. These included the fact that the violence against the individual was "institutionalised", i.e "permitted by law", "carried out by the police authorities", the "official procedure attending the punishment", the "psychological effects of the punishment" and that it was "administered over Tyrer's bare posterior".[50] It may have been a deliberate tactic of the Court to concentrate on these factors in an attempt to placate those who were still, in large numbers, in favour of corporal punishment of one form or another.[51] In doing so it allowed the possibility of the judgment being interpreted as a finding to the effect that the punishment inflicted on Tyrer was, in that given case,

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46 Ibid, at 53-59.
47 Ibid, at 82-83.
48 Ibid, at 58.
49 Id.
50 Supra note 37, at 14-17.
51 For example in relation to corporal punishment in schools in 1974 Terry Casey, the then General Secretary of the National Union of Schoolmasters/Union of Women Teachers, was quoted as saying that "the swish of the cane" was "one of the essential sounds of education." "Corporal Punishment in schools - the law", C.L.Centre Information Sheet p. 1. Similarly, in 1978 the National Association of Heads and Matrons of Assessment maintained that corporal punishment was necessary as a deterrent for hard core offenders under 14 years of age. (TES) Feb 10, at 99.

contrary to Article 3, but that judicial corporal punishment was not, *per se*, contrary to the Convention. However, the better conclusion is that the judgment did amount to a finding that the punishment is *per se* contrary to Article 3, because, as Sir Gerald Fitzmaurice correctly pointed out, these "special circumstances" did not stand up to close scrutiny.

Responding to the "institutionalised" observation, he stated:

> "To be "institutionalised" is, in an ordered society, inseparable from any punishment for crime, since non institutionalised punishment, except such as the law tolerates, must be illegal. Therefore, it does not follow (and it is not explained) why institutionalised violence must necessarily be degrading, if non-institutionalised is not, or be more degrading than the latter. Indeed, it is not at all clear what form of non-institutionalised violence the Court had in mind which, by comparison, would not be regarded as degrading to the recipient".[52]

With regard to the Court's reference to the "official aura of the procedure", Sir Gerald was as equally dismissive:

> "Next the alleged effect of the institutionalisation is said to be "compounded" by the "whole aura of official procedure attending the punishment" - (but how could the procedure not be official if there was institutionalisation? - the one is, or entails, the other) - and also compounded "by the fact that those inflicting [the punishment] were total strangers to the offender". As to this last objection, leaving aside the question whether, in the restricted community of Castletown, Isle of Man, the police officers concerned were "total strangers" to the boy, I for my part fail to see how it can be any more degrading to be beaten by strangers than non strangers. Many would, I believe, think it less so".[53]

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[52] Sep Op. of Judge Fitzmaurice supra 37, at 27.
[53] Ibid, at 27-28.

He concluded:

> "This brings me..to the conclusion...which constitutes one of the basic causes of my dissent over the Judgment-namely that it is the fact of corporal punishment as such, irrespective of the circumstances, which in the Court's view is degrading-so that no circumstances could make it otherwise".[54]

A similar understanding of the case is accepted by Mlyniec:

> "Its holding ...must be read to ban as degrading per se all corporal punishment inflicted by the state as punishment for a crime. No other conclusion can be reached given the fact that procedural safeguards were in effect, and also given the fact the actual physical injury in this case, while significant, was neither long lasting nor permanently disfiguring".[55]

The judgment was criticized, *inter alia*, by Professor Zellick who complained that the Court had reached a conclusion, but without giving any reason *why* the infliction of violence is degrading, as the term is to be understood in Article 3.[56] However, the problem Zellick rightly identifies of satisfactorily determining when the treatment or punishment must be considered tortuous, inhuman or degrading has already been examined.[57] For the purposes of this Chapter it is necessary to be concerned with the fact that the Court in the Tyrer case failed to address a number of issues pertinent to the proper consideration of corporal punishment. It has already been noted[58] that a satisfactory assessment of any punishment necessarily requires thought to be given to its deterrent rehabilitative and retributive qualities. None of these issues were addressed by the Court, despite the fact that parties to the hearing made numerous submissions which, when carefully analysed, clearly amounted to arguments relating to the rehabilitative, retributive or deterrent

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[54] Ibid, at 29.
[55] Mlyniec, at 52, (1985).
[56] Zellick, at 667, (1978).
[57] Supra Chapt. 4, at pp. 130-150 & Chapt. 5, at 166-169.
[58] Supra pp. 203-205.

functions of corporal punishment. Counsel Blom-Cooper, representing the United Kingdom directly mentioned in his submission the possibility that the Court should not consider the punishment degrading "perhaps on the ground that its proved effectiveness was sufficient to justify its use".[59] Corrin, the Isle of Man Attorney-General, argued in his submission to the Court that corporal punishment had redeeming social factors.[60] He stated that the Tynwald government of the Isle of Man believed the punishment to be a deterrent:

> "in the sense that some people -....either are in fact deterred from even coming to the Isle of Man or, if they do come to the Isle of Man, once they come to live or come on holiday, are deterred from committing acts of violence, because they are all aware that this penalty, although rarely used, is on the statute book and can be used in the necessary case".[61]

He then sought to support this submission with statistical evidence that corporal punishment was in fact an effective deterrent on the Island against crimes of violence.[62] He then commented on the rehabilitative aspects of the punishment, referring to a letter he cited as typical from a former recipient of the punishment on the Island who had written to him to express his support for the practice. The author of the letter had stated that the punishment had helped him appreciate the difference between right from wrong and deterred him from further mischief. Observing that he may have been destined for a life of crime he concluded his letter by stating that he was now a successful businessman.[63]

Other factors that the Attorney General of the Isle of Man chose to submit to the Court included local support for judicial birching. He also mentioned that outside help was not available to the Isle of Man as it was to

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[59] Supra note 34, at 63.
[60] Ibid, at 74.
[61] Ibid.
[62] Ibid, at 77.
[63] Ibid, at 75.

other British Isles. Quoting the example of the Island's main resort, Douglas, having a complement of just 40 policeman in the event of civil disorder, he maintained that it would not be possible to control hundreds of rioters.[64]

It is clear that the Court of Human Rights paid scant attention to these issues, if any at all. It addressed the deterrent related submission of the Attorney-General by pointing out "that a punishment does not lose its degrading character just because it is believed to be, or actually is, an effective deterrent or aid to crime control",[65] and that it "is never permissible to have recourse to punishments which are contrary to Article 3, whatever their deterrent effect may be".[66]

This summary dismissal of the deterrent value of corporal punishment is to be contrasted to that discussed above[67] in the Barry Report, in which the Council considered in exhaustive detail whether the deterrent case for corporal punishment had been made. The Council also considered whether the punishment was useful for reformative purposes before concluding that the case for reintroduction of judicial corporal punishment had not been made.[68]

The failing of the Court in the Tyrer case was, it is submitted, to accept the potential scope of Article 3 noted earlier in this thesis,[69] without at the same time reviewing its understanding of the provision as permitting no justification for conduct considered tortuous, inhuman or degrading. It had indicated that it accepted the Article's relevance to types of conduct far removed from that which the drafters of the provision may

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64 Id.
65 Supra note 34, at 15.
66 Id.
67 Supra note 20.
68 Id.
69 Supra Chapt. 3, at pp. 104-110.

have had in mind, but had chosen to apply the same understanding of it as allowing for no concept of justification in the consideration process. In so doing, the Court placed itself inside a judicial straight-jacket, preventing it from considering factors which were clearly relevant to a proper review of the conduct to be judged by it.

It is contended that this interpretation of the Article leads to an inadequate review of not only corporal punishment, but also many others forms of treatment or punishment which have since had to be considered by the Commission and the Court. Furthermore, it also precludes satisfactory review of other conduct which might, at a future date, raise issues which will need to be examined in Strasbourg. To support this observation it will be necessary to examine the extradition case of Soering v. U.K,[70] the cases of McFeeley v. U.K[71] and Reed v. U.K[72] concerning the treatment of prisoners, the racial discrimination allegation raised in the East African Asians case[73] and the practice of compulsory vaccination.

6.3 Review of Extradition Under Article 3 of the Convention.

There have been many applications questioning the extradition or deportation of an individual from a member State of the Council of Europe to a third state. Only a few, however, have been successful.[74] The burden placed on individuals in cases of extradition of proving that they are likely to face treatment contrary to Article 3 is a difficult one to discharge. However, the main cause for concern, is not the difficulty or otherwise of establishing that extradition in certain circumstances is

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[70] Series A. 161, (1989).
[71] Application No. 8317/78, McFeeley et al v. United Kingdom, 3 E.H.R.R.161.
[72] Application No. 7630/76, D & R 7 p. 161.
[73] Application No.4403/70, 3 E.H.R.R. 76.
[74] A recent exception, albeit under Article 8 of the Convention is Lamgiundaz v. United Kingdom Case No. 48/1992/393/471), The Times Law Report August 11 1993, at 32.

likely to violate Article 3, but in the consideration the Commission and Court give to such applications. This point can be supported by an examination of the leading extradition decision from the European Court which is Soering v. United Kingdom.[75]

The facts and importance of the Soering case from the point of view of international law of human rights have already been discussed.[76] It will suffice to summarize and emphasize the facts of the case important to the present discussion.

Soering was arrested in the United Kingdom and proceedings were commenced to extradite him to the United States of America to face two charges of capital murder. Claiming that upon his return and conviction he would have to face both the "death row phenomenon" and the possibility of execution, he argued, *inter alia*, that the U.K. would be responsible if it agreed to his return, for subjecting him to treatment contrary to Article 3. The Court, disagreeing with the Commission, and by unanimous decision, concluded that the decision of the United Kingdom to extradite Soering to the United States would give rise to a breach of Article 3.[77] The Court determined thus:

> "having regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant..".[78]

It is interesting to note that the Court's judgment spoke in terms of taking into account "all the circumstances of the case" and of striking a fair balance between the demands of the general interest of the community [in combatting crime] and the requirements of the protection

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[75] Series A. 161, (1989)
[76] Supra Chapt. 3 at pp. 101-103. See also Lillich, (1989).
[77] Supra note 75.
[78] Ibid, at 44.

of the individual's fundamental rights".[79] The Court, it may be concluded, used terminology which indicates that it is not possible to consider Article 3 as offering complete protection from all forms of ill-treatment. Lillich, it is submitted, is right to comment:

> "How one can balance an individual's rights under Article 3, which are nonderogable, against the community's interest in effective law enforcement awaits further clarification by the Court". [80]

It may be that this is a reflection of the frustration of the Court in being prevented from addressing matters which it considers important along its course to a satisfactory decision or, just as likely, it is an indication that, in fact although not expressly admitted, the Court does take into account factors which are clearly outside the strict interpretation required of it by the understanding of the Article to date.

It is this interpretation, if faithful to the present understanding of the norm, which would, it is argued, exclude a number of considerations important to the proper development of extradition law. These shall now be briefly examined.

First, the Court was clearly prevented from considering whether a finding in favour of the applicant would have the effect of creating a haven in Europe for fugitives. As a critic of the judgment has stated:

> "[e]very prisoner awaiting extradition to the USA [on a capital murder charge] is going to have to take his case all the way up the ladder to see if the European Court of Human Rights will make the same decision in his case.....If extradition were refused by the Court in such a case, the prospect opens up of the UK filling up with wanted American murderers".[81]

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[79] Ibid, at 35.
[80] Lillich, at 144, (1991).
[81] ROBERTSON, at 232, (1990).

Although it must be questioned whether the numbers resisting extradition are ever likely to be that large and that the question of a safe haven for fugitives in the Council of Europe is likely to arise, it is clear that the Court, under the present understanding of the Article, is prevented from taking such a possibility, both at present and in the future, into account when determining whether an application under Article 3 is to succeed.

Secondly, the Court was prevented from considering any of the implications refusal to extradite might have for the United Kingdom. The decision to extradite Soering was undoubtedly an issue involving more than simply the extradition of an individual who may suffer ill-treatment upon his return to the receiving state. The case became of crucial importance to relations between the United Kingdom and the United States in respect of extradition matters, with the former State keen to resolve the matter without damaging prospects of the latter extraditing important IRA suspects to London for trial. Undoubtedly the eventual decision of the Court did much to damage this sensitive relationship. As Robertson states:

> "In political and diplomatic terms, [Soering] is a disaster for the U.K. In recent years considerable effort has been expended to obtain the extradition to the UK from the USA of wanted IRA suspects. The issue of their extradition has aroused considerable publicity in the U.S. and our diplomats have had to fight against the weight of the Irish-American lobby. ....The reaction of the average American to this decision can well be imagined. If we are not going to extradite their murderers, why should they extradite ours?"[82]

Thirdly, the Court was also prevented from considering whether compatibility of the interpretation of what are regarded to be very similar anti-torture and ill-treatment provisions[83] is a factor which should have a bearing on the final outcome of its decision. In its

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[82] Id.
[83] Soering Commission Report, para 142.

decision the Commission noted that the Virginia Supreme Court had "rejected the submission that electrocution would cause the "needless imposition of pain before death and emotional suffering while awaiting execution of sentence" and would therefore constitute "cruel or unusual" punishment contrary to the Eighth Amendment of the United States Constitution (Stamper v. Commonwealth.)". The Commission noted that "in the light of the similarity between Article 3 of the Convention and the Eighth Amendment, the Commission must attach substantial weight to the above finding of the Virginia Supreme Court".[84] However, an interpretation by the Court true to its understanding of the norm prevents it from considering not only this factor, but also that the Virginia Supreme Court may be better placed to determine the conditions on death row and, therefore, whether they should be outlawed as being contrary to modern norms on acceptable treatment or punishment.[85]

Fourthly, the importance of a possible alternative venue for the trial and conviction of Soering could not be properly evaluated by the Court under the present understanding of Article 3. Frowein, in his dissenting opinion[86] on behalf of the Commission, considered that the decision to extradite to the United States would violate Article 3 for the very reason that an alternative venue for the applicant, in the form of Germany, was possible. Although the submission of the United Kingdom must be correct that the German extradition request was irrelevant to the issue of an Article 3 violation, since "the question of whether there is a breach of Article 3 should involve exclusively an objective assessment of the gravity of the treatment complained of...",[87] it is submitted that a route somewhere between the two is

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[84] Id.
[85] This is a consideration which may be described as the "margin of appreciation" afforded by the Strasbourg court to another in the United States.
[86] Supra note 75, at 32.
[87] Ibid, para.147.

preferable. This is because, although Germany's extradition request is irrelevant to the issue of the severity of the treatment, it is relevant to the reasonableness of the United Kingdom's decision and whether its intended actions were reasonable in all the circumstances. Again, however, this consideration was excluded by the present understanding of Article 3.

6.4 Review of Treatment of Prisoners Under Article 3 of the Convention.

The cases of McFeeley v. United Kingdom, and Reed v. U.K, were discussed in Chapter 5.[88] It will be recalled that in the former case prison procedures were in dispute, the applicant claiming, *inter alia*, that body searches amounted to inhuman and degrading treatment. In Reed v. U.K, it was alleged, *inter alia*, that substandard prison-cell conditions amounted to a violation of Article 3.

A proper consideration of the McFeeley case, it is submitted, required the following factors to be taken into account. First, the reasons why the security procedures were in place which would include reference to the security category of the applicant, recent examples, if any, of major security breaches, and the personal history of the applicant in respect of his own incarceration; secondly, a detailed examination of any safeguards which may have been in place to ensure that reasonable procedures laid down were in fact followed. None of these factors, it is noted, could be considered adequately under the present interpretation of Article 3 by concentrating on the consequences of the treatment in order to discover whether it was sufficiently severe to be considered degrading.

Similar observations may be made with regard to the case of Reed v. United Kingdom. The applicant's circumstances: having to live in a cold and uncomfortable cell

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[88] Chapt.5 at p. 165, & note 48.

containing cockroaches undoubtedly raised an issue under Article 3. However, the fact that he was kept in such accommodation whilst repairs were being carried out in another section of the prison, it is contended, is a factor which the Commission should be allowed to give some consideration. Likewise, it was submitted by the U.K that many of the problems at the prison in question were caused by overcrowding, due to the fact that a number of prisoners had to be transferred there from a second prison, where there had been riots. These are all factors which require examination, but which is impossible under the current approach to Article 3.

6.5 Review of Discrimination Under Article 3 of the Convention.

The possible application of Article 3 in discrimination cases became apparent in the East African Asians case,[89] and it is to this decision that it is necessary to turn to assess whether the current understanding of the Article provides satisfactory review for applicants alleging racial discrimination.

The background to the case is as follows: as the decline of the British Empire accelerated after the Second World War British subjects from former British colonies sort refuge in the United Kingdom. As a response to the large numbers of people in the U.K. who were concerned by the influx of many immigrants, Parliament passed a series of strict immigration laws intended to restrict the numbers of immigrants entering the country. The plaintiffs, a group of Asians living in East Africa, were Citizens of the United Kingdom and Colonies, but had been denied entry into the U.K. because of a recent change in immigration legislation. The effect of the new immigration law[90] was, effectively, to discriminate between those British Passport holders who could

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[89] Yearbook XIII, (1970) 928.
[90] Commonwealth Immigrants Act, 1962, 10 7 11 Eliz. 2, ch. 21.

establish British descent and those, principally the East African Asians, who could not. The problem faced by the applicants in trying to contest the U.K. action in Strasbourg was that the main provision in the Convention relevant to their plight was the Fourth Protocol, which has not been ratified by the U.K.[91]

Even more problematic was the fact that Article 14 of the Convention, prohibiting discrimination, is not an autonomous provision, but operative only in relation to another substantive Article of the Convention.[92] In the absence of Protocol Four, Article 14 was of no assistance. The applicants decided, therefore, to petition under Article 3 of the Convention, claiming that their treatment at the hands of the government of the United Kingdom amounted to degrading treatment.

The Commission embarked on a thorough investigation into the reasons for the legislation. It found that it was directed at a particular racial minority, i.e. the East African Asians, who were being targeted directly for denial of entry into the United Kingdom. These objectives, the Commission considered, had clear racial motives. Comments made by the Secretary of State and the Home Secretary were cited in support of this conclusion.[93] The Commission also noted that further elements of British immigration legislation existed which gave preference to white persons in East Africa.[94] The Commission concluded that the racial discrimination faced by the applicants, together with the special circumstances of their case, amounted to degrading

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[91] This provides: No one shall be deprived of the right to enter the territory of the State of which he is a national. Fourth Protocol of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 16, 1963, art 3920, Europ. T.S. No.46.

[92] See generally VAN DIJK & VAN HOOF, 532, (1990).

[93] The Commission concluded that the legislation had racial motives from the following statement made in Parliament by the Home Secretary: "...the origin of the Bill lies...in a considered judgment of the best way to achieve the idea of a multi-racial society," supra note 89, para. 200.

[94] Ibid, at 83-84.

treatment contrary to Article 3.[95] Significantly, however, the Commission stated that racial discrimination on its own, without the "special circumstances" mentioned, would be sufficient to violate Article 3.[96]

It is submitted that on the facts of the East African Asians case both the decision and the Commission's reasoning were acceptable. The applicants' had not only been subjected to differential treatment, but the result of the United Kingdom's action was in effect to render them stateless. For a time they neither had a right of abode in their homeland or a right of entry into the country of which they were, according to their passports, nationals.[97] On these facts, concentrating on the applicants feelings to determine a violation in such extreme conditions was, it is accepted, at least one satisfactory way of determining whether Article 3 had been violated.

However, if one were to change the facts of the East African Asians case slightly, the unsuitability of the present understanding of Article 3 is readily apparent: if the United Kingdom had been motivated to pass the legislation due to racial tension and unrest in its own country, the measures taken against the applicants would not have appeared so unreasonable. The action might have been compared to that presently being taken by the government of the Federal Republic of Germany to control immigration following considerable domestic unrest caused by right-wing extremists.[98] Of course, such state action may not of itself be sufficient to justify its policy relating to entry into a country, but it does amount, it is submitted, to a factor which merits appraisal by the Commission in a full and proper consideration of the

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[95] Ibid, at 86.
[96] Ibid, at 81-82.
[97] Cf here the U.S. case of Weems v. United States 217 U.S. 349 (1910).
[98] See here THES May 8, 11a, June 8, 10h (1992).

facts in a given case. The present approach, it is noted, excludes such possibilities.

If Article 3 is to develop into a provision through which acts of discrimination may be reviewed, it can be seen that the present understanding of it is not conducive to proper consideration of any such applications. An examination of legislation, both at the domestic and international level, indicates that provision is made for examining the circumstances and reasons for differential treatment between races, the sexes, and ethnic groups. For example, the International Convention on the Elimination of All Forms of Racial Discrimination 1966 defines "racial discrimination" as:

> "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life".

Similarly, the Convention of the Elimination of all forms of Discrimination Against Women defines in Article 1 discrimination against women as:

> "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field".[99]

In European Union law, Article 119 of the Treaty of Rome 1957, which provides for equal pay for equal work between men and woman, has been interpreted to exclude indirect discrimination which cannot be justified. Any difference in treatment must correspond to a "genuine need of the enterprise, be suitable for the objective pursued by the enterprise and necessary for that purpose".[100] There is

[99] 1249 UNTS 13.
[100] STEINER, at 256, (1992). See also Directives 75/117, 76/207, 79/7 86/378, 86/613.

considerable jurisprudence, both nationally and at the level of the European Union, addressing the question of when indirect discrimination may be considered justifiable.[101]

Accepting that Article 3 has potential as a forum for the consideration of racial discrimination cases, it is not unreasonable to expect that it might also have an application for other groups, including those categories also mentioned in Article 14, which are sex, colour, language, religion, political, national or social origin, association with a national minority, property, birth or other status.[102] Although the East African Asians case may be considered as special on its facts and, therefore, Article 3 is unlikely to develop into a provision allowing general review of discrimination matters, it is clear that the present understanding of the norm does not suggest that it has the potential of developing into a satisfactory means of reviewing cases of discrimination.

6.6 Consideration of Compulsory Vaccination Under Article 3 of the Convention.

Examples of compulsory vaccination programmes can be found in the United States,[103] in many third world countries,[104] and also in a number of Council of Europe countries such as Spain[105] Italy[106] and Germany.[107]

It will be recalled that it was Eleanor Roosevelt who expressed concern that the draft article at the United Nations prohibiting torture and ill-treatment might prove

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101 Jenkins v. Kingsgate (Clothing Productions) Ltd [1981] ICR 715 (EAT); Bilka-kaufhaus GmbH v Weber von Hartz (case 170/84) [1986] ECR 1607.

102 Report of 12 May 1983, Abdulaziz, Cabales and Balkandali, A. 94 (1985), at 56-57.

103 DUDGEON & CUTTING, at 59, (1991). See generally Jackson, (1969).

104 DICK, 51, (1985). See generally Daniel, (1982); Walsh, (1983).

105 See generally Barranco, (1990).

106 See generally Tanzi et al, (1990).

107 KOMMERS, at 343, (1989). In 1840 the English Parliament passed a law recommending vaccination and making variolation illegal. Between 1853 and 1890 certain vaccinations were made compulsory, but objections to the involuntary nature of these programmes led to compulsory immunizations being discontinued in 1946, DUDGEON & CUTTING, at 59, (1991).

problematic for the United States and its compulsory vaccination programmes.[108]

The practice of compulsory immunization in the United States dates back to the early 19th century, when legislation was adopted in the Commonwealth of Massachusetts requiring smallpox vaccination of the general population.[109] Opposition to such laws quickly followed on the grounds that it violated the individual's inalienable right to "life, liberty, and the pursuit of happiness".[110] However, the constitutionality of the Massachusetts compulsory vaccination law was upheld in 1905 when the U.S. Supreme Court decided that a State did have the power to pass and enforce compulsory smallpox vaccinations.[111] In 1922, the Supreme Court addressed the issue of compulsory immunization again when asked to consider the constitutionality of a city ordinance requiring smallpox vaccination as a prerequisite for attendance at school. The Court, basing its decision on its earlier precedent, upheld the ordinance.[112] Although both cases related to the legality of compulsory smallpox vaccinations, it was generally accepted that the decisions applied, *mutatis mutandis*, to all compulsory vaccination programmes.

The court decisions were taken against a background of increasing use of compulsory immunization programmes. By 1915, 15 States together with the District of Columbia, had laws requiring smallpox vaccination as a prerequisite for school attendance.[113] Furthermore, 21 other States had laws or regulations which enabled local jurisdiction to enforce compulsory vaccination regulations under certain conditions.[114] A study by Fowler of smallpox vaccination

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108 Supra Chapt. 1, at p. 51.
109 Tobey, (1947).
110 Jackson, at 787, (1969).
111 Jacobson v. The Commonwealth of Massachusetts, 197 U.S.11, 25 S.Ct.358,49L,Ed. 643, Ann Cas.765 (1905).
112 Zucht v. King, 260 U.S. 174 43 S.Ct. 24, 67L. (1922).
113 Hanlon, at 552, (1968).
114 Id.

laws indicated that in the 1940s only six States, Arkansas, Florida, Missouri, Nebraska, Nevada and Oklahoma, did not have some statute which made express reference to compulsory immunization against smallpox.[115] During the time of the drafting work of the United Nations' provisions outlawing torture and ill-treatment, the enactment of amendments to compulsory immunization programmes were relatively static.[116] However, the development of certain vaccines, such as the poliomyelitis virus vaccine in the late 1950s, the live virus oral poliomyelitis vaccine in 1962, and the live virus measles vaccine in 1963, renewed interest in compulsory immunization programmes as a method of preventing the outbreak and spread of preventable diseases.[117] Today, the majority of States have a compulsory vaccination system, but with an accompanying conscience clause to allow for refusal on religious or other grounds.[118]

To date, it does not appear that the practice of compulsory vaccination, either as performed in the United States or in Europe, has been challenged before a supra-national human rights tribunal on the grounds that it is "inhuman" or "degrading". However, bearing in mind that the practice exists in a number of member States of the Council of Europe, it does not appear an unreasonable exercise to speculate as to how the Commission might approach any application claiming that compulsory vaccination amounted to degrading treatment if it were to come before it.

The first and probably most difficult hurdle to overcome would be the matter of the severity requirement.[119] However, as has already been noted, it appears that the Commission and the Court have been prepared to relax

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[115] Fowler, (1941).
[116] Jackson, at 788 (1969).
[117] Id.
[118] DUDGEON & CUTTING, at 59, (1991).
[119] Supra Chapt.5, at pp. 162-165.

gradually what was once a rigid standard to be satisfied regarding severity of suffering. The recent decision of Costello v. Roberts[120] indicates that at least 3 members of the Commission were prepared to accept that the slippering of a schoolboy, which left no physical signs of injury, could satisfy the severity requirement of Article 3. Accepting that this approach to the severity standard is likely to continue, it is not unreasonable to conclude that the Commission would not be able to dismiss the application summarily on the severity issue.

If compulsory vaccination were to satisfy the severity requirement, it is clear that the practice would not receive satisfactory analysis within the present understanding of Article 3. Such an analysis would only allow examination of whether the result of the practice was to cause the applicant to feel degraded. Such a subjective approach would, if strictly applied, preclude a number of considerations pertinent to a fair evaluation of the practice. It is submitted that a decision would only be perceived as just if it took into account whether the action was reasonable in all the circumstances. This would include consideration of whether there was a real risk of contracting the disease the immunization programme was introduced to combat. The Commission would need to consider particularly whether there was an epidemic at the time which might have required serious remedial measures.[121] A historical survey of compulsory vaccination programmes in the United States[122] indicates that they have been introduced as a response to a pressing social need. The practice was far more common in the States east of the Mississippi River facing immediate danger of disease introduced by immigrants.[123] In addition States with large concentrated populations and many

[120] Series A. 247-C, (1992).
[121] "A virus that can "out of the blue" kill more people in 18 months than all the deaths from battle casualties in two world wars is one to be reckoned with", DUDGEON & CUTTING, at 23, (1991).
[122] Supra p. 228.
[123] Jackson, (1969).

people living under poor socio-economic conditions showed a greater inclination to adopt compulsory, as opposed to voluntary, immunization programmes.[124]

It is interesting to compare the review of compulsory vaccination advocated above, and currently impossible under the present interpretation of Article 3, with that afforded compulsory medical procedures under German law. A study of German jurisprudence demonstrates that it is possible to give proper consideration to compulsory medical procedures by carefully considering the individual's right to physical integrity against a general interest requirement. To illustrate this contention a brief excursion into jurisprudence from the courts of the Federal Republic of Germany is necessary.

In the "Spinal Tap case",[125] a district court judge ordered the applicant to undergo a medical test requiring, *inter alia*, the withdrawal of body fluid for the purpose of determining his mental condition following his refusal to pay a fine imposed after failing to answer a Board of Trade questionnaire. He challenged the order as violative of his right, *inter alia*, of personal inviolability under Article 2(2) of the Constitution. The Court stated:

> "When ruling on cases involving the compulsory extraction of body fluids, the judge must - as in all cases involving government encroachment on the sphere of freedom - observe the principle of proportionality relative to ends and means. While the public interest in solving crimes - an interest based on the especially important principle of legality - ordinarily justifies even encroachments on the freedom of the accused, this general interest suffices less the more severe the infringement of freedom". [126]

The Court then considered the seriousness of the offence in respect of the procedure to which he was required to submit.

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[124] Id.
[125] 16 B VerfGE 194, (1963).
[126] Id.

It concluded:

> "All in all, the matter is a minor offence that might only lead to a light sentence, possibly even an acquittal on account of its insignificance. By comparison, the extraction of fluid is not an insignificant physical procedure. There is no justification for submitting the accused to such a surgical procedure against his will".[127]

A similar decision was taken in the "Pneumoencephalography case"[128] in which the court invalidated a court order to puncture a vertebral canal for the purpose of ascertaining criminal responsibility for a crime. In the "Heinrich P. case", however, the Constitutional Court decided that, in the circumstances, an order requiring the applicant to submit to a blood test to determine parentage was reasonable and not contrary to the individual's right to inviolability of her/his person.[129]

The above decisions indicate that German courts recognize that the practice of compelling individuals to submit to compulsory medical procedures may be condoned in situations where the "principle of proportionality relative to ends and means has been observed". This necessarily requires an examination of the circumstances in which the individual was required to submit to the procedure. A balancing of interests arises, but the court has acknowledged that the more severe the infringement, the less compelling the general interest consideration. It is this assessment of the competing interests of the individual and the general public interest in matters relating to vaccinations and other medical procedures involving violation of the individual's physical integrity, which, it is submitted, requires to be incorporated into the application of Article 3 of the Convention. It is one however, that under the present

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[127] Quoted from KOMMERS, at 345, (1989).
[128] 17 BVerfGE 108 (1963).
[129] 5 BVerfGE 13 (1956).

understanding of the provision as rejecting the concept of justification, the Commission and Court are prevented from developing.

The above analysis of the Commission's and the Court's efforts in reviewing certain conduct for the purposes of compatibility with Article 3 of the Convention suggests, that their understanding of the provision is unsuitable for a proper review of the cases now before it. This is a conclusion which is particularly apparent the more the Commission and Court are required to consider conduct far removed from the sorts of treatment or punishment the drafters of Article 3 had in mind.

It is submitted, that a more satisfactory method of reviewing the "new areas" to which Article 3 is now being utilised is required. A proposal for this shall now be discussed.

6.7 Accommodating the Concept of Justification into the Consideration of Article 3 Cases.

It is submitted that in the many areas to which Article 3 is potentially relevant, review must, to be satisfactory, accommodate consideration of a number of factors currently excluded by the present understanding of Article 3. It is clear from the Tyrer decision that, as a vehicle for review of punishment, the present understanding of Article 3 is unsatisfactory. The Court, in that case, was unable to address the many points submitted to it by the Attorney General of the Isle Man, such as the retribution qualities of the punishment, or the confidence the local population had in the punishment as a deterrent. It is equally clear that, when compared to the thorough consideration given to the practice in the Barry Report, the punishment did not receive a review which could be considered satisfactory. When it is recalled that it was in the Tyrer case that the practice of judicial corporal punishment was effectively

denounced,[130] the Court must be criticised for producing a judgment which did not address the retributive, deterrent and rehabilitative effects of the punishment. Earlier in this Chapter it was noted that penologists agree that any assessment of punishment to be satisfactory must consider all of these elements and in depth.[131] None of them received adequate consideration by the European Court of Human Rights.

It is submitted that these matters could be addressed if the Court were permitted to consider whether a punishment which may be inhuman or degrading may also be justified for reasons of, for example, "the prevention of disorder or crime". This would allow the State the opportunity to justify the practice by referring to the proven deterrent value of corporal punishment or its retributive qualities as a further example. The burden would be on the State to make out the case for justification the standard of proof increasing in proportion to the severity of the treatment. There would, of course, be a threshold beyond which no treatment or punishment could be said to be justifiable.

Likewise, permitting the State to justify its treatment of prisoners on the grounds of, for example, "the interests of public safety" would allow full consideration of a number of issues essential to a proper review of cases concerning treatment of prisoners. If the reasoning of the Commission in the McFeeley case is recalled, it can be seen that the decision was eventually justified in the "light of prison security", - a term very similar to that proposed above.

Similarly, when considering extradition cases, allowing the State the opportunity to justify its action on the grounds of, for example, the "prevention of disorder or

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130 Supra Mylniec, 52, (1985) and p. 211-214.
131 Supra p. 204-205.

crime" or "the protection of the rights and freedoms of others" would permit consideration of issues conducive to proper assessment of the case. This would allow the Court to address a State's submission that it was becoming a haven for fugitives, although it would be expected that considerable evidence of this would have to be submitted to discharge the burden on the State in this regard. The applicant's own circumstances might also be relevant. The Court might wish to inquire whether the applicant deliberately sought refuge in the respondent State in order to avoid justice or whether his or her choice of destination was more accidental.

When considering the practice of compulsory vaccination, the advantage of allowing the State the opportunity to justify its actions would be that the Court could consider whether the treatment although degrading to the recipient was necessary, for example, for the "protection of health" due to an epidemic or the need to eradicate a life threatening disease.

It may be considered that the terms suggested above - which are "in the interests of public safety", "the prevention of disorder of crime", or "the protection of health", might be abused and that they are broad enough to encompass the justification of a range of evils. However, an examination of the interpretation of similar terms by the court in respect of Article 8 of the Convention, which protects, *inter alia*, the right to respect for an individual's private and family life, demonstrates that the terms have been narrowly interpreted. For example, in Silver v. United Kingdom[132] the Court, in considering the scope of Article 8(2), stated that any limitation to the right should correspond to a "pressing social need" and be "proportionate to the aim pursued".

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[132] Series A. 61, at 37-38, (1983).

In addition to the vigilance of the Court, it would be open to the individual to submit that the suffering experienced was of such a severity that no "justification" considerations may apply. Where this threshold would lie would be for the Commission and the Court to decide. In respect of the comments made in Chapter 5[133] on the assessment of severity, it is argued, that the individual would be able to ascertain where this threshold lies, as the European Commission and Court consider Article 3 cases under this revised understanding of the torture and ill-treatment prohibition and it becomes possible to plot its co-ordinates.

It must be noted that it is not expected that the revised approach advocated would lead to a significant change in the direction of the Court's jurisprudence. It may even be that the direction the Court's decision would take would remain unchanged. What is important is that the way to the decision in each case would be perceived as more thorough, and fair. It is submitted that review by the Court would be considered more reasonable if it allows a greater number of submissions considered relevant by each party to be addressed even if they were to be resoundingly rejected by the Court, in contra-distinction to an approach which refuses to acknowledge their relevance at the outset.

In advocating what may appear to amount to a compromise on the protection afforded by the terms of Article 3, it is conceded that this represents a considerable departure from the accepted interpretation of the Article. It is also conceded, that the provision which includes the word "torture" may prove too emotive for any theory of interpretation to be considered acceptable which advocates that some conduct within the scope of the provision may not violate the Article on the grounds that it is justifiable. Professor Tarnolopolsky commented on

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[133] Supra pp. 168-169.

the United Nations' norm prohibiting torture and ill-treatment stating that reference to corporal punishment in schools "tended to trivialize the prohibition of torture or cruel, inhuman or degrading treatment or punishment". Similarly, it must also be said that mention of "torture" in the provision may make any theory advocating limited compromise of the absolution prohibition in the article impossible to accept.

The solution to this dilemma may lie in the proposal to direct conduct leading to all but the most severe forms of suffering for consideration under Article 8, which accommodates a regime similar to that proposed above. Its second paragraph permits justification in respect of:

> "interests of national security, public safety or the economic well-being of the country, the prevention of disorder or crime,..the protection of health or morals... the protection of the rights and freedoms of others".[134]

If the two recent corporal punishment cases of Y v. U.K[135] and Costello-Roberts v. U.K[136] are examined it can be seen that the Commission has already embarked on a path which is not incompatible with this suggestion. In Y v. U.K, which involved an application challenging the use of corporal punishment in a private school in the United Kingdom, the Commission considered that the injury caused to the applicant was of sufficient severity to satisfy Article 3, and did not consider it necessary to consider the application under Article 8, as requested by the applicant. In the Costello case, which concerned the slippering of a schoolboy, the Commission refused to accept that the severity threshold had been satisfied. Rejecting the application under Article 3, it then continued to consider whether there were grounds for considering the case as a violation of Article 8.

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[134] UKTS 71 (1953)
[135] Series A. 247-A, (1992).
[136] Series A. 247-C, (1992).

The merit of the above proposal, may only be fully appreciated however, when observations on the nature of recent Article 3 decisions are discussed.

6.8 The Need for the Interpretation of Article 3 to Account for the Change in the Nature of the Prohibition of Torture and Ill-treatment.

The Court's consideration of the "new areas" discussed above must be criticized for more than its failure to take into account a number of factors pertinent to proper consideration of the conduct under review. It must also be criticized for rejecting conduct in a manner which precludes its reintroduction.

In the early years of the Convention[137] it was satisfactory and, indeed, desirable that the Court could dispose of the tortuous practices that were brought to the attention of the Commission in the Greek case, without allowing for the possibility that the practices might have to be re-assessed in the future with a view to their re-introduction. However, it is clear that this method of rejecting the types of conduct now frequently examined by the Commission for compatibility with Article 3 is no longer acceptable. It will be recalled from the examination of penal policy at the European level that no one approach to sentencing may be considered superior to another, nor may it be considered that a consensus has been achieved on which approaches to punishment are to be considered as permanently rejected. Likewise, the historical survey of penal reform earlier in this Chapter suggests that there is constant reappraisal of penal policy and rejection and then re-emphasis of certain sentencing principles. No one penal principle has emerged over time as paramount and preferable leading to the exclusion in full or part of all others. An acceptable rejection of any punishment by the European Court, it is submitted, must provide for the possibility that penology

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[137] See here supra p. 91.

in the future may emphasize the importance of a principle previously neglected or disgarded. For example, if deterrence is substituted in favour of rehabilitation as the primary goal of sentencing, the European Court must be permitted to review punishment in accordance with this new priority. The method of review proposed in this Chapter, it is contended, would incorporate these requirements.

Advocating a mechanism which allows the Court to return to the consideration of conduct previously rejected as incompatible with the Convention is important for a further reason. This is because the Convention's application has extended to the point at which it is perhaps no longer correct to talk about the Court as being engaged in an exercise of recognizing "right" or "wrong" conduct of the State. The language of "preferred conduct" or "more appropriate behaviour" is likely to be as suitable in many cases. Therefore, decisions on compatibility of conduct with the Convention must be considered as recognizing change as much as progress. The mechanism proposed, it is contended, would allow for change to occur and the Court to consider whether it may follow a course previously rejected. Today, not all rights in the Convention may be considered to be of a "lobster pot nature" - from which, once entered into, there can be no retreat.[138] To some degree, the moral sceptic must be accommodated in the interpretation process under the Convention. Whether corporal punishment or compulsory vaccination is capable of being declared incompatible with the European Convention is likely to depend as much on the Court recognizing a mood against the practices in member States of the Council of Europe and its judicial rejection being politically palatable, as the Court acknowledging a "natural" and "inalienable"

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[138] Mahoney, at 67, (1990) quoting Brubaker, S., Comment, 47 Maryland Law Review, at 165, (1987)..

right of the individual to be protected from such conduct.

Conclusion

To conclude, this Chapter has set out to prove that the types of conduct to which Article 3 is now applied and for which it might be used in the future, are currently unable to receive adequate consideration. What is proposed is that the concept of justification be incorporated into the consideration of the many new types of cases to which the Commission and Court have been required to assess. The grounds on which conduct within Article 3 must be considered justifiable are those already accommodated in Article 8 of the Convention. It may just be that for many it would be unacceptable for conduct said to be "inhuman or degrading" to be considered justifiable. Although normal usage of these terms has without doubt undermined their currency, they still inspire evocative images of cruelty. It is for this reason that removal of all but the most serious forms of conduct for consideration under Article 8 may be the preferred alternative. It is this proposal which would allow adequate consideration of the many new areas to which the Convention has now become applicable. It will also allow Article 3 to return to its *raison d'etre*, which is the outlawing of torture and severe ill-treatment.

CONCLUSION

The history of the prohibition of torture and ill-treatment at an international level uncovers a number of facts which the scholar is likely to consider remarkable.

It is remarkable how a prohibition articulated at the United Nations, but reproduced in regional human rights treaties and many state constitutions, has remained largely undefined despite its ubiquity and, indeed, its importance. Equally surprising is that the interpretation of the prohibition has remained unchanged in almost half a century. This is despite the fact that in this time it has undergone a complete metamorphosis; created with the horrors of the Nazi concentration camps in mind, it may now be considered to be a standard against which all forms of conduct, leading to suffering of a certain suffering, may be tested.

The early part of thesis sought to explain the reasons why the definition of torture and ill-treatment has remain relatively undeveloped. Reference was made to the difficulties experienced during the drafting of the prohibition of torture and ill-treatment both at the United Nations and then at the Council of Europe. Following the examples of maltreatment at the hands of the Nazis during the Second World War, it was clear that the prohibition would be required to cover conduct wider than that traditionally associated with the medieval dungeon. However, concerned not to unduly restrict the prohibition by an overspecific definition of torture and ill-treatment, the phrase eventually accommodated in the Universal Declaration was:

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

It is perhaps a measure of the difficulty of the task of articulating a satisfactory definition of torture and ill-treatment that it has since been left more or less unchanged in subsequent United Nations' human rights instruments and in regional treaties such as the European Convention.

Although this reticence to alter the articulation of the torture and ill-treatment prohibition is understandable, those charged with the task of applying it may have been forgiven for considering that its drafters had abdicated their duties by choosing to pass on to others the task of determining the scope and, content of the provision.

It may be argued that it is unnecessary to attempt to define further the meaning of the prohibition as first articulated in the Universal Declaration. There is some force in the view that although obscure phrases create uncertainty, they also provide great flexibility, providing tribunals the freedom to reach the desired conclusion in each particular case. However, it has been argued that this postion should be rejected for two reasons. First, many states have accepted that national constitutions or laws should be interpreted in accordance with international human rights provisions, and, indeed, some have accepted that these rights should have direct application into domestic law. This demands, that the rights documented at a supra-national level are clear and that they are interpreted in a manner which produces consistent jurisprudence. Secondly, it was argued that the sanctions against a State considered to be in violation of standards documented in human rights instruments, can in certain circumstances be severe. This requires that rights expressed internationally are adequately defined, providing the State with a satisfactory indication of their content and the measures necessary to ensure that they are properly secured to individuals within the State's jurisdiction.

The task, however, of producing an acceptable definition of torture and ill-treatment is by no means a simple one. It was clear from the examination of the provision outlawing torture and ill-treatment in Chapter Four that, in choosing to include "treatment" in addition to "punishment" in its terms the drafters had created a prohibition which was potentially all-encompassing. Any working definition of the prohibition of torture and ill-treatment to be acceptable required a mechanism which could select conduct from a potentially unlimited range of treatment and punishments for further scrutiny, to ensure that it complied with standards in respect of the treatment of individuals.

This task fell first to the European Comission of Human Rights in the Greek case. The Commission considered that the method of "conduct selection" would be based on the "*intent*" of the State for the torture and inhuman components of the prohibition and on the "*result*" of the conduct for the remainder of it. For conduct to be considered inhuman or tortuous it would need to be demonstrated that the State intended to subject an individual to suffering which reach a certain severity. For conduct to be degrading it would be necessary, the Commission concluded, to establish that suffering of a certain severity was the *result* of the State's conduct.

Chapter Four discussed the problems of having, in effect, two criteria for this process of "conduct selection" or "qualification" of treatment and punishment. It also noted the difficulty the Commission had experienced in developing a satisfactory and consistent use of the "qualifiers" for the purposes of Article 3 and that the Commission, together with the European Court of Human Rights, has effectively abandoned this task preferring to give individual rationalizations for each decision. In so doing, it was concluded, neither the State nor the individual is provided with a satisfactory indication as to whether a given form of conduct is likely to be

contrary to the norm prohibiting torture and ill-treatment.

This thesis sought to explain why the Commission and Court have been placed in this position with reference to two factors. First, it was argued that the qualifiers of "intent" and "result" adopted by the Commission and confirmed by the European Court of Human Rights are unsatisfactory. This is because a consistent application of the "qualifiers" would qualify some forms of conduct into the consideration process of the prohibition which clearly require to be outwith its focus, such as, heart surgery on a consenting patient. It would also, disqualify from consideration conduct many would consider properly belongs within its ambit and in need of continuous supervision, such as, capital punishment. Secondly, it was argued that because the Commission and Court have accepted that there can be no justification for conduct considered tortuous, inhuman or degrading, once the treatment or punishment "qualifies" for review, it follows that a finding of a violation is the inevitable consequence. This is due to the fact that the State is prevented from contending that the conduct is justifiable for a number of reasons, for example, on grounds of public security or the prevention of crime. It is because, therefore, a violation is determined at the stage of "qualification" under the present understanding of Article 3 that the "qualifier" has been applied loosely, and on occasion, abandoned altogether so as not to produce results which are plainly undesirable.

Chapter Six of this thesis proposed an alternative method of "qualification" based on the consent of the individual. The adoption of a consent-based definition of the freedom from torture and ill-treatment was supported from both a theoretical and a functional perspective.

The theoretical justification was developed in Chapter 3 of this thesis. This was devoted to examining the

contribution the interpretation of the European Convention has made to enhancing the status of the individual as a subject of International Law. It was noted that at the outset the approach to human rights in International Law was based on what was considered to be reasonable concessions to state sovereignty. Today, following the development of human rights jurisprudence, principally by the European Commission and Court of Human Rights, the emphasis is on the "sovereignty of the individual" and the importance of the effective enforcement of human rights standards. This change in emphasis allows, and to a point requires, a reappraisal of the prohibition of torture and ill-treatment focusing on the position of the State. It was argued that a definition of torture and ill-treatment concentrating on the consent of the individual reflects this new direction in the enforcement of human rights standards.

This conclusion began by noting that the scholar would consider a number of observations concerning the prohibition of torture and ill-treatment remarkable. Equally as surprising as the ill-defined nature of the torture and ill-treatment prohibition is that its interpretation has remained unchanged since its creation shortly after the Second World War. This is despite the fact that since that time the prohibition has undergone a complete metamorphosis. In its infancy it was properly regarded as a provision seeking to prevent a recurrence of the types of atrocities witnessed in the Nazi concentration camps and forms of torture which, until those atrocities, many had considered belonged in the past. Today, it may be properly regared as a standard against which all forms of treatment or punishment leading to suffering of a certain severity may be tested.

It was noted that the initial understanding of the prohibition as excluding any concept of justification for conduct considered tortuous inhuman or degrading was difficult to question when the norm's *raison d'etre* was

to safeguard against torture and the most severe forms of ill-treatment. Indeed, in the Greek case, in which the Commission first attempted to define the norm, some of the most barbaric forms of treatment fell to be considered. Clearly, no issue of justification could properly be put before the Commission in such a case. However, this thesis has argued that, as the prohibition of torture and ill-treatment began to be applied to conduct far removed from that originally in the minds of the drafters of Article 5 of the Universal Declaration, the rejection of the concept of justification appeared increasingly in need of review. Summary disposal of submissions advocating justification for practises of *falanga* were acceptable. However, when considering issues such as corporal punishment, prison conditions and the discipline of children, the rejection of the concept prevented, it is submitted, the Commission and the Court from considering a number of issues properly put before them by the parties to the case.

The purpose of Chapter Six was to support this position by demonstrating that it is not possible to adequately consider the types of conduct which have recently been reviewed for compatibility with Article 3 without considering a number of factors which fall under the general heading of "justification issues". This observation is supported by a close examination of the assessment of judicial corporal punishment in the Tyrer case and other areas previously examined by the Commission, in addition to conduct which might in the future be examined for compatibility with the prohibition of torture and ill-treatment, such as compulsory vaccination. It is clear that the assessment of judicial corporal punishment afforded by the European Court of Human Rights under the current understanding of Article 3 of the Convention was unsatisfactory when compared both to an earlier examination of the punishment in the Barry

Report and modern methods of assessing the efficacy of punishment.

It is submitted that a satisfactory method of reviewing the types of conduct which is now required to be assessed for compatibilty with the prohibition of torture, inhuman or degrading conduct requires the following condition to be present. The interpretation of Article 3 must accommodate a mechanism which would allow the State the possibility of attempting to justify some conduct within the terms of the provision on certain grounds. These are grounds identical to those accommodated in paragraph 8(2) of the European Convention which concerns, *inter alia*, the right to respect for private life. To advocate the incorporation of the concept of justification within the interpretation process of Article 3 is to depart from the position of the Commission and the Court, which in common with other tribunals, national and international, have consistently stated that the concept has no rightful place in a provision prohibiting torture and ill-treatment. It is submitted that this position can be rejected for two reasons. The first, a functional justification, which argues for a satisfactory assessment of the types of conduct now being reviewed for compatibility with the prohibition, has already been mentioned. The second, is that the drafters of Article 3 had only the most severe forms of torture and ill-treatment in mind when the concept of justification was rejected as having a rightful place in the application of the prohibition. Historically, it is clear that the rejection of the concept of jusitication is good only for the most severe forms of treatment and punishment prohibited by the phrase. This conclusion it may be noted, sits comfortably with the section of this thesis which advocates incorporation of the concept of justification into the application of the prohibition of torture and ill-treatment but only to a point which does not include severe forms of suffering.

Aware that to advocate an apparent compromise to the absolute nature of the provision prohibiting torture and ill-treatment is a radical departure from the present understanding of the norm reference is made to two factors which would restrict the operation of the concept of justification. The first is that the concept would operate only as far as a certain level of suffering. Beyond this threshold no concept of justification could be considered. The second is that the "justification clause" adopted in Article 8(2) has been interpreted in a most restricted sense and that this could be expected to continue in relation to the prohibition of torture and ill-treatment.

Chapter Six concluded by conceding that this suggeston of incorporating a form of justification into the consideration process of the prohibition of torture and ill-treatment may prove for many unacceptable. This may be because the phrase, despite containing language which belongs to common usuage, still conjures up for many, vivid images of horrific and barbaric acts. It is accepted too, that it may not be satisfactory to incorporate any concept of justification into a prohibition which includes the word "torture". It is for this reason that it was argued that the preferred solution may be to direct all but the most extreme forms of conduct to rights concerned with the privacy of the individual and respect for the individual's physical integrity such as Article 8 of the European Convention.

This would allow the prohibition of torture and ill-treatment to return to its original *raison d'etre* which is the prohibition of the most severe forms of maltreatment of an individual.

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